

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

Suffolk County  
NO. SJC-08860

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

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

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

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BRIEF AMICI CURIAE  
THE HONORABLE PHILIP TRAVIS (BRISTOL),  
EDWARD CONNOLLY (MIDDLESEX), GUY GLODIS (SECOND  
WORCESTER), JAMES MICELI (MIDDLESEX), ELIZABETH  
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### **PRELIMINARY STATEMENT**

This amici curiae brief is submitted in support of Appellees Department of Public Health, et al.

### **INTEREST OF AMICI**

Amici are members of the Massachusetts General Court. As members of the General Court, Amici have a duty to determine the law and policy of the Commonwealth in accord with provisions of the Massachusetts Constitution. As members of one of Massachusetts' three branches of government, Amici also have an interest in the constitutional separation of powers and in securing their lawmaking powers as representatives of the people of Massachusetts.

### **STATEMENT OF THE ISSUES**

Amici adopt Appellee's statement of the issues presented in this case.

### **STATEMENT OF THE CASE**

Amici adopt Appellee's statement of the case.

## ARGUMENT

### I. THIS COURT SHOULD DEFER TO APPROPRIATE LEGISLATIVE REGULATION OF MARRIAGE

#### *A. The regulation of marriage is a matter long entrusted to the legislature*

For over three centuries, the Massachusetts Legislature has maintained a statutory system to regulate the institution of marriage in the Commonwealth. Inhabitants of the Town of Milford v. Inhabitants of the Town of Worcester, 7 Mass. 48, 53, 1810 WL 982 (1810) (citing marriage regulation dating to 1646). Throughout this history, the statutes of the Commonwealth have regulated the institution of marriage without need of a statutory definition for the word "marriage."

What marriages between our own citizens shall be recognized as valid in this Commonwealth is a subject within the power of the Legislature to regulate. But when the statutes are silent, questions of the validity of marriages are to be determined by the jus gentium, the common law of nations, the law of nature as generally recognized by all civilized peoples.

Commonwealth v. Lane, 115 Mass. 458, 462-63 (1873).

Thus the Commonwealth, in the absence of a statutory definition of marriage, has incorporated the common law understanding of marriage as the union of one man and one woman. This common law definition

remains universally accepted, with the sole exception of the Netherlands, which in 2000 chose to expand its definition of marriage by way of legislative enactment.<sup>1</sup> No jurisdiction has departed from the common law, male-female definition of marriage by way of judicial intervention.<sup>2</sup>

While the definition of marriage is of common law origin,<sup>3</sup> the adoption of the Constitution of 1780 did nothing to abridge that definition, but rather incorporated it into the law of the Commonwealth. Mass. Const. pt. 2, c. 6, art. 6; Commonwealth v. Chapman, 54 Mass. 68, 71-72 (1847); see also Joel Prentiss Bishop, Commentaries on the Law of Marriage §

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<sup>1</sup> Stb. 2001, No. 9 ("Act on the Opening Up of Marriage") (Bill 22672) (Dec. 21, 2000), available at <http://www.eerstekamer.nl/9202266/d/w26672st.pdf> (last visited Dec. 11, 2002) (an unofficial English translation of the bill as introduced is available at [http://marriagelaw.cua.edu/nl\\_marriage.htm](http://marriagelaw.cua.edu/nl_marriage.htm) (last visited Dec. 11, 2002)).

<sup>2</sup> Amici curiae professors of remedies, constitutional law and litigation assert that two nations, Canada and South Africa, are likely to do so in the near future. Regardless of whether this prediction proves true, the constitutions of these nations are demonstrably different from the Massachusetts Constitution, providing heightened protection for "sexual orientation." No provision of the Massachusetts Constitution has been interpreted to impose heightened scrutiny on this basis.

<sup>3</sup> The fact that Massachusetts law has incorporated the definition of marriage from the common law raises unique considerations which will be discussed in Section III.

29 (1856). Both prior to and following the adoption of the Constitution of 1780, the General Court has exercised its constitutional authority over marriage, adopting a detailed statutory system of registration and regulation. Mass. Const. part. 2, tit. 5; Mass. Gen. Laws ch. 207, §§ 1 et seq. (2002); Inhabitants of the Town of Milford v. Inhabitants of the Town of Worcester, 7 Mass. 48, 53, 1810 WL 982 (1810).

***B. The Massachusetts General Court has Adopted an Unambiguous Statutory System Which Recognizes Marriage as a Male-Female Union***

As recently articulated by this Court, the goal of statutory interpretation is "that the purpose of its framers may be effectuated." Chandler v. County Com'rs of Nantucket County, 437 Mass. 430, 435 (2002). To that end, the first principle of statutory interpretation requires that statutory language be accorded its "plain and ordinary meaning." Foss v. Commw., 437 Mass. 584, 586 (2002); Mass. Gen. Laws. ch. 4, § 6 (2002) (undefined statutory terms "shall be construed according to the common and approved usage of the language"). Only where the ordinary interpretation of terms yields an unworkable or illogical result does it become necessary for the

Court to rely upon extrinsic aids such as legislative history and other statutes. Chandler, 437 Mass. at 435; Foss, 437 Mass. at 586-587. By any of these three standards, whether plain meaning, legislative history, or other related statutes, it is manifestly evident that provisions of the Massachusetts General Laws governing marriage contemplate only marriage as a male-female union.

**1. The plain meaning of "marriage" requires that the Commonwealth recognize only male-female unions as marriage.**

The plain meaning of the word "marriage," as used in the Massachusetts General Laws unambiguously refers to the union of a man and a woman. See, e.g., Mass. Gen. Laws ch. 207, § 19 (2002) (requiring notice of intention to be joined in marriage); Mass. Gen. Laws ch. 207, § 28 (2002) (providing for issuance of marriage certificate). This Court has often relied upon various dictionaries as evidence of the common usage of a word not defined by statute. See, e.g., Berish v. Bornstein, 437 Mass. 252 (2002); Albrecht v. Clifford, 436 Mass. 706 (2002); Com. v. Deramo, 436 Mass. 40 (2002); Com. v. Ray, 435 Mass. 249 (2001). As quoted by Judge Connolly in his decision below:

Black's Law Dictionary (7th ed. 1999) defines "marriage" as "[t]he legal union of

a man and woman as husband and wife," and defines "husband" as "[a] married man." Id. at 986, 746. Similarly, Webster's Third New International Dictionary (1964) defines marriage as "the state of being united to a person of the opposite-sex as husband or wife." Id. at 1354.

Goodridge v. Dept. of Pub. Health, 14 Mass. L. Rptr. 591 (Mass. Super. 2002).

Moreover, no jurisdiction in the United States recognizes same-sex unions as a legal "marriage." See David Orgon Coolidge, Same-sex Marriage? Baehr v. Miike and the Meaning of Marriage, 38 S. Tex. L. Rev. 1, 7 (1997). In each of the fifty states, "marriage" is a legal term which denotes the legal union of a man and a woman. Even in Vermont, where the Legislature adopted a system of "civil unions," the Legislature explicitly distinguished between same-sex civil unions and "marriage," which is limited to opposite-sex couples. 15 Vt. Stat. Ann. § 1201 (2002).

The "ordinary and approved usage" of the word "marriage" requires both a man and a woman. Mass. Gen. Laws ch. 4, § 6, cl. 3 (2002). While Plaintiffs summarily assert that same-sex unions are within the plain meaning of the Massachusetts laws regulating marriage, they fail to provide even a single example

where the word "marriage" refers to a same-sex union. (Br. of Plaintiffs-Appellants at 12-16.) This is because such examples are rare and obscure, to the extent they exist at all.<sup>4</sup> The word "marriage," as used in the Massachusetts General Laws, both when first enacted and today, manifestly refers to the union of one man and one woman.

**2. The legislative history of Chapter 207 of the Massachusetts General Laws evinces a clear intent that marriage be a male-female union.**

By ordinance of 1646, the legislative authorities of the Massachusetts Bay Colony adopted a system requiring solemnization of marriages by a magistrate. Inhabitants of the Town of Milford v. Inhabitants of the Town of Worcester, 7 Mass. 48, 53, 1810 WL 982 (1810) (citing marriage regulation dating to 1646). Much of what is now chapter 207 of the Massachusetts General Laws has its origin in English common law and then in statutory enactments from the seventeenth and eighteenth centuries. For example, the statutory

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<sup>4</sup> The only existing legal definition of "marriage" which incorporates same-sex unions is found in the Netherlands, having been enacted just two years ago. Stb. 2001, No. 9 ("Act on the Opening Up of Marriage") (Bill 22672) (Dec. 21, 2000). Every other state, province and nation in the world defines marriage as a male-female union. It is absurd to suggest that same-sex unions are within the plain meaning of the Massachusetts marriage laws.

prohibition against incest dates back to 1695. Mass. Gen. Laws ch. 207, § 1, Historical and Statutory Notes, St. 1695-6 c. 2, § 1. Current statutory provisions governing the marriage of minors date back to 1692. Mass. Gen. Laws ch. 207, § 7, Historical and Statutory Notes, St. 1692-3, c. 25, § 1. The solemnization requirements have been often amended since being first enacted in 1692. Mass. Gen. Laws ch. 207, § 38, Historical and Statutory Notes, St. 1692-3, c. 25, § 1. Many of these and other provisions were again amended in 1785 and 1786 following the adoption of the Constitution of Massachusetts. See, e.g., Mass. Gen. Laws ch. 207, § 1, Historical and Statutory Notes, St. 1785, c. 69, § 1; Mass. Gen. Laws ch. 207, § 7, Historical and Statutory Notes, St. 1786, c. 3, § 3; Mass. Gen. Laws ch. 207, § 38, Historical and Statutory Notes, St. 1786, c. 3, §§ 1, 2, 8.

The first American lawsuit seeking issuance of a marriage license to a same-sex couple was decided by the Minnesota Supreme Court in 1971. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). Since that time, numerous courts have construed other marriage statutes, unanimously concluding that the statutory enactments did not contemplate recognition of same-sex unions as

"marriage." See, e.g., Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974); Baehr v. Lewin, 852 P.2d 44, 56-57 (Haw. 1993); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct., Feb. 27, 1998); Dean v. District of Columbia, 653 A.2d 307, 312-316 (D.C. 1995); Baker v. Vermont, 744 A.2d 864, 868-869 (Vt. 1999).

Moreover, sodomy was a criminal offense at the time the Massachusetts Constitution was ratified and remains so under Massachusetts law today. Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785, cited in Bowers v. Hardwick, 478 U.S. 186, 192 (1986). Though litigation has limited the scope of enforcement of these provisions, they remain an expression of the public policy of the Commonwealth. Commw. v. Balthazar, 366 Mass. 298 (1974); Gay & Lesbian Advocates & Defenders v. Attorney General, 436 Mass. 132 (2002). When considering the history of Massachusetts marriage laws, it cannot seriously be argued that the Massachusetts legislature intended to recognize same-sex unions under the legal rubric of "marriage."

As stated by this Court in 1810:

Marriage, being essential 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, so as to prevent a conflict of duties, and to preserve the purity of families; by describing the solemnities, by which the contract shall be executed, so as to guard against fraud, surprise, and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and to discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals, and a dissolution of manners; and by declaring the causes, and the judicature for rescinding the contract, when the conduct of either party and the interest of the state authorize a dissolution.

Inhabitants of the Town of Milford v. Inhabitants of the Town of Worcester, 7 Mass. 48, 52-53, 1810 WL 982 (1810).

**3. Other Massachusetts statutes reflect a male-female definition of marriage without ambiguity or contradiction.**

Finally, the whole realm of Massachusetts statutes reinforces the conclusion that marriage is a male-female union. Repeatedly, Massachusetts law refers to "husband and wife," See, e.g., Mass. Gen. Laws ch. 62C, § 6 (2002) (husband and wife may file taxes jointly); Mass. Gen. Laws ch. 184, § 7 (2002) (husband and wife may hold property in tenancy by the entirety); Mass. Gen. Laws ch. 188 § 1 (2002)

(definition of "family" for purposes of homestead estate); Mass. Gen. Laws ch. 207 § 6 (2002) (marriage gives rise to "husband and wife" relationship). Similarly, the statutory prohibition of incestuous marriages is gender-specific, suggesting that the legislature contemplated marriage only as an opposite-sex union. Mass. Gen. Laws ch. 207 §§ 1-2 (2002).

More directly, in recent years the legislature has explicitly disclaimed any intention to extend legal recognition of same-sex unions. In prohibiting discrimination on the basis of sexual orientation, the General Court declared, "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage', so-called, or to provide health insurance or related employee benefits to a 'homosexual spouse', so-called." Mass. Gen. Laws ch. 151B, § 4 (2002), Historical and Statutory Notes, St. 1989, c. 517, § 19. The existence of such a statement clearly indicates that, at least as of 1989, Massachusetts law neither recognized same-sex "marriage" nor extended spousal benefits to domestic partners of public or private employees. See also, Connors v. City of Boston, 430 Mass. 31 (1999) (domestic partners are neither "spouse" nor

"dependent" within scope of Mass. Gen. Laws ch. 32B, §§ 2(b), 15(b)).

By contrast, nowhere has the Massachusetts legislature created or recognized domestic partnerships or other same-sex unions. The Massachusetts statutory structure is uniform in its recognition of marriage as the basis for family relationships.

***C. Legislative enactments are presumptively constitutional and entitled to judicial deference.***

Legislative enactments regulating the institution of marriage have long been entitled to a strong presumption of constitutionality in Massachusetts.

It is a familiar principle of constitutional law that every presumption is made in favor of the validity of an act of the Legislature, and that the courts will not refuse to enforce it unless compelled so to do by provisions of the Constitution so plain in their bearing as to prevent any other rational construction.

A.G. v. Brissenden, 271 Mass. 172, 176 (1930) (citation omitted); see also Longval v. Superior Court Dept. of Trial Court, 434 Mass. 718 (2001).

Traditionally respectful of the independent duties each branch of government bears to uphold the Massachusetts Constitution, this Court has exercised

great deference in reviewing legislative enactments. In McClure v. Secretary of Commw., this Court rejected claims that legislative districts had been gerrymandered for political benefit in violation of the equal protection clause. McClure v. Secretary of Com., 436 Mass. 614 (2002). In doing so, this Court extended great deference to the legislative justifications proffered in defense of the redistricting plan, stating that "the plaintiff bears a heavy burden of proof and 'every reasonable presumption must be made in favor of the constitutionality of the statute.'" Id. at 854 (citation omitted). This Court went on to state that the "plaintiff must next establish that the Legislature's plan is without justification. The Legislature's proffered justification is entitled to a 'high degree of deference.'" Id. 436 Mass. at 622.

Though arising in the context of a legislative redistricting challenge, the principles of equal protection review expressed in McClure are equally applicable here. The Court applied similar language in rejecting a challenge to a Massachusetts law requiring a prescription for purchase of a hypodermic needle in an effort to stem AIDS infections communicated through

intravenous drug use. In Commw. v. Leno, 415 Mass. 835 (1993), this Court held that “[legislative] public policy is entitled to deference by courts. Whether a statute is wise or effective is not within the province of courts.” Id. at 841. The Court went on, “Our deference to legislative judgments reflects neither an abdication of nor unwillingness to perform the judicial role, but rather a recognition of the separation of power and the ‘undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature.” Id. (citations omitted).

The Massachusetts marriage laws challenged by the Plaintiffs in this case are an exercise of the Legislature’s function in setting public policy for the Commonwealth. The Legislature did not adopt a new or arbitrary definition of marriage but has rather incorporated the common law understanding of marriage as a male-female union which has effectively served the Commonwealth for centuries. In recent years, the Legislature has adopted a number of statutory provisions extending greater protections to lesbians and gay men and their households. See, e.g., Mass. Gen. Laws ch. 151B, § 4 (2002) (prohibiting

discrimination on the basis of "sexual orientation"); Mass Gen. Laws, ch. 22C § 32 (2002) (including "sexual orientation" within list of categories protected under hate crimes statute); Mass. Gen. Laws, ch. 76, § 5 (2002) (prohibiting discrimination on the basis of "sexual orientation" in Massachusetts public schools). In doing so, however, the Legislature has explicitly refrained from redefining the institution of marriage. Mass. Gen. Laws ch. 151B, § 4 (2002), Historical and Statutory Notes, St. 1989, c. 517, § 19. In its brief, the Commonwealth has set forth a number of reasons for which the Legislature may have chosen not to recognize same-sex "marriage." This Court should be highly deferential of those policy concerns and justifications.

**II. THE RELIEF REQUESTED BY THE PLAINTIFFS-APPELLANTS WOULD INAPPROPRIATELY INTERFERE WITH CONSTITUTIONAL PROTECTIONS OF SELF-GOVERNMENT AND SEPARATION OF POWERS**

Massachusetts constitutional history reveals a strong commitment to self-government, deriving its governmental power and approval of its laws from the people. The Massachusetts Constitutional Convention of 1780, consisting of the people's elected representatives, resolved that the government would be

a "free republic" and "that it is of the essence of a free republic, that the people be governed by the FIXED LAWS OF THEIR OWN MAKING." Resolution of the Massachusetts Constitutional Convention of 1780, Sept. 3, 1779, reprinted in 4 Works of John Adams 215 (Charles F. Adams ed., 1851)(emphasis in original). The general constitutional framework established by the framers was intended to protect and perpetuate principles of self-government. Plaintiffs-Appellants' attempt to take the definition of marriage out of the normal legislative process and have it reinterpreted by the judiciary defeats this fundamental constitutional purpose of creating a government by those governed.

Without the people's consent to the laws, political equality is likely to be abridged. Requiring the consent of the people to govern gives them an equality before the law, and also legislates against arbitrary use of power by those in government. Liberty is closely tied to consent in the Massachusetts Constitution.<sup>5</sup> The framing generation understood

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<sup>5</sup> The Defendants-Appellees' Memorandum in support of the Commonwealths' Motion for Summary Judgment notes that "The meaning of the term 'liberty,' as understood by the framers, also counsels against an expansive

liberty as the people being subject only to laws to which they had given their consent.

All individuals share in the ability to give their consent, so that the foundation of equality and liberty is the concept of consent. Liberty rests upon the consent of the people governed, and their equal ability to give consent to the laws is the true nature of equality. "Let it be thus defined; political liberty is the right every man in the state has, to do whatever is not prohibited by laws, TO WHICH HE HAS GIVEN HIS CONSENT. This definition is in unison with the feelings of a free people." The Essex Result, 1778, reprinted in, Handlin and Handlin, Popular Sources of Political Authority 331. This is also why the lawmaking power is reserved to the legislative branch, as that branch is directly elected by consent of the people for the purpose of lawmaking. Were the judiciary to make or mandate laws, such as the marriage laws, the people would not have consented to the laws, and therefore their liberty rights would be impaired.

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reading of the term . . . At the time the Massachusetts Constitution was drafted, "[l]iberty" consisted primarily in having a voice in legislation.' Adams, at 127." (Defendants-Appellees' Memorandum Supp. Summ. J. at 20.

**A. Article XXX of the Massachusetts Constitution Specifically Provides for the Separation of Powers Between the Judicial Branch and the Legislative Branch**

The constitution of Massachusetts makes specific provision for preventing abuse of power by those charged with enacting and executing the laws, and thereby protecting individual liberty. Article XXX of the Massachusetts Constitution requires the separation of governmental powers, such that there is no overlap between the powers of the executive, legislative or judicial.<sup>6</sup>

Plaintiffs-Appellants' claim offends the separation of powers principle which is recognized explicitly in the Massachusetts Constitution. Mass. Const. pt. 1, art. XXX. The arbitrary misuse of power by rulers was of great concern to those who authored the Massachusetts Constitution. The Massachusetts General Court understood the consent of the governed to be the foundation of a free government when they proclaimed in January 1776: "As the Happiness of the

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<sup>6</sup> "In the government of the Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them; The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Mass. Const. pt. 1, art. XXX.

People, (alone) is the sole end of Government, so the Consent of the People is the only Foundation of it, in Reason, Morality, and the natural Fitness of Things; and therefore every Act of Government, every Exercise of Sovereignty, against, or without, the Consent of the People, is Injustice, Usurpation, and Tyranny." Proclamation of the General Court, January 23, 1776, reprinted in Handlin and Handlin, Popular Sources of Political Authority 65.

The Massachusetts Constitution and its framers would never concede lawmaking powers to the judicial branch as Appellants and their Amici request this Court to undertake here.<sup>7</sup> The Essex Result writes, "The judicial power follows next after the legislative power; for it cannot act, until after laws are prescribed . . . . If the legislative and judicial powers are united, the maker of the law will also interpret it; and the law may then speak a language, dictated by the whims, the caprice, or the prejudice of the judge, with impunity to him—And what people are

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<sup>7</sup> "[T]he principle continuing criticism of the General Court's draft constitution of 1778 was its . . . failure to adhere to the doctrine of separation of powers." Alexander J. Cella, The People of Massachusetts, A New Republic, and the Constitution of 1780, 14 SUFFOLK U. L. REV. 975, 995.

so unhappy as those, whose laws are uncertain." The Essex Result, reprinted in Handlin and Handlin, supra, at 337-338.

More modernly, this Court has recognized the separation of powers provision in the Massachusetts Constitution as uniquely strong. "The Massachusetts version [of the separation of powers], like those of only a handful of other States, is in a most explicit form, and on its face calls for a complete and rigid division of all powers among the three branches." Opinion of the Justices, 365 Mass. 639 (1974). Speaking of Article XXX, this Court has given "scrupulous observance of its limitations" and will not tolerate "the creation of interference by one department with the power of another department." New Bedford Standard-Times Publ. Co. v. Clerk of the Third District Ct. of Bristol, 377 Mass. 404, 410 (1979).

***B. This Court Is Consistently Reluctant to Violate Article XXX of the Massachusetts Constitution Which Specifically Prohibits One Branch of Government from Exercising Powers Conferred on Another Branch***

Plaintiffs-Appellants and their Amici misinterpret Massachusetts precedence by suggesting that this court should engage in social engineering.

Citing to Cohen v. Attorney General, 357 Mass. 564, 570 (1970), Plaintiffs-Appellants fail to acknowledge that the Constitution was "designed by its framers and accepted by the people as an enduring instrument so comprehensive and general in its terms that a free, intelligent and moral body of citizens might govern themselves under its beneficent provisions through radical changes in social, economic and industrial conditions." Cohen, at 570 (emphasis added). As this court in Cohen stated, the constitution is to be "a statement of general principles and not a specification of details," about social, economic or industrial conditions. Id. 571, quoting Tax Comm'r. v. Putnam, 227 Mass. 522, 532-524 (1917).

While the constitution provides guidelines under which the people govern, it is not an instrument to make law in response to social or other changes, nor is it to empower the judiciary to make or change the laws. This is for the citizens and their duly empowered elected representatives. Even "social changes," which Plaintiffs-Appellants hope this Court will view in their favor and adjust the law accordingly (Br. of Plaintiffs-Appellants at 27-28), have not been sufficient to lure the Supreme Judicial

Court into creating new privileges or changing other areas of the law. See, e.g., Babets v. Secretary of Human Services, 403 Mass. 230 (1988); Connors v. City of Boston, 430 Mass. 31 (1999).

On several occasions, this Court has addressed their role under Article XXX. On each occasion, the Court has refused to engage in statutory revision or extension in contrast to the Legislature's intent, or to create new legislation implementing the Court's intent.

In Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534 (1996) the Court cited to several cases noting that statutes must be construed as they are written and that the judicial authority is to interpret and apply statutes in accord with the Legislature's intent, not to create new legislation. "The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative, body. In construing a legislative enactment, it is our duty to ascertain and implement the intent of the Legislature. . . . We cannot interpret a statute so as to avoid injustice or

hardship if its language is clear and unambiguous and requires a different construction." Pielech v. Massasoit Greyhound, Inc., 424 Mass. 714, 721 (citations omitted).

The SJC has also noted its duty "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." Commonwealth v. A Juvenile, 368 Mass. 580, 595, (1975), cited in Pielech vs. Massasoit Greyhound, Inc., 424 Mass. 714 (1996). This principle was applied in Connors v. City of Boston, 430 Mass. 31 (1999), where the SJC declined to construe the term "spouse" to include domestic partners, declaring that "[a]djustments in the legislation to reflect these new social and economic realities must come from the Legislature." Connors, at 341. Specific to the present case, the trial court decision held that "[t]his deferential standard [presumption of a statute's constitutionality] is rooted in separation of powers principles, which are even stronger when a court is asked to invalidate, rather than simply interpret, a legislative enactment." Goodridge v. Dept. of Pub.

Health, 14 Mass. L. Rptr. 591, 2002 WL 1299135 at \*5 (Mass. Super. 2002).

When asked to create a new testimonial privilege in Babets v. Sec. of Human Services, 403 Mass. 230 (1988), as a matter of common law, this Court refused to do so, noting its reluctance to involve itself in policy matters and to create new testimonial privileges. Acknowledging its power to create privileges, this Court nevertheless left such to the Legislature in Babets, and when the power was judicially exercised, the court did so sparingly. Babets, at 234. It should be noted that creating a new "spousal testimonial privilege" for same-sex partners is but one of the many policy and legislative changes which would result if this Court were to grant Plaintiffs-Appellants the relief they request.

Other state supreme courts have also been cited with favor by this Court when considering whether to delve into the area of legislative policymaking.

The expansion of testimonial privileges and acceptance of new ones involves a balancing of public policies which should be left to the legislature. A compelling reason is that while courts, as institutions, find it easy to perceive value in public policies such as those favoring the admission of all relevant and reliable evidence which directly assist

the judicial function of ascertaining the truth, it is not their primary function to promote policies aimed at broader social goals more distantly related to the judiciary. To the extent that such policies conflict with . . . other values central to the judicial task, the balance that courts draw might not reflect the choice the legislature would make.

Babets, 403 Mass. at 237, n.6, quoting People v. Sanders, 99 Ill. 2d 262, 271 (1983).

What has been said about the absence of testimonial privilege may also be said of spousal testimonial privilege and other supposed "benefits of marriage" which would be altered with the creation of same-sex "marriage":

We think that the [Plaintiffs-Appellants'] assertions (which are unsupported by any empirical evidence) are speculative in light of the long history of the Commonwealth and the lack of any showing of real harm that has accrued from the absence of [same-sex "marriage"].

Babets 403 Mass. at 238.

Recognizing same-sex "marriage" or requiring marital benefits for same-sex couples, either from current statutes or the Declaration of Rights, would offend separation of powers principles which are recognized explicitly in the Massachusetts Constitution. Mass. Const. pt. 1, art. XXX. This Court

has specifically refused to "engage in a judicial enlargement of the clear statutory language beyond the limit of our judicial function," noting that it has "traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. XXX of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved." Dalli v. Bd. of Educ., 358 Mass. 753, 759 (1971), citing King v. Viscoloid Co., 219 Mass. 420 (1914) and Simon v. Schwachman, 301 Mass. 573 (1938).

The Massachusetts Supreme Judicial Court has always been loathe to reform statutory language to reach an unexpressed result or to cover cases which the General Court has not yet considered.<sup>8</sup> In King v. Viscoloid Co., 219 Mass. 420 (1914), this Court expressly stated that it has "no right to conjure what the

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<sup>8</sup> See, e.g., Simon v. Schwachman, 301 Mass. 573, 582 (1938) ("The Legislature simply have not covered the case . . . How can the court say which if either of these courses would have been adopted by the Legislature . . . we have no right to conjure what the Legislature would have enacted if they had foreseen the occurrence of a case like this; much less can we read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.")

Legislature would have enacted if they had foreseen the occurrence of a case like this; much less can we read into the statute a provision which the Legislature did not see fit to put there."

This is precisely what Plaintiffs-Appellants' and Amici request this court to do, however. The Legislature "simply [has] not covered the case" of same-sex relationships, therefore "how can the court say which . . . courses would [be] adopted by the Legislature," regardless of whether the "omission came from inadvertence or of a set purpose." King v. Viscoloid Co., 219 Mass. 420, 425 (1914). Extending legal recognition, including marital benefits and responsibilities, to same-sex couples is not only clearly an area of public policy for the Legislature alone, it is an area in which the Legislature has not acted, and for purposes which it is not appropriate for this Court to question.

The Massachusetts General Court has not legislated to create same-sex "marriage" or to give marital benefits to couples other than to male-female couples who are lawfully married. They have not legislated in this way even though the General Court

has on at least one occasion considered the possibility of homosexual marriage. In a recent statutory amendment to include "sexual orientation" in the anti-discrimination provision, the General Court was careful to include a statutory note that "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage' . . . or to provide health insurance or related employee benefits to a 'homosexual spouse'." Mass. Gen. Laws ch. 151B, § 4 (2002), Historical and Statutory Notes, St. 1989, c. 517, § 19.

To create same-sex "marriage" or require issuance of marital benefits to same-sex couples "would require [the Court] to engage in a massive rewriting of the statute [which would] impermissibly infringe on the lawmaking function of the Legislature." Aime v. Commonwealth, 414 Mass. 667, 683 (1993). It would require more than an extension of the law, as argued by Amici Curiae Professors of Remedies, Constitutional Law and Litigation, Libby Adler, et al. Rather, it would produce a dramatic change in numerous laws of the Commonwealth.

The Massachusetts Constitution never concedes lawmaking powers to the judicial branch as Plaintiffs-Appellants request the Courts to take here. Succumbing to Plaintiffs-Appellants' demand for judicial redefinition of the marriage laws would violate the express provisions of Article XXX, as well as constitutional precedence.

**III. IT WOULD BE INAPPROPRIATE FOR THIS COURT TO UNDERTAKE A LEGISLATIVE REDEFINITION OF MARRIAGE**

Even if this Court were to find the Commonwealth's recognition of marriage as a uniquely male-female institution to be constitutionally invalid, there are numerous considerations which counsel this court to refrain from extending the definition of marriage to include same-sex couples.

***A. Marriage is a preexisting common law institution not subject to arbitrary and fundamental redefinition.***

Massachusetts has no statute defining marriage. Instead, the common law understanding of marriage prevails as recognized in Inhabitants of the Town of Milford v. Inhabitants of the Town of Worcester, 7 Mass. 48, 52 (1810) (marriage is "an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife.").

As a preexisting institution, marriage is not subject to arbitrary redefinition.

The lack of a statutory definition of marriage is an indication that Massachusetts law recognizes the preexisting nature of marriage as a social, religious and legal institution which does not require a statutory definition to have a legal meaning. Thus, in this action, plaintiffs are not questioning the constitutional validity of a statute; they are asking that the understanding of marriage now accepted in Massachusetts law, which predates the enactment of the Massachusetts Constitution, be redefined. While a statute's validity can be gauged by a court, the very nature of marriage, which is assumed rather than created by the law, cannot be subject to arbitrary redefinition by a court. If the legal nature of marriage is to be changed in Massachusetts, that change would have to be brought about through specific legislative action rather than a court pronouncement of preference for a definition different from that presumed in Commonwealth law.

A case noted by Plaintiffs-Appellants is instructive on this point. In re Adoption of Tammy, 416

Mass. 205 (1993). Plaintiffs-Appellants say that this case, involving an adoption petition by a partner of a prospective adoptive child's biological mother, "implicitly acknowledge[s] gay people to form a distinct group in [] family-related cases." Br. of Plaintiffs-Appellants, at 111. However, in that case, this court did not redefine legal concepts of family or adoption based on some free-floating concept of "fundamental rights." In fact, the court did not apply any constitutional analysis at all and was content to construe the language of the adoption statute. Specifically, the court dismissed the requirement that a biological parent's rights must be terminated before their child can be adopted by someone to whom they are not married by construing the statutory provision for adoption by any "person" to mean by any "persons": "In the context of adoption, where the legislative intent to promote the best interests of the child is evidenced throughout the governing statute, and the adoption of a child by two unmarried individuals accomplishes that goal, construing the term 'person' as 'persons' clearly enhances, rather than defeats, the purpose of the statute." Adoption of Tammy at 212.

Subsequently, the Massachusetts adoption statute was amended to provide that, "if the child has been previously adopted, all the legal consequences of the former decree shall, upon a subsequent adoption, determine, except so far as any interest in property that may have vested in the adopted child and a decree to that effect shall be entered on the record of the court." Mass. Gen. Laws ch. 210, §1 (2002). The Plaintiffs-Appellants' hesitance, actually extreme aversion, to take their cause to the legislature indicates that they recognize the weakness in their claim and thus mistakenly believe they will get a more sympathetic hearing in another forum.

Finally, even if one were to assume that this Court had jurisdiction to redefine the institution of marriage, the Court's role in that process would necessarily be severely limited because marriage, as a common law institution, should be subjected to only small, incremental changes, rather than the wholesale redefinition requested by the Plaintiffs-Appellants. See In re Roche, 381 Mass. 624, 639 (1980) (referring to "the incremental process of common law development" as a means to "avoid overly broad generalizations"). Massachusetts marriage law is not a statutory

provision which may be immediately discarded as unconstitutional. Rather, marriage has been incorporated into the common law as a longstanding tradition to which changes should be made only incrementally if at all.

In a similar case, the Supreme Court of British Columbia recently concluded that the redefinition of marriage to include same-sex couples would be much more than an incremental change, invoking numerous questions of social concern and legal interpretation. See Egale v. Attorney General of Canada, 2001 BCSC 1365, at 89-97 (observing that marriage is so entrenched in society, and the impact of redefining marriage so uncertain, that the matter must be addressed by the legislature rather than a court). The court thus refused to redefine marriage as this Court should do.

***B. Redefinition of the institution of marriage would have far-reaching implications deserving of detailed legislative consideration.***

Plaintiffs-Appellants and Amici Curiae Professors of Remedies, Constitutional Law and Litigation, Libby Adler, et al., contend that the judicial extension of existing marriage laws would be the appropriate remedy

in the event that the marriage statutes are found to be unconstitutional. This approach, however, would not only raise separation of powers concerns, but would also gloss over the myriad legislative and regulatory questions raised by an extension of the definition of marriage.

In arguing that "this is not that rare case where the Court should defer to the Legislature," Amici appear to underestimate the fundamental impact which the redefinition of marriage would have on Massachusetts society. To the contrary, this is precisely such a case.

In Vermont, which less than two years ago adopted a comprehensive system of "civil unions," the bill required a four-month legislative process during which the various issues were addressed with expert testimony, prolonged deliberations, and constituent input. David Orgon Coolidge & William C . Duncan, Beyond Baker: The Case for a Vermont Marriage Amendment, 25 Vt. L. Rev. 61, 67-80 (2000). Similarly, the Ontario and Quebec trial courts even in finding the Canadian marriage law violative of the Canadian Charter of Rights and Freedoms deferred its remedy for

two years so as to provide time for the Parliament to reach a satisfactory and well-reasoned solution. Halpern v. Toronto, 60 O.R.3d 321 (Ont. Div. Ct. 2002); Hendricks c. Quebec, 2002 Carswell Que 1890, 2002 WL 1608180 (Cour Super., Montreal, Quebec, Sept. 6, 2002) (no official English translation).

The judicial system, as contrasted with the legislative system, is singularly ill-designed to fashion legislative and regulatory remedies. While this Court may pass upon the constitutionality of a legislative enactment, it is unwise for this Court to attempt to adopt a comprehensive legislative system recognizing same-sex unions. It is for precisely this reason that the Vermont Supreme Court deferred to the legislature for implementation of its ruling. Baker v. State, 744 A.2d 864, 886-887 (Vt. 1999). Even after the months of legislative debate, there remained a variety of regulatory issues which required several months' additional consideration by the appropriate bodies. See, e.g., Banking Bulletin No. 23, Vermont Department of Banking, Insurance, Securities and Health Care Administration (BISHCA) (June 4, 2001) (addressing tenancy by the entirety, homestead exemption and IRA disclosures); Regulation 2001-01-IH

Civil Unions, Vermont Department of Banking, Insurance, Securities and Health Care Administration (governing insurance providers, policies and contracts) (Dec. 6, 2000); Insurance Bulletin No. 128, Vermont Dept. of Banking, Insurance, Securities and Health Care Administration (governing life insurance policies) (Dec. 13, 2000), all available at <http://www.bishca.state.vt.us/civilunion/defaultcv.htm> (last visited Dec. 11, 2002).

Many of the questions raised by the recognition of same-sex unions are particularly complicated due to the federalist structure of the United States, raising questions both of federal supremacy and of sister-state interaction and recognition. For example, in Vermont, certain employee benefits are extended to couples in civil unions, while other benefits (e.g., pension benefits governed by ERISA, 29 U.S.C. § 1001 et seq. (2002)), because they are governed by federal law, remain limited to married couples under the federal Defense of Marriage Act. Pub. L. 104-199, sec 1, 100 Stat. 2419 (Sep. 21, 1996), codified at 1 U.S.C. § 7 (1997). Similarly, many federally funded programs are administered at the state level, requiring state officials to determine whether federal

law permits states to apply their own definition of marriage, or whether the family is defined under federal law.

Sister-state interaction raises additional questions. Vermont's experience has shown that approximately 85% of civil union applicants come from out-of-state. However, case law to date has shown that sister states are not inclined to recognize Vermont civil unions as legal marriages. Burns v. Burns, 560 S.E.2d 47 (Ga. App. 2002) (holding civil union not recognized as "legal marriage" under Georgia law); Rosengarten v. Downes, 802 A.2d 170 (Conn. App. 2002) (denying Connecticut dissolution of Vermont civil union), cert. granted, 261 Conn. 936 (plaintiff passed away in early November, leaving status of appeal in doubt). Amici suggest that calling the union same-sex "marriage" will solve this problem, though this disregards the reasoning of the courts which have heard the cases. See Brief of Amici Curiae Professors Libby Adler, et al., at 34-35. In both Burns and Rosengarten, the court reasoned that state law did not recognize same-sex "marriage," thus leading to the conclusion that it would not recognize civil unions, either. With such reasoning, it is misguided to

suggest that a different result will follow simply by giving the relationship a different name. (See generally, Brief of Amici Curiae State Attorneys General.) Similar, though nuanced, questions arise where the case involves a couple from Vermont which has traveled out-of-state. Ralph U. Whitten, Exporting and Importing Domestic Partnerships: Some Conflicts of Law Questions and Concerns, 2001 BYU L. Rev. 1235 (2001).

Even entirely within the Massachusetts statutes, it would be necessary to legislatively reconcile various complications created by a redefinition of marriage. These issues include statutory exemptions for religious organizations, exemptions recognizing the associational rights of Massachusetts citizens, provisions to respect the religious liberty of clerks and health department officials, and others.

***C. This Court cannot extend the provisions of the marriage statutes based on what it believes the Legislature might do or read into the law provisions the Legislature did not provide.***

Amici assert that the Legislature would be more likely to extend the statutory inclusion to same-sex couples than to invalidate the statute entirely. While this may or may not be true, Amici have provided no

basis upon which this conclusion is to be based. Faced with this very question, the Canadian Justice Minister has proposed three options to the Canadian Parliament, only one of which is the extension of existing marriage laws. Marriage and Legal Recognition of Same-sex Unions, A Discussion Paper, Department of Justice Canada (November 2002). It is not the place of the Court to guess as to what the Legislature might-or might not-do in a given situation where there is no evidence upon which to base that conclusion. See King v. Viscoloid Co., 219 Mass. 420 (1914).

***D. If this Court applies a different standard of review than was applied by the trial court, the case should be remanded for further proceedings.***

The trial judge in this matter granted the Commonwealth's motion for summary judgment, finding that the Plaintiffs-Appellants had failed to implicate any form of heightened judicial scrutiny. On appeal, Plaintiff-Appellants contend that this Court should impose a heightened form of scrutiny under either an equal protection or fundamental rights analysis. For the reasons argued above and elsewhere, this argument should be rejected. If, however, the Court does adopt a heightened scrutiny analysis, the case should then

be remanded to the trial court for further proceedings to determine whether the state has a sufficient interest in the marriage statute to justify the statute under heightened scrutiny.

In the trial court, the State moved for summary judgment on the basis that the marriage laws were rationally related to a legitimate governmental interest. Having concluded that no heightened scrutiny was implicated by the matter, the court did not consider whether the State might also have a substantial or compelling interest in maintaining the existing statutory structure regulating marriage.

Thus, no court has yet considered whether the Massachusetts marriage laws can satisfy a heightened form of constitutional scrutiny. Moreover, the parties have not briefed or presented evidence on this point. If this Court elects to impose a heightened form of scrutiny, the appropriate procedure would be to remand the case for further proceedings consistent with this Court's holding, rather than to immediately and unilaterally extend the existing marriage statute to include same-sex couples. Blixt v. Blixt, 437 Mass. 649

(2002) (remanding on issue not considered by trial court).

### CONCLUSION

This Court should not take this decision in its own hands, and effectively prevent self-government by the People of Massachusetts. Plaintiffs-Appellants' attempt to redefine marriage, in order to invalidate the existing marriage law, should be firmly resisted by this Court as a matter of both constitutional principle and judicial prudence.

For all these reasons, Amici Legislators of the Commonwealth of Massachusetts urge this Court to defer to the legislative regulation of marriage, respecting the separate governmental jurisdictions created by the Massachusetts Constitution, and to affirm the decision of the lower court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, James R. Knudsen, attorney for Amici Curiae The Honorable Philip Travis, et al., hereby certify that on December 20, 2002, I served the foregoing Motion for Leave to File Brief of Amici Curiae by causing a copy to be mailed, first-class postage prepaid, to counsel for the plaintiffs, Mary L. Bonauto, Gay and Lesbian Advocates and Defenders, 294 Washington Street, Suite 301, Boston, Massachusetts 02108-4608, and counsel for the defendants, Judith S. Yogman, Assistant Attorney General, One Ashburton Place, Boston, Massachusetts 02108-1698.

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