

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-08860

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,

v.

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

Defendants-Appellees

Appeal from a Judgment of
The Superior Court, Suffolk County

BRIEF OF *AMICI CURIAE*
MASSACHUSETTS FAMILY INSTITUTE, INC.,
INSTITUTE FOR FAMILY DEVELOPMENT, INC., and
PARENTS' RIGHTS COALITION, INC.,
IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF THE *AMICI*

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.

The Institute for Family Development, Inc. (FID), is a not-for-profit educational corporation organized under the laws of the Commonwealth of Massachusetts. FID is a member of a federation of similar educational organizations which operate in 47 countries, under the name International Federation for Family Development (IFFD). IFFD is accredited as an NGO in consultative

status to the United Nations, and advocates for international policies which support strong families and healthy children. IFFD is familiar with the research that establishes that children are best raised in healthy households, with a natural mother and father taking responsibility for their education. FID is in favor of public policy that supports marriage as a union between a man and a woman, committed to each other and to the upbringing of their children, which would be undermined by a holding that "same-sex marriages" are equivalent.

The Parents Rights Coalition, Inc. (PRC), is a non-profit corporation made up of parents, families, and citizens from all parts of Massachusetts. It was formed in 1994 in the Boston area as local parents felt it was time to challenge the growing incidents of public school sexuality programs foisted on children without their parents' knowledge or consent. PRC firmly believes that the official legitimization of same-sex "marriage" by the court system would give public schools the green light to legally and officially portray homosexuality as a "normal and healthy" activity for children or adults -- further subverting parents' moral and religious views on that

subject. Furthermore, PRC believes that legalization of same-sex "marriage" would accelerate many of today's social pathologies that are breaking down the nuclear family.

SUMMARY OF THE ARGUMENT

This Court should affirm the Superior Court's ruling that the Commonwealth's asserted interest in procreation justifies plaintiffs-appellants' exclusion from marriage licensing. Procreation is a legitimate and compelling state interest, and it is the primary interest promoted by the state's marriage laws (pp.6-9). The state interest in "procreation" should not be understood as a narrow interest in maximizing the number of babies born, but as a broad interest in promoting the social practice of begetting and rearing children in stable biological families (pp.9-11). Objections drawn from bastardy laws, sex-discrimination law, and adoption law do not undermine the state's interest in procreation in biological families (pp.11-15).

Instead of directly regulating procreative decisions, the state advances its interest in procreation through an indirect strategy of promoting

the pre-existing social institution of procreative marriage. Marriage is not invented by the state; the state creates "civil marriage" to promote and protect naturally procreative "social marriage" (pp.15-17). Civil marriage is thus designed to substantially overlap with social marriage, and affirm the social expectations surrounding it (pp.17-19). Both constitutional and prudential problems with direct regulation of procreative decisions require the state to adopt this indirect strategy of promoting procreation in stable families (pp.19-23).

Thus understood, the Commonwealth's marriage laws withstand all three kinds of judicial scrutiny invoked against them. First, they withstand rational basis scrutiny (pp.24-26). Promoting procreative families is not a pretext but the actual purpose served by the state's marriage laws; the inclusion of non-procreative gender-diverse couples publicly affirms the procreative institution of social marriage and is required by constitutional concerns (pp.26-31). The exclusion of same-sex couples from marriage is similarly rationally related to the state's interest in procreative families. Including same-sex couples in civil marriage would be counterproductive to the

purpose of the marriage laws by diluting the distinctive character of marriage as a procreative institution, and by undermining the state's ability to draw principled boundaries around the institution of civil marriage (pp.31-36).

The marriage laws also withstand traditional strict scrutiny, because they are ordered to the compelling state interest of responsibly promoting procreation, and are narrowly tailored to achieve that interest (pp.36-39). They are not overinclusive, because they admit only the couples required to achieve their goal of encouraging procreation by promoting the social institution of procreative marriage. The inclusion of non-procreative couples is required both to affirm clearly the social procreative institution, and to avoid unconstitutionally intrusive screening of couples for procreative ability and intent (pp.39-42). The marriage laws are also not underinclusive. Technologically assisted reproduction by same-sex couples does not advance the state's interest in encouraging stable biological families, and same-sex couples are much less likely to be procreative than gender-diverse couples (pp.42-44).

The marriage laws also withstand *Mary Moe* balancing scrutiny. Plaintiffs-appellants and their amici distort the state's interest in procreation in biological families by trying to separate procreation and child-rearing into distinct categories. On the contrary, the state retains an interest in preserving the familial *link* between procreation and child-rearing (pp.44-46). The state's interest in promoting procreative families is a weighty interest, while any intrusion into the self-determination and privacy of same-sex couples by denial of marriage licenses is both minor and indirect (pp.46-50).

ARGUMENT

I. THE PURPOSE OF THE CIVIL MARRIAGE STATUTES IS TO PROMOTE PROCREATION AND CHILDREARING IN STABLE BIOLOGICAL FAMILIES.

A. Procreation is the Legitimate State Interest Promoted by the Marriage Laws.

Legal authorities universally agree that procreation is a legitimate and compelling goal for the state to promote, and that procreation is in fact the goal promoted by state marriage laws. See, e.g., Inhab. of Milford v. Inhab. of Worcester, 7 Mass. 48,

52 (1810) ("Marriage is unquestionably a civil contract, founded in the social nature of man, and intended ... to multiply, preserve, and improve the species."); Reynolds v. Reynolds, 85 Mass. (3 Allen) 605, 610 (1862) (asserting that "one of the leading and most important objects of the institution of marriage under our laws is the procreation of children"); Smith v. Smith, 171 Mass. 404, 408 (1898) (marriage voidable where husband's fraudulent concealment of syphilis would force wife to "become a party to the transmission of such a disease to her posterity"); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. App. 1974) (refusal of marriage licenses to same-sex couples is not based on sex classifications but on "the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children"); Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (relying on the notion that "propagation of the race is basic to the concept of marriage and its legal attributes"). The fact that earlier authorities did not always make this purpose explicit does not indicate that procreation is a post factum pretext for the marriage laws, as plaintiffs' amici suggest. See

Brief for Monroe Inker and Charles Kindregan, Amici Curiae at 7 ("Kindregan Br."). On the contrary, the concern for procreation has always been clearly present in the structure of the marriage laws, and was presupposed so universally that legal authorities seldom found it necessary to make it explicit.

Procreation is a legitimate public goal. In fact, it is among the most compelling of state interests because the very continued existence of the state depends on it. See, e.g., In re Moe (Matter of Mary Moe), 385 Mass. 555, 560 (1982) (procreation is "fundamental to the very existence and survival of the [human] race") (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.")); see also Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (same); Dean v. District of Columbia, 653 A.2d 307, 363 (D.C. App. 1995) (concurring opinion) (same). Also, the state is deeply concerned with numerous sensitive issues surrounding procreation, such as responsible begetting of children, stability of families, child support and welfare, and healthy child-rearing. These issues are complex and closely interrelated. Many factors converge in marriage to

make it a successful legal and cultural institution for the procreation and upbringing of children, who form the future of the public state.

B. "Procreation" Cannot Be Understood In the Narrow Sense Proposed by Plaintiffs, But Must Be Understood In the Richer Sense of an Embedded Cultural Practice of Begetting and Raising Children in Stable Biological Families.

1. "Procreation" as promoted by the Commonwealth is a cultural practice bound up in the social institution of marriage.

Plaintiffs-appellants and their amici repeatedly rely on a narrow, literalistic reading of the notion of "procreation" as a state interest. They suggest that any state interest in procreation must be understood as a mere interest in maximizing the number of babies born, to stave off population collapse. See, e.g., Brief of Plaintiffs-Appellants at 87 ("Pl.-Ap. Br.") (construing state's interest as an attempt merely to create "more marriages involving procreation"); Kindregan Br. at 4 (characterizing the state's interest in procreation as a "concern[] with underpopulation"). Clearly, the state's goal in "promoting procreation" cannot be reduced to mass

baby-production - or else the state could advance this goal simply by offering a cash bounty for each baby produced. As noted above, many other complex, interrelated state and private interests - related to the most intimate issues of family life - come into play when the state seeks to promote responsible procreation.

The Commonwealth does not seek to promote mere unqualified "procreation." Instead, the state seeks to promote "procreation" in the deeper sense of the long-established cultural practice of begetting, bearing, and raising children in stable biological families. Through their marriage laws, the Commonwealth and other states seek to advance the interest articulated by the Singer court: "our society as a whole views marriage as the appropriate and desirable forum for the procreation and rearing of children." Singer, 522 P.2d at 1195. In short, the state's interest in "procreation" is ipso facto an interest in promoting those social institutions that form the most congenial environment for responsible procreation. As the Singer court observed, our society holds a deeply-rooted view that the *ideal* situation for the upbringing of children is in

traditional marriage, where the child is reared by *both* her biological parents, who are bound by family bonds both to her and to each other.

2. Neither bastardy law, nor sex discrimination law, nor adoption law undermines the state's interest in procreation in biological families.

Plaintiffs and their amici offer three objections here. First, they argue that the repeal of the bastardy laws implies that the state has no preference for procreation *within* marriage, and is thus indifferent to child-rearing inside and outside of marriage. See Kindregan Br. at 41-43 (suggesting that repeal of bastardy laws means the state has abandoned its traditional concern "that procreating people marry"). To this end, they also suggest that, because procreative decisions are shielded from direct state intrusion by constitutional privacy, the state can assert no preference for encouraging procreation within marriage. See Pl.-Ap. Br. at 36; Kindregan Br. at 24. This line of objection is mistaken. In repealing the bastardy laws, the state sought to remedy the injustice of punishing a child for the marital status of her parents. See Kindregan Br. at

41. It did not thereby abandon its concern about out-of-wedlock births and the social problems attendant to them, public concern for which is abundantly documented.¹ Similarly, although the Commonwealth declines at this time to intrude into many of the personal procreative decisions of unmarried people, the Commonwealth still retains a strong interest in encouraging procreation and child-rearing in the context of the stable social institution of marriage. An underlying public value like family procreation may be momentarily outweighed by some other value, like constitutional privacy, in a particular context, but it still retains its independent weight and potency.

Second, plaintiffs object to the use of "biology" in this context, arguing that this Court views classifications based on biology with some skepticism

¹ For example, a simple search of Lexis news databases for stories concerning out-of-wedlock births in the last two years alone produced 761 results, from various news sources across the country. See, e.g., (among many others) Clarence Page, "Tie the knot between marital values, behavior," Baltimore Sun, Nov. 15, 2002, 17A; Betty Holcomb, "Women: Conservatives Push for Marriage Promotion Programs," Inter Press Service, Oct. 21, 2002 (detailing federal debate about using welfare reform to combat out-of-wedlock births); Nina Bernstein, "Child-only cases grow in welfare," N.Y. Times, Aug. 14, 2002, A1 (all discussing various aspects of out-of-wedlock birth rates as a social problem).

in sex discrimination cases. Pl.-Ap. Br. at 58. As an initial matter, this argument must be rejected because this is not a sex-discrimination case (see Part II.B, below). "Biology" here is not being used as a proxy for some invidious sex-based classification. Rather, it is being used to identify a unique and special bond between parents and the children born to them. This special link between biological parents and their offspring is well-recognized by legal authorities. See, e.g., Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity..., he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (marriage forms "the relationship that is the foundation of the family in our society" by providing the "traditional family setting" for raising children); see also Adoption of Georgia, 433 Mass. 62, 66 (2000); Care and Protection of Stephen, 401 Mass. 144, 150 (1987) (both requiring clear and convincing

evidence of unfitness to defeat strong presumption in favor of custody for biological parents). The special nature of this link makes it abundantly reasonable for the Commonwealth or other states to judge that preserving intact biological families provides an *ideal* institution for the procreation and rearing of children: marriage establishes the biological family as "the appropriate and desirable forum" for procreation and child-rearing. Singer, 522 P.2d at 1195. Moreover, by promoting marriages of one man and one woman, the Commonwealth seeks to preserve not merely an *isolated* link between one biological parent and her child, but to preserve and promote a *set of family relations and family bonds*: between the child and *both* of her biological parents, and between the biological mother and biological father. In seeking to promote procreation in traditional marriages, the Commonwealth seeks to promote *procreation in stable biological families*.

Third, plaintiffs argue that the state in fact shows no preference for biological families over adoptive families, and that the asserted preference for promoting childrearing in stable biological families is thus pretextual. Pl.-Ap. Br. at 90-91.

This argument suffers from the same fallacy indicated above: the value of parenting in biological families is not canceled by the existence of other strong interests that encourage robust adoption laws and policy. The Legislature is not convinced that biologically related parents provide the *only* positive setting for child-rearing, but it is convinced that preserving the link between biological procreation and child-rearing provides an *ideal* setting for raising families. In light of its interest in promoting biological families, the Commonwealth no doubt views the events and circumstances that lead to the severing of the bonds between a child and her biological parents as a tragedy, if often an unavoidable evil. The state's attempt to protect these children through enlightened adoption laws designed to give adoptive children all the protections enjoyed by children in biological families, does not denigrate its distinct interest in promoting procreation in biological families.

C. The State Seeks Its Procreative Purpose Not By Commanding Procreation, But By Fostering a Pre-Existing Social and Cultural Institution By Creating a Parallel Legal Institution.

**1. Marriage is not invented by the state.
The state establishes civil marriage to
promote the pre-existing institution of
social marriage.**

One key feature of the *legal* institution of marriage ("civil marriage") is that the institution is not invented by the state. Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) ("Marriage was a custom long before the state commenced to issue licenses for that purpose."). It mirrors and substantially overlaps with the social and cultural institution of marriage ("social marriage"), the practice of men and women coming together as husbands and wives for the joint purpose of binding themselves together in love and raising families together. Though any state interest in privileging a particular kind of *intimate association* is likely quite attenuated, the state has a strong interest in encouraging the procreative activity of begetting and raising biological families (Part I.A-B).

Without civil marriage, men and women would still engage in social marriage. In order to promote and encourage this procreative family-generating activity, the state enacts the marriage laws to promote, encourage, stabilize, and defend the social marriages

in which procreation is most naturally and most ideally carried out. See Singer, 522 P.2d at 1195; Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (marriage "uniquely involv[es] the procreation and rearing of children within a family"). The legal rules governing civil marriage are selected to reflect and promote the healthy procreative practice of social marriage.

2. Civil marriage promotes procreation in biological families through indirect encouragement, instead of direct regulation.

Civil marriage and social marriage are thus parallel institutions by the state's design. The Commonwealth achieves its procreative purpose of promoting biological family-raising by a uniquely appropriate *indirect* means: it creates the legal structure of marriage law to bolster and encourage the social structure of marriage, which tends on its own accord to produce biological families.

The consciously chosen, substantial overlap between civil and social-cultural marriage can be seen from the fact that civil marriage consciously embodies six of the core features of traditional social

marriages. First, social marriage is a *union*, presumably sexual or at least ordered toward sexual intimacy. Civil marriage reflects this by, e.g., invalidating marriages of consanguineous parties whose sexual intercourse would violate public policy, see G.L. c. 207, §§ 1-2, and allowing dissolution for impotency, see G.L. c. 208, § 1. Second, social marriage is a *freely entered* or *autonomous* union, arising from the free will of the parties. Civil marriage reflects this by, e.g., regulating entry into marriage of minors whose free and informed consent cannot be presumed, see G.L. c. 207, §§ 7, 24-25. Third, social marriage is a *monogamous* or *mutually exclusive* union, and so is civil marriage, see G.L. c. 207, § 4 (polygamous marriages void); G.L. c. 272, § 15 (criminalizing polygamy). Fourth, social marriage is a *gender diverse* union, between one man and one woman, which allows both for biological parenting and for unique and separate complementary gender contributions to that biological parenting. The civil marriage statutes reflect this presupposition by their consistent use of gender-diverse terms like "husband" and "wife" to describe marriage; see numerous instances cited in the Superior Court's discussion,

Mem. Dec. at 6. Fifth, social marriage aspires to be a *stable and lasting* union, and civil marriage laws reflect this by treating marriage as valid until dissolution or death, see G.L. c. 207, § 6. Sixth, social marriage is a *procreative* union, involving sexual love that tends naturally to produce biological offspring, and generally entered into with the intention of producing and raising these biological offspring. Thus the Commonwealth statutes maintain the distinction between children born into true marriages and children born out of wedlock, G.L. c. 207, § 15, while wisely refusing to impose legal penalties on children for the marital status of their parents. All in all, it is clear that the marriage statutes are designed to create a legal institution that accurately reflects the social institution of gender-diverse, procreative marriage. By affording legal protection to the social expectations surrounding marriage, the Commonwealth asserts its public interest in procreative marriage and bolsters the strength of that social institution.

3. The indirect strategy of promoting procreation by promoting social marriage is required by constitutional and prudential concerns.

The Commonwealth's "regulation" of procreation is thus indirect, at one remove from the actual act of procreation. The state (1) sets up a legal institution that (2) supports and encourages a social practice that (3) tends on its own to produce outcomes in the public interest.

The state uses this indirect strategy to advance its compelling interest in procreation for two reasons. First, as plaintiffs observe, the state cannot constitutionally regulate procreation directly, because constitutional privacy protections prevent the Commonwealth from intruding on this intimate decision. See Mary Moe, 385 Mass. at 563-64 ("The right to reproduce and the decision whether or not to beget or bear a child is at the very heart of the constitutionally protected right to privacy.") (citing numerous cases). But the fact that the constitution draws a sphere of protection around private procreative choices does not cancel out the state's independent interest in promoting responsible procreation. Instead, the state is forced to select alternative, non-intrusive means to promote procreative families. Rather than intruding into procreative decisions with unconstitutional

regulation, the state seeks to foster the social institutions which in general tend to lead to optimally responsible procreative activity.

Second, regardless of constitutional constraints, any scheme to impose state regulation on procreative decisions would be deeply unwise. Because these decisions involve complex, sensitive, and deeply personal and psychological factors, prudential concerns strongly oppose any direct intrusion by the state into personal choices about marriage and procreation. These prudential concerns counsel the Commonwealth to pursue its interest in procreative families indirectly, by taking prudent and constitutionally permissible steps to support and shore up the procreative institution of social marriage.

Such prudential concerns, in a policy of *indirect support* rather than *direct regulation*, explain the disparate statutory treatment of impotence and infertility. Plaintiffs' amici make much of the fact that state annulment and divorce law hold marriages voidable for impotence, but not for infertility - suggesting that these cases indicate a state concern for promoting intimate association, not procreation,

in civil marriage. Kindregan Br. at 10-13. They also point out that "consummation of a marriage by coition is not necessary to its validity," Kindregan Br. at 14 (quoting Franklin v. Franklin, 154 Mass. 515, 516 (1891)). These amici are correct to note that "[t]he law recognizes that sexual intimacy is at the heart of the marital contract," Kindregan Br. at 12, but wrong to suggest that this is somehow in tension with civil marriage's purpose of promoting procreation in stable biological families. Prudential concerns easily explain the Commonwealth's treatment of these cases. For example, the Franklin rule of recognizing non-consummated marriages promoted the stability of marriages in a fault-based divorce regime, by preventing one party from evading marital obligations by denying sexual union. In the same vein, the Commonwealth may choose to treat impotence and sterility differently in the marriage statutes because this treatment most accurately reflects the expectations and practices of social marriage. It would violate social expectations to allow one party to evade marital obligations by alleging infertility (which is difficult to prove), and thus tend to destabilize marital expectations. Impotence or sexual

incapacity, however, does strike at the heart of social marriage as an intimate union (see Part I.C.2 above). By matching society's expectations and practices in social marriage through parallel rules for legal marriage, the Commonwealth bolsters the institution of social marriage - which is the essence of its strategy for promoting procreative families.

D. Summary: The State's Concern Is To Promote Procreation in Biological Families, and It Achieves This Goal By Setting Up Civil Marriage as a Parallel Institution to Social Marriage.

In sum, the Commonwealth's concern is to promote procreation in stable biological families. This concern is compelling because it is essential to the continuation of human society. The Commonwealth cannot pursue this goal through direct regulation of procreative decisions, because such regulation would be both unconstitutional and unwise. So the Commonwealth adopts an indirect strategy of fostering the ideal milieu for procreation and childrearing, i.e. biological families, by encouraging social marriage. The civil marriage laws constitute a

parallel legal institution to promote and encourage this social institution of procreative marriage.

II. THE MARRIAGE LAWS WITHSTAND ALL THREE KINDS OF SCRUTINY INVOKED BY PLAINTIFFS AND AMICI.

Plaintiffs-appellants and their amici argue that this subtle legal scheme of promoting the state's compelling interest in procreation in biological families falls afoul of at least three kinds of judicial scrutiny: rational basis scrutiny, traditional strict scrutiny, and *Mary Moe* balancing scrutiny. Their arguments here are not convincing. This Court should uphold the existing structure of the marriage laws under all three kinds of scrutiny.

A. The Marriage Laws Withstand Rational Basis Scrutiny.

To withstand rational basis scrutiny, the state must show that the marriage laws are (1) rationally related to the achievement of (2) some legitimate state interest. Murphy v. Comm'r of Dep't of Indus. Accidents, 415 Mass. 218, 226 (1993). This highly deferential standard requires only a "minimal" showing of rationality by the Commonwealth. Id. This

deference is due to the Legislature under principles of separation of powers, which acquire special weight when "delicate consideration and balancing" of complex family issues is concerned: "our deference to the Legislature on this privilege is particularly compelling because the decision ... necessarily depends on balancing vital, yet competing, social policies" concerning family relations. In re Grand Jury Subpoena, 430 Mass. 590, 597-99 (2000). Cf. Cass Sunstein, "Homosexuality and the Constitution," 70 Ind. L.J. 1, 24-25 (1994) (calling for "great caution on the part of the courts" and "institutional constraint" to allow resolution of debates about same-sex marriage in the democratic legislatures). In Part I.A-B above, we argued that promoting procreation in stable biological families is a legitimate state interest. In part I.C above, we showed that the marriage laws are rationally related to advancing this interest, by seeking to preserve, support, and promote the social institution which most naturally leads to responsible biological procreation.

Nevertheless, amici launch a twofold attack on the notion that the marriage laws are rationally related to the state's interest in procreation in

biological families. First, they argue that "procreation" has been offered as a pretextual justification for an invidious practice of discriminating against same-sex couples, and that the actual justification for the marriage laws is exclusively to promote "a committed union of two persons who share intimacy and economic resources." Kindregan Br. at 2. Second, they argue that, even if promoting procreation is the goal of the marriage laws, excluding same-sex couples from marriage licenses is not rationally related to achieving that goal. We address each of these objections in turn.

1. Promoting procreation in biological families is not a pretextual justification, but a central purpose of the marriage laws.

Abundant evidence from legal authorities belies amici's claim that promoting "procreation" is a pretextual justification for the marriage laws (see cases cited at Part I.A, above). These authorities indicate that the Commonwealth and similarly situated states have continuously held the promotion of procreative families as a predominant purpose of the civil marriage statutes. The observation that

procreation is not expressly listed in the text of the marriage statute fails to undermine this purpose. See Kindregan Br. at 7. Statutes routinely fail to recite their purposes explicitly, but judges nevertheless routinely discern the objective purposes of such statutes - indeed, identifying the unstated rational purposes of a statute has been a chief technique of statutory interpretation since time immemorial. See, e.g., Commonwealth v. Smith, 431 Mass. 417, 421-25 (2000) (discerning the unstated purpose of incest statutes by examining the language, structure, and the nature of the prohibitions).

Plaintiffs' amici also argue that promoting procreative families cannot be the purpose of the marriage laws, because these laws admit to marriage many couples who cannot procreate, such as the elderly, the sterile, and the infertile. Kindregan Br. at 9-10. For example, they note that post-menopausal women are allowed to marry under the current marriage laws, suggesting that the laws thus have nothing to do with promoting procreative families. Kindregan Br. at 8.

As explained above, constitutional and prudential constraints may prevent the state from regulating

procreation directly (Part I.C.3). Instead, the marriage laws indirectly promote procreative families by promoting the social institution of traditional marriage (Part I.C.2). As explained above (Part I.C.2), the social institution of marriage serves a number of closely interrelated ends: e.g. sexual union, autonomy, stability, monogamy, gender diversity, procreation, and child-rearing. In the context of this complex network of marital goals, permitting post-menopausal and other sterile members of society into culturally recognized marriages has always been deeply rooted in the cultural practices of social marriage. By issuing civil marriage licenses to the infertile and post-menopausal, the state seeks to preserve, promote, and support the clearly defined social institution of heterosexual, procreative marriage. In licensing such unions, the Commonwealth *publicly affirms* the precise relationship that strongly tends to produce biological families in other contexts. No such similar procreative interest would be served by attempting to expand the traditional *social* understanding of marriage by expanding *civil* recognition of marriage to same-sex couples who, as

the Superior Court correctly observed, are incapable of joint biological procreation.

The appropriateness of this strategy of publicly affirming traditional heterosexual marriage is made apparent by considering the constitutional problems that would attend any attempt to exclude couples who are sterile or post-menopausal, or otherwise unwilling to procreate. First, the Commonwealth could not *require* procreation from married couples who choose not to procreate, since procreative decisions are shielded by constitutional privacy protections. See Mary Moe, 385 Mass. at 563-64. Second, the Commonwealth could not *inquire* into the fertility of couples seeking marriage licenses without likely intruding into constitutionally protected zones of privacy and invoking prohibitive costs. For example, it would very likely constitute an unconstitutional invasion of privacy for the Commonwealth to impose various medical tests to screen applicants for marriage licenses. See, e.g., Adams v. Howerton, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980) (“[T]o inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants” would “raise serious

constitutional questions."). Moreover, to impose such screening tests would be strongly counterproductive to the state's end of *promoting* procreation in stable biological families, insofar as it would likely deter many *fertile* couples from seeking marriage licenses in the first place, and thus encourage them to procreate without the public commitment and legal protections of civil marriage. Third, the Commonwealth could not impose a bright-line age cutoff for post-menopausal women, as plaintiffs' amici propose (Kindregan Br. at 8), because such a line would likely involve unconstitutional sex discrimination, insofar as men above the age line would remain presumptively fertile while women above the age line would be presumptively infertile. See Attorney Gen. v. MIAA, 378 Mass. 342, 357 (1979) (constitutional problems with using "biological circumstance" as a basis for sex-based classifications).

It follows that the positive purpose of *publicly affirming* traditionally procreative unions, and the negative purpose of avoiding serious constitutional, prudential, and administrative difficulties, combine to make the state's inclusion of non-procreative gender-diverse couples in marriage squarely rationally

related to the state's purpose of promoting procreative families.

2. Refusing marriage licenses to same-sex couples is rationally related to the state's goal of promoting procreative unions.

Plaintiffs' amici argue that, even if the purpose of the marriage laws is to promote procreative families, the refusal of marriage licenses to same-sex couples is not rationally related to that purpose. Kindregan Br. at 32. This argument fails for three reasons.

First, they suggest that same-sex couples are capable of reproducing using assisted-reproduction technologies, so the state has the same interest in promoting same-sex unions as equally procreative. See Kindregan Br. at 36 (arguing that the state has no preference for biological procreation over reproductive technology). The Superior Court easily rebuffed this argument by pointing out that procreation via reproductive technologies is far more "cumbersome" than procreation via heterosexual union, and that same-sex couples are accordingly far less likely to engage in procreation. Mem. of Dec. at 25.

But this is only the beginning of the story: amici's argument also significantly distorts the state's asserted interest in "procreation." As noted above (Part I.A-B), the state's interest in promoting procreative families is not simply to encourage baby-production at the highest possible rate, but to promote the procreation and upbringing of children by their biological parents in stable biological families. As argued above, the link between the child and *both* of her biological parents has a special place and is a unique good. The special nature of this link strongly warrants the Commonwealth's policy of encouraging through the marriage laws procreation and upbringing of children in monogamous families of *both biological parents* - both the biological father and the biological mother. It is an inevitable feature of assisted reproduction in same-sex couples that *at most one* member of the same-sex couple is a biological parent to the child born through assisted reproduction. Therefore, the inclusion of same-sex couples in marriage licensing would not be rationally related to the state's interest in promoting procreation and childrearing in stable biological families.

Indeed, the inclusion of same-sex couples under the marriage laws would be *contrary to* that purpose of promoting procreation in biological families. As argued above, the regulatory strategy of the marriage laws is to create a parallel *legal* institution to protect and promote the *social* institution that tends to produce procreation and parenting in biological families. Again, this is a strategy of *indirect encouragement*, not direct command. Civil marriage promotes biological procreative families by preserving, supporting, encouraging, and establishing clear boundaries around the *social* institution in which biological families are formed. Thus, just as allowing post-menopausal women to enter socially recognized marriages *publicly affirms* the procreative institution of heterosexual social marriage, conversely, allowing couples who are strictly incapable of biological procreation together to enter into civil marriages would undermine the affirmation that civil marriage gives (albeit indirectly) to biological families. Cf. Lynn D. Wardle, "Multiply and Replenish," 24 Harv. J.L. & Pub. Pol'y 771, 798 (2001) ("Legalizing same-sex marriage would weaken the nexus between procreation and parenting."). Admitting

couples to marriage who are inherently and categorically incapable of biological procreation together, and whose relations lie inherently outside the traditional boundaries of social procreative marriage, would cut against the Commonwealth's public affirmation of civil marriage.

In fact, the alternative regime offered by plaintiffs-appellants and their amici, in which procreation is not an interest motivating the Commonwealth's marriage laws, would be of dubious constitutionality. The basis for the state interest in promoting procreation in biological families is clear: the state has a fundamental interest in ensuring its continuity through sensible procreation and parenting, which it achieves through an indirect encouragement of the procreative institution of social marriage (see Part I.A-C). This procreative interest allows and encourages the Commonwealth to draw principled boundaries in its civil marriage laws that reflect boundaries in the social institution of traditional marriage. On the other hand, the alternative purpose of marriage laws proposed by plaintiffs' amici (namely, "to support a committed union of two persons who share intimacy and economic

resources," Kindregan Br. at 2) would undermine any principled boundaries in the marriage laws. While the state has a legitimate interest in *procreation* that allows it to draw a distinction between *procreative* and *non-procreative* unions, the state has no articulable interest in "intimacy" that allows it to draw any principled distinction between *intimate* and *non-intimate* unions. If inclusion in marriage licensing were based on "intimacy," it is not clear what rational basis would justify stopping at same-sex couples. Emotional intimacy, strong emotional bonds, and commingling of economic resources can exist in all manner of personal associations: e.g. between siblings or parents and their children, among groups of friends or roommates, or in an autonomous collective. For example, a brother and sister who live together in close friendship and wish to commingle economic resources could seek a marriage license under amici's proposed scheme - the Commonwealth could not privilege the kind of "intimacy" between married and same-sex couples in derogation of this other kind of intimate relationship. By re-casting the basis of civil marriage in terms of "intimacy" in relationships, which is a paradigmatically *private* interest, the

Commonwealth would render civil marriage a *private* institution serving private interests, and abandon its power to draw distinctions about civil marriage in the public interest. By preserving the link between civil marriage and the admittedly *public* interest of promoting procreation, the Commonwealth preserves its power to draw principled distinctions among groups of people who seek marriage licenses.

B. The Marriage Laws Withstand Strict Scrutiny.

Plaintiffs-appellants also argue that the marriage laws are subject to strict scrutiny under the equality guarantees of the Massachusetts Constitution. Pl.-Ap. Br. at 42. They invoke the analogy to the Supreme Court's decision in Loving v. Virginia, 388 U.S. 1 (1967), to argue that their exclusion from marriage licensing is a form of sex discrimination. As an initial matter, this argument is flawed because the Loving Court required a showing of invidious purpose and effect against the protected class before finding the challenged statutes constitutionally infirm. See Loving, 388 U.S. at 11 (finding "no legitimate overriding purpose independent of invidious

racial discrimination"); see also Baker v. Vermont, 744 A.2d 864, 880 n.13 (Vt. 1999) (rejecting sex-discrimination argument for same-sex marriage because there was no evidence of discriminatory purpose against a given sex). Here, plaintiffs-appellants have produced no evidence to support the implausible proposition that the Commonwealth's marriage laws have an invidious purpose and effect against one sex or the other. But regardless of the success of these arguments, the marriage laws withstand strict scrutiny as written and as applied in this case, and therefore should be upheld.

In order to pass muster under traditional strict scrutiny, defendants must show that the marriage laws achieve a compelling state interest and that they are narrowly tailored at the point of application to achieve that interest.

1. The marriage laws advance the compelling state interest of promoting procreation in stable biological families.

As argued above in Part I.A-B, the state's interest in promoting procreation in stable biological families is a compelling interest. As shown above in

Part I.C, the marriage laws are rationally structured to promote this interest by preserving, promoting, and encouraging the social institution of procreative marriage.

It remains to argue that the marriage laws are narrowly tailored at the point of application to achieve this compelling state interest. Plaintiffs-appellants and their amici argue that the marriage laws are not narrowly tailored to promote procreation because (1) they are *overinclusive* in admitting many non-procreative couples, and (2) they are *underinclusive* in failing to admit many procreative same-sex couples. In fact, the marriage laws are neither overinclusive nor underinclusive, and are appropriately narrowly tailored to achieve the compelling state interest in question. Cf. Adams v. Howerton, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980) (finding that "the state has chosen the least intrusive alternative available to protect the procreative relationship," so that laws excluding same-sex marriage are "narrowly tailored to serve a compelling state interest").

2. The marriage laws are not overinclusive. They admit exactly the right kinds of couples required to achieve their purpose by constitutionally acceptable and practically achievable means.

To allege overinclusiveness, plaintiffs and their amici indicate three classes of non-procreative couples who are nevertheless allowed civil marriage licenses: (1) married couples who choose not to procreate, (2) married couples who are infertile due to physical disorder or advanced age, and (3) married couples who are separated by incarceration. See Pl.-Ap. Br. at 47; Kindregan Br. at 8-9, 26-32.

As indicated above, the constitutional protections surrounding procreative decisions prevent the Commonwealth from regulating procreation directly (Part I.C.3). These protections preclude state intrusion into the procreative choices of couples who choose not to procreate, and prevent the state from screening couples for fertility (Part II.A.1). Constitutional equal protection rights similarly prevent any exclusion from marriage of women of advanced age (Part II.A.1). Moreover, the inclusion of these couples serves to affirm procreative marriage as a social institution, while including same-sex

couples would undermine the distinctly procreative character of marriage (Part II.A.2). So the marriage laws cannot be considered overinclusive with respect to the first two categories of non-procreative couples listed above: constitutional considerations demand, and prudential considerations urge, that these couples be included in civil marriage.

In the third category, plaintiffs' amici rely on the Supreme Court case Turner v. Safley, 482 U.S. 78 (1987), in which the Court applied rational basis scrutiny to rule that a Missouri prison regulation requiring approval for inmate marriages was "not reasonably related to [the asserted] penological interests" of preventing inter-inmate jealousy and preventing excessive dependence on male figures by woman inmates. Id. at 97. Amici concede that the prisoners generally "expected to be able to consummate marriages upon their release," but argue that this "expectation ... does not account for prisoners' right to marry even before their release." Kindregan Br. at 28. They also point out that the Turner Court invoked non-procreative purposes of civil marriage, such as emotional support and the exercise of religious faith. Turner at 95-96; Kindregan Br. at 27. However, it is

clear that refusing to force inmates to wait until release before marriage does nothing to undermine the procreative purpose of the marriage laws. The marriage laws are structured to encourage the social institution congenial to procreation in stable biological families. Issuing marriage licenses to inmates is wholly consistent with this purpose. Most of these inmates are likely to procreate within their marriages, as plaintiffs' amici concede, and the state cannot easily or reliably predict ex ante which inmate marriages will result in procreation. The fact that inmates are deferred from procreating by unfortunate circumstances merely makes them similar to millions of other newly married couples who defer procreation because of economic difficulties, career choices, or other personal choices. Forcing inmates to wait until release before marriage would be like forcing these other couples to wait until they are ready to procreate before marriage: constitutionally dubious and contrary to the state's strategy of promoting procreation by affirming the social practices and expectations surrounding social marriage, such as the emotional support and religious exercise noted by the Turner Court.

None of the non-procreative couples cited by plaintiffs and their amici could be excluded from marriage without violating constitutional mandates and undercutting the procreative purpose of the marriage laws. Therefore the marriage laws are not overinclusive, but appropriately tailored to achieve their purpose.

3. The marriage laws are not underinclusive. They exclude only those couples who are incapable of promoting the state's interest in procreation in biological families.

Plaintiffs and their amici also argue that the marriage laws are underinclusive with respect to their procreative purpose, in that they exclude same-sex couples who *do* procreate via reproductive technologies. See Pl.-Ap. Br. at 47. This argument suffers from three fatal defects.

First, as noted by the trial court, any procreative interest in promoting same-sex unions is highly attenuated, because procreation by reproductive technology is far more cumbersome, difficult, and expensive than procreation by heterosexual union. Mem. Dec. at 26. Same-sex couples are thus far less likely

to have children than married couples. It would be irrational for a state seeking to promote procreation to expend resources to promote inherently non-procreative unions.

Second, and more importantly, assisted reproduction in same-sex unions necessarily lies outside the state's interest of promoting procreation in biological families (Part I.A-B). As noted above, the biological links between the parents and children form a special set of family bonds, justifying the state's treatment of biological families as the ideal forum for child-rearing (Part I.B). By reserving the special privileges of civil marriage for inherently procreative unions, the Commonwealth pursues its goal of promoting procreative biological families. The inclusion of same-sex couples reproducing by artificial means would render the marriage laws overinclusive with respect to their purpose, and thereby possibly constitutionally infirm.

Third, the inclusion of same-sex couples in civil marriage would inevitably undercut the special message of affirming procreative unions that the Commonwealth seeks to send through its creation of civil marriage. Plaintiffs and their amici, in advocating for same-sex

marriage, invariably interpret the Commonwealth's marriage laws as *unrelated to* procreation; this itself is evidence that the inclusion of same-sex couples would radically transform the state's rationale and public understanding of the marriage laws. The inclusion would thereby undermine the principled boundaries that the state is currently able to draw in directing its marriage laws toward the end of responsible procreation in biological families. (See Part II.A.2, above.)

C. The Marriage Laws Withstand *Mary Moe* Balancing Scrutiny.

Plaintiffs-appellants also argue that the Commonwealth's marriage laws fall afoul of the balancing of interests that this Court deployed in Mary Moe to scrutinize intrusions on fundamental liberties. As an initial matter, plaintiffs-appellants' exclusion from marriage licensing does not trigger Mary Moe scrutiny because same-sex marriage has never been a "fundamental right" that is deeply rooted in the nation's history and tradition. See Singer, 522 P.2d at 1197 ("marriage as now defined [to exclude same-sex couples] is deeply rooted in our

society"). 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). All of plaintiffs' citations to cases stating that "marriage" is a "fundamental right" are cases in which marriage is understood as requiring gender diversity: a relationship between one man and one woman. At the proper level of specificity, therefore, same-sex marriage is explicitly excluded from "marriage" (a policy shared by all fifty states and the federal government), and plaintiffs' invocation of same-sex marriage as a "fundamental right" is entirely question-begging.

At any rate, plaintiffs-appellants' invocation of Mary Moe balancing scrutiny in this context avails them nothing, because the Commonwealth's marriage laws easily withstand this kind of scrutiny. The state's interest in promoting procreative biological families outweighs any perceived intrusion on plaintiffs' "needs for self-determination and family privacy." Pl.-Ap. Br. at 39.

On the one hand, the Commonwealth's interest in promoting procreation by supporting traditional

procreative marriages is a weighty and compelling interest, as argued above (Part I.A-C). In their discussion, plaintiffs significantly mischaracterize the Commonwealth's interest in promoting procreative marriages by positing an arbitrary distinction between "procreation" and "childrearing" as separate state interests. See *Kindregan Br.* at 3 (procreation and child-rearing are "separate" as "basic personal choices" with no necessary link). As we argued in Part I, the Commonwealth's interest must be understood as preserving the *link* between biological procreation and parenting. Many factors conjoin in civil marriage to optimize the state's interest in promoting procreative families (Part I.C.2). By treating "biological procreation," construed narrowly to mean mere "baby production," in isolation, plaintiffs mischaracterize the state's interest, and so their analysis of the Mary Moe balancing test must be rejected, for three reasons.

First, plaintiffs argue that "procreation is an area in which the individual's interests predominate over the state's," and that the state's interest in promoting procreation should be granted accordingly little weight. *Pl.-Ap. Br.* at 36. This argument

suffers from the fallacy that occurs repeatedly in the briefs of plaintiffs and their amici: the presence of a very weighty, even dominant, *personal* interest in procreation does not cancel or annihilate the weight of a compelling state interest in the same. A very weighty private interest may predominate over an also quite weighty public interest in procreation; the public interest nevertheless remains weighty, as argued above (Part I.B). Second, plaintiffs argue that the state's interest in procreation must be seen as diluted by the fact that the state permits many non-procreative couples to marry, while refusing marriage licenses to procreative same-sex couples. Id. Again, as argued above (Part II.B), the state's inclusions and exclusions from civil marriage are neither overinclusive nor underinclusive, and therefore the state's compelling interest in promoting procreative families is not at all diluted in the way plaintiffs suggest. Third, plaintiffs argue that any asserted state interest in biological parenting is undermined by the state's policy of "increasing access to reproductive technologies to infertile individuals and couples." Id. at 37. Again, this argument suffers from the fallacy of suggesting that the

presence and weight of competing interests annihilates or cancels the weight of the state's interest in promoting procreative families. Independent considerations, such as privacy and autonomy, might explain why the Commonwealth currently makes reproductive technologies equally available to all of its citizens. These considerations do not denigrate the state's interest in and preference for procreation in stable biological families that is evident in the structure of its marriage laws.

On the other side of the Mary Moe balancing test, plaintiffs assert that the "self-determination and family privacy" interests of same-sex couples weigh in favor of their inclusion in Commonwealth marriage licensing. Pl.-Ap. Br. at 39. To this end, they cite both Loving, 388 U.S. 1, and Turner, 482 U.S. 78, to argue that forced exclusion from marriage impinges on self-determination and privacy. However, these cases are inapposite here, because both are cases in which the plaintiffs were excluded not just from the *legal* protections of civil marriage, but effectively from contracting any marriage at all: civil, private, or religious. In other words, they were excluded from engaging in the *social practice* of marriage, which

constituted a grave intrusion on their civil liberties. However, plaintiffs here suffer no such intrusion: they are permitted by the state to enter into whatever union they and their private communities recognize ("self-determination"). The Commonwealth will not intrude on their private decisions to commit themselves to one another and create alternative family structures with one another ("family privacy"). But the Commonwealth can and should refuse to afford them certain legal protections that are adopted and carefully tailored by the state to achieve the compelling state interest of promoting procreative families, when their inclusion would be counterproductive to the state's promotion of procreative families. This refusal does not burden plaintiff couples' freedom to engage in intimate and expressive association. It does not violate their rights to self-determination and privacy. The Court should accordingly afford no weight to plaintiffs' "self-determination" interest in this regard.

Under any Mary Moe balancing analysis, the state's compelling interest in establishing a legal institution to promote procreative biological unions dwarfs any de minimis interest of plaintiffs in "self-

determination and privacy," which are not significantly burdened by their lack of a marriage license. Accordingly, the Commonwealth's marriage statutes should be upheld.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request this Court to affirm the judgment of the Superior Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dwight G. Duncan, attorney for *Amici Curiae* Massachusetts Family Institute et al., hereby certify that on December 20, 2002, I served the foregoing Brief of *Amici Curiae* by causing two copies to be mailed, first-class postage prepaid, to counsel for the plaintiffs, Mary L. Bonauto, GAY & LESBIAN ADVOCATES & 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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