

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-08860

HILLARY GOODRIDGE, et al.
Plaintiffs-Appellants

v.

DEPARTMENT OF PUBLIC HEALTH, et al.
Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE
SUFFOLK COUNTY SUPERIOR COURT

**BRIEF AMICUS CURIAE OF
THE NATIONAL LEGAL FOUNDATION**

In support of *Defendants-Appellees*.
Supporting affirmance.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. CONTRARY TO PLAINTIFF’S ASSERTION, MARRIAGE IS NEITHER EXPRESSIVE NOR INTIMATE ASSOCIATION; IT IS A STATUS AND AN INSTITUTION	2
A. <u>Contrary To The Assertions of Professor Cruz, Marriage Is Not An Expressive Form of Symbolic Speech</u>	3
1. Professor Cruz Admits That No Court Has Ever Found Free Speech Protection For Same-Sex Marriages	4
2. The Cases Cited By Professor Cruz Undercut His Own Position And Emphasize That Marriage Is An Institution And A Status	5
3. Marriage Is Not Expression Merely Because It Contains An “Expressive Element”	7
4. Professor Cruz’s Citation Of His Own Law Review Article Cannot Render His Assertions More Authoritative	8
B. <u>Professor Cruz’s Own Law Review Article Demonstrates The Invalidity Of The Arguments Presented To This Court</u>	9
1. Professor Cruz’s Law Review Article Undercuts His Assertions To This Court Because They Emphasize That Marriage Is An Institution And A Status, Not Speech	11

2. Professor Cruz’s Law Review Article Contradicts His Assertion To This Court That Marriage Is Not Government Speech	15
3. Professor Cruz’s Assertions In His Law Review Article are More Credible Than The Assertions Presented To This Court Because In His Law Review Article Professor Cruz Admits The Novelty, Weakness, And Radicalness Of His Theory	20
a. This Court should not accept Professor Cruz’s speech argument because he admits it is novel.....	21
b. This Court should not accept Professor Cruz’s speech argument because he has identified many problems with his own theory	21
c. This Court should not accept Professor Cruz’s speech argument because Professor Cruz has admitted that his radical theory would lead to either recognition of polygamous and incestuous marriages or the abolition of civil marriage	25
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

<i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986)	23
<i>Baehr v. Miike</i> , No. Civ. 91 – 1394, 1996 WL 694235 (Haw. Ct. App. 1996) <i>rev'd as moot Baehr v. Miike</i> , 92 Haw. 634, 994 P.2d 566 (1999)	4
<i>Baker v. Vermont</i> , 17 Vt. 194, 744 A.2d 864 (1999).....	4, 24
<i>Barnes v. Glen Theatre, Inc.</i> , 501 U.S. 560 (1991)	23
<i>Brause v. Bureau of Vital Statistics</i> . No. 3AN-95-6562 CI. 1998 WL 88743 (Alas. Sup. Ct. Feb. 27, 1998), <i>dismissed for lack of ripeness</i> , 21 P.3d 357 (Alas. 2001)	4
<i>Chipman v. Johnston</i> , 237 Mass. 502 (1921).....	5
<i>City of Dallas v. Stanglin</i> , 490 U.S. 19 (1989)	8
<i>City of Erie v. Pap's A.M.</i> , 529 U.S. 277 (2000)	23
<i>Coe v. Hill</i> , 201 Mass. 15 (1909)	5
<i>Concord Rod and Gun Club, Inc. v. Massachusetts Commission Against Discrimination</i> , 402 Mass. 716 (1988)	3
<i>Fearon v. Treanor</i> , 272 N.Y. 268, 5 N.E.2d 815 (1936)	13
<i>French v. McAnarney</i> , 290 Mass. 544 (1935)	5-7
<i>In re Johnson</i> , 658 N.Y.S.2d 780 (Sup. Ct. N.Y. 1997)	13
<i>Loving v. Commonwealth of Virginia</i> , 388 U.S. 1 (1967)	4
<i>Ramsey v. Murphy</i> , 114 U.S. 15, (1884).....	15
<i>Reynolds v. United States</i> , 98 U.S. 145 (1878).....	14
<i>Richardson v. Richardson</i> , 246 Mass. 353 (1923).....	5
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984).....	3
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	15

<i>Smith v. Smith</i> , 171 Mass. 404 (1898)	5
<i>SunAmerica Corporation v. Sun Life Assurance Co. of Canada</i> , 77 F.3d 1325 (11th Cir. 1996)	19-20
<i>Svenson v. Svenson</i> , 178 N.Y. 54, 70 N.E. 120 (1904).....	13
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	8
<i>Turner v. Safeley</i> , 482 U.S. 78 (1987)	4, 7
<i>United States v. O'Brien</i> ,	24
<i>Wade v. Kalbfleisch</i> , 58 N.Y. 282 (1874)	14
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978).....	4

CONSTITUTIONAL PROVISIONS

Massachusetts Const., Art. XVI.....	2, 3, 8
-------------------------------------	---------

STATUTES

G.L. c. 207 §28.....	2
----------------------	---

OTHER

Amicus Curiae Brief of Professors of Expression and Constitutional Law, et al.	<i>passim</i>
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David B. Cruz, “Just Don’t Call It Marriage”: The First Amendment and Marriage as an Expressive Resource, 74 S. Cal. L. Rev. 925 (2001)	<i>passim</i>
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David B. Cruz, The New “Marital Property”: Civil Marriage and the Right to Exclude?, 30 Capital U. L. Rev. 279 (2002).....	8-9
--	-----

Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L.J. 1225, 1229 (1999).....	23-24
--	-------

Plaintiff-Appellants’ Brief	2, 3
-----------------------------------	------

Story on Con. Laws, § 108.....	14
--------------------------------	----

INTEREST OF THE *AMICUS*

Amicus Curiae The National Legal Foundation (NLF) is a 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF has gained valuable expertise in the area of First Amendment law, which it believes will assist this Court in deciding this appeal. The NLF has an interest, on behalf of its constituents and supporters, in arguing on behalf of the preservation of the institution of marriage. The instant case is of great interest to our constituents and supporters who are greatly concerned about maintaining the traditional understanding of marriage and family found in this nation's history.

STATEMENT OF THE ISSUES

Amicus adopts the Statement of the Issues of the Defendant–Appellees.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of the Defendant–Appellees.

SUMMARY OF THE ARGUMENT

Plaintiffs have relied upon an *amicus* brief filed by Professor David Cruz to support their claim that the clerks' refusal to issue marriage licenses to them violates their rights of expressive and intimate association. Professor Cruz's argument is that marriage is an expressive form of symbolic speech. From there he argues that the marriage relationship implicates an associational right to expression; that since marriage is a form of symbolic expression and an intimate

association it is protected under Article XVI of the Massachusetts constitution and is subject to strict scrutiny. Professor Cruz also spends considerable time discussing whose speech marriage is (the Plaintiffs' or the government's) and how much protection the speech/expressive conduct is entitled to. However, in order for these arguments to be implicated, Professor Cruz's initial assertion that marriage is speech must be accepted as true.

Professor Cruz's initial assertion is not true. No court has ever employed this theory. Furthermore, Professor Cruz's own brief emphasizes that marriage is an institution and a status, not speech. Finally, Professor Cruz's own prior law review article demonstrates that this Court should not adopt his proffered analysis for the following reasons: The law review article also emphasizes that marriage is an institution and a status, not speech. The law review article flatly contradicts several assertions made to this Court in his brief in the instant case. Finally, the law review article admits the novelty, weakness, and radicalness of his theory. Specifically, Professor Cruz's article admits that his theory would require states to either recognize polygamous and incestuous marriages or abolish civil marriage.

ARGUMENT

I. CONTRARY TO PLAINTIFF'S ASSERTION, MARRIAGE IS NEITHER EXPRESSIVE NOR INTIMATE ASSOCIATION; IT IS A STATUS AND AN INSTITUTION.

From among the many issues raised by Appellants, this brief will address their claim that the clerks' refusal to issue a marriage license under G.L. c. 207 §28, violates their freedom of expression. Plaintiffs claim that they have dedicated "pp. 16-34" of their brief to their arguments concerning "private

personal decisions and expressive and intimate associations.” (Plaintiffs-Appellants’ Brief at 7.) In reality, the expression argument and the association argument are combined and limited to a single footnote. (Plaintiff-Appellants’ Brief at 13, n.13.) Rather than strenuously pushing this argument, plaintiffs seem to have relied upon *amici* to make this argument. It is the *Amicus* Brief filed by Professor David Cruz on behalf of various other Professors of Expression [sic] and Constitutional Law and various homosexual organizations that makes this argument (hereafter Cruz Brief).

A. Contrary To The Assertions of Professor Cruz, Marriage Is Not An Expressive Form of Symbolic Speech.

Professor Cruz’s brief argues that marriage is “an expressive form of symbolic speech.” (Cruz Brief at 6-7.) Professor Cruz further argues that since marriage is a form of speech, the marriage relationship implicates an associational right to expression. *Id.* at 24-25. Professor Cruz then goes on to claim that since marriage is a form of symbolic expression and an intimate association it is protected under Article XVI of the Massachusetts constitution¹ and is subject to

¹ Professor Cruz has correctly recognized the two distinct concepts of the freedom of association, “the right ‘to enter into and maintain certain intimate human relationships,’ and a right ‘to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.’” *Concord Rod and Gun Club, Inc. v. Massachusetts Commission Against Discrimination*, 402 Mass. 716, 721 (1988) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984)). However, Professor Cruz spends a significant amount of his brief asserting that when a couple marries they are associating themselves for the purposes of engaging in expression. (Cruz at 23–31.) Cruz chooses to assert that marriage is an intimate association based on the right “to associate for the purpose of engaging in those activities protected by the First Amendment,” because Article XVI only ensures that “speech” will not be abridged. Thus, Professor Cruz’s

strict scrutiny. *Id.* at 31. Professor Cruz also spends considerable time discussing whose speech marriage is (the Plaintiffs' or the government's), *id.* at 18-23, and how much protection the speech/expressive conduct is entitled to, *id.* at 31-49. However, in order for these arguments to be implicated, Professor Cruz's initial assertion that marriage is speech must be accepted as true. In other words, Plaintiffs' and Professor Cruz's entire argument stands or falls on pages 6-14 of Professor Cruz's fifty page brief.

1. Professor Cruz Admits That No Court Has Ever Found Free Speech Protection For Same-Sex Marriages.

However, Professor Cruz's assertion simply is not true. Marriage is not speech, as an examination of Professor Cruz's own arguments will show. Professor Cruz begins, commendably, by acknowledging those cases that undercut his position. He admits that no court has ever found an expressive right implicated by regulation of marriage—not even those that invalidated bars against same-sex marriage. (Cruz Brief at 8, n.3) (citing *Turner v. Safeley*, 482 U.S. 78, 99-100 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384, 388 (1978); *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967); *Brause v. Bureau of Vital Statistics*. No. 3AN-95-6562 CI. 1998 WL 88743 (Alas. Sup. Ct. Feb. 27, 1998), *dismissed for lack of ripeness*, 21 P.3d 357 (Alas. 2001), *Baker v. Vermont*, 17 Vt. 194, 744 A.2d 864 (1999), *Baehr v. Miike*, No. Civ. 91-394, 1996 WL 694235 at *22 (Haw. Ct. App. 1996) *rev'd as moot*, *Baehr v. Miike*, 92 Haw. 634, 994 P.2d 566 (1999)).

intimate association argument is dependent upon and derivative of his free speech argument.

2. The Cases Cited By Professor Cruz Undercut His Own Position And Emphasize That Marriage Is An Institution And A Status.

After admitting that no cases explicitly stand for his proposition, Professor Cruz's Brief next discusses cases that he claims at least *support* his position. However, his own descriptions of these cases belie his assertion. In Section I. B. of his brief, Professor Cruz lists decisions of this Court that he claims "[r]ecognize [] [t]he [e]xpressive [n]ature [o]f [m]arriage." (Cruz Brief at 8-10.) However, his descriptions of these cases emphasize marriage as a status or an institution and as something that affects the parties, the parties' posterity, and the whole community. For example, Professor Cruz describes the following cases with the following brief parentheticals:

See Richardson v. Richardson, 246 Mass. 353, 354 (1923) (viewing marriage, unlike mere cohabitation, as "a status, which affects the parties thereto, their posterity and the whole community"); *Chipman v. Johnston*, 237 Mass. 502, 504 (1921) (holding that the marriage ceremony gives rise to "a change of status . . . affecting both the parties and the community" and "might affect the legitimacy of the posterity of the parties"); *Coe v. Hill*, 201 Mass. 15, 21 (1909) (viewing marriage as a social institution or status); *Smith v. Smith*, 171 Mass. 404, 406-07 (1898) (expressing the difference between being "affianced" and being married because "[a]t marriage there is a change of status which affects [the spouses] and their posterity and the whole community. It is a change which, for important reasons, the law recognizes, and it inaugurates conditions and relations which the law takes under its protection.").

(Cruz Brief at 9.) None of these cases paints marriage as a vehicle for the speech of the spouses.

Professor Cruz inexplicably chooses the case of *French v. McAnarney*, 290 Mass. 544, 546 (1935) to support in more detail the proposition that "this

Court has recognized that through marriage a couple communicates a desire to take on the responsibilities and benefits attendant to this new status.” (Cruz Brief at 9.) However, in *French*, this Court once again emphasized marriage as a status. In *French*, the wife petitioned the court “for an allowance for her support” from her husband. 290 Mass. at 545. The husband and wife married, this Court concluded, for the purpose of legitimizing the couple’s illegitimate son. *Id.* Before marrying, the couple signed an antenuptial contract in which the wife agreed never to make any claim for support against her husband. *Id.* This Court pointed out that “[t]he outstanding desire on the part of the [wife] was to have the [husband] ‘right what she considered a great wrong and an injustice to the child, and in order to have the child legitimized she was willing to forego any provisions for her own support.’” *Id.* (citation omitted). In discussing the validity of the antenuptial contract, this Court discussed the responsibilities and duties that come with the status of being married. *Id.* at 546-48. This Court first stated that the “*status* of the parties as husband and wife was fixed when the marriage was solemnized.” *Id.* at 546 (emphasis added). The court then went on to state that,

Marriage is not merely a contract between the parties. It is the foundation of the family. It is a social *institution* of the highest importance. The Commonwealth has a deep interest that its integrity is not jeopardized. “It is against the policy of the law that the validity of a contract of marriage, or its effect upon the *status of the parties*, should be in any way affected by their preliminary or collateral agreements.” The moment the marriage relation comes into existence, certain *rights and duties* necessarily incident to that relation spring into being. One of these *duties* is the *obligation imposed by law* upon the husband to support his wife.

Id. (emphasis added) (internal citations omitted). This Court went on to say that the rights and duties of a marriage exist even if the marriage is “not based upon the ordinary incidents of mutual affection and respect” *Id.* at 547.

Professor Cruz cites *French* in trying to convince this Court that it has in the past “recognized that through marriage a couple *communicates a desire* to take on the responsibilities and benefits attendant to his new status.” (Cruz Brief at 9-10 (emphasis added).) Ironically, however, the *French* case stands for almost the opposite proposition. In *French*, the husband did not want the responsibility of supporting his wife, and when the wife entered into the marriage she waived the right of support from him. 290 Mass. at 547–48. However, this Court held that despite the couple’s desires they afforded “no basis in law for a contract to relieve [the husband] from the obligation to support his wife after the marriage.” *Id.* at 548. So, in direct contradiction to Professor Cruz’s assertion, *French* does not stand for the proposition that marriage is an expression. Rather, *French* holds that marriage is a status, which has attached to it certain obligations and duties, even in the face of the spouses’ explicit use of their marriage to express exactly the opposite opinion and desire. *See Id.* at 547–48.

3. Marriage Is Not Expression Merely Because It Contains An “Expressive Element.”

Professor Cruz does cite one case that actually mentions an “expressive element” of marriage, namely *Turner v. Safeley*, 482 U.S. 78 (1987). (Cruz Brief at 10.) However, this proves too little, since the Supreme Court has stated that, “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a

shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (emphasis added).² Merely because the Supreme Court stated that marriage might have some expressional element to it does not therefore entitle marriage to First Amendment protection. Indeed, Professor Cruz himself has called this the “floodgate problem,” (Cruz Article at 975, n.269) quoting *Texas v. Johnson* 491 U.S. 397, 404 (1989), for the proposition that the Supreme Court has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”

4. Professor Cruz’s Citation Of His Own Law Review Article Cannot Render His Assertions More Authoritative.

The remaining primary support for Professor Cruz’ position comes from law review literature, including his own scholarship. Although he did not include it in his Table of Authorities, Professor Cruz quotes his law review article, David B. Cruz, “Just Don’t Call It Marriage”: The First Amendment and Marriage as an Expressive Resource, 74 S. Cal. L. Rev. 925, 933 (2001) (hereafter Cruz Article), five times in the critical eight pages of the Brief. (Cruz Brief at 7, 11, 12, 13, 14.) In addition, he cites another of his articles (this one included in the Table of Authorities), David B. Cruz, The New “Marital Property”: Civil Marriage and the

² Your *Amicus* understands that Professor Cruz is asserting that under Article XVI of the Massachusetts Declaration of Rights marriage is protected as symbolic speech; however just as Professor Cruz recognized in footnote 1 of his brief, federal First Amendment decisions are persuasive. (Cruz at 4, n. 1.) Throughout this brief quotations of or citations to First Amendment arguments are used only if applicable to Article XVI analysis.

Right to Exclude?, 30 Capital U. L. Rev. 279 (2002). (Cruz Brief at 14, 15.)

Quoting and citing one's own scholarship imbues the words with no more authority than baldly asserting one's own opinion in the brief without support—it is still nothing but one's own opinion.

Thus, at bottom, Professor Cruz offers no real support for the proposition that marriage is entitled to protection as speech. Since there is no support for his assertion that marriage is speech, and since his own arguments actually show that marriage is a status or institution, his argument, and thus Plaintiffs' argument, could be rejected out of hand. However, having encountered Professor Cruz's article, that article is worth examining for other reasons.

B. Professor Cruz's Own Law Review Article Demonstrates The Invalidity Of The Arguments Presented To This Court.

First, Professor Cruz's article includes some statements that *undercut* the assertions in his brief. Second, he makes certain assertions in the article that flatly *contradict* the assertions made in his brief. For reasons that will be explained below, when choosing between these mutually exclusive assertions, this Court should find the assertions in the article more credible than the assertions in the brief. Third, in his article, Professor Cruz acknowledges the novelty of his position, the problems with it, and the radical ramifications of it, although none of this material makes it into his brief.

At the outset, your *Amicus* notes that in order to document these two points, this brief will use a considerable number of quotations from both Professor

Cruz’s brief and his article of a length sufficient to provide context.³ Further, while these quotations will concentrate on those portions of Professor Cruz’s brief that relate to whether marriage is speech and/or expression (since that has been the main point of this brief), some of these quotations will deal with Professor Cruz’s derivative arguments about whose speech marriage is, the proper level of scrutiny and related matters. In fact, because this brief otherwise does not address Professor Cruz’s argument that the expressive content of marriage is private speech, we must here insert a short excursus on this topic in order to understand some of the quotations given below.

Professor Cruz argues in his brief that Plaintiffs are only claiming that a marriage “license is a permit for civil marriage through which couples speak,” (Cruz Brief at 18) and that “Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage” *id.* at 18 n.7. He reiterates that “civil marriage is a means by which individual couples express themselves and constitute their identities; it is not predominately a mode of government speech.” *Id.* at 18-19. For this proposition he cites his law review article. *Id.* (citing Cruz Article at 986.) It is true that *at that point in his article*, Professor Cruz makes arguments rebutting marriage as government speech (and this brief will revisit this issue below). However, Professor Cruz *elsewhere* in his article spends five pages arguing that marriage *is* governmental speech (as he

³ *Amicus* recognizes that unfortunately, the arguments documenting the novelty weakness and radicalness of Dr. Cruz’s position will be somewhat overlapping with each other and with prior sections of this brief; however, in order to establish sufficient context for each argument, this is unavoidable.

admits to doing in his footnote 236). As the extensive quotations to follow will show, Professor Cruz shifts back and forth between the two claims.

1. Professor Cruz’s Law Review Article Undercuts His Assertions To This Court Because It Emphasizes That Marriage Is An Institution And A Status, Not Speech.

Laying aside the private speech/public speech excursus, we turn first to those assertions in Professor Cruz’s article that, not unlike his citation of opinions of this Court documented in section I.A.2 above, actually accentuate the true nature of marriage. While at times appearing to question whether marriage is an institution at all (note the subjunctive mood in the following quotation), Professor Cruz at other times (and even simultaneously) is willing to admit that marriage is indeed an institution:

Even were it correct to view marriage as an institution (in the singular), marriage would remain a manifold institution, possessed of many different aspects; people arguing in favor of governmental recognition of same-sex marriage quite properly have directed attention to many of these aspects of marriage. Marriage is, for example, an economic institution . . .

(Cruz Article at 931.) Similarly, in discussing the state’s expression, Professor Cruz acknowledges that civil marriage serves “lots” of non-expressive purposes *within society*.⁴

Again, in a passage in which Professor Cruz admits some of the problems with his theory, he writes:

⁴ Professor Cruz puts the word “lots” in the mouth of an imaginary interlocutor stating, “‘But civil marriage serves lots of nonexpressive purposes,’ someone might argue, ‘so why isn’t rational basis review the appropriate kind of scrutiny?’” *Id.* at 959. However, a careful reading of the Article shows that Professor Cruz also believes marriage serves “lots” of non-expressive purposes.

Expressive conduct is action in which people generally might engage with no expressive intent (destroying documents, for example), yet which may on occasion be engaged in for expressive purposes (burning a draft card as a war protest), in which case “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct.” Thus, the government will usually have nonexpression-related reasons to regulate expressive conduct, which typically would only inadvertently come into conflict with expressive activity. Civil marriage likewise may be regulated by government for nonexpression-related reasons, and this regulation (in particular, the mixed-sex requirement, but other restrictions as well) can interfere with people's ability to express love and commitment by marrying civilly.

Although the Supreme Court has recognized that the First Amendment does protect expressive conduct, it has also worried about the floodgate problem: any conduct could potentially be engaged in for expressive reasons, thus subjecting all governmental action to ideally (or at least ostensibly) demanding First Amendment scrutiny. Realistically, a court would hesitate to apply expressive conduct analysis to the mixed-sex requirement for marrying civilly unless the court were convinced that it could be distinguished from the vast majority of laws that do not “deserve” First Amendment scrutiny

Id. at 975-76. (citations omitted).

After reasserting that civil marriage is expressive, Professor Cruz continues the above analysis by admitting that

Nevertheless, in another sense marrying civilly is unlike situations that the Court has treated as expressive conduct: burning a draft card, burning a flag, dancing in the nude, and sleeping in the park. What one does when one marries legally is not really engaging in primary “conduct” with both physical consequences and communicative consequences in the world. Rather, people who marry civilly are engaging in an abstract act, entrance into a quasi-contractual legal status.

Id. at 978.

Yet again, Professor Cruz describes civil marriage as an institution, elaborating that “[a] civil marriage is somewhat like a contract, which is a thing of value, a *res*,” *Id.* at 983. Indeed, Professor Cruz cites multiple cases,

including one decided as recently as 1985 for the proposition that marriage is a three-way contract between the two spouses and the state. *Id.* at 983, n.310.

Finally, Professor Cruz admits that in trying to decide exactly what marriage is, one may, at bottom, have to conclude that “civil marriage is *sui generis*” *Id.* at 965, n.218 (citing *In re Johnson*, 658 N.Y.S.2d 780, 785 (Sup. Ct. N.Y. 1997)).

Professor Cruz tries to convert the *sui generis* nature of marriage into an assertion that marriage is a unique form of *communication*. *Id.* However, *In re Johnson*, the case from which Professor Cruz obtained the “*sui generis*” language does not support this proposition. Even a casual reading of the case shows that *In re Johnson* was referring to the *sui generis* nature of marriage as an institution, “differing from ordinary contracts by reason of the status of the parties and the social institution created thereby in which the state had direct interests.” *Id.* at 785. *In re Johnson*, in turn, rests upon pronouncements of earlier cases. The first case is *Fearon v. Treanor*, 5 N.E.2d 815 (1936), in which the New York Court of Appeals stated,

[Marriage], certainly, does differ from ordinary common-law contracts, by reason of its subject-matter and of the supervision which the State exercises over the marriage relation, which the contract *institutes*. In such respects, it is *sui generis*. While the marriage relation, in its legal aspect, has no peculiar sanctity, as a *social institution*, a due regard for its consequences and for the orderly constitution of society has caused it to be regulated by laws, in its conduct as in its dissolution. Marriage is more than a personal relation between *a man and a woman*. It is a *status* founded on contract and established by law. *It constitutes an institution involving the highest interests of society.*

Id. at 816 (emphasis added) (internal citations omitted). The next case is *Svenson v. Svenson*, 70 N.E. 120 (1904), in which New York’s highest court stated that

“[m]arriage begins by contract and results in a *status*.” *Id.* at 121 (emphasis added). Third, in *Wade v. Kalbfleisch*, 58 N.Y. 282, 284 (1874) the New York Court noted that at common law marriage was “more than a contract [and required] certain acts of the parties to constitute marriage, independent of and beyond the contract.” *Id.* The *Wade* Court pointed out that marriage takes on “more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.” *Id.* The Court then quoted Judge Story that marriage “appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties.” *Id.* at 284-85 (quoting Story on Con. Laws, § 108, note).

Other courts, including the Supreme Court of the United States have said similar things regarding the institution of marriage. For example, in *Reynolds v. United States*, 98 U.S. 145, 165 (1878) the Court stated that upon marriage “society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.” Also, in a polygamy case just a few years later, the Court once again recognized the unique and extremely important nature of marriage between *one man and one woman*. The Court, in discussing why it was legitimate for Congress to enact a law in the Territory of Utah stripping the right to vote from those who would not limit marriage to one man and one woman, stated,

For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the

family, as consisting in and springing from the union for life of *one man and one woman* in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Ramsey v. Murphy, 114 U.S. 15, 45 (1884) (emphasis added). Although *Ramsey* involved polygamy, as recently as 1996 Justice Scalia applied the above language to homosexuality, emphasizing that the *institution* of marriage is grounded upon the man/woman requirement as much as the one/one requirement. See *Romer v. Evans*, 517 U.S. 620, 651 (1996) (Scalia, dissenting).

All of this undercuts Professor Cruz's assertion that marriage is speech. Marriage is not speech. As Professor Cruz himself recognizes, marriage is a status, an institution, a contract, a *res*. To label marriage as expression is truly to open the floodgates.

2. Professor Cruz's Law Review Article Contradicts His Assertion To This Court That Marriage Is Not Government Speech.

We move now from those ways in which Professor Cruz's article *undercuts* his brief, to those ways in which the article *flatly contradicts* the brief. One of these items has already been mentioned. In the brief, Professor Cruz argues that "Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage" *id.* at 18 n.7. However, in his article, Professor Cruz more explicitly indicates that while, theoretically, states may be able to express preferences for mixed-sex marriages, to do so through a marriage licensing statute is to engage in government speech that cannot withstand Equal Protection (as opposed to First Amendment) scrutiny:

Not only is civil marriage a uniquely powerful expressive resource, but the purposes of the mixed-sex requirement are also expressive. Specifically, concern with what the institution of civil marriage—as distinguished from individual civil marriages—might express or be capable of expressing underwrites the mixed-sex requirement throughout the United States. Thus, it is the dual expressive character of marriage that is at the root of much resistance to allowing same-sex couples to marry civilly. Although there may be other purposes that the mixed-sex requirement partially serves, however well or poorly, consideration of the mixed-sex requirement in its contemporary legal and social context reveals that government is indeed restricting access to the unique expressive resource of civil marriage in significant part on an expressive basis. Accordingly . . . the mixed-sex requirement for civil marriage must survive stringent constitutional analysis to be adjudged consistent with the First Amendment.

. . . .

At first blush it might seem that if government itself wishes to express something via its regulation of the institution of civil marriage, it could constitutionally restrict any conflicting use of that expressive resource by lesbigay [sic] couples. Thus, for example, if it were permissible for government to use civil marriage symbolically to express support for heterosupremacy, same-sex couples could be denied use of civil marriage to express a belief in the equal capacities for love and commitment of heterosexually identified and lesbigay people.

This position, however, would undermine the constitutional purposes behind recognizing and analyzing civil marriage as an expressive resource. . . . Government certainly may speak in our constitutional order, but First Amendment doctrine should guard scrupulously against the prospect of government expression—which is, after all, simply the preferred expression of some ruling majority—drowning out and ‘unfairly dominating’ citizen speech.

In brief, then, a governmental expressive purpose cannot count as compelling for purposes of overriding First Amendment constraints on regulation of a unique expressive resource such as civil marriage. My argument is not that government may never express messages of support for heterosexuality or even heterosexual superiority. The legitimacy *vel non* of government espousing such positions is—like the question of the constitutionality of governmental endorsement of white supremacy by monuments to Confederate leaders or the Confederacy—primarily a question of equal protection and equal citizenship. But with respect to First Amendment limitations, governmental

symbolism or other expression ought not count as compelling, for to do so would allow a majority to justify an abridgment of speech by its own desire to express something different.

Id. at 945, 969-70. (citations omitted).

In sum, Professor Cruz's argument in his law review article is that civil marriage is dual expression, *i.e.*, it is the speech of both the couple and of the state. Furthermore, while states may theoretically express a preference for mixed-sex marriages, they may not do so through the vehicle of issuing marriage licenses. Thus, Professor Cruz's article doubly contradicts his brief.

First, as noted above, in his article, Professor Cruz clearly asserts that civil marriage is state speech. This is in stark contrast to the assertions in his brief that marriage "is not predominately a mode of government speech," (Cruz Brief at 18) and that "this Court should reject the Superior Court's conclusion that the Plaintiffs seek to compel government speech" *id.* at 23.

The second contradiction occurs in that Professor Cruz writes in his brief that "Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage" (Cruz Brief at 18, n. 7.) Superficially, this may not seem to be a flat contradiction of the language quoted above from his law review article. Indeed, the full quotation from the brief runs as follows: "The Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage, just as it is free to express its views that it opposes smoking, teenage drinking, or alcoholism." *Id.* This seems to comport well with the statement above, "My argument is not that government may never express messages of support for heterosexuality or even heterosexual superiority." (Cruz

Article at 969.) (However, one cannot help but note the dramatic change in analogy from “white supremacy” to “smoking, teenage drinking or alcoholism.”) The problem is that, while this quotation is an attempt to shift attention away from the specifics of the instant case, Professor Cruz was, in fact, discussing the *issuance of marriage licenses* when he wrote that “plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage.” *Id.* This is a contradiction of Professor Cruz’s assertion in his law review article that

if it were permissible for government to use civil marriage symbolically to express support for heterosupremacy, same-sex couples could be denied use of civil marriage to express a belief in the equal capacities for love and commitment of heterosexually identified and lesbian people. This position, however, would undermine the constitutional purposes behind recognizing and analyzing civil marriage as an expressive resource

(Cruz Article at 969.) Elsewhere in the article, he writes “[c]ertainly, part of the point of the institution of civil marriage is to be expressive, to legitimize, to convey a governmental message or messages of legitimacy.” *Id.* at 984. Finally, emphasizing that, in his view, the infirmity with marriage as government speech is its violation of Equal Protection, not the First Amendment, Professor Cruz writes,

[t]here is certainly an important argument to make that, with the mixed-sex requirement, the state is speaking in a way that perpetrates an expressive harm against lesbian persons. But this would primarily be a violation of equal protection norms of equal concern and respect, not First Amendment norms governing freedom of speech.

Id. at 986-87.

The point of all of this is not to argue that Professor Cruz is correct in asserting that restricting civil marriage to mixed-sex couples is unconstitutional,

nor that he is correct in his assertions about the appropriate level of constitutional scrutiny. Rather, the point is to demonstrate the contradictions between the brief filed in the instant case and the actual propositions upon which the underlying law review article is based.

Although Professor Cruz is not a party to this litigation, one is reminded of the situation faced by the federal Eleventh Circuit Court of Appeals when a litigant changed its position to suit its litigation needs. In *SunAmerica Corporation v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325 (11th Cir. 1996), a federal district court issued an injunction against use of a trademark by one of two competing insurance company users of the mark. The enjoined company filed a motion to stay the injunction in the district court pending appeal and, when that motion was denied, filed an emergency motion to stay with the Eleventh Circuit which was also denied. In support of both motions, the insurance company argued that if it complied with the injunction by changing its name, its appeal would be mooted. Nonetheless, when the Eleventh Circuit denied the emergency motion, the insurance company changed its name, but proceeded with its appeal, then arguing that the appeal was not moot.

The Eleventh Circuit included harsh words in its opinion:

The vigor with which SunAmerica argued that the name change would moot this appeal is matched only by the vigor with which it now argues, having been forced to change its name, that the appeal is not moot after all. The same corporation and attorneys who unequivocally represented to the district court and this Court that a name change would be irreversible “as a matter of commercial practicality,” now just as unequivocally represent to this Court that the practical effects of the name change are, in fact, reversible. Such a sea change in factual representations prompted us to ask SunAmerica's counsel at oral argument which of their statements

were false: the ones they made while seeking a stay, or the ones they made after the stay was denied.

.....

Either an appeal is mooted by a particular event or it is not

.....

The type of tactics SunAmerica's counsel have employed in this case invite us to fashion a doctrine that would estop SunAmerica from asserting at this stage of the appeal the opposite of what it had asserted earlier.

Id. at 1331-32 (ultimately not estopping SunAmerica's argument but stating "[a]ll future parties and their counsel are on notice that if they make factual representations in the district court or in this Court that denial of a stay will moot the appeal, they may be estopped from arguing after the stay is denied that the appeal is not moot.").

By quoting this harsh language from SunAmerica, your *Amicus* does not intend to cast disparagement upon Professor Cruz. *Amicus* recognizes that the two situations are not completely analogous—Professor Cruz, as noted, is not a litigant nor a litigant's attorney; he has not made mutually exclusive arguments in the same case to the same court. However, *Amicus* does believe that, *mutatis mutandis*, the *SunAmerica* case highlights the question this Court must ask itself with regard to the contradictions between Professor Cruz's article and his brief: which argument represents his true beliefs?

3. Professor Cruz's Assertions In His Law Review Article are More Credible Than The Assertions Presented To This Court Because In His Law Review Article Professor Cruz Admits The Novelty, Weakness, And Radicalness Of His Theory.

If for no other reason than comparing the purported strength of the two arguments, Professor Cruz's law review article is more credible than his brief. Other than admitting that no court has found that mixed-sex requirements violate

the First Amendment, (*see* Cruz Brief at 8) Professor Cruz presents the argument in his brief as being airtight. However, in his law review article, Professor Cruz is much more honest about the novelty, the weakness, and the radical implications of his theory.

a. This Court should not accept Professor Cruz’s speech argument because he admits it is novel.

Professor Cruz’s article was published in May, 2001. At that time, Professor Cruz could rightly call his theory “new”: “this Article articulates a new argument for why the mixed-sex requirement should be adjudged unconstitutional.” (Cruz Article at 928.) This was no idle, self-aggrandizing claim. Rather, Professor Cruz conducted a review of the literature prior to making this claim. *See id.* at 936 and n. 43. *Amicus*’ own research confirms Professor Cruz’s assertion. Thus, the position that Professor Cruz would have this Court adopt is his own completely novel, newly-minted theory.

b. This Court should not accept Professor Cruz’s speech argument because he has identified many problems with his own theory.

Professor Cruz’s article then anticipates and attempts to rebut multiple attacks on his novel theory. Several of these have to do with the heart of this brief, namely that marriage is not speech or expression, while others address Professor Cruz’s derivative arguments about whose speech marriage is and about the proper standard of review. Again, there is no hint of any possible problems in Professor Cruz’s brief. The first alternative is much more credible.

Specifically, in his law review article, Professor Cruz anticipates at least five attacks on his position:

One might think that incidental infringement principles establish that the mixed-sex requirement does not even implicate the First Amendment on the ground that the requirement only incidentally infringes any expressive rights. Or someone might be tempted to argue that civil marriage ought to be treated as a governmental subsidy or benefit subject to little or no First Amendment scrutiny. Alternatively, even if one thinks that some heightened constitutional scrutiny is due the mixed-sex requirement, perhaps civil marriage should be analyzed as expressive conduct, a doctrinal approach available at least since 1968, thus obviating the need for any new doctrinal rules. Or the proposal of this Article might be seen as superfluous if civil marriage could be properly analyzed under the Supreme Court's forum doctrines by conceiving of civil marriage as a "space" from which people may speak. Finally, the institution of civil marriage might be analyzed as a form of governmental speech under extant doctrine, perhaps rendering my approach unnecessary.

Id. at 971.

It is beyond the scope of this brief to systematically interact with Professor Cruz's answers to each of these problems—although a few comments will be offered—since this Court can easily consult Professor Cruz's article for itself and verify that his response to these serious objections is often nothing more than a paragraph or two, *id.* at 971-987, and since most of them have been discussed previously. Indeed, while Professor Cruz obviously intended these self-identified problems to be strawmen they are not; Professor Cruz's statements of the flaws in his theory are often more persuasive than the statement of his responses. *See Id.* The point here is merely to note that this Court would have to reject every one of the objections to Professor Cruz's position that he himself has identified in order to adopt his analysis.

For example, to embrace Professor Cruz’s argument, this Court would have to reject all of the following arguments: First, this Court would have to reject the argument that “the limitation on the use of [civil marriage as a] resource effected by the mixed-sex requirement might be characterized as simply an incidental infringement by a general law not targeted at speech and hence supposedly of no First Amendment consequence.” *Id.* at 971. Second, this Court would have to reject the argument that “when conduct other than speech itself is regulated, . . . the First Amendment is violated only where the government prohibits conduct precisely because of its communicative attributes.” *Id.* at 972 (quoting *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., joined by Thomas, J., concurring in the judgment)).⁵ Third, this Court would have to reject the argument that any expressive content in civil marriage should be examined under a government subsidy analysis (or reject the view that it could pass muster under this analysis). *Id.* at 974. Fourth, this Court would have to reject the argument (perhaps implicit in the objection to the newly-minted nature of Professor Cruz’s theory) that his position is nothing more than an “unnecessary First Amendment bricolage.”⁶ *Id.* at 974.

In light of matters that Professor Cruz discusses elsewhere in his article, this fourth argument may be a very important problem indeed. Even from

⁵ Professor Cruz dismisses this as “not accepted doctrine;” *id.* however this language was needed to obtain a plurality opinion in *Pap’s A.M.* as well as *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and comports with the holding in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

⁶ Professor Cruz uses this term as employed by Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1229 (1999) (defining

Professor Cruz’s perspective, all of the following problems exist within the legal landscape he would have this Court traverse: “Unfortunately, in light of the novelty of the unique expressive resource argument, the Supreme Court’s reticulation of First Amendment doctrine, and the unique nature of the institution of marriage, no ready-made doctrine is available to handle the First Amendment questions that the mixed-sex requirement raises.” *Id.* at 965-66 (citations omitted.) It is no overstatement to say Professor Cruz’s pet theory is a bricolage.

Fifth, this Court would have to reject the argument that, as either symbolic speech or expressive conduct, civil marriage is “governed directly by *United States v. O’Brien*.” *Id.* at 975. Admittedly, Professor Cruz argues that even under *O’Brien*, the mixed-sex requirement violates the free speech rights of same-sex couples (as he does in footnote 17 of his brief). (Cruz Brief at 41-42 n. 17.) The point, however, is that the marriage-as-speech argument has a much less likely chance of producing Professor Cruz’s desired result under *O’Brien* than under strict scrutiny, and in the article he admits that its potential application is a problem. In the brief Professor Cruz baldly asserts that the mixed-sex restriction must fall under either strict scrutiny or *O’Brien*. In his article, Professor Cruz is more forthcoming about the other side of the argument. As noted previously, he admits that

Nevertheless, in another sense marrying civilly is unlike situations that the Court has treated as expressive conduct: burning a draft card, burning a flag, dancing in the nude, and sleeping in the park. What one does when one marries legally is not really engaging in primary ‘conduct’ with both physical consequences

“bricolage” as “the assembly of something new from whatever materials the constructor discovers[s].”)

and communicative consequences in the world. Rather, people who marry civilly are engaging in an abstract act, entrance into a quasi-contractual legal status.

(Cruz Article at 978 (citations omitted).)

Sixth, this Court would have to reject the argument that, despite Professor Cruz's attempts to bring civil marriage under the rubric of speech or expression, forum analysis should not apply. *Id.* at 979-84. Seventh, and alternatively, this Court would have to reject the argument that if forum analysis were to apply, civil marriage is not a nonpublic forum. *Id.* at 982-84. Eighth, this Court would have to reject the argument, addressed previously, that if civil marriage is speech at all, it is government speech. *Id.* at 984-87. In his article, but not his brief, Professor Cruz admits that "[I]f civil marriage were assimilated to government speech, then the usual First Amendment neutrality rules would likely not apply does apply." *Id.* at 985.

c. This Court should not accept Professor Cruz's speech argument because he has admitted that his radical theory would lead to either recognition of polygamous and incestuous marriages or the abolition of civil marriage.

Thus, the court would have to believe, at a minimum, that Professor Cruz's theory can surmount all of these problems. However, the reasons for this Court to decline to adopt Professor Cruz's analysis go beyond the contradiction between the article and the brief, the novelty of this newly-minted pet theory, and the many self-identified problems. The ramification of adopting Professor Cruz's theory is that consistent application of this flawed analysis would toll the death knell for marriage in the Commonwealth. In sharp contrast to the Plaintiffs' assertion in their brief, Professor Cruz's article is brutally honest about the

ramifications of striking the mixed-sex requirement, at least on the basis of his free speech theory.

In their brief, Plaintiffs write:

Unable to justify the exclusion of the plaintiffs from marriage on its own terms, the defendants below and its *amici* here are sure to suggest that the balance favors the status quo because, the argument goes, polygamy will inevitably follow if the plaintiffs prevail here. That suggestion is pure fear-mongering . . . The decision in this case will neither advance nor hinder any such claim.

(Plaintiff–Appellant’s Brief at 40.)

Professor Cruz, who after all supports the Plaintiffs, is not engaged in “fear-mongering,” but rather in academic honesty when he writes in his article:

Neither may the mixed-sex requirement be justified as a dike against the floodtide of ostensibly self-evident evils such as legalized prostitution, polygamy, and incest. . . . It is true . . . that those wishing to enter plural marriages are denied the expressive resource of civil marriage, thus the dyad requirement is subject to challenge on First Amendment grounds under the theory advanced in this Article. . . . society might have to accept polygamous civil marriages (unless government chooses to get out of the marriage business entirely): It simply is not the case that the constitutionality of denying legal recognition to polygamous unions is so clear that any contrary constitutional theory must be rejected, As for incest, my expressive resource argument would again apply and demand the state to satisfy a high level of justification for its failure to recognize civilly incestuous marriages between people of sufficient age, which the state might or might not be able to do. Again, however, this does not establish the propriety of denying recognition to both same-sex marriages and incestuous marriages, as opposed to the possible constitutional necessity of recognizing both.

Id. at 1004-05. So, far from engaging in fear-mongering about polygamy, Professor Cruz honestly acknowledges that should any court adopt his analysis, it would be forced to either allow both polygamous and incestuous marriages or get

out of the marriage business altogether. Of course, these academically honest admissions are lacking from Professor Cruz's *brief*.

And lest there be any mistake, the total destruction of marriage is the goal of Professor Cruz's scholarship. He writes:

probably any . . . U.S. jurisdiction confronting the issue, may choose whether to abolish the mixed-sex requirement, and thus to extend civil marriage to same-sex couples, or instead to abolish civil marriage itself. . . . Similarly, both extension of civil marriage and its abolition would be consistent with the First Amendment, for neither would regulate a unique expressive resource on any ground related to the content (let alone viewpoint) of expression; rather, the resource would simply no longer exist were civil marriage abolished.

. . . .
Even the First Amendment theory of this Article supports the disestablishment of marriage [*i.e.*, abolition of civil marriage] under one interpretive approach to the Constitution. The chief constitutional vice of the mixed-sex requirement upon which I have focused is its lack of neutrality. Without powerful justification, which I have argued is also lacking here, such a breach of neutrality with respect to the expressive resource of civil marriage is impermissible under the First Amendment. Yet a more fundamental neutrality principle that some scholars take to underlie the U.S. constitutional order is that of neutrality about the good life. On this view, government may not act to promote one vision of the good at the (relative) expense of those who take a different view. Yet this is precisely what civil marriage, with or without the mixed-sex requirement, does. So long as government licenses marriage, it provides a resource to those who model their expression and their lives in governmentally approved ways. A more thoroughgoing commitment to neutrality than that embodied in current First Amendment doctrine would condemn this result as well. Rather than package an enormous bundle of economic and legal strictures into the civil marriage package, government would be required to distribute them on a less ideological, more functional basis.

Id. at 1020-21.

Finally, it is evident that Professor Cruz believes that this Court is the place to “test drive” his pet theory. First, he writes in his article that “[I]t may

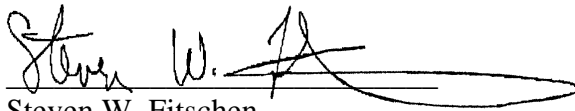
well be, however, that the country’s current constitutional doctrines and legal institutional cultures will render acceptance of this analysis difficult for courts, legislatures, and legal scholars.” *Id.* at 1025. Writing just seventeen months after Vermont’s *Baker v. Vermont*, 744 A.2d 864 (1999), Professor Cruz went on to write, “[b]ecause the Vermont Supreme Court has already given same-sex couples so much and would face even greater political uproar were it to adopt the arguments of this Article to require same-sex marriages, I believe that, at this time, litigation to test my arguments judicially would be premature.” *Id.* at n. 487. Apparently, Professor Cruz believes the time has come to experiment with this Court’s “institutional culture.” The constitutionality of the Commonwealth’s marriage laws should not be decided on the basis of satisfying Professor Cruz’s curiosity. Rather, this Court should resounding say that, indeed, this analysis cannot and will not be accepted under current constitutional *doctrine*—as Professor Cruz himself suspected.

CONCLUSION

For the foregoing reasons this Court should reject Plaintiff-Appellants' argument that same-sex marriage is entitled to protection Article XVI of the Massachusetts Declaration of Human Rights. Furthermore, for the foregoing reasons and for the reasons found in the Defendant-Appellee's brief this Court should affirm the trial court's decision.

Respectfully Submitted,

This 20th day of December 2002

A handwritten signature in black ink, appearing to read "Steven W. Fitschen", with a long, sweeping horizontal flourish extending to the right.

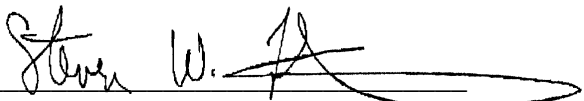
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party on December 20, 2002 by depositing the same in the United States mail addressed as follows.

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