

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-08860

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Goodridge et al.,

Plaintiffs-Appellants

v.

Department of Public Health et al.,

Defendants-Appellees

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Appeal from Commonwealth of Massachusetts  
Superior Court, Suffolk County

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**AMICI CURIAE BRIEF OF RELIGIOUS GROUPS, INDIVIDUALS  
AND A FRATERNAL ORGANIZATION IN SUPPORT OF DEFENDANTS-  
APPELLEES**

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## INTEREST OF AMICI

This amici curiae brief is submitted in support of Appellees Department of Public Health et al. Amici are religious entities and individuals from various theological traditions that support the age-old definition of marriage as the legal union of a man and a woman. That definition, which Massachusetts and all jurisdictions in the United States uphold, has been a fundamental pillar of our (and every) society from time immemorial. Amici join together to strongly urge this Court to reject Appellants' invitation to redefine marriage to suit their individual interests. Specific statements of the interest of the amici may be found in the appendix.

## SUMMARY OF ARGUMENT

The crux of the controversy before this Court concerns the substance and symbolism of a social institution that transcends the private interests asserted in this case. How that social institution is shaped is a question that deserves careful consideration in society, but raises concerns that the courts are ill-prepared to address. Pp. 2-5. Informed by religious and social tradition, the public institution of marriage circumscribes a totality that is greater than the sum of its parts, and draws its

unique public value from the presence of both sexes in the relationship. Pp. 6-16. Each of several social functions that marriage as so constituted serves, including 1) ensuring the continuity of human life (pp. 16-20), 2) handing down and enforcing social norms (pp. 20-23), 3) integrating the sexes (pp. 23-27), 4) benefiting children (pp. 27-29), and 5) affirming an ideal means of human relations conducive to survival (pp. 30-31), cannot be furthered in any other way. In view of these factors, government has a compelling interest in promoting the committed union of a man and a woman as marriage. Pp. 32-37.

#### **INTRODUCTION**

Appellants seek to make their demands seem like a natural and even inescapable implication of existing fundamental rights and equal protection jurisprudence. Yet everyone understands that this case is about a radical alteration of the very definition of marriage. The outcome Appellants demand is unprecedented. Throughout history, marriage may or may not have been monogamous; interracial marriages may or may not have been permitted; the consent of the parties may or may not have been required; marriage to one's cousin, half-sibling, etc., may or may not have been allowed; age restrictions may or may not have existed; love may

or may not have been relevant. But there has been one constant: marriage has always, without exception, been heterosexual. The most basic requirement of marriage is that it consist of a male and a female.

To speak of "marriage" is not merely to speak of two persons who love and are committed to living with and supporting each other. Though clearly of great personal importance, marriage is not just a personal matter. It has the most profound and sweeping social implications. Whatever the specific intent of the parties, by law marriage is a legal estate (not a private contract) with carefully prescribed boundaries. It is a state recognized and sanctioned union of a man and a woman, for life unless dissolved by a court, that creates specific burdens and duties and confers certain rights and privileges. It forms the basis of the traditional mother-father-child family. First and foremost, marriage is a powerful symbol that teaches society's deepest aspirations and ideals. It is a norm—a paradigm—about how life ought to be lived.

As Appellants' briefing makes so clear, at bottom this case is not really about legal benefits, equality of the sexes, or basic constitutional protections.

Massachusetts already has in place legal means for Appellants to protect their interests, and they admit to using them for those ends. Fundamentally, this case is a battle over a symbol, and who will decide the nature and meaning of that symbol. Using the language of equality and rights, Appellants demand that this Court give marriage a meaning that it has never had precisely so they can claim the recognition and affirmation of our most profound social symbol. They cannot obtain that symbolic approbation from the Legislature because the people of Massachusetts, though generous and liberal in their sentiments toward gays and lesbians, are not ready to discard the basic meaning and structure of marriage. Although many "marital" rights have been extended to other relationships, the people of Massachusetts still uphold traditional heterosexual marriage as a special and unique paradigm of human association.

Appellants' recourse to this Court is thus an attempt to obtain social recognition for their relationships by judicial ukase. To grant their demands would be an abuse of judicial authority. Appellants' equality and rights talk notwithstanding, nothing in the constitutions of the United States or

Massachusetts mandates a fundamental redefinition of marriage.

It is no exaggeration to say that the outcome of this case will have enormous and wide-reaching effects. At stake in this debate is the very foundation of our social order. Marriage is the most basic institution in our society.<sup>1</sup> As the Court decides whether to dramatically change its legal character, thoughtful reflection on the distinct nature and contribution of marriage as it presently exists, and as it has existed for millennia, is in order. The traditional marital union between one man and one woman meets vital social needs that cannot be fully addressed in any other institution or program.

Moreover, traditional marriage is also an intrinsic good that is at least as important as the sum of its social functions. Marriage affords the opportunity for a type of male-female association that is singularly valuable and that society and government have the highest interest in promoting and preserving. Appellants totally reject such notions, arguing that

the traditional marriage paradigm “lacks” even “a rational basis” (Appellants’ Brief [“App. Brf.”] at 79)—as if our civilization’s most elemental understanding of what constitutes marriage has been an irrational absurdity from the outset. That is simply—and obviously—untrue. While one can understand Appellants’ desire for social affirmation, amici respectfully urge this Court not to mandate the abandonment of a substantive social vision that is indispensable to civilization as we know it.

#### ARGUMENT

##### **I. Marriage Between One Man and One Woman Creates an Institution Whose Unique Value Is Much More Than the Sum of Its Many Social Functions.**

In debating the many state interests served by marriage, the tendency is to value the importance of marriage purely by referencing the utility of its many social functions. Those functions, some of which are described below, are no doubt vital to society and thus fully justify marriage’s special legal status. Nevertheless, the worth of traditional marriage cannot be reduced to the social utility of its practical

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<sup>1</sup> Throughout this brief the term “marriage” will refer to traditional, opposite-sex unions unless

benefits. Marriage has intrinsic, not merely instrumental, value.<sup>2</sup>

By birth, each of us is either male or female. Although there are innumerable similarities between the sexes by virtue of their shared humanity, there are also (in the words of Justice Ginsburg) "[i]nherent differences' between men and women" which "we have come to appreciate" and which "remain cause for celebration." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Marriage joins a man and a woman, with their inherent differences, to form a unique institution that is neither wholly male or female in nature, but simultaneously both. At its ideal, marriage between a man and woman has been "described as a communion of two giving rise to a community of persons greater than

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specifically indicated otherwise, *e.g.*, "same-sex marriage" or "homosexual marriage".

<sup>2</sup> For an eloquent explication of the intrinsic worth of traditional marriage, *see The Homosexual Movement: A Response by the Ramsey Colloquium*, First Things, March 1994, at 15 (hereinafter "Ramsey Colloquium") <<http://www.firstthings.com/ftissues/ft9403/articles/homo.html>>. The Ramsey Colloquium "is a group of Jewish and Christian theologians, ethicists, philosophers, and scholars that meets periodically to consider questions of morality, religion, and public life." *Id.* at 15.

the two." Teresa Stanton Collett, Recognizing Gay Marriage: Asking for the Impossible?, 47 Cath. U. L.Rev. 1245 (1998).

Marriage, as a communion of love between one man and one woman, ideally contemplates a

total gift of self to the spouse. This gift includes not only the mind, body, and spirit of the person, but their past, present and future. It encompasses not only the willing offering of self, but the loving reception and embrace of the other. Through this communion the husband and wife experience affirmation of the goodness inherent within each.... Husband and wife create a common future from the gifts and talents each brings to the union C a future which can be richer and more satisfying than the future either could create alone.

Id. at 1249.

Rather than a semantic technicality, the heterosexual dimension of marriage is indispensable to its intrinsic worth. The physical, intellectual, and emotional blending of the male and female produces a bond and a union different from all others.

The heterosexual dimension of the relationship is at the very core of what makes marriage a unique union and is the reason why marriage is so valuable to individuals and to society. The concept of marriage is founded on the fact that the union of two persons of different genders creates a relationship of unique potential strength and inimitable potential value to society. The essence of marriage is the integration of a universe of gender

differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity. Thus, the definition of marriage as a cross-gender union is not merely a matter of arbitrary definition or semantic wordplay; it is fundamental to the concept and nature of marriage itself.

Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. Rev. 1,

39. The Supreme Court expressed a similar view in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1942):

Marriage [between a man and a woman] is a coming together for better or for worse, hopefully enduring, and intimate to a degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

The physical union that is emblematic of male-female unity in marriage naturally leads not only to physical and emotional fulfillment but also to new life. When born within the bounds of wedlock, children become the living heritage of their parents' marital oneness, a physical manifestation of their enduring commitment. In turn, children make a marriage a family and bind their parents together beyond their lifetimes.

For many, including these amici, the marriage of a man and a woman also has great religious significance. Christian scripture, for instance, teaches that "neither is the man without the woman, neither the woman without the man, in the Lord." 1 Corinthians 11:11. Emblematic of Christ's love for his Church, the covenantal and sacramental meaning which tens of millions of Americans ascribe to marriage further confirms and deepens its enduring significance. In Jewish tradition and practice, marriage is of primary importance. "'No man without a wife, neither a woman without a husband, nor both of them without God' (Gen. Rabbah 8: 9) sums up the Jewish concept of marriage. This is the Jewish ideal, which applies to all without distinction—rabbi and layman, priest and prophet." Rabbi Hayim Halevy Donin, *To Be A Jew: A Guide to Jewish Observance in Contemporary Life* 123 (1991).

The foregoing no doubt states an ideal—a paradigm—which many marriages fail to fully achieve. Nevertheless, "it is unwise to let pathology and failure, rather than a vision of what is normative and ideal, guide us in the development of social policy." Ramsey Colloquium. Moreover, even marriages that are

less than ideal involve, at least in their best moments, much of the male-female communion just described, otherwise the marriage typically does not last. The heterosexual nature of the institution requires that the man and the woman give of themselves and reach out towards each other as they struggle with life's complexities; otherwise the marriage is unlikely to last. Thus, the very survival of a marriage necessitates conflict resolution and compromise, frequently entailing painful but salutary stretching by each spouse across the gender divide to attain marital harmony. The result is a life, jointly lived, that is a hybrid of the male and female, drawing from the strengths of each sex.

This single reality arising from the lifetime marital union of one man and one woman is itself, apart from the utility of its social functions, worthy of the special legal recognition the state has traditionally provided. The individual flourishing that can occur only within traditional marriages and the families they beget, and the nature of that flourishing, are of inestimable human value. No other association presents such possibilities. In recognition, Massachusetts' marriage laws (like those

of all American jurisdictions) affirm and promote the positive good of male-female marriage and the families that typically arise therefrom. Beyond conserving marriage's obvious worth as a means to other important social ends, Massachusetts has a compelling interest in promoting the institution of marriage as an end in itself:

[T]he State has a compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or in nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values.

In re Estate of Cooper, 149 Misc.2d 282, 287, 564 N.Y.S.2d 684, 688 (1990), aff'd 187 A.D.2d 128, 592 N.Y.S.2d 97 (N.Y.A.D. 1993) (emphasis added); see also C.C. v. A.B., 406 Mass. 679, 690-91, (1990) ("Despite a vast array of recent challenges to the traditional concept of the family, our civilization still places inestimable value on the importance of family life.").

Regardless of its legal status or label, a same-sex union can never attain the ideal embodied in a traditional male-female marriage. Appellants contend that a homosexual union includes commitment, love, support, and so on just like traditional marriage.

Although obviously of great importance, these elements alone are insufficient to create a true marriage: the sexes of the participants necessarily define and limit the nature of the institution.<sup>3</sup> Irrespective of its

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<sup>3</sup> Seeking to deflect concerns that their definition of marriage would necessitate polygamous marriage, Appellants state that "the exclusivity of marriage flows from the companionate vision of marriage as two people pledging themselves to one another" and that "[t]he entire edifice of laws protecting married persons is premised on the notion of a unitive pairing of two people with an emotional and financial interdependence and reciprocal rights and responsibilities." App. Br. at 41. That would all be true, of course, but for one critical omission: the "companionate vision" and "unitive pairing" has always involved a man and a woman who are not otherwise legally precluded from marrying. The mere fact that two people have "pledg[ed] themselves to one another" and experience "emotional and financial interdependence" does not alone qualify them for marriage. Appellants' description of marriage and defense of monogamy are also ironic. Appellants decry allegedly formalistic arguments that marriage must remain heterosexual as it has always been defined, but then dismiss the polygamy concern by insisting with similar logic that marriage must always be monogamous. Yet, if this Court discards the established heterosexual definition of marriage and adopts Appellants' view that marriage should be available to any couple who love each other and are deeply committed to supporting and sustaining each other, then the monogamous definition of marriage will be in serious jeopardy. As Professor George Dent has explained, "[l]aws against polygamy can be defended only with reasoning that also excludes same-sex marriage." George W. Dent, The Defense of Traditional Marriage, 15 J.L. & Pol. 581, 629 (1999). Having discarded the exclusively male-female basis of marriage—with its many benefits and its important symbolism—to accommodate those with a homosexual

personal value to those involved, a same-sex union cannot synthesize and bind together the separate lives of a man and a woman into a shared life that is uniquely male and female and thus more complete than any other intimate association. It therefore cannot satisfy the core criterion for being "marriage." This is not simply a matter of arbitrary definitions. What

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orientation, by what logic will those with an allegedly polyamorous orientation be denied marriage? If three women love and are deeply committed to each other, are bound together by children whom they have loved and nurtured since their (technology-assisted) births, and desire to affirm that commitment and further cement their relationship and protect their family by entering into marriage—how can arguments about the unique importance of monogamous marriage to American society be used to deny them the ability to marry if those very types of definitional arguments are rejected here? Appellants' basic argument—that the current definition of marriage is discriminatory, invasive of the rights of privacy and autonomy in intimate matters, and fundamentally unfair to those with a different approach to sexual intimacy and family life—works every bit as well to advocate polygamous marriages. See id. at 626; see also id. at 628 ("Gay activists champion autonomy in intimate relationships . . . . On these grounds polygamy is even easier to support because, unlike gay marriage, it has been and still is condoned by many religions and societies. The Equal Protection argument for same-sex marriage also applies to polygamy. The ban on polygamy discriminates not only against religions that approve polygamy but also bisexuals, who cannot act on their sexual preference within marriage unless they can have multiple spouses. . . . Every argument for gay marriage is an argument that would support polygamy.") (footnotes and quotation marks omitted) (emphasis added).

is unique about traditional marriage cannot be captured by same-sex unions, whatever one chooses to call them. "[T]he very concept and reality of the relationship between man and woman that we call marriage fundamentally differs from the nature of the relationship between two persons of the same sex." Wardle, supra, 1996 B.Y.U. L. Rev., at 38 (emphasis in original). Marriage requires the equal participation of both sexes—neither the man nor the woman can be omitted; both are indispensable. Despite the core assumption of Appellants' argument, it cannot seriously be denied that "a community made up exclusively of one [sex] is different from a community composed of both." Virginia, 116 S.Ct. 2264, 2276 (1996) (Ginsburg, J., writing for the Court). The nature of marriage is antithetical to the sexual segregation inherent in a same-sex union. Without the integration of the sexes, marriage cannot exist.

Massachusetts like all jurisdictions acknowledges the great value of this immutable reality by providing special institutional recognition for traditional marriage. That is not a denial of the importance or deeply personal meaning of the many other forms of human association. It is instead an affirmation of the distinctly important association that is created when a man and a woman voluntarily join their lives in marriage.<sup>4</sup>

## **II. Marriage Serves Vital Social Functions.**

Although not reducible to its instrumental value, traditional marriage advances many critically important social interests that cannot adequately be furthered in any other way. A full listing and explication of these numerous interests is beyond a single brief, but several deserve particular mention, especially because in a few instances they clearly highlight the basic difference between the

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<sup>4</sup> As should be obvious, this argument is not about the tremendous value individual men and women, married or single, contribute to society apart from their companions and associates. And it most emphatically should not be understood as a critique of efforts to improve the legal and social standing of women and men as individuals. Rather, the point we wish to make relates to the profoundly important relationship that can arise when two individuals, a man and a woman, voluntarily choose to share their lives in marriage.

traditional, male-female marital union and the homosexual associations Appellants and their amici demand be given the status of marriage.

**A. Procreation and the continuity of human life.**

Traditional marriage is the principal vehicle through which human society extends itself over time. Every child necessarily has a father and a mother and thus a biological history, whether born of a marital union or not. However, beyond supplying essential genetic material, procreation within marriage provides a child with a full human context—a history that accounts not only for biology but also for the deeper intentions and commitments of the parents who conceived the child. It also provides a stake in that context. The child born of the physical union of parents in an enduring marriage arrives as a natural and fully integrated part of the continuous stream of life—a stream that, by connecting past and future generations, gives meaning to the present. In short,

the child becomes part of a family.<sup>5</sup> Only the heterosexual (and monogamous) norm in marriage can give full expression to the commitment to time and history evident in having and caring for children. No other human association has the same power to account for the past while projecting life into the future. No other association is as essential to the continuity of human society and the well-being of children.<sup>6</sup> In marriage, procreation moves beyond the mere biological

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<sup>5</sup> Of course, the legal status and human worth of a child are in no way dependent upon whether his or her parents are married. The argument we are making is about the importance to the child of birth into a context where the child's parents are committed both to the child and to each other through marriage.

<sup>6</sup> Professor Bruce C. Hafen, makes the point this way:

Not all formal families are stable .... But the commitments inherent in formal families do increase the likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment.

Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Mich. L.Rev. 463, 475-76 (1983).

and takes on a permanence that starkly contrasts with (in the memorable words of Edmund Burke) "the flies of a summer" which, having no connection to the past, care nothing for the future. See Edmund Burke, Reflections on the Revolution in France, in The Best of Burke: Selected Writings and Speeches of Edmund Burke 565 (Peter J. Stanlis, ed., 1963).

Appellants' assertion that "[p]rocreation is not a concern of the marriage laws" (App. Br. at 83) is plainly wrong. To state the obvious, though government may not compel procreation, the very perpetuation of the human community—to say nothing of national security, the future viability of social security programs, the economy, etc.—depends on healthy patterns of bearing and raising children. The legal form of marriage and its status within the community are unavoidably linked to procreation and how children are reared. Thus, it has long been recognized that one of the core functions of marriage law is to encourage procreation and child rearing within the traditional family structure, as well as to address situations where that ideal norm has broken

down.<sup>7</sup> To be sure, the traditional mother-father family is not the only context where children are born and raised, but by reserving marriage to heterosexual couples the law legitimately encourages that time-honored result.

**B. The inculcation of moral and cultural norms.**

The continuation of human life is a biological process, but it is also a social process involving the inculcation of the ethical and moral norms essential to a meaningful life with others. Marriage generates families, and it is in families that "we inculcate and pass down many of our most cherished values, moral and cultural." Moore v. City of East Cleveland, 431 U.S.

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<sup>7</sup>See e.g., Coe v. Hill, 201 Mass. 15, 21 (1909) ("Marriage is a social institution, or status, in which, because the foundations of the family and domestic relations rest upon it, the Commonwealth has a deep interest to see that its integrity is not put in jeopardy, but maintained."); Inhabitants of Milford v. Inhabitants of Worcester, 7 Mass. (1 Tyng) 48, 51 (1810) (marriage "intended . . . to multiply, preserve, and improve the species"); Singer v. Hara, 522 P.2d 1187, 1195 (Wash.Ct.App. 1974) ("Marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race"); Adams v. Howerton, 486 F.Supp. 1119, 1124 (C.D.Cal. 1980) ("the main justification . . . for societal recognition and protection of marriage is procreation, perpetuation of the race"); see also G.L. c. 208, § 28 ("best interests of child" standard governs child custody issues).

494, 503-504 (1977). As one court insightfully concluded:

The family, as the basic unit of American society, is the milieu in which such values are inculcated into individuals, and thus into society as a whole. Consequently, the child learns to relate to society and have respect for society within the initial framework of his own relationship to his parents and other family members.

In re Agosto, 553 F. Supp. 1298, 1326 (D. Nev. 1983).

It is in the family that a child first learns about honesty, trustworthiness, obedience, sacrifice, selflessness, and reverence for the basic freedoms we all enjoy. Marriage and family life teach a mother and father about sacrifice, selflessness, self-control, and genuine concern for others. In the family, all members become aware and learn to take account of the needs and wants of others, critical skills for life in the broader human community. As William J. Goode, renowned family expert and professor of sociology at Columbia University, recognized more than two decades ago:

[T]he family is the fundamental instrumental foundation of the larger social structure, in that all other institutions depend upon its contributions. The role behavior that is learned within the family becomes the model or prototype for role behavior required in other segments of the society. The content of the socialization process is

the cultural traditions of the society; by passing them on to the next generation the family acts as a conduit or transmission belt by which the culture is kept alive.

William J. Goode, *The Family as an Element in the Social Structure*, in *Marriage and Family in the Modern World* 15 (R. Cavan ed., 4th ed. 1974) (emphasis omitted).

The traditional family, of which heterosexual marriage is the chief cornerstone, is also best situated to teach public virtue to children and to cultivate its growth in adults. This virtue, expounded by the Founders as a crucial component in the American system, requires self-control, self-sacrifice, and a desire to work for the good of society even at a cost to one's personal interests.<sup>8</sup> Although it has a role, by nature government is limited in its capacity to inculcate this most important of virtues. The majority of teaching in this regard must be left to basic family units, where children and adults learn in microcosm the values and virtues necessary to the functioning of society:

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<sup>8</sup>See generally Horwitz, *John Locke and the Preservation of Liberty: A Perennial Problem of Civic Education*, in *The Moral Foundations of the American Republic* 131 (R. Horwitz ed. 1979).

Because this essential social—even political—ingredient[*i.e.* public virtue] could not be a coercive State function, American society has relied to a considerable extent on the family not only to nurture the young but also to instill the habits required by citizenship in a self-governing community. We have relied on the family to teach us to care for others, and to moderate self-interest. This connection between home and society has made it clear since the early days of the Republic that it was more important to keep pure the headwaters of humanity than simply to worry about downstream pollution. With this perspective, the family in a democratic society not only provides emotional companionship, but is also a principal source of moral and civic duty.

Hafen, 81 Mich. L.Rev. at 477 (quotations and citations omitted). The United States Supreme Court captured this very point long ago in Maynard v. Hill, 125 U.S. 190 (1888), when it stated that “[m]arriage creat[es] the most important relation in life” and “ha[s] more to do with the morals and civilization of a people than any other institution,” and that traditional marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.” Id. at 205 and 211.

**C. The integration of men and women.**

Human society requires that we learn to value difference within community. To truly value diversity and to truly make it a strength within a community

requires that citizens see not only difference but complementarity—that they not only acknowledge diversity among the many parts of the body politic, but also recognize the manner in which the body's different yet essential parts can combine to make a unified whole. It is in the recognition and affirmation of complementarity that true unity can exist amidst diversity.

The complementarity of men and women is uniquely and powerfully affirmed and embodied in marriage. Marriage bridges the most readily apparent distinction between persons in society, that between the sexes, precisely because in marriage both the man and the woman are equally essential. That is the vision of the sexes codified in Massachusetts' marriage laws. Heterosexual marriage declares the equal indispensability and importance of each sex to the other. Traditional marriage teaches that both sexes fundamentally need each other, that neither sex can go it alone. This interdependency is undeniable as regards procreation, in that over time each sex would literally cease to exist without the other. But it is also evident in the truth that the good of marriage cannot be obtained by one sex alone.

If imposed, homosexual "marriage" would institutionalize a radically different vision of sexual relationships, rejecting the interdependency and indispensability of both sexes to marriage.<sup>9</sup> Homosexual marriage would teach that fundamentally the sexes do not need each other and can—perhaps ought to—live separately. In traditional marriage, each sex is

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<sup>9</sup>The radical intent of the gay marriage movement is openly admitted by some advocates. For instance, in a nationally circulated magazine article, the executive director of the National Gay and Lesbian Task Force, Melinda Paras, discussed the upcoming battles regarding recognition of homosexual marriage and the changes it will have upon legislation and society. She then is quoted saying, "By the time equality finally gets won universally, we'll be in a whole other place about the definition of family, and gay marriage may become almost irrelevant." B. Findlen, *Is Marriage the Answer?*, Ms. 86, 91 (May/June 1995). Leaders of the 1993 gay march on Washington drafted a platform that included a demand for "legalization of multiple partner unions." *See Texas Platform Agreement for Next Years March*, Wash. Blade, May 22, 1992; *see also* David L. Chambers, *What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 Mich. L. Rev. 447, 489-91 (1996) (supporting legal recognition of gay marriage and also polygamy). Michaelangelo Signorile urges activists "to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, . . . to debunk a myth and radically alter an archaic institution . . . . The most subversive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely." Michaelangelo Signorile, *Bridal Wave*, Out, Dec.-Jan., 1994, at 161.

essential. In homosexual marriage, one sex or the other would be unnecessary.

Of course, homosexual couples exist as a fact of society. What is at issue here, however, is not whether single-sex unions will continue to exist. They obviously will. The issue is whether, amidst the diverse forms of intimate relationships, society can constitutionally maintain the paradigm of traditional marriage. Appellants contend that the Massachusetts Constitution mandates that homosexual unions receive the same formal recognition and stamp of social approval as traditional marriage. According to this view, the Massachusetts Constitution compels the Commonwealth not only to tolerate diverse lifestyles but to affirm them—to teach through the symbolism of marriage that homosexual unions are of equal social importance as traditional marital unions.

Proponents of homosexual marriage often present their position as advancing the equality of the sexes. See, e.g., Brief Amicus Curiae of Massachusetts Bar Association at 14. Precisely the opposite is true. Homosexual marriage would embody a vision of sexual segregation that, in its symbolism, denies the equal value and indispensability of each sex to marriage—our

most important social institution—and thus is inherently injurious to the notion of sexual equality. A dignified social equality between the sexes may well be the primary victim of a legal regime that not only tolerates the sexual separateness of homosexual relationships but also accords them society's highest seal of approval. This Court should not require the state, in the name of equality, to publicly affirm and legally sponsor relationships that fundamentally contradict the vital ethos of gender integration. Forcing the state to grant marital status to homosexual unions would do just that.

**D. Providing male and female role models for children.**

Without question “[c]hildren grow up best under conditions of intense emotional involvement with their parents.” Hafen, 81 Mich. L. Rev. at 477 (quotation, ellipses and brackets omitted). “[S]ociety requires a critical mass of married, two-parent families, both to raise their own children well and to serve as models for those who are being reared outside of the ‘conventional’ family.” Wade F. Horn & Andrew Bush, *Fathers and Welfare Reform*, Pub. Interest, Fall 1997, at 42. But Appellants seem to deny the importance of

the involvement of both parents—father and mother—in a child’s life. Appellants’ argument in part rests on the assertion that single-sex parenting (two mothers or two fathers) is just as desirable as traditional opposite-sex (mother-father) parenting, and that the Commonwealth is constitutionally compelled to publicly affirm that position.<sup>10</sup> Yet the fact is that neither the father nor the mother is expendable in raising children.<sup>11</sup> Ideally—and when addressing the legal form

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<sup>10</sup>Appellants argue that “[t]he umbrella of family privacy means that the defendants cannot invoke a preferred type of parental role modeling as a basis for plaintiffs’ exclusion from marriage.” App. Br. at 38. By that rationale, the state could never publicly encourage or promote monogamous two-parent child rearing over, for instance, single fatherhood. The constitutional right to privacy has never been interpreted in that fashion. Moreover, the legal structure of families is not solely a private matter because it affects the stability of families generally and thus the very foundations of society. William A. Galston, *Liberal Purposes* 285 (1991); see also Amitai Etzioni, *The Spirit of Community* 248 (1993) (“To shore up the moral foundations of our society, we start with the family.”) In any event, the argument does not appear to be serious. Appellants’ contention that their relationships should be publicly affirmed just like traditional marriage, while insisting that polygamous relationships will not be the ultimate result, is necessarily premised on the state having an interest in advancing certain types of private family relationships while discouraging others. See id. at 41.

<sup>11</sup>For example, the critical importance of fathers in the lives of male adolescents is now beyond rational debate. See, e.g., Barbara Dafoe Whitehead,

marriage should take we are often dealing with ideals—both a loving father and mother should be fully involve with raising a child. In their own ways, both parents serve as crucial role models.

Of especial significance is the modeling a mother and father can provide of the equal dignity and importance of each sex. Heterosexual marriage demonstrates to children the interdependency of the sexes. Boys and girls naturally segregate themselves along gender lines. The unique status and obvious prominence of traditional marriage are subtle yet powerful reminders that the destinies of both sexes lie together. Officially sanctioned same-sex marriage would send precisely the opposite message.

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*Dan Quayle Was Right*, Atlantic Monthly, April 1993. The powerful (and tragic) correlation between fatherless parenting and high rates of adolescent male crime is well established. *Id.* ("Nationally, more than 70 percent of all juveniles in state reform institutions come from fatherless homes.") And no one argues that girls do not need the socializing influence of their mothers. "Under every standard—educational achievement, drug use, criminal activity, physical and emotional health, social adjustment and adult earnings—children of intact [traditional] marriages have fewer problems than children of broken families." Dent, *supra*, 15 J.L. & Pol. at 594.

**E. Public affirmation of an ideal in human relations and of an institution essential to social survival.**

In like fashion, state-sponsorship of traditional marriage and family life affirms an ideal in human relations. Massachusetts law accords a special social status (mostly symbolic) to a man and woman joined in matrimony. Thereby, the state not only accommodates the private desires of individual men and women to unite their lives in matrimony, but also publicly affirms the correctness and goodness of that decision as a matter of social policy.

It is well established in law and modern government theory that the state has a proper role in upholding public morality and fostering those institutions which the majority judge to be most conducive to the preservation and continuation of a good society. See John M. Finnis, Law, Morality, and Sexual Orientation, 69 Notre Dame L. Rev. 1049, 1052-53 (1994) (distinguishing between state supervision of truly private conduct and state supervision of the public "moral-cultural-educational environment"). Traditional marriage and family life are the first among such institutions:

It is clearly evident that the concept of family is essential to [the survival of] society; homosexual relationships are not. A primary function of government and law is to preserve and perpetuate society, in this instance, the family.

Constant A. v. Paul C.A., 344 Pa. Super. 49, 496 A.2d 1, 6-7 (1985).

Massachusetts' determination to accord special state recognition and privilege to heterosexual unions is a proper and non-coercive way for the state to publicly recognize and support the intrinsic and instrumental good of traditional marriage and family life. Appellants seek the same public affirmation and statement of government approval for their relationships. However, it is for the democratically elected government of the people to decide which institutions and norms it will publicly advocate as socially ideal and which it will not. Massachusetts' Constitution may preclude the state from regulating or prohibiting certain types of private conduct or associations, but that is a far cry from mandating state endorsement, sponsorship, and affirmation.

### III. The Protection of Marriage and the Traditional Family Unit It Generates Constitutes a Compelling Governmental Interest.

The intrinsic and instrumental importance of marriage and families has been recognized in the many court decisions holding that protection of the traditional family is a vital or compelling state interest.<sup>12</sup> Yet of particular value to the Court are those cases which have directly confronted the

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<sup>12</sup>See, e.g., Oliverson v. West Valley City, 875 F.Supp. 1465 (D.Utah 1995), in which the court concluded:

[The traditional family] has tremendous societal value which helps to explain why it alone continues to serve as the only legitimate referent for our political and public discussions about intimacy, sexuality, and morality, as well as defining for us what are appropriate family policies and needed law reforms.

Id. at 1485 (quotations omitted); see also Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); Amezquita-Soto v. I.N.S., 708 F.2d 898, 908 (3d Cir. 1983) ("The family and relationships between family members occupy a place of central importance in our nation's history and are a fundamental part of the values which underlie our society."); Ziedorff v. Catholic Social Services, 92 Mich.App. 579, 581, 285 N.W.2d 378, 380 (1979) ("The family relationship occupies a basic position in our society's hierarchy of values, and is of great importance."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The [United States Supreme] Court has frequently emphasized the importance of the family.").

specific issue of whether granting special state preference to marriage and the traditional family, but not to all other intimate associations, properly advances compelling state interests.

In the first, Adams v. Howerton, 486 F.Supp. 1119 (C.D.Cal. 1980), aff'd 673 F.2d 1036 (9<sup>th</sup> Cir.), cert. denied 458 U.S. 1111 (1982), a male Australian citizen and a male American citizen sought to have their informal marriage ceremony recognized by the state in order to prevent the I.N.S. from deporting the Australian. Plaintiffs argued that their union should be recognized by the court as a legal marriage under governing state and federal law, and that if either prohibited same-sex marriages, such a law "is unconstitutional under due process and equal protection." Id. at 1121. The District Court firmly rejected these claims, recognizing some of the compelling state interests at issue in marriage. Id. at 1124.

Significantly, the court then expressly and specifically responded to Appellants' argument that even if there were a compelling governmental interest in protecting traditional marriage and family life, prohibition of homosexual marriage is not narrowly

tailored to that interest because today many persons enter marriage without the desire or ability to have children:

There is no real alternative to some over breadth in achieving this goal. The state has chosen to allow legal marriage as between all couples of opposite sex. The alternative would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family. Such tests and inquiries would themselves raise serious constitutional questions.

Thus, it seems to me that the state has chosen the least intrusive alternative available to protect the procreative relationship. When the legislative classification is narrowly tailored to serve a compelling state interest, there is no constitutional infirmity even when there is a strict scrutiny requirement. Such a narrowly tailored classification exists here.

Id. at 1124-1125 (citations and footnote omitted).

The second case, In re Estate of Cooper, involved a claim by the surviving partner of a homosexual relationship for a declaration that he had the right to elect against his homosexual partner's will as a "surviving spouse" under New York law. 149 Misc.2d 282, 283, 564 N.Y.S.2d 684, 685 (1990), aff'd 187 A.D.2d 128, 592 N.Y.S.2d 97 (N.Y.A.D. 1993).  
Petitioner argued to the court that his relationship

with the decedent was "identical to that of husband and wife" and that the only reason they did not enter into formal marriage was that "New York State will not issue licenses to persons of the same sex." Id.

Initially determining that petitioner was not entitled to heightened scrutiny because there was no invidious discrimination in the state's refusal to recognize homosexual marriage, the court upheld the law under rational basis review. 149 Misc.2d at 288, 564 N.Y.S.2d at 688. However, even assuming that heightened scrutiny was required, the court determined that the state's marriage law was valid because it directly furthered compelling governmental interests:

In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in fostering procreation of the race and providing status and stability to the environment in which children are raised.

\* \* \* \*

[T]he State has a compelling interest in fostering the traditional institution of marriage ....

149 Misc.2d at 287, 564 N.Y.S.2d at 688.

Like the State of New York, the Commonwealth of Massachusetts has a compelling interest in publicly affirming only traditional heterosexual marriages in

order to advance the many vital social functions marriage serves and to "nurtur[e] and keep[] alive the concept of marriage and family as the basic fabric of our society." Id.

Among the innumerable interests, important and petty, that Massachusetts advances through its laws, few if any are of greater importance to the health and ultimate survival of society than the preservation and promotion of male-female marriage. As society's most primal institution, marriage is at the heart of human community. It "creat[es] the most important relation in life." Maynard, 125 U.S. at 205. It is "the foundation of the family and of society, without which there would be neither civilization nor progress." Id. at 211. And it "ha[s] more to do with the morals and civilization of a people than any other institution." Id. at 205; see also Goode, supra, at 15 (marriage and family are "the fundamental instrumental foundation of the larger social structure, in that all other institutions depend upon its contributions"). Because of the intrinsic worth of marriage and the inestimable value of the many social functions it performs, Massachusetts' reservation of marital status for traditional,

opposite-sex unions serves a compelling state interest.

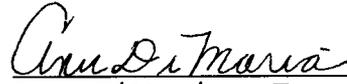
### **CONCLUSION**

Marriage is much more than the sum of its social functions. Marriage, defined as the union of one man and one woman, is intrinsically valuable because of the singular institution it creates. In marriage, men and women come together to form a union whose nature is, in a unique way, both male and female. Homosexual unions, whatever their legal label, are inherently different from marriage because they lack the combined strength of both sexes. Marriage also serves numerous compelling state interests, only a few of which have been mentioned above. In light of those interests, courts have sustained the limitation of marriage to heterosexual couples.

Finally, we have no way of knowing what will become of society should the definition of our most basic institution progressively be expanded (as the logic of Appellants' argument requires) to include any intimate grouping of emotionally committed persons. Marriage, like all things, must have a definition. It cannot mean everything, or it will ultimately mean nothing. Throughout all history, marriage has been

heterosexual. Massachusetts' marriage laws are no exception. Upon the life-generating foundation of marriage and family life is built the entire edifice of civilization. Appellants have asked the Court to alter an essential attribute of that foundation, implying it will have no negative impact on society or the stability of traditional marriage. They are joined by others who urge that, despite the risks, society should just "pull the pin and see what happens." Dent, supra, 15 J.L. & Pol. at 622 (quoting Christine Pierce, Gay Marriage, 26 J. Social Phil. no. 2, 5, 10 (1995)). Naturally, we cannot know precisely what such a change will unleash. But common sense suggests that even a small shift in a foundation can have seismic effects on the structure that relies on it for support. We respectfully urge the Court not to tamper with the age-old definition of marriage.

RESPECTFULLY  
SUBMITTED:



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ADDENDUM TO AMICI CURIAE BRIEF OF RELIGIOUS GROUPS,  
INDIVIDUALS, AND A FRATERNAL ORGANIZATION IN SUPPORT  
OF DEFENDANTS-APPELLEES

LIST OF AMICI

The Ethics & Religious Liberty Commission. The Ethics & Religious Liberty Commission is the ethics, moral concerns, and religious liberty agency for the Southern Baptist Convention, the Nation's largest non-Catholic denomination, with sixteen million members in over 42,000 autonomous local churches. The Commission is charged with addressing issues concerning the family in the legal and legislative arena.

The National Association of Evangelicals. The National Association of Evangelicals is a fellowship of member denominations, churches, organizations, and individuals which stands for biblical truth, speaking with a representative voice, and serving the evangelical community through united action, cooperative ministry, and strategic planning. With a sixty year history, the NAE is the most representative agency of American evangelicals. It provides stability and order for a diverse and competitive movement while providing a respected voice for unvoiced multitudes across the United States. In

accord with its biblical purposes and because of its concern for the culture at large, the National Association of Evangelicals has an interest in protecting marriage as the foundation of the family.

*The Massachusetts Catholic Conference.* The Massachusetts Catholic Conference is the public policy office for the Roman Catholic Church in the Commonwealth, governed by the Ordinary Bishops of the Archdiocese of Boston and the Dioceses of Fall River, Springfield and Worcester. The Massachusetts Catholic Conference advocates the Roman Catholic Church's social justice teaching as applied to public policy issues being debated in the state legislature and courts. The Bishops have consistently spoken out in favor of maintaining the traditional definition of marriage as the union between one man and one woman.

*The Massachusetts State Council of the Knights of Columbus.* The State Council of the Knights of Columbus is a Catholic fraternal insurance organization consisting of approximately 48,000 members in the Commonwealth. The Knights of Columbus aids and assists families, having available life insurance, annuities and long-term care for its members and their families.

*The Greek Orthodox Diocese of Boston and New  
England and His Eminence Metropolitan Methodios, Greek  
Orthodox Presiding Hierarch of Boston and New England.*

The Orthodox Church looks upon marriage as a dynamic love between a particular male and a particular female that choose to unite themselves into one for their journey through life in a love that leads to eternity. In the Orthodox Church marriage is a sacrament, divinely instituted and blessed uniting a male and female. History and tradition, philosophy and religion, ancient and contemporary all point dramatically and clearly to the reality of marriage as the union of both sexes. Any other view is not acceptable to Orthodoxy.

*New England District Church of the Nazarene,  
Quincy, Massachusetts, and its District  
Superintendent, The Rev. Charles E. Zink, Jr.* The New England District of the Church of the Nazarene is comprised of 96 churches and seven New Type Church Missions. The District churches minister to eight different language groups, with upwards of 70% of some congregations being non-English speaking. The Church of the Nazarene and the New England District is committed to strengthening marriages and families

through its local churches and upholds marriage as the union of one man and one woman.

The following individual amici are religious leaders of various faith traditions that uphold the definition of marriage as a union between a man and a woman.

Grand Rabbi Y. A. Korff (JD, LLM, MALD, PhD)  
Chaplain, City of Boston  
Associate Chief Justice, Rabbinic Court of  
Justice of New England  
Associate Rabbinic Administrator, Rabbinical  
Council of New England  
Congregation Bnai Jacob of Boston and Newton  
Boston, Massachusetts (Rabbi Korff joins the  
brief as an individual rather than as a  
representative of any of the organizations  
listed.)

The Rev. Robert E. Baril  
First Assembly of God of Framingham  
Framingham, Massachusetts

The Rev. Steven James Chin, Senior Pastor  
Boston Chinese Evangelical Church  
Boston, Massachusetts

The Rev. James M. Ennis, Senior Pastor  
Church of the Nazarene at Trolley Square  
Framingham, Massachusetts

The Rev. Dick Germaine, Senior Pastor  
First Congregational Church  
Hopkinton, Massachusetts

The Rev. Samuel J. Hollo, Senior Pastor  
Westgate Church  
Weston, Massachusetts

Certificate of Service

I, Daniel Avila, hereby certify that on December 20, 2002, I served the Motion for Leave to File an amicus brief and the foregoing *Amici Curiae Brief of Religious Groups, Individuals, and A Fraternal Organization in Support of Defendants-Appellees* by causing one copy of the motion and two copies of the brief to be mailed, first class postage prepaid, to counsel for the plaintiffs, Mary L. Bonauto, Jennifer L. Levi, Gary D. Buseck, Bennett H. Klein, Karen L. Loewy, GAY & LESBIAN ADVOCATES & DEFENDERS, 294 Washington Street, Suite 301, Boston, Massachusetts 02108-4608, and counsel for the defendants, Judith S. Yogman, Assistant Attorney General, and Anthony E. Penski, Assistant Attorney General, One Ashburton Place, Boston, Massachusetts 02108-1698.



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