

No. 10-16696

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,
v.
ARNOLD SCHWARZENEGGER, et al.,
Defendants,
and
DENNIS HOLLINGSWORTH, et al.,
Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW
The Honorable Vaughn R. Walker

**BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS
IN SUPPORT OF PLAINTIFFS-APPELLEES
AND IN SUPPORT OF AFFIRMANCE**

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INTEREST OF THE *AMICUS*

The Commonwealth of Massachusetts (“Massachusetts”) files this amicus brief in support of Plaintiffs-Appellees Kristin M. Perry, *et al.* as a matter of right pursuant to Fed. R. App. P. 29(a).

Massachusetts was the first state to extend equal marriage rights to same-sex couples and has been licensing those marriages for more than six years. As a state that has experienced firsthand the myriad benefits of marriage for same-sex couples, Massachusetts has an interest in correcting several inaccuracies and misconceptions that Defendants-Intervenors and their *amici* have introduced.

ARGUMENT

On May 17, 2004, Massachusetts became the first state to legally permit same-sex couples to marry. Over the past six years, more than 16,000 same-sex couples have wed here, and Massachusetts is a stronger state because of it. The state's interests in promoting marriage—to provide stability and security in families, efficient allocation of household resources, clear definition of legal relationships, and supportive environments for raising children—have been furthered by extending marriage to more couples willing to assume its obligations, including couples of the same sex. Contrary to the assertions of Defendants-Intervenors and their *amici*, the interests of Massachusetts have been strengthened, not undermined, by allowing same-sex couples to marry.

The residents of Massachusetts—and the institution of marriage within this state—have benefitted from the Massachusetts Supreme Judicial Court's holding in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), that same-sex couples have a constitutional right to marry. Since same-sex couples began marrying here in 2004, Massachusetts' marriage rate has remained stable, its divorce rate has declined, and its nonmarital birth rate has remained well below the national average. Marriage equality has also led to greater acceptance of gays,

lesbians, and their children, increased stability for gay and lesbian families, and improved public health outcomes.

More fundamentally, permitting same-sex couples to marry in Massachusetts has been an important step toward eradicating discrimination against gays and lesbians. As the Supreme Judicial Court explained in *Goodridge*, “[t]he history of constitutional law ‘is the story of the extension of constitutional rights and protections to people once ignored or excluded.’ . . . This statement is as true in the area of civil marriage as in any other area of civil rights.” 798 N.E.2d at 966 (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)). Today, that story includes the extension of equal marriage rights to same-sex couples. The Massachusetts experience wholly contradicts the speculations of Defendants-Intervenors and their *amici* that marriage equality will have negative repercussions. Despite the fears of some,¹ history has proven that marriage in the United States is a strong and adaptable institution. And in Massachusetts, where same-sex couples have been marrying for more than six years, the institution of marriage remains as vibrant as ever.

¹ See, e.g., Tr. 237:12-239:4, 245:19-23 (Cott) (describing the alarms sounded over the legalization of interracial marriage and over the expansion of the rights of married women).

I. ALLOWING SAME-SEX COUPLES TO MARRY HAS HAD A POSITIVE IMPACT ON THE INSTITUTION OF MARRIAGE IN MASSACHUSETTS.

Extending marriage to same-sex couples has benefitted Massachusetts by conferring legal rights and protections to those couples and, thereby, providing their families with greater stability and security. Contrary to the dire predictions of Defendants-Intervenors, gay and lesbian spouses have not eroded the institution of marriage in Massachusetts.

Defendants-Intervenors suggest that permitting same-sex couples to marry will have several negative consequences.² Relying primarily on the opinions of David Blankenhorn,³ they argue that marriage equality will likely “contribute over time to a further social devaluation of marriage, as

² David Blankenhorn refers to these negative consequences as part of the “deinstitutionalization” of marriage. *See, e.g.*, ER 337-41. Blankenhorn has borrowed that term from Johns Hopkins University Professor Andrew Cherlin, a proponent of marriage equality. Tr. 2777:22-2778:10 (Blankenhorn). Yet Blankenhorn has mischaracterized Professor Cherlin’s work, as the District Court noted. ER 81. While Blankenhorn defines deinstitutionalization as occurring when “an institution weakens” or “becomes frailer,” ER 338, Professor Cherlin actually describes deinstitutionalization as “a weakening of the *social norms that define partners’ behavior*,” ER 408 (emphasis added). Professor Cherlin makes clear that the “deinstitutionalization” of marriage began in the 1970s, ER 409, is not a consequence of same-sex couples marrying, ER 410-11, and is not necessarily a negative trend, ER 408.

³ The District Court found that Blankenhorn’s testimony constituted “inadmissible opinion testimony that should be given essentially no weight.” ER 74.

expressed primarily in lower marriage rates, higher rates of divorce and nonmarital cohabitation, and more children raised outside of marriage and separated from at least one of their natural parents.”⁴ Appellants’ Br. 100. None of these predictions has proved to be correct in Massachusetts.

Six years of data show that the negative consequences of marriage equality about which Blankenhorn speculates have simply not occurred in Massachusetts.⁵ When marriages between same-sex couples began here in 2004, Massachusetts’ marriage rate immediately increased, and it has remained at or above the rate it was the year before same-sex couples could marry. Massachusetts’ divorce rate has remained the lowest of any state in the country, and its nonmarital birth rate has remained well below the national average.

⁴ The Commonwealth of Virginia made similar arguments in its brief to the U.S. Supreme Court in *Loving v. Virginia*. See Brief and Appendix on Behalf of Appellee at *47-48, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931. Among other things, Virginia referenced “the higher rate of divorce among the intermarried” and a concern for the well-being of children “who become the victims of their intermarried parents” to justify its anti-miscegenation law. *Id.* (internal quotations omitted); see also Tr. 237:12-239:4 (Cott) (noting that proponents of anti-miscegenation laws argued that the institution of marriage would suffer as a result of interracial marriage).

⁵ Massachusetts does not agree that the statistical categories on which Defendants-Intervenors rely are relevant methods of measuring the strength of marriage in a state. See *infra* Part II.

A. Allowing Same-Sex Couples To Marry Has Had No Impact On Marriage Or Divorce Rates In Massachusetts.

1. Massachusetts' Marriage Rate Increased When Same-Sex Couples Began Marrying And Has Remained High.

The extension of marriage rights to same-sex couples in Massachusetts was accompanied by an immediate increase in the state's marriage rate, and that rate has remained high in the years since. In 2004, when same-sex couples began marrying, Massachusetts' marriage rate (measured in number of marriages per thousand residents) rose by approximately 15% (from 5.6 to 6.5). ER 1415. For the three following years (2005 to 2007), the average annual marriage rate (6.0) was higher than the average rate for the three years preceding the extension of marriage rights to same-sex couples (5.9). *Id.* Massachusetts' marriage rates for 2008 and 2009 were the same as the rate for 2003, the year before same-sex couples could marry. Betzaida Tejada-Vera & Paul D. Sutton, National Center for Health Statistics, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2009*, at 5 (2010), available at http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf; U.S. Census Bureau, *Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009* (2009),

<http://www.census.gov/popest/states/NST-ann-est.html>.⁶ Massachusetts' marriage rate has also fared well when compared with national trends. Massachusetts' rate increased relative to the national marriage rate between 2003 and 2009. *See* Tejada-Vera & Sutton, *supra*, at 5; Census Bureau Population Estimates, *supra*; ER 1415; ER 1412.

2. Massachusetts' Divorce Rate Remains The Lowest Of Any State In The Country.

The Massachusetts experience also directly contradicts Defendants-Intervenors' suggestion that allowing same-sex couples to marry leads to increased rates of divorce. The divorce rate in Massachusetts has been declining for twenty years, and that decline has only continued since same-sex couples began marrying. ER 1363; Tejada-Vera & Sutton, *supra*, at 5; Census Bureau Population Estimates, *supra*. Defendants-Intervenors mischaracterize the data when they claim that the Massachusetts divorce rate increased from 2004 to 2007. Appellants' Br. 101. Although the Massachusetts divorce rate increased by 0.1 in 2006, it consistently has remained lower than it was before same-sex couples were permitted to

⁶ Marriage rates for 2008 and 2009 were calculated by multiplying each year's number of marriages by 1000, then dividing by that year's population, as listed in the Census Bureau population estimate table.

marry.⁷ ER 1363. Massachusetts has had the lowest divorce rate of any state since at least 1990, a trend that continued after marriage for same-sex couples became possible.⁸ See ER 1363; Tejada-Vera & Sutton, *supra*, at 5; Census Bureau Population Estimates, *supra*.

3. Excluding Same-Sex Couples From Marriage Has Not Improved Marriage Or Divorce Rates.

To the extent that Defendants-Intervenors suggest that excluding same-sex couples from the institution of marriage will positively impact marriage and divorce rates, current data do not support that claim. While divorce rates declined in many states between 2003 and 2008, that decline was largely confined to states that had not passed a constitutional ban on same-sex marriage. Nate Silver, *Divorce Rates Higher in States with Gay Marriage Bans*, N.Y. Times FiveThirtyEight Blog, Jan. 12, 2010, <http://www.fivethirtyeight.com/2010/01/divorce-rates-appear-higher-in-states.html>. Divorce rates increased by 0.9% in states with constitutional

⁷ The Massachusetts divorce/annulment rate was 2.5 in 2003, 2.2 in 2004, 2.2 in 2005, 2.3 in 2006, and 2.3 in 2007. ER 1363. The most recent data indicate that the rate fell to 2.0 in 2008 and 1.9 in 2009. Tejada-Vera & Sutton, *supra*, at 5; Census Bureau Population Estimates, *supra*. Divorce rates for 2008 and 2009 were calculated by multiplying each year's number of divorces by 1000, then dividing by that year's population, as listed in the Census Bureau population estimate table.

⁸ From 2002 to 2007, only the District of Columbia had a lower divorce rate than Massachusetts. ER 1363.

bans during that five-year period, while states without bans witnessed an 8.0% decrease in their divorce rates. *Id.* Similarly, by 2009, twenty-seven of the twenty-nine states with constitutional bans had seen their marriage rates decrease since the year preceding the ban. *See* ER 1415; Tejada-Vera & Sutton, *supra*, at 5; Census Bureau Population Estimates, *supra*; Alaska Bureau of Vital Statistics, *1997 Annual Report*, at 77, http://www.hss.state.ak.us/dph/bvs/PDFs/1997/annual_report/marrdiv.pdf; Oklahoma State Department of Health, *Marriage and Divorce Statistics: 1990-2007*, at 3, http://www.ok.gov/health/documents/HCI_Marriage%20and%20Divorce_1990_2007.pdf.

B. Allowing Same-Sex Couples To Marry Has Had No Impact On Nonmarital Births In Massachusetts.

Defendants-Intervenors have also relied on Blankenhorn for the opinion that allowing same-sex couples to marry will lead to an increase in nonmarital births. *See* Appellants' Br. 100; ER 339-40, 342 (Blankenhorn). Once again, Blankenhorn's speculation is unsupported by the facts. Massachusetts' nonmarital birth rate has been well below the national average for years, and that did not change after same-sex couples began to marry.

The nonmarital birth rate increased nationally from 1940 through at least 2007, the most recent year for which nonmarital birth data are

available. Stephanie J. Ventura, National Center for Health Statistics, *Changing Patterns of Nonmarital Childbearing in the United States* 1 (2009), available at www.cdc.gov/nchs/data/databriefs/db18.pdf. Since at least 1993, Massachusetts' nonmarital birth rate has been consistently and significantly below the national rate—a trend that persisted after same-sex couples began to marry.⁹ See Centers for Disease Control and Prevention, National Vital Statistics System, Birth Data Files, <http://205.207.175.93/VitalStats/ReportFolders/ReportFolders.aspx>.¹⁰

More fundamentally, Blankenhorn's position is illogical. Extending marriage to same-sex couples results in more children being raised by married parents. That is true simply because many same-sex couples are raising children together and because many of those couples are getting married. By 2008, approximately 64% of same-sex couples residing in the same household in Massachusetts were married. Tr. 1397:19-23 (Badgett).

⁹ Nationally, nonmarital births climbed from 31.0% of total births in 1993 to 39.7% in 2007. For the same years, the Massachusetts percentage climbed from 26.4% to 33.4%. See Centers for Disease Control and Prevention, National Vital Statistics System, Birth Data Files, <http://205.207.175.93/VitalStats/ReportFolders/ReportFolders.aspx>, and see *infra* note 10.

¹⁰ Follow “Births” hyperlink, then “Tables” hyperlink, then hyperlink for the year needed, then “Demographic Characteristics of Mother by State/County” hyperlink; then drag the “Marital Status - Total” box into the box labeled “Race;” then use the raw number of total births and of nonmarital births to calculate the percentage of nonmarital births for each state and year.

By 2009, 28% of same-sex couples in Massachusetts were raising at least one child. Christopher Ramos et al., The Williams Institute, *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-Sex Couples* 1 (2009), available at http://www.law.ucla.edu/williamsinstitute/publications/Effects_FINAL.pdf.

II. MARRIAGE HAS MAINTAINED A PLACE OF HIGH REGARD IN MASSACHUSETTS.

When the Massachusetts Supreme Judicial Court made marriage equality the law, it did so out of a recognition that the institution of marriage has evolved over time and must continue to do so. *Goodridge*, 798 N.E.2d at 966-67 (“As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm.”). As the Court noted, marriage has survived a variety of transformations, including expansions to provide greater rights for married women and to embrace interracial couples. *Id.* at 967. It is because of this ability to evolve that marriage remains a “vibrant and revered institution” in Massachusetts and throughout the United States today.¹¹ *Id.*

¹¹ At trial, Harvard University Professor Nancy Cott testified that marriage is “alive and vigorous” in the United States today in large part because it is a flexible—not a static—institution. Tr. 331:7-17. Professor Cott compared the institution of marriage with the U.S. Constitution, noting that both have certain “essentials that remain the same over time” but have also had to be “altered to adjust to changing circumstances” in order to remain relevant.

Contrary to the suggestions of Defendants-Intervenors and their *amici*, marriage is not in a state of crisis. *See, e.g.*, Appellants’ Br. 96-97; Amici States’ Br. 15-16. The divorce rate has been declining nationwide for the past quarter century and, in 2009, reached its lowest level since 1970. *See* National Center for Health Statistics, *Summary Report Final Divorce Statistics, 1970*, at 2 (1974); Tejada-Vera & Sutton, *supra*, at 1.

Furthermore, the symbolic importance of marriage remains very high for most Americans. ER 415. Professor Cherlin’s research reveals that while marriage was once “the foundation of adult personal life,” it is now “sometimes the capstone.” *Id.* Americans are increasingly postponing marriage until they “are sure they can do it successfully,” for instance, waiting until they are financially stable or have obtained steady employment. *Id.* Indeed, the median age at first marriage in this country is currently 28 for men (as compared with 23 in 1970) and 26 for women (as compared with 21 in 1970). *See* U.S. Census Bureau, *Table MS-2, Estimated Median Age at First Marriage, by Sex: 1890 to the Present* (2009), available at <http://www.census.gov/population/socdemo/hh-fam/ms2.xls>.

Tr. 331:13-17. Indeed, marriage has embraced equal rights for newly-freed slaves, SER 103-04 (Cott), for women, *see, e.g., Bradford v. City of Worcester*, 69 N.E. 310 (Mass. 1904), and for interracial couples, *see Loving v. Virginia*, 388 U.S. 1 (1967).

Despite the fact that couples are waiting longer to get married, regard for marriage remains higher in the United States than in other developed countries. Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, *Future Child.*, Fall 2005, at 44. As Professor Cherlin points out, one need look no further than the marriage equality debate to know that marriage is as highly valued by gays and lesbians as it is by heterosexual couples. *Id.* at 43. Extending equal marriage rights to same-sex couples, far from eroding the institution as Blankenhorn suggests, works to reinforce the importance of marriage by allowing those who believe in its value to be a part of it. *See Goodridge*, 798 N.E.2d at 965 (“That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.”); *see also* Tr. 252:20-23 (Cott) (“[B]y excluding same-sex couples from the ability to marry and engage in this highly-valued institution, . . . society is actually denying itself another . . . resource for stability and social order.”).¹²

In Massachusetts, where marriage has evolved to embrace same-sex couples, the institution is thriving. A 2009 poll demonstrated that

¹² Professor Cott suggested that eliminating restrictions on marriage has “helped to give it new reverence in recent years,” which has in turn improved public opinion regarding the value of marriage as an institution. SER 129.

Massachusetts residents overwhelmingly believe that extending marriage to same-sex couples has been good for families and good for society, because it encourages responsibility, commitment, and family-building. Marriage Equality Works for Massachusetts, *5th Anniversary Voter Survey 5* (2009), available at <http://www.massequality.org/sites/default/files/marriage-equality-works-survey-report.pdf>. Sixty-seven percent of those surveyed agreed that “it’s better for Massachusetts that more couples can get married and raise families.” *Id.* at 7; *see also* Tr. 1361:14-17 (Badgett).

III. MASSACHUSETTS’ INTERESTS IN MARRIAGE ARE FURTHERED BY EXTENDING MARRIAGE TO MORE COMMITTED COUPLES AND BEAR NO RELATIONSHIP TO THE SEXUAL ORIENTATION OF THE SPOUSES.

As in California, there are thousands of gay men and lesbians in Massachusetts who have entered into committed relationships and, in many instances, are raising children together. Excluding these couples from marriage is irrational and only undermines the purposes of marriage. As the District Court noted, marriage implicates numerous state interests, ER 102-06, none of which depend upon the sexual orientation of the couple.

Extending marriage to same-sex couples has furthered Massachusetts’ interests in promoting marriage, and the Massachusetts experience belies the contention of Defendants-Intervenors and their *amici* that marriage should be limited to different-sex couples.

Because of the Supreme Judicial Court’s decision in *Goodridge*, same-sex couples in Massachusetts can avail themselves of the protections and benefits of marriage, which touch “nearly every aspect of life and death” for those couples and their families. *Goodridge*, 798 N.E.2d at 955.

Marriage equality therefore improves the economic stability and well-being of families throughout Massachusetts, which is a compelling interest for any state.

A. Marriage Provides Numerous Legally-Recognized Protections To Same-Sex Couples.

As a legal matter, there are myriad ways in which marriage affects a couple. Same-sex married couples in Massachusetts can now file joint state income tax returns, rather than having to subdivide themselves into two economic units, Mass. Gen. Laws ch. 62C, § 6, and they have increased protections against creditors upon the death of a spouse, *see, e.g.*, Mass. Gen. Laws ch. 184, §7. *See also Goodridge*, 798 N.E.2d at 955. Same-sex spouses have the right to make medical decisions for an incompetent spouse, *see Goodridge*, 798 N.E.2d at 956, the right to share their spouse’s medical insurance policy, Mass. Gen. Laws ch. 175, § 108, and the right to have that health coverage continue for a period after a spouse’s death, *id.* § 110G. *See also Goodridge*, 798 N.E.2d at 955-56. Same-sex spouses may collect wages owed to a deceased spouse, Mass. Gen. Laws ch. 149, §§ 178A,

178C, and have the right to bring claims for wrongful death and loss of consortium, Mass. Gen. Laws ch. 229, §§ 1, 2. *See also Goodridge*, 798 N.E.2d at 955-56. By extending marriage to same-sex couples, Massachusetts has granted those couples much greater security and stability through legally-recognized rights and responsibilities.¹³

B. Marriage Benefits The Children Of Same-Sex Couples.

The children of same-sex couples have also benefitted from the extension of equal marriage rights in Massachusetts. As the Supreme Judicial Court explained in *Goodridge*, excluding same-sex couples from marriage can hurt the children those couples are raising. *Goodridge*, 798 N.E.2d at 963-64 (“[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws.”); *see also Baker v. State*, 744 A.2d 864, 882 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196, 216-17 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting).

Marriage improves the lives of the children of same-sex couples in a number of ways. Most notably, it strengthens the stability of those

¹³ Prior to 2004, same-sex couples had to find alternative methods of garnering some of the legal protections that marriage provides. Those efforts were expensive and time-consuming, and often ineffective and inadequate. *See Note, Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 Harv. L. Rev. 2684, 2706-07 (2004).

children's families through, for instance, enhanced access to medical insurance, tax benefits, and estate and homestead protections. *See Goodridge*, 798 N.E.2d at 956. Additionally, if a married same-sex couple divorces, the couple's children are protected by the certain application of rules of child custody, visitation, and support. *Id.*

The Massachusetts experience with marriage for same-sex couples reaffirms this prevailing wisdom. A 2009 statewide survey conducted by the Massachusetts Department of Public Health found that 93% of married gay and lesbian parents in the state believe their children are happier and better off as a result of their marriages. Ramos et al., *supra*, at 1. Married same-sex parents also reported that their children "felt more secure and protected," had "gained a sense of stability," and saw "their families as being validated or legitimated by society or the government," which sometimes increased those children's sense of being connected to their family members. *Id.* at 9. Indeed, even Blankenhorn acknowledged that the children of same-sex couples benefit from the extension of equal marriage rights to their parents. *See* SER 291 ("[I]t is almost certainly true that gay and lesbian couples and their children would benefit by having gay marriage.").

C. Marriage Creates A Private Safety Net.

Marriage also ensures that members of the familial unit are not alone in a time of crisis. The stability and security of marital relationships give individuals an important safety net and prevent them from having to rely on the state. ER 102-03. Marriage is “a strong signal of commitment” that creates an expectation that the two individuals will remain together and support each other, even as a “family’s economic fortunes might change.” *See* Tr. 1335:1-7, 1333:21-23 (Badgett). Massachusetts’ interest in the private forms of support that marriage affords is not reasonably limited to different-sex couples. *See Goodridge*, 798 N.E.2d at 954-58.

D. Marriage Promotes Household Stability And The Efficient Allocation Of Household Resources.

The interdependency created by marriage’s rights and protections also promotes household stability and enables the efficient allocation of household resources. Married couples can more effectively specialize their labor and reduce their cost of living. *See* Tr. 1332:24-1334:17 (Badgett). Spouses can also invest in one another’s education and career development, which has long-term benefits for the couple and for the state of Massachusetts. Tr. 1333:8-13 (Badgett). Marriage allows a couple to presume that their relationship will last for the long term and, if it does not, that the state will ensure an equitable division of marital property, as well as

potential alimony or child-support payments. Marriage also gives a couple the security to make decisions about education and labor force participation knowing that, if one spouse provides the primary economic support, the other spouse will be protected in the event of divorce or death. Tr. 1134:19-1135:9 (Badgett). Massachusetts' interests in household stability and the efficient distribution of household resources—like all of the other interests described above—are furthered by extending marital protections to same-sex couples. *See Goodridge*, 798 N.E.2d at 963-64.

IV. ALLOWING SAME-SEX COUPLES TO MARRY ADVANCES MASSACHUSETTS' GOALS OF ERADICATING DISCRIMINATION AND PROMOTING PUBLIC HEALTH AND WELFARE.

Separate and apart from Massachusetts' interests in promoting marriage, extending equal marriage rights advances two paramount state interests: eliminating inequality and improving public health.

A. The *Goodridge* Decision Is One Of Several Steps That Massachusetts Has Taken To Eradicate Discrimination Against Gays And Lesbians.

The *Goodridge* decision reflects one of many steps Massachusetts has taken to end sexual orientation discrimination in this state. Initial efforts included extending equal custody, visitation, and adoption rights to gays and lesbians, as well as passing laws protecting gays and lesbians from hate crimes and discrimination in housing, employment, and places of public

accommodation. Extending marriage rights to same-sex couples was a necessary continuation of these efforts to ensure equality under the laws.

1. Massachusetts Has Taken Steps To Address Discrimination Against Gays And Lesbians.

Massachusetts, like many other states, had an anti-sodomy statute that was enforced. *See* Mass. Gen. Laws ch. 272, §§ 34, 35. Gay and lesbian people were considered mentally ill and were discriminated against in employment, in public accommodations, and by the police. *See generally* Tr. 361-394 (Chauncey); *see also* William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 841-42 (1997) (describing waves of police harassment and brutality against gay people in cities across the nation, including Boston).

In the early 1980s, Massachusetts courts took the first step forward in protecting the rights of gays and lesbians by holding that sexual orientation was not a proper basis for denying custody or visitation. *See Bezio v. Patenaude*, 410 N.E.2d 1207, 1215-16 (Mass. 1980) (concluding that the fact that a mother was a lesbian did not render her unfit to further her children's welfare); *Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983). In 1989, the Legislature amended the state anti-discrimination statute, Mass. Gen. Laws ch. 151B, as well as the public accommodation

law, Mass. Gen. Laws ch. 272, §§ 92A, 98, to include sexual orientation as a protected class.

These developments continued in the 1990s. In 1993, the Supreme Judicial Court permitted the adoption of a child by the birth mother's same-sex partner. *Adoption of Tammy*, 619 N.Ed.2d 315 (Mass. 1993); *Adoption of Susan*, 619 N.E.2d 323 (Mass. 1993). That same year, the Massachusetts Legislature included sexual orientation in the non-discrimination law that applies to schools. Mass. Gen. Laws ch. 76, § 5. In 1996, the Legislature amended the state's hate crime statute to include punishments for bias-motivated crimes committed on the basis of sexual orientation. Mass. Gen. Laws ch. 265, § 39. More recently, the Legislature passed anti-bullying legislation, responding in part to bullying incidents against lesbian, gay, bisexual, and transgender students. Mass. Gen. Laws ch. 71, § 370.

2. Extending Equal Marriage Rights Has Been A Continuation Of Massachusetts' Efforts To Address Discrimination.

Despite all of these efforts, the Supreme Judicial Court determined that discrimination persisted in Massachusetts as a result of gays' and lesbians' inability to marry:

The withholding of relief from the plaintiffs, who wish to marry, and are otherwise eligible to marry, on the ground that the couples are of the same gender . . . creates a straightforward case of discrimination that disqualifies an entire group of our

citizens and their families from participation in an institution of paramount legal and social importance.

Goodridge, 798 N.E.2d at 970 (Greaney, J., concurring). Denying access to marriage precluded gays and lesbians from the “full range of human experience,” *id.* at 957, and “work[ed] a deep and scarring hardship on a very real segment of the community for no rational reason,” *id.* at 941. The Supreme Judicial Court reinforced this notion when it ruled unconstitutional a civil union proposal from the Legislature, which would have extended all legal rights attendant to marriage. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004) (“Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status.”).¹⁴

¹⁴ Following *Goodridge*, Massachusetts has taken further steps to ensure equality for gays and lesbians. On July 31, 2008, the Legislature signed into law the MassHealth Equality Act, Mass. Gen. Laws ch. 118E, § 61, which guarantees equal access to Medicaid benefits. And, on July 8, 2009, Massachusetts, by its Attorney General, filed a lawsuit challenging the constitutionality of Section 3 of the federal Defense of Marriage Act, which limits the definition of marriage to a legal union between one man and one woman. On July 8, 2010, the District Court held that Section 3 exceeded Congressional authority and struck it down. *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010). See also *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

**B. Extending Legal Protections To Gays And Lesbians
Furtheres Massachusetts' Interest In Promoting The Public
Health Of Its Residents.**

It is in a state's interest to protect its residents from the harms of discrimination and social stigma. *See, e.g., Alfred L. Snapp & Son., Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982) (“This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.”). Inequality under the law can lead to both, which can cause significant public health problems. *See* Tr. 2051:23-2053:18 (Herek) (discussing how structural stigma sanctioned by law “gives a level of permission to denigrate or attack particular groups”); Tr. 821:22-822:5, 832:1-18, 846:22-847:12, 870:23-872:21 (Meyer). Studies have firmly established the general psychological benefits of marriage and the detriments of discrimination, and emerging research indicates that legal protections, including marriage, have a substantial beneficial effect on the mental health of gays and lesbians.

Recent studies have concluded that laws extending rights and protections have a positive effect on the health of gays, lesbians, and their children. These studies show that gays and lesbians living in states with protective policies are significantly less likely to suffer from psychiatric

disorders than their counterparts living in states without such policies. Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, Am. J. Pub. Health, December 2009, at 2275, 2275.¹⁵ And emerging data from Massachusetts specifically indicate that, in the twelve months after the *Goodridge* decision, gay men experienced a statistically significant decrease in medical care visits, mental health care visits, mental health care costs, and diagnoses of depressive and substance abuse disorders, compared to the twelve months before the law change. Mark L. Hatzenbuehler et al., *The Impact of Same-Sex Marriage Laws on Health Care Utilization and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment* (2010) (under review, on file with author).

Research has also established that different-sex married couples enjoy greater physical and psychological health and greater economic prosperity than unmarried persons. Tr. 578:2-25 (Peplau). Same-sex couples “are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions,” ER 112, and therefore “receive the same tangible and intangible benefits from marriage that opposite-sex couples receive,” ER 114.

¹⁵ The study compared states that extend protections to gays and lesbians from hate crimes and employment discrimination with states that do not extend such protections.

CONCLUSION

At the conclusion of the Supreme Judicial Court's opinion in

Goodridge, Chief Justice Margaret Marshall wrote:

Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.

798 N.E.2d. at 965. Almost seven years later, marriage remains a vital institution in Massachusetts, one strengthened by including same-sex couples. The state, its families, and its children have benefitted in many ways from ensuring equal opportunity under the law for gays and lesbians.

Massachusetts therefore respectfully requests that this Court affirm the District Court's holding that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

October 25, 2010

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,254 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 word processing software in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2010.

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