

FILED  
MAR 28 2008  
IOWA SUPREME COURT

IN THE SUPREME COURT FOR THE STATE OF IOWA

KATHERINE VARNUM, et al.

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Supreme Court No. 07-1499

Plaintiffs/Appellees,

Polk County CVCV 005965

vs.

TIMOTHY J. BRIEN, in his official  
capacities as the Polk County Recorder  
and Polk County Registrar,

Defendant/Appellant.

Appeal from the Iowa District Court for Polk County  
The Honorable, Robert Hanson, District Judge

BRIEF *AMICI CURIAE* OF MASSEQUALITY, MASSACHUSETTS GAY AND  
LESBIAN POLITICAL CAUCUS, GAY & LESBIAN ADVOCATES & DEFENDERS,  
MASSACHUSETTS STATE SEN. EDWARD M. AUGUSTUS, JR., MASSACHUSETTS  
STATE REP. CHRISTINE E. CANAVAN, MASSACHUSETTS STATE SEN. CYNTHIA  
STONE CREEM, MASSACHUSETTS STATE REP. PAUL KUJAWSKI, MASSACHUSETTS  
STATE REP. PAUL J. LOSCOCCO, MASSACHUSETTS STATE REP. ELIZABETH A.  
MALIA, MASSACHUSETTS STATE REP. SARAH K. PEAKE, MASSACHUSETTS STATE  
REP. CARL M. SCIORTINO, MASSACHUSETTS STATE SEN. RICHARD R. TISEI,  
EQUALITY FEDERATION, GARDEN STATE EQUALITY, LOVE MAKES A FAMILY,  
VERMONT FREEDOM TO MARRY TASK FORCE, HUMAN RIGHTS CAMPAIGN,  
HUMAN RIGHTS CAMPAIGN FOUNDATION AND NATIONAL GAY AND LESBIAN  
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IN SUPPORT OF PLAINTIFFS-APPELLEES

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PROOF OF SERVICE AND CERTIFICATE OF FILING

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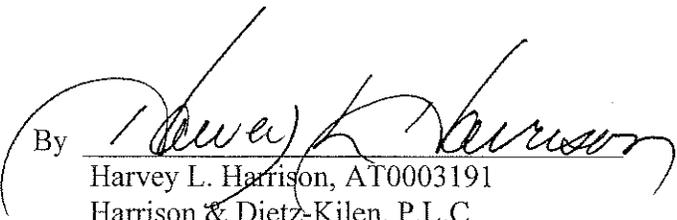
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## STATEMENT OF *AMICI CURIAE*

*Amicus Curiae* MassEquality is a coalition of a number of local organizations that was formed after the Massachusetts Supreme Judicial Court's ("SJC") decision in Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003), to defend marriage equality and to defeat proposed constitutional amendments that sought to overturn Goodridge. MassEquality coordinated communications and meetings between married same-sex couples and state legislators, educated the public about the lives of lesbian and gay families and their children and how marriage protects them, organized religious, business, labor and other communities in support of marriage equality, and supported pro-marriage equality candidates for legislative and state-wide offices. *Amicus Curiae* Massachusetts Gay and Lesbian Political Caucus, founded in 1973, has worked to establish civil rights for the gay, lesbian, bisexual and transgender community in Massachusetts and to defeat anti-gay marriage laws and constitutional amendments. *Amicus Curiae* Gay & Lesbian Advocates & Defenders ("GLAD") is a New England-wide legal rights organization that works to end discrimination based upon sexual orientation, HIV status, and gender identity and expression. GLAD has been lead or co-counsel in three cases seeking to establish marriage equality for same-sex couples: Goodridge; Baker v. Vermont, 744 A.2d 864 (Vt. 1999); and Kerrigan v. Dep't of Pub. Health, Connecticut Supreme Court, No. 17716 (argued May 14, 2007 and decision pending).

The following *Amici Curiae* are Massachusetts state legislators. State Senator Edward M. Augustus, Jr. (D) has represented parts of Worcester County since 2005. State Representative Christine E. Canavan (D) has represented the 10th District (Plymouth County) since 1993. State Senator Cynthia Stone Creem (D) has represented parts of Middlesex and

Norfolk Counties since 1999. State Representative Paul Kujawski (D) has represented the 8th District (Worcester County) since 1994. State Representative Paul J. Loscocco (R) has represented the 8th District (Middlesex County) since 2001. State Representative Elizabeth A. Malia has represented the 11th District (Suffolk County) since 1998. State Representative Sarah K. Peake (D) has represented the 4th District (Barnstable County) since 2007. State Representative Carl M. Sciortino, Jr. (D) has represented the 34th District (Middlesex County) since 2005. State Senator and Minority Leader Richard R. Tisei (R) has represented parts of Middlesex and Essex Counties since 1991.

These *Amici* (hereinafter “Massachusetts *Amici*”) are organizations and state legislators intimately familiar with the legal, political and social landscape in which marriage equality for same-sex couples in Massachusetts was secured and maintained. In the wake of Goodridge, some opponents of equal marriage rights have made charges of “judicial activism” and predicted negative social consequences in Massachusetts. The Massachusetts *Amici* submit this brief to convey to this Court that the process by which Massachusetts came to embrace marriage equality for same-sex couples involved far more than the judicial branch playing its proper role interpreting the state constitution. In fact, over a period of several years, the citizens engaged in robust democratic participation, and all three branches of government played their critical constitutional roles in ultimately upholding marriage equality. *Amici Curiae* State Representatives Christine E. Canavan (D), Paul J.P. Loscocco (R), and Paul Kujawski (D) are three examples of legislators whose positions on marriage equality evolved from supporting to opposing proposed constitutional amendments to reverse Goodridge. The Massachusetts *Amici* also wish to convey to this Court that the specter of harm to families and social institutions raised by opponents of marriage equality has been

totally unfounded. In the end, the thousands of marriages performed in the years following Goodridge provided a powerful learning process through which the political branches and society at large came to understand how marriage equality only strengthens all families in Massachusetts.

*Amicus Curiae* Equality Federation is a network of 50 state-based organizations committed to securing full civil rights for lesbian, gay, bisexual and transgender citizens. *Amici Curiae* Garden State Equality, Love Makes a Family and Vermont Freedom to Marry Task Force are the state-wide organizations in New Jersey, Connecticut and Vermont, respectively, that seek to establish civil rights and marriage equality for the lesbian, gay, bisexual and transgender (LGBT) communities. Each of these organizations has first-hand knowledge of the experience with civil union laws in those states. *Amicus Curiae* Human Rights Campaign is the largest national lesbian, gay, bisexual and transgender political organization, with over 700,000 members and supporters, including more than 3,000 in the state of Iowa. *Amicus Curiae* Human Rights Campaign Foundation is its affiliated organization whose work includes public education, legal and policy work relating to lesbian and gay families. *Amicus Curiae* National Gay and Lesbian Task Force, founded in 1973, is the oldest national LGBT civil rights and advocacy organization, working to build the grassroots political power of the LGBT community.

Some may urge this Court to adopt a separate institution and status for same-sex couples (e.g. civil unions) as a remedy for the constitutional harm in this case. All of the *Amici* who are signatories to this brief, however, also wish to convey that civil unions fail to provide full equality to same-sex couples and, as a practical matter, can never be the equivalent of marriage.

## ARGUMENT

### I. MASSACHUSETTS' EXPERIENCE HAS DEMONSTRATED THAT ALL PARTS OF DEMOCRATIC SOCIETY PARTICIPATED IN PRESERVING AND SECURING MARRIAGE EQUALITY.

In November 2003, the SJC became the first court in the nation to end the historical exclusion of same-sex couples from marriage. See Goodridge, 798 N.E.2d at 968 (2003). It is neither surprising nor unprecedented in our nation's history that a landmark legal decision brings not only jubilation and social progress, but also charges by some of "judicial activism" as well as anxieties about negative consequences.<sup>1</sup> The Massachusetts *Amici* have firsthand knowledge that in Massachusetts, all branches of government and the public at large fully engaged in their proper democratic and constitutional roles from the date of the Goodridge decision to the present. After unprecedented public attention brought to the marriages of same-sex couples, numerous legislative debates and votes on proposed constitutional amendments, meetings between constituents and representatives, electoral victories for pro-equality candidates, public discourse in the media, and normal, everyday conversations between neighbors, friends and family members, what became clear to the people of Massachusetts was that marriage equality strengthened the entire Commonwealth and did not result in any harm to any families or social institutions.

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<sup>1</sup> For example, after Brown v. Bd. of Educ., 347 U.S. 483, 74 S. Ct. 686 (1954), almost 100 Southern congressmen signed the Southern Manifesto in 1956, criticizing the Supreme Court for a "clear abuse of judicial power" and called on "all lawful means to bring about a reversal of this decision which is contrary to the Constitution." Carlos A. Ball, The Backlash Thesis and Same-Sex Marriage: Learning From Brown v. Board Of Education and its Aftermath, 14 Wm. & Mary Bill Rts. J. 1493, 1508 (2006). Likewise, in Perez v. Sharp, 198 P.2d 17 (Cal. 1948) (overturning California's anti-miscegenation law), Justice Shenk wrote in dissent: "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. The purity of the public morals, the moral and physical development of both races, and the highest advancement of civilization, under which the two races must work out and accomplish their destiny, all require that they should be kept distinctly separate, and that connections and alliances so unnatural should be prohibited by positive law and subject to no evasion." Id. at 41 (quoting Eggers v. Olson, 231 P. 483 (Okla. 1924)).

**A. The SJC Paved The Way Toward Marriage Equality With Goodridge And Opinions of the Justices.**

On November 18, 2003, the SJC held in Goodridge that the Massachusetts Constitution required equal marriage rights for its gay and lesbian citizens. Finding that “the marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason,” 798 N.E.2d at 968, the SJC “conclude[d] that the marriage ban does not meet the rational basis test for either due process or equal protection.” Id. at 961. Instead, the SJC construed civil marriage “to mean the voluntary union of two persons as spouses, to the exclusion of all others.” Id. at 969. As part of its order, the SJC issued a stay “for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.” Id. at 970.

Within a month of the Goodridge ruling, members of the State Senate drafted a proposed “civil unions law” and asked the SJC for an advisory opinion on that bill’s constitutionality in light of Goodridge. See Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004). Specifically, the proposed bill “prohibit[ed] same-sex couples from entering into marriage but allow[ed] them to form civil unions with all ‘benefits, protections, rights and responsibilities’ of marriage.” Id. at 566. The SJC answered by affirming its decision in Goodridge and holding that “[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.” Id. at 571 (emphasis in original).

**B. Robust Civic Engagement And Democratic Participation Affirmed Marriage Equality.**

**1. The Legislatively-Initiated Proposed Constitutional Amendment.**

As the role of the SJC diminished, the other branches of government and individual citizens engaged in the political and civic process in determining whether to uphold marriage

equality in the Commonwealth. Only one week after the Opinions of the Justices and before the citizens of Massachusetts had the full opportunity to comprehend the benefits of protecting gay and lesbian families through marriage equality, the Legislature convened a previously scheduled constitutional convention on February 11, 2004. At this convention, it considered a legislative response to Goodridge, including a previously filed constitutional amendment proposal to deny marriage but offer civil unions to same-sex couples.<sup>2</sup> On March 29, 2004, after four sessions of debate and discussion, the 2004 constitutional convention approved by a vote of 105-92 a “compromise” measure providing for civil unions for same-sex couples and reversing Goodridge’s provision of equal marriage rights.<sup>3</sup>

Following that close vote in March, on May 17, 2004, the 180-day stay of Goodridge expired.<sup>4</sup> That very day, over 1000 same-sex couples sought marriage licenses.<sup>5</sup> By

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<sup>2</sup> Frank Phillips & Raphael Lewis, Two Marriage Amendments Fail, The Boston Globe, February 12, 2004, at A1, available at [http://www.boston.com/news/specials/gay\\_marriage/articles/2004/02/12/two\\_marriage\\_amendments\\_fail\\_lawmakers\\_to\\_reconvene\\_today/](http://www.boston.com/news/specials/gay_marriage/articles/2004/02/12/two_marriage_amendments_fail_lawmakers_to_reconvene_today/). In order for a legislatively-initiated proposed constitutional amendment to be placed on the general ballot, it must first gain a majority vote (101 out of 200 members) at a constitutional convention (i.e. a joint session of both chambers of the Massachusetts legislature) for two consecutive legislative sessions, each being separated by an intervening election. Mass. Const., Article XLVIII, IV, §§ 1-5.

<sup>3</sup> Journal of the Senate in Joint Session, March 29, 2004 (Mass.).

<sup>4</sup> Both prior to and through the commencement of equal marriage rights on May 17, 2004, Governor Mitt Romney both used the bully pulpit of his office to oppose marriage equality and performed his constitutional role as head of the Executive Branch. He came out early in his opposition to marriage equality and in support of the various proposed constitutional amendments to reverse Goodridge. As May 17, 2004 approached, he unsuccessfully requested that the attorney general seek further stay of the Goodridge opinion from the SJC. Frank Phillips & Kathleen Burge, Reilly Gives Governor a Hurdle, The Boston Globe, March 30, 2004, at A1, available at [http://www.boston.com/news/specials/gay\\_marriage/articles/2004/03/30/reilly\\_gives\\_governor\\_a\\_hurdle/](http://www.boston.com/news/specials/gay_marriage/articles/2004/03/30/reilly_gives_governor_a_hurdle/). Governor Romney also promulgated new marriage procedures to municipal clerks, including an amended “Notice of Intention of Marriage” form, instructing them not to allow out-of-state same-sex couples who lacked intent to permanently reside in Massachusetts from obtaining marriage licenses. This instruction conformed to his interpretation of a state law that prevents the contracting of marriage by “a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction.” See Cote-Whitacre v. Dep’t of Pub. Health, 844 N.E.2d 623, 631-32 (Mass. 2006) (upholding superior court’s refusal to enjoin state from denying marriage licenses to out-of-state couples). Governor Romney also helped implement marriage equality by reminding state justices of the peace of their obligation not to discriminate against same-sex couples in officiating ceremonies, as well as by changing the state marriage application to list “Party A” and “Party B,” instead of “Bride” and “Groom. Jennifer Peter, Justices of the Peace Warned Not to Discriminate Against Same Sex Couples, Associated Press, April 25, 2004.

December 31 of that year, nearly 6000 same-sex couples had married.<sup>6</sup>

With marriage equality a reality in Massachusetts, the public was finally able to observe and participate in the celebrations of happiness, love and joy with their neighbors, friends and families. As the former chairman of The Bank of America and his wife explained in a Boston Globe opinion article:

Despite predictions, we have not witnessed any threat to so-called “traditional marriage.” There has not been an attack on family and almost all would admit that very little has changed. In fact, however, something has changed. Many of our citizens have experienced the joy of marriage for the first time where the laws of our state have said, “You are equal.” We have seen that joy in our son.<sup>7</sup>

The reality of same-sex couples marrying also helped many legislators better understand the lives of their gay and lesbian constituents. For example, Representative Richard Ross reported that his past views opposing marriage equality evolved after meeting with married gay constituents and having the “fear of the unknown” behind him. He said, “When you start to understand the legal challenge that gay couples face, and now they’ve been allowed to marry, it throws a whole lot into the mix that allows you to take away the prejudice, if you will.”<sup>8</sup> As a result, Representative Ross switched his prior position opposing marriage equality.<sup>9</sup>

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<sup>5</sup> Yvonne Abraham & Michael Paulson, Wedding Day First Gays Marry; Many Seek Licenses, The Boston Globe, May 18, 2004, at A1, available at [http://www.boston.com/news/specials/gay\\_marriage/articles/2004/05/18/wedding\\_day/](http://www.boston.com/news/specials/gay_marriage/articles/2004/05/18/wedding_day/).

<sup>6</sup> See Massachusetts Executive Office of Health and Human Services, Dep’t of Public Health, Registry of Vital Statistics, Table 1 (preliminary number of marriage certificates issued and registered in Massachusetts from May 17, 2004 to December 31, 2004 by month), available at <http://www.glad.org/marriage/RVRS/MarriageStatistics05-03-2005.pdf>.

<sup>7</sup> Anne & Chad Gifford, Our Family’s Values, The Boston Globe, May 17, 2005, at A15, available at [http://www.boston.com/news/specials/gay\\_marriage/articles/2005/05/17/our\\_familys\\_values/](http://www.boston.com/news/specials/gay_marriage/articles/2005/05/17/our_familys_values/).

<sup>8</sup> Emelie Rutherford, Gay Marriage Debate: Some Local Legislators Rethink Their Opposition, Metrowest Daily News, September 4, 2005.

<sup>9</sup> Journal of the House in Joint Session, September 14, 2005, at 622 (Mass.).

Commentators and citizens also came to reject the argument that allowing same-sex couples to marry would somehow hurt the Commonwealth. As The Boston Globe stated in its May 17, 2005 editorial commemorating the first anniversary of marriage equality, “It strains the imagination to see how a year of gay marriage has caused the state any discernible harm.”<sup>10</sup> Similarly, The Republican (covering Springfield and western Massachusetts) observed: “[E]ven some of [the] most vocal opponents have come to realize that the controversy over gay marriage was a lot of fuss about nothing.”<sup>11</sup> As Senator Frederick E. Berry (who also changed his mind and opposed the proposed amendment) aptly stated: “There were no earthquakes.”<sup>12</sup>

The electorate also voiced its clear opinion in the November 2004 state elections. Every single marriage equality supporter in the legislature was re-elected.<sup>13</sup> Marriage equality supporters also uniformly won seats vacated by marriage equality opponents.<sup>14</sup> An openly gay candidate defeated an opponent of marriage equality, a long-time incumbent in his district.<sup>15</sup> In addition, marriage equality supporters won an unusually high number of primary and special elections in 2004 and 2005, including the vote to replace House Speaker Thomas

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<sup>10</sup> Editorial, Happy Anniversary, The Boston Globe, May 17, 2005, available at [http://www.boston.com/news/globe/editorial\\_opinion/editorials/articles/2005/05/17/happy\\_anniversary/](http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2005/05/17/happy_anniversary/).

<sup>11</sup> Editorial, Honeymoon is Over for Gay Marriage Foes, The Republican, June 22, 2005, at A8.

<sup>12</sup> Raphael Lewis, Key Senators Break from Travaglini Amendment, The Boston Globe, September 7, 2005, at B1, available at [http://www.boston.com/news/local/massachusetts/articles/2005/09/07/key\\_senators\\_break\\_from\\_travaglini\\_amendment/](http://www.boston.com/news/local/massachusetts/articles/2005/09/07/key_senators_break_from_travaglini_amendment/).

<sup>13</sup> Laura Kiritsy, State Results Buoy Hope Of Defeating Amendment, Bay Windows, November 4, 2004, available at [http://www.massequality.org/news/news\\_story.php?id=39](http://www.massequality.org/news/news_story.php?id=39).

<sup>14</sup> Id.

<sup>15</sup> Id.; Raphael Lewis, A Rift On Gay Unions Fuels A Coup At Polls – How A Somerville Activist Ousted A Fixture, The Boston Globe, September 26, 2004, at B1, available at [http://www.boston.com/news/politics/primaries/massachusetts/articles/2004/09/26/a\\_rift\\_on\\_gay\\_unions\\_fuels\\_a\\_coup\\_at\\_polls?pg=3](http://www.boston.com/news/politics/primaries/massachusetts/articles/2004/09/26/a_rift_on_gay_unions_fuels_a_coup_at_polls?pg=3) (anti-gay marriage incumbent ousted by openly gay challenger in primary).

Finneran, an opponent of marriage equality, who had resigned his seat.<sup>16</sup> As The Boston Globe commented:

[T]he people have been heard. They have been heard through their elected representatives, a majority of whom told the Associate Press last week that they would not vote to ban gay marriage. They have been heard at the polls, where every challenger to a supporter of gay marriage was defeated in the 2004 election. They have been heard in public opinion polls, where 56 percent of Massachusetts voters in a Boston Globe poll this March said gay marriage should be allowed as law. And they have been heard in the loving acceptance of gay married couples and their children in communities as varied as Dracut and Newton.<sup>17</sup>

In September 2005, the newly elected legislature considered again the proposed constitutional amendment that had initially passed in March 2004. This time around, however, a former opponent of marriage equality, Senate Minority Leader Brian Lees, set the tone for the convention:

Today, gay marriage is the law of the land. To outlaw the marriages of gay and lesbian couples is more than legislating the status of hypothetical couples in the future. I received over 7,000 letters, emails and phone calls from people. The majority of people asked me to vote against this proposal. Gay marriage has begun and life has not changed for the citizens of the Commonwealth with the exception of those who can marry who could not before. That is why I would vote no today on this amendment.<sup>18</sup>

Senator Lees was not the only one to repudiate his past support for a constitutional

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<sup>16</sup> Brock Parker, Jehlen Wins Senate Seat, Somerville Journal, September 29, 2005, available at [http://www.massequality.org/news/news\\_story.php?id=136](http://www.massequality.org/news/news_story.php?id=136) (marriage-equality supporter elected to state Senate); Massachusetts Voters Support Pro-Gay Candidates In Primary, The Advocate, March 15, 2005, available at [http://www.massequality.org/news/news\\_story.php?id=28](http://www.massequality.org/news/news_story.php?id=28) (describing victory of three marriage-equality supporters in primaries for seats vacated by the retirement of opponents of marriage equality); Margery Eagan, Rep Fills Finneran's Shoes – In Heels, Boston Herald, March 17, 2005, at 8 (Finneran's replacement a marriage-equality supporter); Jack Dew, Speranzo Wins Easily, The Berkshire Eagle, April 13, 2005 (describing win of another marriage-equality supporter in a special election triggered by a resignation).

<sup>17</sup> Editorial, Equal Voices, The Boston Globe, September 13, 2005, at A18, available at [http://www.boston.com/news/globe/editorial\\_opinion/editorials/articles/2005/09/13/equal\\_voices/](http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2005/09/13/equal_voices/).

<sup>18</sup> Here are Excerpts from Three of the Speeches Made on the House Floor at Last Week's Constitutional Convention, The Boston Phoenix, September 23-29, 2005, available at [http://www.bostonphoenix.com/boston/news\\_features/other\\_stories/documents/04989507.asp](http://www.bostonphoenix.com/boston/news_features/other_stories/documents/04989507.asp).

amendment overruling Goodridge.<sup>19</sup> For example, Senator James E. Timilty explained his change to a vote in opposition: “When I looked in the eyes of the children living with these couples, I decided that I don’t feel at this time that same-sex marriage has hurt the commonwealth in any way. In fact I would say that in my view it has had a good effect for the children in these families.”<sup>20</sup>

After just two hours of debate, the 2005 constitutional convention emphatically rejected the previous year’s proposal by a lopsided vote of 39-157. Fifty-five lawmakers who had supported the 2004 amendment switched their votes to oppose the measure.<sup>21</sup> The intervening year of robust civil engagement, thoughtful public debate and real-life experience with same-sex married couples was crucial to this legislative victory. With that vote, the legislative amendment process concluded.

## **2. The Citizen-Initiated Proposed Constitutional Amendment.**

The legislature considered another proposed constitutional amendment in 2006 -- this time arising from a citizen-initiated petition.<sup>22</sup> That proposed amendment, which would have defined marriage as the union between a man and a woman without any provision for civil unions, needed the votes of only 25% of the legislature (50 out of 200 members) at the

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<sup>19</sup> Raphael Lewis, Key Senators Break From Travaglini Amendment, The Boston Globe, September 7, 2005, at B1, [available at](http://www.boston.com/news/local/massachusetts/articles/2005/09/07/key_senators_break_from_travaglini_amendment/) [http://www.boston.com/news/local/massachusetts/articles/2005/09/07/key\\_senators\\_break\\_from\\_travaglini\\_amendment/](http://www.boston.com/news/local/massachusetts/articles/2005/09/07/key_senators_break_from_travaglini_amendment/).

<sup>20</sup> Pam Belluck, Massachusetts Rejects Bill To Eliminate Gay Marriage, The New York Times, September 15, 2005, at A14, [available at](http://www.nytimes.com/2005/09/15/national/15amendment.html?_r=1&th&emc=th&oref=slogin) [http://www.nytimes.com/2005/09/15/national/15amendment.html?\\_r=1&th&emc=th&oref=slogin](http://www.nytimes.com/2005/09/15/national/15amendment.html?_r=1&th&emc=th&oref=slogin).

<sup>21</sup> Raphael Lewis, After Vote, Both Sides In Debate Energized, The Boston Globe, September 15, 2005, at A1, [available at](http://www.boston.com/news/local/articles/2005/09/15/after_vote_both_sides_in_debate_energized/) [http://www.boston.com/news/local/articles/2005/09/15/after\\_vote\\_both\\_sides\\_in\\_debate\\_energized/](http://www.boston.com/news/local/articles/2005/09/15/after_vote_both_sides_in_debate_energized/).

<sup>22</sup> Pam Belluck, Massachusetts Gay Marriage to Remain Legal, The New York Times, June 15, 2007, at A16, [available at](http://www.nytimes.com/2007/06/15/us/15gay.html?_r=1&th&emc=th&oref=slogin) [http://www.nytimes.com/2007/06/15/us/15gay.html?\\_r=1&th&emc=th&oref=slogin](http://www.nytimes.com/2007/06/15/us/15gay.html?_r=1&th&emc=th&oref=slogin). A legal challenge to stop the citizen-initiated proposed amendment, on the grounds that the state constitution did not permit the citizen-initiated amendment process to “reverse a judicial decision,” failed at the SJC. See Schulman v. Attorney General, 850 N.E.2d 505, 512 (Mass. 2006).

constitutional conventions of two consecutive legislatures in order to be put to the voters on the November 2008 general ballot. Mass. Const., Article XLVIII, II, § 4.

Although the overwhelming majority of the legislators opposed the amendment, in January 2007, on the final day of the 2006-07 legislative session, the constitutional convention supported the amendment by just over 25% (62 out of 200 votes), enough to advance the proposed amendment to a second constitutional convention.<sup>23</sup> The 2007-08 legislature then took office.

During the period before the second constitutional convention, newly elected Governor Deval Patrick and newly appointed Senate Leader Therese Murray,<sup>24</sup> as well as Speaker of the House Salvatore DiMasi, worked to persuade the public and legislators to uphold marriage equality.<sup>25</sup> For example, in opposing the proposed amendment, Governor Patrick rallied for marriage equality on its third year anniversary:

I'm glad that there's been three years of sanctimony given to private choices that you

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<sup>23</sup> Pam Belluck, Same-Sex Marriage Setback in Massachusetts, The New York Times, January 3, 2007, at A12, available at <http://www.nytimes.com/2007/01/03/us/03gay.html>. Prior to the January 2, 2007 vote, the constitutional convention had attempted to defeat the proposed amendment through a procedural mechanism that would have allowed the legislative session to end without taking a vote on the proposed amendment, effectively defeating it. Andrea Estes & Scott Helman, Legislature Again Blocks Bid to Ban Gay Marriage, The Boston Globe, November 10, 2006, available at [http://www.boston.com/news/local/politics/candidates/articles/2006/11/10/legislature\\_again\\_blocks\\_bid\\_to\\_ban\\_gay\\_marriage/](http://www.boston.com/news/local/politics/candidates/articles/2006/11/10/legislature_again_blocks_bid_to_ban_gay_marriage/). Governor Romney and others brought a legal challenge to this procedural strategy, and the SJC agreed that the state legislators had a constitutional duty to take a vote on the merits of all citizen-initiated proposed constitutional amendments (although the SJC lacked the statutory authority to compel the legislature to do so). Doyle v. Sec. of Commonwealth, 858 N.E.2d 1090, 1096 (Mass. 2006); see also Jonathan Saltzman, Vote on Gay Marriage is Due But Can't Be Forced, SJC Says, The Boston Globe, December 28, 2006, available at [http://www.boston.com/news/local/articles/2006/12/28/vote\\_on\\_gay\\_marriage\\_is\\_due\\_but\\_cant\\_be\\_forced\\_sjc\\_says\\_sjc\\_says\\_it\\_cannot\\_force\\_legislative\\_vote/](http://www.boston.com/news/local/articles/2006/12/28/vote_on_gay_marriage_is_due_but_cant_be_forced_sjc_says_sjc_says_it_cannot_force_legislative_vote/).

<sup>24</sup> As pro-marriage equality candidate, Mr. Patrick defeated anti-marriage equality opponent Kerry Healy in 2006 to succeed Governor Romney. With a strong record supporting marriage equality, Ms. Murray was elected president by a 34-5 margin in the state senate, replacing outspoken marriage equality opponent Robert Travaglini. Steve LeBlanc, Murray Elected to Replace Travaglini as Senate President, The Boston Globe, March 21, 2007, available at [http://www.boston.com/news/local/massachusetts/articles/2007/03/21/travaglini\\_to\\_resign\\_murray\\_expected\\_to\\_be\\_elected\\_as\\_president/](http://www.boston.com/news/local/massachusetts/articles/2007/03/21/travaglini_to_resign_murray_expected_to_be_elected_as_president/).

<sup>25</sup> Yvonne Abraham, Waves of Change Swept Away Bid vs. Gay Nuptials, The Boston Globe, June 17, 2007, available at [http://www.boston.com/news/local/articles/2007/06/17/waves\\_of\\_change\\_swept\\_away\\_bid\\_vs\\_gay\\_nuptials/](http://www.boston.com/news/local/articles/2007/06/17/waves_of_change_swept_away_bid_vs_gay_nuptials/).

have made, and that others have made. I'm glad that we've had three years of affirming the basic principle that people come before their government as equals. And I am glad that we have three years of experience of showing that the sky hasn't fallen and the earth hasn't opened up."<sup>26</sup>

Speaker of the House DiMasi also had a similar message in support of the fight for marriage equality: "[E]veryone in America has equal opportunity. That's what everyone deserves . . . . The battle will be won by each and every one of you going out, proving to everyone that you are a good human being, a valued member of the community."<sup>27</sup>

At the next constitutional convention on June 14, 2007, with a vote of 45-151, supporters fell 5 votes short of the 25% needed to advance the proposed amendment to the ballot box.<sup>28</sup> Over three-quarters of the convention opposed the amendment. As a result, the citizen-initiated proposed amendment was decisively defeated.

Nine legislators made this historic victory possible by changing their positions, after seeing how gay and lesbian families were just like other families, with the same needs and struggles.<sup>29</sup> These legislators included Representative Robert J. Nyman, who described his decision: "I listened and I listened and I listened. I just felt at this point, I was not comfortable putting people's human rights on the ballot."<sup>30</sup> The same was true for Representative Geraldo Alicea, a first-term legislator who had campaigned in favor of the

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<sup>26</sup> David Foucher, MA Governor Joins Gay Advocates to Celebrate 3 Years of Same-Sex Marriage, EDGE Publisher, May 17, 2007, available at <http://www.edgeboston.com/index.php?ch=news&sc=gibt&sc2=news&sc3=&id=20453>.

<sup>27</sup> Chuck Colbert, Caucus Fund-Raiser Brings Out Bigwigs and Bucks, InNews Weekly, August 2, 2006, available at [http://www.innewsweekly.com/innews/print.php?article\\_code=4270](http://www.innewsweekly.com/innews/print.php?article_code=4270).

<sup>28</sup> Pam Belluck, Massachusetts Gay Marriage to Remain Legal, The New York Times, June 15, 2007, available at [http://www.nytimes.com/2007/06/15/us/15gay.html?\\_r=1&th&emc=th&oref=slogin](http://www.nytimes.com/2007/06/15/us/15gay.html?_r=1&th&emc=th&oref=slogin).

<sup>29</sup> With the new legislative session beginning on January 3, 2007, the legislature also lost a number of marriage equality opponents due to mid-year electoral defeats, retirements and resignations. Lisa Wangsness & Andrea Este, Personal Stories Changed Minds, The Boston Globe, June 15, 2007, available at [http://www.boston.com/news/local/massachusetts/articles/2007/06/15/personal\\_stories\\_changed\\_minds/](http://www.boston.com/news/local/massachusetts/articles/2007/06/15/personal_stories_changed_minds/).

<sup>30</sup> Id.

amendment but then voted against it after five months of meetings with constituents, including a same-sex couple who had been together 28 years and who, before they were married, had been unable to see each other in the hospital when one of them was sick.<sup>31</sup>

For Senator Gale Candaras, after receiving 6,800 phone calls, letters, emails and faxes, it was clear to her how her constituents wanted her to vote.<sup>32</sup> In a statement released after her June 14 vote, she wrote:

I have been most impressed by the number of individuals who have called me and asked me to change my vote because they have changed their minds. One grandmother told me she had changed her mind and wanted me to change my vote in case one of her grandchildren grew up to be gay or lesbian. She did not want any of her grandchildren to be denied the right to marry the person they love.<sup>33</sup>

Likewise, Representative Paul Kujawski cited the many meetings with gay and lesbian constituents as convincing him that he “couldn’t take away the happiness those people have been able to enjoy.”<sup>34</sup> One of those meetings was with Deb and Sharon, a couple who helped him understand how their exclusion from marriage hurt their family.<sup>35</sup> Before meetings such as these, Mr. Kujawski had never heard the “real life stories” of gay and lesbian citizens who had been hurt by their exclusion from marriage.<sup>36</sup> Because he met people like Deb and Sharon, Representative Kujawski has had “no second thoughts. I firmly believe I’ve done the

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<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> State Representative Gale Candaras, Marriage Vote Statement, June 14, 2007, available at [http://www.galecandaras.org/press\\_releases/MARRIAGE\\_VOTE\\_STATEMENT\\_Final\\_Draft\\_6.14.pdf](http://www.galecandaras.org/press_releases/MARRIAGE_VOTE_STATEMENT_Final_Draft_6.14.pdf).

<sup>34</sup> Pam Belluck, Massachusetts Gay Marriage to Remain Legal, The New York Times, June 15, 2007, available at [http://www.nytimes.com/2007/06/15/us/15gay.html?\\_r=2&th&emc=th&oref=slogin&oref=slogin](http://www.nytimes.com/2007/06/15/us/15gay.html?_r=2&th&emc=th&oref=slogin&oref=slogin).

<sup>35</sup> Lee Hammel, Change of Vote Defended, Worcester Telegram & Gazette, June 16, 2007, at A1, available at <http://www.telegram.com/article/20070616/NEWS/706160349&SearchID=73284639038956>.

<sup>36</sup> Id.

right thing.”<sup>37</sup>

Massachusetts’ historic journey towards equality, which Goodridge set in motion, has been “confirmed by representative democracy,” as the Amesbury News editorial board (covering the region north of Boston) put it.<sup>38</sup> Or as the editorial board of the MetroWest Daily News (covering region west of Boston) described: “[T]he people have . . . voted, and those votes reflect the growing acceptance of those unions.”<sup>39</sup>

In a statement to her constituents, Senator Candaras wrote the following:

We engage in any process to change our constitution with only the greatest care, and sober reflection. We have had an open and vigorous debate on this issue for several years now, and every possible argument on all sides has been made and has had a thorough hearing. No one can honestly say that they have not had the opportunity to be heard, and to participate in a wide ranging, public discussion. As difficult as it has sometimes been, I think, we should be proud of how we have conducted ourselves to arrive at where we are today, and that we have done right by the generations that have come before in the hope of making a democratic and constitutional order work as well as humanly possible. . . .

I believe . . . that the tremendous knowledge, political and social skills we have developed in the course of this remarkable debate, can transform our political life together in ways that will help us be far better off as a state and as a nation than if we had never had this debate, and all that we have done to bring us here today.<sup>40</sup>

Polls continue to show that an increasing majority understand that providing equality to all citizens of Massachusetts benefits everyone and hurts no one. For example, just after the Goodridge decision but before the first marriages of same-sex couples, only 35% of

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<sup>37</sup> Id.

<sup>38</sup> Editorial, A Nod for Marriage, Amesbury News, November 16, 2006, available at [http://www.massequality.org/news/oped\\_story.php?id=64](http://www.massequality.org/news/oped_story.php?id=64).

<sup>39</sup> Editorial, The People Have Spoken On Marriage, MetroWest Daily News, June 14, 2007, available at <http://www.metrowestdailynews.com/archive/x1517879654>.

<sup>40</sup> State Representative Gale Candaras, Marriage Vote Statement, June 14, 2007, available at [http://www.galecandaras.org/press\\_releases/MARRIAGE\\_VOTE\\_STATEMENT\\_Final\\_Draft\\_6.14.pdf](http://www.galecandaras.org/press_releases/MARRIAGE_VOTE_STATEMENT_Final_Draft_6.14.pdf).

Massachusetts approved of marriage equality, while 53% opposed it.<sup>41</sup> Those numbers in support have gradually increased to 40% in 2004,<sup>42</sup> to 56% in 2005<sup>43</sup> and to 59% in 2006.<sup>44</sup>

Over the same period, opposition has inversely declined to 31.7% in 2006.<sup>45</sup> As The Boston Globe wrote in an editorial the day after the June 2007 legislative victory,

Time is on the side of equality. The state's first same-sex married couples have already celebrated their third wedding anniversaries. With each year that passes, it becomes ever clearer that the sky will not fall; that the institution of marriage has been strengthened, not weakened; and that giving everyone the right to marriage makes Massachusetts a happier place overall.<sup>46</sup>

## **II. CIVIL UNIONS ARE NOT A CONSTITUTIONALLY ADEQUATE SUBSTITUTE FOR MARRIAGE.**

Some courts have left to the legislature the choice of remedy for the unconstitutional exclusion of same-sex couples from the rights and protections of marriage, leading to the adoption of civil unions in these states. See, e.g., Lewis v. Harris, 908 A.2d 196, 221 (N.J. 2006); Baker, 744 A.2d at 886. Civil unions, however, are unable to provide the full equality -- both legally and practically -- that only marriage can. Civil unions purport to grant all the rights and responsibilities of

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<sup>41</sup> Frank Phillips, Majority in Mass. Poll Oppose Gay Marriage, The Boston Globe, February 22, 2004, available at [http://boston.com/news/specials/gay\\_marriage/articles/2004/02/22/majority\\_in\\_mass\\_poll\\_oppose\\_gay\\_marriage/](http://boston.com/news/specials/gay_marriage/articles/2004/02/22/majority_in_mass_poll_oppose_gay_marriage/).

<sup>42</sup> Frank Phillips, Poll Finds Split Over Marriage Amendment, The Boston Globe, April 6, 2004, available at [http://www.boston.com/news/local/articles/2004/04/06/poll\\_finds\\_split\\_over\\_marriage\\_amendment/](http://www.boston.com/news/local/articles/2004/04/06/poll_finds_split_over_marriage_amendment/).

<sup>43</sup> Frank Phillips, Poll Backs Research on Stem Cells but Cloning Opposed in Mass. Survey, The Boston Globe, March 13, 2005, available at [http://www.boston.com/news/local/massachusetts/articles/2005/03/13/poll\\_backs\\_research\\_on\\_stem\\_cells/](http://www.boston.com/news/local/massachusetts/articles/2005/03/13/poll_backs_research_on_stem_cells/).

<sup>44</sup> Merrimack College Bay State Poll, Overview of Bay State Poll Results From the Center for Public Opinion Research at Merrimack College: With Mihos in the Race, Healy Trails Democrats, March 2006, available at [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2006\\_March\\_13/ai\\_n16104318](http://findarticles.com/p/articles/mi_m0EIN/is_2006_March_13/ai_n16104318).

<sup>45</sup> Id.

<sup>46</sup> Editorial, A Good Day for Marriage, The Boston Globe, June 15, 2007, available at [http://www.boston.com/news/globe/editorial\\_opinion/editorials/articles/2007/06/15/a\\_good\\_day\\_for\\_marriage/](http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2007/06/15/a_good_day_for_marriage/).

marriage, changing only the name attached to the relationship. Instead, civil unions create a separate status for same-sex couples only, setting them apart as different and inferior. By itself, simply the creation of a separate legal status and institution for same-sex couples only is constitutionally infirm. Moreover, civil unions do not convey the vitally important social, cultural and tangible benefits of marriage, nor do they provide couples the future possibility of receiving federal benefits attached only to marriage. Indeed, the experiences of other states with civil unions -- such as New Jersey, Connecticut and Vermont--have shown that only inequality results from creating a separate and inferior status for a single group of people.

**A. Our Constitutional History Affirms The Principle That Creating A Separate Status For One Minority Group Perpetuates Inequality.**

As the SJC noted in Opinions of the Justices, 802 N.E.2d at 569, “[t]he history of our nation has demonstrated that separate is seldom, if ever, equal.” The U.S. Supreme Court in Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996), reaffirmed the principle that “class legislation ... [is] obnoxious to the prohibitions of the Fourteenth Amendment....,” Id. at 635 (quoting Civil Rights Cases, 109 U.S. 3, 22, 3 S. Ct. 18, 30 (1883)), by striking down a Colorado constitutional amendment forbidding any anti-discrimination protections for gay and lesbian individuals. In doing so, Justice Kennedy opened his opinion by noting: “One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’ Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.” Id. at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559, 16 S. Ct. 1138, 1146 (1896) (Harland, J., dissenting)).

Indeed, cases striking down race and sex-based classifications have become

paradigmatic for what constitutional guarantees of equality require. See, e.g., Brown, 347 U.S. at 494 (segregating African-American children “solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,” and “the impact is greater when it has the sanction of the law”); U.S. v. Virginia, 518 U.S. 515, 532, 116 S. Ct. 2264, 2275 (1996) (parallel military school program for women excludes them from “full citizenship stature”). Indeed, as these cases show, for more than fifty years, courts in the United States have enforced the basic principle that a state cannot remedy the discriminatory exclusion of a minority group from a governmental institution by creating a separate institution exclusively for the use of that group.

**B. Even Assuming Arguendo That a Separate Institution Can Be Equal, Civil Unions Are An Inferior Institution To Marriage.**

Marriage is indisputably a civil institution of unparalleled prestige, respect and longevity. No other relationship has been characterized by the U.S. Supreme Court as a “way of life,” a “bilateral loyalty,” and a relationship “intimate to the degree of being sacred.” Griswold v. Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682 (1965). No other state-recognized relationship can have the same “spiritual significance” for many couples. See Turner v. Safley, 482 U.S. 78, 95-96, 107 S. Ct. 2254, 2265 (1987). Because of marriage’s unparalleled prestige and respect, few heterosexual couples would willingly substitute their “marriage” for a “civil union.”<sup>47</sup>

Our courts have fully recognized the manifest advantage that comes from an institution’s longevity, tradition and prestige as compared to a new institution created solely

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<sup>47</sup> For example, when Oregon Senate Majority Leader, Kate Brown, asked the senate during a debate on a civil union bill, “Is anyone on the Senate floor willing to trade their marriage for a civil union?,” no one volunteered. Editorial, Don’t blame Oregonians, The Register-Guard, July 12, 2005, at A10.

for a minority group. For example, Sweatt v. Painter, 339 U.S. 629, 70 S. Ct. 848 (1950), involved whether Texas's attempt to create a separate law school for black students was "substantially equal" to its law school for whites under the "separate but equal" doctrine in effect prior to Brown. Although the Court in that context was properly concerned with tangible comparisons such as the number of faculty or the size of the library, the Court went beyond such factors to emphasize some of the very factors that distinguish marriage and civil union. The Court stated:

What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these schools would consider the question close.

339 U.S. at 634 (emphasis added). See also Brown, 347 U.S. at 493-94 (affirming the relevance of this principle from Sweatt because separation itself "generates a feeling of inferiority as to ... status in the community that may affect ... hearts and minds."); Virginia, 518 U.S. at 557 (rejecting Virginia's alternative of a separate military institution for women and citing Sweatt for the principle that the "'prestige' -- associated with [Virginia Military Institute's] success in developing citizen soldiers -- is unequalled").

To believe that being denied the most prestigious status is innocuous or inconsequential also necessarily suggests there are no advantages to participating in marriage. But there are at least five ways in which being "married" helps individuals and couples. First, the unique social meaning of marriage over the centuries carries profound personal meaning and value for couples that civil unions can never provide. Political theorist Ronald Dworkin has eloquently explained:

The institution of marriage is unique: it is a distinct mode of association and

commitment with long traditions of historical, social, and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love.<sup>48</sup>

Second, the prestige and longevity of marriage as a social institution have created a common ritual that ties people together into the larger fabric of families, generations and communities. Couples who cannot marry live outside of that cultural fabric and cannot be part of the continuity of tradition. Without “the right to choose to marry -- one is excluded from the full range of human experience.” Goodridge, 798 N.E.2d at 956-57.

Third, marriage ties into a common vocabulary that all people share. The word “marriage” immediately conveys to the community that two people love each other and are a family. As one guest columnist for a Connecticut newspaper described,

People know what marriage means. Their parents are married, or their siblings or friends. They grew up wanting someday to get married themselves. They know that marriage equals more than sum of its legal parts. They want to marry because marriage signifies lasting, committed relationships -- relationships like ours . . . . [E]xcluding gay and lesbian couples from marriage excludes them from this world of meaning.<sup>49</sup>

There are no civil union analogues to the verb “to marry” or the adjective “married,” nor do civil unions convey the same weight and importance as marriage. As the editorial board of The Hartford Courant wrote, “[C]ivil union isn’t marriage, with the legitimacy that the M word bestows.”<sup>50</sup>

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<sup>48</sup> Ronald Dworkin, Three Questions for America, New York Review of Books, September 21, 2006, available at <http://www.nybooks.com/articles/19271>.

<sup>49</sup> Mark Pearsall, Civil unions significant, but not same as marriage, Norwich Bulletin, May 11, 2007, available at [http://www.lmfc.org/site/News2?page=NewsArticle&id=6259&news\\_iv\\_ctrl=1321](http://www.lmfc.org/site/News2?page=NewsArticle&id=6259&news_iv_ctrl=1321).

<sup>50</sup> Editorial, Civil Union Isn’t Enough, The Hartford Courant, April 3, 2007, at A16, available at [http://www.lmfc.org/site/News2?page=NewsArticle&id=6185&news\\_iv\\_ctrl=1321](http://www.lmfc.org/site/News2?page=NewsArticle&id=6185&news_iv_ctrl=1321).

The public's unfamiliarity with civil unions also makes it difficult for couples joined in a civil union to experience equality as a practical matter in everyday life. For example, Barbara Levine-Ritterman of Connecticut described a recent visit to the hospital: "They asked me my marital status and I said 'civil union' and they said they had no place in the computer for that. That is just one way it is clear that it is not the same. No one seems to know what it means."<sup>51</sup> In the end, the hospital listed her as single.<sup>52</sup>

Fourth, rather than being merely "semantic" or "innocuous," the term "civil union" "is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." Opinions of the Justices, 802 N.E.2d at 570.<sup>53</sup> As the president of the New Jersey State Bar Association testified to the New Jersey Civil Union Review Commission: "From the Bar's perspective, civil unions are a failed experiment. They have shown to perpetuate unacceptable second-class legal status."<sup>54</sup>

Language has "power" because "[l]abels set people apart as surely as physical separation on a bus or in school facilities." Lewis, 908 A.2d at 226 (Poritz, C.J., dissenting).

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<sup>51</sup> Michelle Tuccitto Sullo, Gays hold out hope for wedlock, New Haven Register, May 13, 2007, at A1, A9, available at [http://www.lmfct.org/site/News2?page=NewsArticle&id=6271&news\\_iv\\_ctrl=1282](http://www.lmfct.org/site/News2?page=NewsArticle&id=6271&news_iv_ctrl=1282).

<sup>52</sup> Id.

<sup>53</sup> Such government-sponsored discrimination has a damaging effect on lesbians and gay men. See, e.g., Ellen D. B. Riggle, et al., The Marriage Debate and Minority Stress, 38 Pol. Sci. & Pol. 221 (2005) ("The stratification of rights, establishing rights for one set of citizens based on a characterization that is not available to all citizens, creates a status of stigmatized 'second-class citizens.'"). Like many minority groups who are often the targets of discrimination, gay men and lesbians frequently internalize this societal disapproval, suffering feelings of inadequacy and self-loathing. Social scientists refer to these feelings as "internalized homophobia," which can give rise to a wide range of psychological effects, including depression and a heightened risk of suicide. See Michael W. Ross & B. R. Simon Rosser, Measurement and Correlates of Internalized Homophobia: A Factor Analytic Study, 52 J. of Clinical Psychol. 15 (1996); Gregory M. Herek, et al., Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men, 2 J. Gay and Lesbian Med. Ass'n 17 (1997).

<sup>54</sup> New Jersey Civil Union Review Commission, First Interim Report, February 19, 2008, at 4, available at <http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf>. The New Jersey Civil Union Review Commission was formed as part of New Jersey's 2006 civil union act to study and evaluate the effectiveness of New Jersey's civil union law. Id. at 2-3.

As Chief Justice Poritz explained:

Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as “real” marriage, that such lesser relationships cannot have the name of marriage.

Lewis, 908 A.2d at 226-27 (Poritz, C.J., dissenting).<sup>55</sup>

The weight of imposed inferiority falls especially hard on the children of same-sex couples. As one same-sex couple with children in New Jersey testified to the New Jersey Civil Union Review Commission:

Our children have asked many questions. One of the questions . . . asked of us was, ‘If all men were created equal, why can’t you and Poppy get married?’ I can’t answer that question at this time. One of the most recent questions that came up by one of my children was, ‘I don’t understand how someone on TV who has murdered someone can get married, but you and Poppy cannot.’<sup>56</sup>

As a result, children whose parents are not allowed to marry receive the message from the government that their families -- and, by implication, they -- are not worthy.

Fifth, employers are more likely to recognize marriages than civil unions for important employment benefits -- such as spousal health insurance. While the federal Employment Retirement Income Security Act (“ERISA”) allows employers who choose to self-insure their health plans to refuse health insurance benefits to the same-sex partners of employees regardless of whether the couple is in a civil union or a marriage, employers are more likely to discriminate against employees in a civil union than those in a marriage. Part of the reason is

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<sup>55</sup> See also EGALE Canada Inc. v. Canada (Att’y Gen.), 2003 B.C.C.A. 251, ¶ 156 (“[a]ny other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples ‘almost equal’, or to leave it to governments to choose amongst less-than-equal solutions.”); Halpern v. Toronto, 172 O.A.C. 276, ¶¶ 102-107 (2003) (separate status for same-sex relationships insufficient; right to equality requires access to “fundamental societal institutions”).

<sup>56</sup> New Jersey Civil Union Review Commission, First Interim Report, February 19, 2008, at 12, available at <http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf>.

that employers have greater familiarity with marriage than with civil unions. As one electrician in New Jersey told the New Jersey Civil Union Review Commission,

When you tell your employer or union you are married, there's something about that word that makes them recognize your relationship in a way they don't recognize it when you tell them you are civil union[ed]. And because of their respect for the word marriage, which is something they understand, they are much less likely to invoke [ERISA]. That's what happened to us.<sup>57</sup>

In addition, with civil unions, employers are able to deny insurance coverage by claiming that they simply do not recognize civil unions within their benefit policies. As Tom Barbera, a Massachusetts labor leader and former Vice President of the Massachusetts AFL-CIO, explained: "[E]mployers . . . understand that without the term 'civil union' or 'domestic partner' to hide behind, if they don't give equal benefits to employees in same-sex marriages, these employers would have to come forth with the real excuse for discrimination."<sup>58</sup>

Finally, without marriage, same-sex couples are precluded from access to the federal rights and protections granted to married couples (e.g., the ability to share in a spouse's Social Security). While the law currently defines marriage for federal purposes as "only a legal union between one man and one woman as husband and wife," 1 U.S.C. § 7, it is only through being married that the couples can attempt to overturn this discriminatory law in the courts. In addition, while many states have laws that refuse to recognize marriages between same-sex couples, there can be little doubt that a marriage license would provide couples with the strongest arguments for legal respect of their relationships in another state or country. See, e.g., Rosengarten v. Downes, 802 A.2d 170 (Conn. Cir. Ct. 2002) (no jurisdiction to dissolve civil union), cert. granted, 806 A.2d 1066 (2002), appeal dismissed as moot (Dec. 21, 2002).

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<sup>57</sup> Id. at 8.

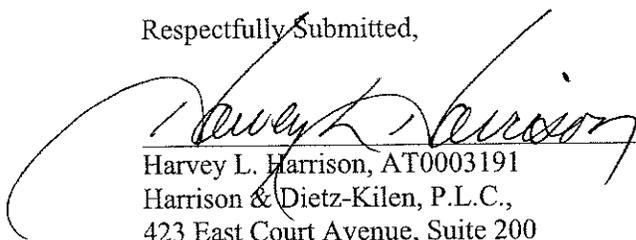
<sup>58</sup> New Jersey Civil Rights Review Commission Public Hearing, Sept. 26, 2007, at 39, available at <http://www.state.nj.us/lps/dcr/downloads/public-hearing-transcript-curc-9.26.07.pdf>.

In contrast, each time a civil union couple travels to a different state that has not recognized civil unions, they take a risk. As Eileen Ego and Corrine Frost, a same-sex couple in a Connecticut civil union, more succinctly put it: "Once we cross a state line, we're just friends traveling in a car."<sup>59</sup>

### CONCLUSION

For the foregoing reasons, the *Amici* urge this Court to provide full and equal marriage rights to the plaintiff couples.

Respectfully Submitted,



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<sup>59</sup> Kathleen Edgecomb, Connecticut's Ban on Gay Marriage Doesn't Stop Families From Forming, New London Day, May 13, 2007, available at [http://lmafoc.convio.net/site/News2?page=NewsArticle&id=6261&news\\_iv\\_ctrl=1282](http://lmafoc.convio.net/site/News2?page=NewsArticle&id=6261&news_iv_ctrl=1282).

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