

Authorization form or the Health Care Power of Attorney -- that will allow a gay or lesbian person to be by his or her partner's side.

Brian Rater of Brookline has been with his partner Brendan for 9 years. He testified about a medical emergency that landed him in the emergency room:

When I was just coming out of some odd state of consciousness, I was groggy and confused. I didn't know what was going on, but I saw Brendan there in the emergency room and I knew that it was going to be OK. He was there to make sure the doctors knew what they needed to know about me and was able to make medical decisions when I wasn't able to...He was able to do this because of the very unromantic legal documents that we had a lawyer draw up for us in her office. They cost us \$1,000 rather than the \$45 marriage license fee and they only provide 8 of the 400 protections of marriage under New Hampshire law.¹⁰⁹

Many gay and lesbian partners recounted their inability to see their loved one in the emergency room or the anxiety created by their not knowing whether the nurse or doctor on duty would question the legitimacy or the whereabouts of the authorizing documentation. Moreover, many relayed the frustrations involved in getting a health care professional to recognize their relationship, only to have to start the process over with a shift change.¹¹⁰

2. Barriers to Health Care Access.

Numerous families spoke of the difficulties encountered because of their inability to obtain health care for their spouse or their spouse's children.

Didi Wallace and Carrie Blake of Portsmouth have been together for 22 years. Carrie Blake testified:

I have worked for the same company for 25 years. And just this past year they finally offered domestic partner benefits so I

¹⁰⁹ See Testimony of Brian Rater on August 29, 2005.

¹¹⁰ In response to this acknowledged harm, the Majority proposes to "clarify" what is already existing law – that the wishes of a conscious patient should be respected when it comes to visitation at a health care facility. This "clarification" does not remedy the harms described above, as discussed in Section IV (B)(2) below.

can put Didi on my insurance. I can tell you how much of a personal toll it has taken for me to have to constantly fight for these rights without putting too much pressure on my employer that I risked my job.¹¹¹

Many employers, including many public employers in the state, extend family employment benefits to marital partners and legal dependents. Restricting family benefits to married couples affects the financial well-being of many families who are denied the right to marry. Moreover, because same-sex couples cannot marry and cannot become the legal parents of their partners' children, many partners must live without coverage in order to care for their children at home.

Shelley Saylor of Charlestown testified:

Not only can I not receive health benefits through my wife's employers, but one of our children (my biological son) also does not have health insurance. It is difficult to explain to my son why his brother and other mother can be considered a family and be entitled to certain benefits, but he and I are not.¹¹²

Many children in this situation, like Shelley Saylor's son, find themselves enrolled in the state's Healthy Kids program as their last resort, even though the recognition of that child's family as a legal family would relieve the state of responsibility to pay for that child's health care.¹¹³

3. Inability to Establish Legally Recognizable Relationships between a Child and Both of His or Her Parents.

Witnesses also spoke of the difficulties encountered by the near impossibility of establishing a legal relationship between children and both of their same-sex parents. While some New Hampshire courts have granted second-parent adoptions -- allowing both members of a same-sex couple to be the legal parents of

¹¹¹ See Testimony of Carrie Blake on June 22, 2005.

¹¹² See Testimony of Shelley Saylor on April 4, 2005.

¹¹³ In her testimony, economist Lee Badgett aptly stated the problem: "Same-sex couples are more likely to have health insurance if they could marry. Most people under 65 get health insurance through their job or a spouse's job. However, nationally 86% of employers who provide health insurance do not cover their employees' same-sex partners. As a result, as two recent studies show, people in same-sex couples are almost twice as likely to be uninsured as married people. Marriage would make same-sex partners eligible for employer-provided health coverage, saving thousands of dollars in insurance premiums and health care expenses." See Testimony of Lee Badgett on September 19, 2005.

their children -- there is no clear, state-wide precedent for second parent-adoption. See, e.g., Testimony of attorney Susan Hassan on September 19, 2005. Absent such an adoption, the child is a “legal stranger” to his or her second parent, and thus the non-legal parent has no right to obtain emergency medical care for the child, no right to participate in the child’s schooling, and no right to obtain medical insurance for the child through his or her employer. Thus, if the non-biological parent were to die, the child would not be able to receive legal protections provided to surviving children, such as access to inheritance in the absence of a will or social security survivor benefits.¹¹⁴

Karen McCarthy and her partner, who have been together for eleven years, have a daughter. When Karen McCarthy testified, she said:

I am also here for my daughter. Currently she has one legal parent. It is unbearable to think of the mess that would occur if something happened to my partner. The rights afforded through civil marriage were designed to help families through difficult, unimaginable times...I am in the process of seeking parental rights. This process, like the process of being a stay-at-home-mom, creates extra burdens for our family. We, in effect have had to go through the adoption process twice. That means two times the cost, two times the paperwork, and two times the scrutiny.¹¹⁵

4. Children and Parents Lack Access to Protections and Obligations to Sustain Them Upon Dissolution of the Parental Relationship.

At present, non-marital families and children are not protected in the event the relationship dissolves. Though married couples can readily access the divorce system to address property and monetary issues, as well as issues relating to the custody and visitation of children, same-sex families cannot. See generally Testimony of attorney Susan Hassan on September 19, 2005.

The processes and institutions that help separated and divorced different-sex couples access each other’s property and commonly owned property are not

¹¹⁴ The Majority’s recommendation that the law “clarify” the right of same-sex couples to enter into “co-guardianships” does not rectify (nor justify) these harms. See Section IV (A)(6) and IV (B)(2) below.

¹¹⁵ See Testimony of Karen McCarthy.

available to same-sex couples if they become estranged. No matter how financially interdependent the same-sex couple may have been, a same-sex partner is not empowered by law to seek on-going financial support from the other partner, no matter how long the couple had been together, how intertwined their personal finances had become, or how much one partner relied on the other for financial support. Regardless of the parties' relative bargaining positions vis-à-vis each other, same-sex partners lack the ability to access divorce courts for assistance with the unwinding of the couple's affairs. Simply put, the law pretends that same-sex partners are legal strangers to each other, both during and after the relationship.

This lack of a formal, legal process to dissolve a relationship has an insidious effect on the children of unmarried partners. Biological or adoptive parents are not guaranteed the right to seek child support from his or her ex-partner (when that ex-partner lacks a direct legal relationship with the child), even if the non-bio partner bore primary financial responsibility for the family or equal parenting responsibilities. In addition, a non-biological, non-adoptive child also has no way to secure for himself or herself ongoing access to his or her parent, regardless of the role that non-legal parent may have played during the life of the family.

Similarly, the non-biological, non-adoptive parent is not guaranteed on-going access to his or her child. Although some courts have allowed a non-biological or non-adoptive parent to file a petition for custody or visitation based on the non-legal parent's standing as a "de facto" parent, such claims are equitable in nature and are not expressly authorized in the law. These equitable proceedings to establish a parent's "de facto" status, and the rights and obligations that may flow from that status, are exceedingly difficult in New Hampshire. *Id.* Moreover, when they are pursued, they occur in Superior Court, which has less expertise in determining the best interest of the children than the Family Court, which is where married couples' custody and visitation issues are regularly handled. Simply put, without access to the state's divorce system, the children of same-sex couples are left without proper financial protections and respect for their families and parental relationships. Similarly, unrecognized parents are left with little or no recourse if they wish to remain in, and contribute to, the life of the child they raised.

5. Surviving Same-Sex Partners Are Legally Invisible.

It is in times of tragedy and crisis that people are reminded of the comprehensive protections that marriage provides for families. Virtually every couple who testified before the Commission worried about what will happen when

one of them dies. The Commission heard about surviving partners whose connection with their partner was completely severed upon their partner's death by the lack of a will, the lack of funeral instructions, or the deceased partners' biological family's unwillingness to have anything to do with the surviving partner. Despite long-term relationships based upon mutual responsibility and love, the surviving partner was not considered "next of kin" under New Hampshire law, even though the partner was demonstrably closer to the deceased than the deceased's estranged, biological family. The biological family in these stories refused to allow the surviving partner to attend the funeral services, and in some cases, made it exceedingly difficult for the surviving partner to extricate his or her personal property from the couples' co-mingled assets.

Ronnie Sandler testified about friends Jean and Dodie:

Jean and Dodie had shared their lives for over 30 years... When Dodie died last summer, her body was brought to a funeral home late Thursday night. They had signed all the papers gays and lesbians are told to have. On Friday, Jean went to the funeral home to make arrangements for the release of Dodie's body before the weekend. She was told that Dodie had "next of kin."¹¹⁶

Despite the fact that Jean and Dodie had drawn up powers of attorney, living wills and other legal documents, none of them made mention of the release of a body – and Jean was told she would need a certified letter from Dodie's brother before the body could be released.

Even for those partners who have not had to endure these collateral attacks to their "emotional" status as a surviving partner, the world at large has no vocabulary to describe the status of a surviving same-sex partner -- as widow and widower are generally reserved for married couples -- and thus the world at large pretends that the surviving partner has suffered no recognizable, societal loss. That same-sex partners cannot file claims for loss of consortium or wrongful death; take advantage of the marital estate tax deduction; or obtain the financial protections that social security and private pensions extend to spouses is only part of what same-sex surviving partners are forced to endure on account of their non-marital status.

¹¹⁶ See Testimony of Ronnie Sandler.

6. The Impossibility of Attributing Harm to A Few Discrete Legal Obstacles.

Even a cursory analysis of New Hampshire's laws relating to marriage reveal that marriage rights and obligations extend much farther than that readily evident from the stories of harm illustrated above. For example, many persons spoke of the ways in which they were harmed by not having the right to employment leave to care for their non-biological child or partner or the right to bereavement leave if their partner were to pass away. Others reported that their surviving partners would receive lower or non-existent pension benefits (as compared to married partners), and still others complained of their inability to claim the homestead protections and tax exemptions available to married couples under state law.

Carol Pynn expressed this concern in her testimony:

My partner and I have been together for 24 years. That's a long-term commitment of love and trust. We purchased our home, brought up a teenager (who is a very well-adjusted young adult), saved for retirement with pensions and investments, gave public service to our town and contributed to the system just as you have. We have worked together for all these years looking forward to retirement. We never thought much about the legal status of our investments. But the time has come to face the fact that if one of us dies, the other will have to pay inheritance taxes on half of what we already own. Legally married spouses do not have this burden.¹¹⁷

The Commission also heard that the ban on marriage for same-sex couples has a stigmatizing effect.

Maria Doyle of Bethlehem testified:

Despite the most sincere intentions and best efforts of both my partner and me, we are not able to be full participants in our community.¹¹⁸

¹¹⁷ See Testimony of Carol Pynn.

¹¹⁸ See Testimony of Maria Doyle, May 31, 2005.

Because much of our society talks about marriage as the ultimate in family and commitment, same-sex couples who embrace that same paradigm are forever thwarted in their full, emotional commitment to each other and excluded from participation in the institutions held dear within our communities.

Robert Worden of North Swanzey wrote to the commission:

Marriage equality is about people loving and caring for each other. I myself have always dreamed of having a big wedding, and when I fall in love with the right man, I would like to get married.

Witnesses explained that no word besides “marriage” would allow those interacting with a same-sex couple to understand immediately who and what they are to one another and to their children. The inability to make a public, legal commitment to one another -- backed by the legal obligations that such a commitment would impose upon them -- rendered many same-sex couples who came before the Commission powerless to communicate to their families, friends, and communities, the permanency of their mutual commitment to one another. Many gay and lesbian couples expressed that their inability to make the same legal commitment made by their siblings and friends rendered them outliers, even within their own families and communities. Other same-sex couples found themselves in the unfortunate situation of having to explain to their children -- when their non-marital status raised in their children a concern about the transient nature of their family -- that they love each other as much as married people do. Some gay and lesbian witnesses testified to the security and respect they felt when previously married to a person of the opposite-sex and recounted the paradox of having later found their true love in someone of the same-sex but being unable to marry and express that commitment to the world at large as they had previously done through marriage. Simply put, being denied marriage has thrust upon many same-sex couples the unwanted and unfortunate label of “less than.”

Roderick Forsman of Conway, a psychologist specializing in child and adult development, testified about the harmful impact of prejudice on individuals and society:

In my view, the arguments against same-sex marriage boil down to prejudice... We do not need to be mental health professionals to be aware of the destructive effects of prejudice on society's individual citizens. Its negative effects are painful

and destructive enough when expressed at the level of person-to-person. At least then the victim can chalk it up to individual ignorance. It is vastly more destructive, in my view, when written into law and applied to entire categories of people.¹¹⁹

Indeed, Tawnee Walling of Seacoast Outright sees this destructiveness in her work with gay and lesbian youth:

For glbt youth and young adults, this issue is particularly pertinent. As they are attempting to grow up in a world that much of the time alienates and discriminates against them, and to develop healthy, meaningful relationships in this climate, they are constantly aware that their relationships are not now and might not ever be legally recognized. And this is profoundly confusing since they pay taxes, and participate in their communities in a variety of ways and yet they are persistently and perpetually treated as second-class citizens solely based upon who they choose to love and be in a relationship with.¹²⁰

College student Justin Drake testified:

Unfortunately, as I step out into the real world, I will not have access to one of the principle joys many find. While the majority of my friends have the freedom to marry the person they fall in love with, that freedom will not apply to me simply for who I am... When I first realized I was gay I would never have dreamed I could live an even remotely normal or happy life, because society didn't accept me for who I was. Now I am given hope that this will change.¹²¹

The testimony made it clear that same-sex couples seek more than a subset of the marital rights and obligations that have thus far eluded them; they seek equality.

¹¹⁹ See Testimony of Roderick Forsman.

¹²⁰ See Testimony of Tawnee Walling.

¹²¹ See Testimony of Justin Drake on June 22, 2005.

7. **New Hampshire’s Denial of Recognition to the Legal Relationships of Same-Sex Couples From Other States Harms Same-Sex Couples and New Hampshire.**

SB427 (now codified as R.S.A. 457:3, New Hampshire’s non-recognition statute) forces legally married same-sex couples to involuntarily “divorce” at the border. See Testimony of conflicts of laws professor Barbara Cox on September 19, 2005. It does not alert couples to the fact that their entire world has turned upside down. It does not put alternative legal protections in place to make sure that the couple’s vested expectations of their rights vis-à-vis each other, their children, and their property are maintained. Those who have the freedom to marry have probably never considered the implications of New Hampshire’s marriage non-recognition statute (enacted by SB427 in 2004),¹²² but same-sex couples from other jurisdictions now must grapple with the fact that their legally recognized relationship from another jurisdiction may not survive a vacation, business trip, or a relocation to New Hampshire.

If a legally married same-sex couple were to travel to New Hampshire (either temporarily or permanently) and become involved in an accident, the non-injured spouse may no longer be able to make medical decisions for their injured spouse, inherit intestate from their spouse should she or he pass away, claim and bury her or his spouse’s remains, or sue the person who injured her or his spouse for wrongful death. Id. If their relationship were to survive the accident but dissolve years later, the spouses may face the double trouble of having to obtain a divorce, which may not be easy in light of SB427’s mandate that the relationship not be recognized within New Hampshire.¹²³

¹²² Prior to SB427, New Hampshire followed the general rule of marriage recognition (i.e., that a marriage valid where celebrated was valid in New Hampshire even if it could not have been legally contracted there in the first instance). See Testimony of conflicts of law professor Barbara Cox on September 19, 2005.

SB427’s legislative history reveals that SB 427’s seismic shift from general marriage recognition to express statutory non-recognition came only a few days before same-sex couples would be eligible to marry in Massachusetts under Goodridge v. Dept. of Pub. Health, 440 Mass. 308 (2003). Though SB427 also purports to deny marriage recognition to legally married first-cousins from other states as well as same-sex couples, there can be no doubt that legally married same-sex couples were the intended victims of SB427, thus placing SB427 on dubious constitutional ground. See Romer v. Evans, 517 U.S. 620, 634 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); Hunter v. Underwood, 471 U.S. 222, 232 (1985) (finding equal protection violation where evidence proved state had enacted a provision for the purpose of disenfranchising blacks and the law had a discriminatory effect on blacks, even though some poor whites were also affected).

¹²³ Consistent with the state’s long-standing marriage recognition principles, it may well be that the marriage may be respected in whole or in part for some purposes, notwithstanding SB427. See Testimony of Professor Barbara Cox on September 19, 2005.

Though civil unions are not within the reach of SB427, the experience of civil union spouses may be instructive on this point. Gil Martinez and Max Mitchell of Jaffrey have a Vermont civil union. Since their relationship broke apart, they have lived in a legal limbo. They testified:

Vermont will not divorce us because we do not live there, and New Hampshire won't do it either because the state claims there is nothing to dissolve. Unfortunately, other countries such as Canada do not recognize this union as valid, [but]...because it is not a real marriage whether they would dissolve it remains unclear... We deserve the right to rebuild our lives and perhaps find someone with whom we can form a family again.¹²⁴

Even if all goes well for the couple, simply by crossing the state border, SB427 makes it harder for the couple to obtain simple protections for each other like health and life insurance, even if they continue to work for the same employer.

The involuntary “divorce” at the border also raises the stakes for a married family with children, as the refusal to recognize the marriage may mean that the children have lost their legal connection to their non-biological parent. As Professor Cox explained, SB427 does not, and cannot, unwind adoption decrees entered in other states, even if that adoption legally created same-sex parents, because the Full Faith and Credit Clause of the federal constitution requires New Hampshire to recognize both parents on an adoption decree as the legal parents of that child. That constitutionally mandated recognition would give the non-biological parent access to medical and school decision-making during the life of the relationship; and perhaps more importantly, it would also tie (one or both) of the non-biological parent(s) to the child upon death or dissolution of the relationship, making inheritance in the absence of a will, social security survivor benefits, custody, visitation, and child support options that would not otherwise be available to support the child.

Couples who legally marry (or have civil unions) in other jurisdictions need not pursue a formal adoption decree in that other jurisdiction because a child born into that marital relationship would be a child of both spouses as a matter of law, making a second-parent adoption legally redundant. It is for these couples that SB427 could deprive a child of his or her legal connection to his or her parent. For

¹²⁴ See Testimony of Gil Martinez and Max Mitchell on July 25, 2005.

example, if an accident were to occur while in New Hampshire, the non-biological child may not be able to inherit from his or her non-biological parent, obtain her social security survivor benefits, make medical decisions for him or her (if old enough to participate in the care), or sue for wrongful death.

The Majority recommends that gay families whose marriage is negated by SB427 be recognized as joint guardians.¹²⁵ Yet, a co-guardianship does not come close to providing the automatic protections that come only from marriage (and that are snatched from gay families when SB427 operates to negate the parents' marriage from another jurisdiction). Though a co-guardianship would allow the non-biological parent to act as a decision-making parent for some period of time, it is not a permanent legal protection (*i.e.*, it can be unilaterally withdrawn by the biological parent or the court); it does not assure ongoing protection for the parent and child upon death or dissolution of the relationship (*e.g.*, it does not ensure automatic inheritance rights, Social Security survivor protections, child support, or rights of custody or visitation); and it needlessly interjects the court into a supervisory role over the family's established arrangements.¹²⁶ In the "accident" scenario presented above, if the parent were injured, the ward would have no legal rights to speak for the parent-guardian during her life or any right to inherit from her upon her death. Moreover, if the parents were to survive the accident but later separate, even if a co-guardianship had been in place, the non-biological parent and child could be deprived of custody and visitation options, and the biological parent and child could be deprived of on-going financial support.

Given that New Hampshire law will recognize the non-biological parent-child relationship if a formal adoption exists, SB427's refusal to recognize the same purposefully chosen family simply because the legal relationships arose through an out-of-state marriage makes a mockery of what is in the best interest of that child.

This painful reality for gay and lesbian families also portends badly for the prospects of New Hampshire. As economist M.V. Lee Badgett explained in her testimony,

New Hampshire's employers and communities at risk of losing
its gay, lesbian, and bisexual citizens to friendlier locations,

¹²⁵ See Majority Report, VI(E).

¹²⁶ See Section III (C)(7) above. See also *In the Matter of Nelson*, 149 N.H. 545, 556 (2003) (Nadeau, J. dissenting).

since the gay and lesbian community appears more willing than others to move, perhaps in search of friendlier environments. More than 55% of individuals in same-sex couples moved in the five years prior to Census 2000 compared to only 42% of those in different-sex couples. Furthermore, same-sex couples in neighboring states might be unwilling to visit New Hampshire if the state maintains its policy of unequal treatment of same-sex couples. Married same-sex couples in Massachusetts, for instance, might avoid New Hampshire for fear that their relationship will not be recognized if some accident occurs or to protest unequal treatment. So the state might lose out if same-sex couples opt for vacations in friendlier policy climates.

The long-term strength of the state's economy will depend on its ability to attract and retain a talented workforce, which includes gay, lesbian, and bisexual people as well as heterosexual people who want to live and work in an environment that welcomes diversity.¹²⁷

8. There Was a Noticeable Absence of Testimony on Certain Matters Relevant to the Majority.

To fully understand what the Commission heard, we must mention what the Commission did not hear. For example, the Commission did not hear from any witness that the State actually benefits from having struggling families in its midst. Moreover, the Commission did not hear how the marriages of different-sex couples would be harmed by allowing same-sex couples to marry.

In addition, not one person identified himself as a heterosexual person who would choose to be gay if legal recognition were extended to same-sex couples; and similarly, no gay person announced that they would marry a person of the opposite sex if the state were to continue its discrimination against gay people in marriage.

Also absent from the testimony was any request for marriage or marital benefits from any other family group. In other words, there was no outcry or even a whisper from siblings, grandparent/grandchild families, aunt/nephew or

¹²⁷ See Testimony of Lee Badgett on September 19, 2005.

uncle/niece families, or any other pairing described in R.S.A. 457:1-2. None came forward to explain how they are harmed by their inability to marry; to compare their legal, social, and economic situation to that of gay and lesbian families or married, different-sex families; or to identify themselves as someone who would partake in the benefits contemplated by a subset of the commissioners in the Majority.¹²⁸

To be clear, there were witnesses who alleged, more generally, that the recognition of gay relationships would contribute to the downfall of civilization. Yet, the harms alleged were amorphous in nature and were rooted in the demonization, dislike, and ignorance of the lives of gay people.

Al Goodwin of Pittsfield testified:

This very issue is a reflection of, or an extension of the age old contest between Good and Evil, the age old contest between God and Satan. This is a “frontline” issue. The family has been under spiritual attack since the Garden of Eden and Women especially have been singled out as being hated with supernatural hatred. Men need to be taught to take their proper place as the head of a family and the protector of Women but not all are up to the challenge of the task for even Adam himself fell short. It is my contention that there are powerful unseen forces at work here and now the future of our normal families and the societal atmosphere of this state of New Hampshire seems to be hanging in the balance on this issue.

...

Hidden not very far behind this “smiley face” of acceptable homosexuality presented here are homosexual relationships that are very much not characterized by monogamy or noble sentiments of commitment but by rampant promiscuity, moral degradation, sexual predation, eventual bestiality and other forms of insanity which are grossly offensive to normal heterosexual humans.

Margaret Carnahan of Concord:

¹²⁸ As a technical matter, these other close familial relationships were beyond the scope of the Commission’s assignment. See SB427 (restricting inquiry to “all aspects of same-sex civil marriage and the legal equivalents thereof.”). Nonetheless, the Majority’s proposal to link any legal protections for same-sex couples with those of different-sex relationships that are purposefully excluded from marriage is discussed in Section IV (B)(2) below.

Tolerance of a person's sexual preference is one thing; but to make legislation for a sexual perversion is shortsighted. It will not create a more liberal country, but will open the door to even more perversions. Do not be appalled if one day a man demands the right to have multiple wives, or to marry his sister, mother, or daughter, or perhaps he will demand the right to marry an animal! Will these demands end before man destroys himself; before our future comes to an end?

...

It is our nation's future at stake today. I submit that if a person chooses a sexual behavior that is contrary to nature, let it be his own life and his own future he risks.¹²⁹

Chris Nissen of Merrimack testified before the Commission:

Right reason appeals to our moral conscience to recognize the objective disorder and intrinsic moral evil of homosexual union. We cannot allow the imposition of iniquity on society – something so obviously iniquitous is not “right” simply because it is a law. Society has an obligation to conscientiously object to such evil that destroys the very fabric of society and culture.¹³⁰

Arthur Turner of Carlisle, Massachusetts traveled to New Hampshire to share his thoughts on gay people with the Commission:

Homosexual persons as a group have no responsibility toward the general population and we should feel no obligation toward them, particularly no obligation to advocate legalization of same-sex marriage.¹³¹

To cast a blanket of “immorality” on gay people as some witnesses have is simply a way of dressing up a personal dislike of (or ignorance about) gay people. Yet, government is not permitted to disadvantage a group of people, even gay people, simply because some people dislike them.¹³² Access to the legal rights of marriage cannot be denied on that basis.

¹²⁹ Testimony of Margaret Carnahan of Concord on April 25, 2005.

¹³⁰ Testimony of Chris Nissen of Merrimack on August 29, 2005.

¹³¹ Testimony of Arthur Turner of Carlisle, Massachusetts on August 29, 2005.

¹³² See Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (“[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect”). See also Section IV (B) (4) below.

Those testifying against legal recognition for gay families also rooted their concerns in their faith-traditions, as if the witnesses' deeply-held personal or religious beliefs views should, in all cases, trump the civil right of gay people to be treated as equal citizens.

Thelma Burt of Exeter rooted her objections to legal recognition in her personal religious beliefs:

Homosexuality and lesbianism are part of the list of sins we commit. In no way should we legalize sin in our society. ¹³³

Karen Towle provided written testimony:

Same-sex marriages do not reproduce so this is an abomination of the Lord.

Mark and Judith Race of Loudon submitted written testimony:

God's position on homosexuality is clear in the Bible - ... God calls it an abomination and a perversion.

Will we – His creation cross God and not suffer the consequences He has clearly warned us about?

This country was formed on godly principles. We must return to godliness and ask God to heal our land ...

Pastor Peter Preston also testified:

[N]o one has to remain in bondage to homosexuality or lesbianism. God clearly states that it is unnatural and He has not made anyone to be that way.

...

God hasn't changed His mind, so let's not try to change our laws.

We in the Minority do not discount these views because they are based in morality or religion. Rather, because the beliefs of individuals and religious

¹³³ Testimony of Thelma Burt on April 25, 2005.

institutions will remain unaffected by the extension of legal rights to same-sex couples,¹³⁴ we question why such views on gay people should dictate what legal rights can and should be extended to New Hampshire's gay families. Put differently, the Commission's mandate was to explore the legal needs of same-sex couples. Concerns about the religious views of non-gay citizens can be part of the discussion but they should not alone derail an analysis of the harms that flow to gay families by virtue of their ban from marriage and the associated legal rights and obligations that flow from marriage.

9. Summary of Oral Testimony to the Commission.

In sum, gay and lesbian couples live and work in our communities. They volunteer and worship side-by-side with us. They pay taxes. Their children attend the same schools as our children. They have formed stable, long-lasting, intimate relationships that are comparable in quality to those of different-sex couples, despite the legal obstacles that have made that feat all the more challenging. They work very hard to establish security, safety, health and happiness for their kids – just like all parents do. As same-sex couples are, in all relevant respects, the same as different-sex couples, ending the exclusion of same-sex couples from the legal rights of marriage would serve the same purposes for gays and lesbians as marriage does for heterosexuals: enhancing and fortifying the stability of relationships between two adults that are based on commitment, love, and mutual support and care.

IV. The Commission's Work Does Not Present Credible Reasons to Justify the Continuation of A State Marriage Policy that Withholds the Promises of Equal Justice Under Law From New Hampshire's Gay and Lesbian Families.

We believe that the Majority's report evidences a nearly complete failure to address the Commission's mandate. The Majority has chosen to attack gay people and challenge whether gay families deserve legal protection rather than pursue the Legislature's mandate to conduct a detailed study of the laws that are causing hardships for New Hampshire's gay and lesbian families. Omitted from the Majority's report is an analysis of the legal landscape affecting same-sex couples and any recitation of the harms that have befallen gay families as a result of their

¹³⁴ See Section IV (A) (5) below discussing the sanctity of religious belief and the protections afforded religious practice in our constitutional democracy. See also Section I (B)(1) discussing the civil nature of marriage in New Hampshire.

exclusion from the legal rights associated with marriage. It is unfortunate that the preceding sections of this Minority Report have no parallel in Majority report.

Equally disappointing is the fact that the work the Majority did pursue does little to advance the Legislature's understanding of the relevant issues. Rather than fulfill the Legislature's request for a comprehensive study of all "rights, responsibilities, laws, and legal obligations" relating to same-sex couples,¹³⁵ the Majority makes six "Findings:"

1. That the Massachusetts Goodridge decision was "incorrectly decided."¹³⁶
2. That the United States Supreme Court decision in Loving v. Virginia is not instructive as to the question of same-sex couples' quest for marriage equality.¹³⁷
3. That there is no consensus on whether sexual orientation is a matter of "nature or nurture," and the resolution of that question is believed by some commissioners as bearing on whether gay people present a "civil rights" question.¹³⁸
4. That "an intact family including both the biological mother and father is the optimal vehicle for raising children" while acknowledging at the same time that studies concerning children raised by "same-gender parents" are "encouraging."¹³⁹
5. That marriage for same-sex couples raises concerns regarding "cascade effects" on religious freedom, parental rights in schools, "private groups and public access" and "medical issues involving public health."¹⁴⁰
6. That any grant of rights to New Hampshire same-sex couples would not be recognized by either the federal government or 44 states in the nation.¹⁴¹

It takes little effort to see that these "Findings" are essentially beside the point. Findings 1 and 2 are responses or legal arguments concerning court

¹³⁵ See SB427.

¹³⁶ See Majority Report, V(A).

¹³⁷ See Majority Report, V(B).

¹³⁸ See Majority Report, V(C).

¹³⁹ See Majority Report, V(D).

¹⁴⁰ See Majority Report, V(E).

¹⁴¹ See Majority Report, V(F).

decisions. They do not speak at all to an assessment of the needs of the lesbian and gay community in New Hampshire and what role the Legislature should take in addressing those needs.

Similarly, Finding 6 is a legal opinion and says nothing about what the New Hampshire legislature can and should do within New Hampshire for New Hampshire's citizens. Moreover, many of the legal assertions in Finding 6 are open to debate and are not necessarily a correct statement of the law.

As to Finding 3, "nature v. nurture", the commission heard repeatedly from citizens and experts that homosexuality is not chosen; that it occurs throughout nature and in all cultures. The majority simply ignores these testimonies. Furthermore this analysis is perhaps an interesting theoretical or philosophical discussion in some quarters; but it hardly addresses the practical questions that the Commission was mandated to study about the very real members of the lesbian and gay community in New Hampshire and their needs and their families' needs. On these practical questions, the Majority is totally silent.

Again, Finding 4 has two parts: (a) a "male female intact married structure" is the "gold standard" for childrearing; and (b) studies on "same gender parenting" are "encouraging." While the "gold standard" finding can be debated perhaps endlessly, the mandate for the Commission was to study something quite different – something that remains a pressing question regardless of how one views the "gold standard" – that is, how to address the needs of the children of families headed by same-sex couples. Again, on this vital question, the Majority is totally silent.

Finally, Finding 5 is, by definition, totally unrelated to the question of addressing the needs of New Hampshire's lesbian and gay citizens. Rather, it is solely about the non-gay citizens of New Hampshire and the fears of a very small minority of those non-gay citizens. Again, regardless of how one assesses the "cascade effect," it is certainly a classic case of the "cart before the horse" to make a finding about the feared consequences of something that the Majority never addresses, *i.e.*, the needs of New Hampshire's lesbian and gay citizens and their families and the legislative means of addressing those needs.

In sum, the Majority Report has simply made no findings of any relevance to guide the Legislature in assessing and addressing the needs the Commission was mandated to study. Whether or not the Commission's work will have long-term value, one thing is clear: the Commission has presented no justifiable reason to

withhold the legal rights of marriage from same-sex couples given the constitutional promises of equal justice under law. We turn to each of the Majority’s “Findings” in subsection A below. Then, in subsection B, we address many of the underlying assertions embedded within the Majority’s “Findings.” Simply put, the Commission has offered nothing constructive

A. The Majority’s “Findings” Are Specious.

1. Attacking Goodridge Does Not Justify the Exclusion of Same-Sex Couples From Marriage in New Hampshire.

We reject the Majority’s “Finding” that the Massachusetts Supreme Judicial Court overstepped its bounds in deciding the case of Goodridge v. Dept. of Public Health, 440 Mass. 308 (2003), a case which found unconstitutional under that state’s constitution the denial of marriage licenses to same-sex couples. It is the Massachusetts Supreme Judicial Court, not this Commission, that is the ultimate arbiter of what that Constitution means. We note that the citizens of Massachusetts ratified a constitution in 1780 with three distinct branches of government, specifically acknowledging the judicial power. Mass. Const., art. I, sec. 30.

We further note the Court’s leadership over the years in defining human rights. One of that Court’s earliest acts under the state constitution was to abolish slavery.¹⁴² Many surmise that the Court’s leadership in this area provided the context for the state Legislature to become the first to repeal a ban on interracial marriage in 1843.¹⁴³

It has long been part of our federal system that “a single courageous State may serve as a laboratory” for other states.¹⁴⁴ We observe that the Commonwealth to our south is alive and well. Over 6000 same-sex couples have married, and as they have done so, public support for their marriages has increased.¹⁴⁵ Moreover, a

¹⁴² Inhabitants of Winchendon v. Inhabitants of Hatfield, 4 Mass. 123, 128 (1808) (referring to action of Supreme Judicial Court in holding slavery “was no more” in light of the Massachusetts Declaration of Rights); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 209 (1836) (reiterating the principle with respect to a slave brought to Massachusetts by her Louisiana “owner”).

¹⁴³ Mass. Acts 1843, ch. 5. See also Louis Ruchames, Race, Marriage, and Abolition in Massachusetts, 40 J. Negro History 250 (1955).

¹⁴⁴ Santosky v. Kramer, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting)(quoting New State Ice Co., v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

¹⁴⁵ See Raphael Lewis, Gay Marriage Ban Expected to Fail, The Boston Globe September 12, 2005 at B1.

Massachusetts constitutional convention rejected a proposed amendment to deny marriage rights to same-sex couples and replace marriage with civil unions.¹⁴⁶

While this Minority believes that the courts have a proper role to play in protecting and enforcing constitutional guarantees,¹⁴⁷ the Majority's recommendation that any change in our marriage laws must be made by the Legislature and the people is a red herring.¹⁴⁸ This Study Commission was created to address what the Legislature should do. The Majority chooses to engage in an ideological skirmish about the courts while ignoring the legislative task at hand. We all agree that the Legislature has a role and can and should act.

2. The Right to Marry is a Civil Right For Gay People Too.

The Majority's second "Finding" is a rejection of "the notion that same-sex marriage is comparable to civil rights and consistent with Loving v. Virginia, 388 U.S. 1 (1967)."¹⁴⁹

Although the Majority has rejected the notion that gay people should not have the right to marry because the discrimination against them is not rooted in racial discrimination, we note that the Majority's view is not universally held. For example, Coretta Scott King and Julian Bond, Chairman of the NAACP, embrace marriage rights for same-sex couples even though the oppression at the heart of the discrimination turns on sexual orientation rather than race.¹⁵⁰ The Honorable Byron Rushing, a prominent African-American Massachusetts legislator who testified before the Commission, eloquently explained that a civil right is a legal prerogative to receive equal treatment before the law and that those who have

¹⁴⁶ See Raphael Lewis, After Vote, Both Sides in Debate Energized, The Boston Globe, September 15, 2005 at A1.

¹⁴⁷ As discussed at Section II (A), above, any and all laws enacted by the Legislature are subject to constitutional review, and in appropriate cases, the courts can and must decide them. See also Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 163 (1803) ("The very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.")

¹⁴⁸ See Majority Report VI (A).

¹⁴⁹ See Majority Report, V(B). In Loving, the U.S. Supreme Court struck down a state ban on interracial marriages. In addition to ruling that the law was an unconstitutional racial classification on equal protection grounds, the Court unequivocally declared that the right to marry is fundamental under the Due Process Clause of the Fourteenth Amendment. Loving, 388 U.S. at 12 ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.")

¹⁵⁰ See Julian Bond's Speech at the Human Rights Campaign Anniversary Dinner available at http://www.hrc.org/dinner/speech_jbond.htm; Associated Press Staff Writer, "Coretta Scott King gives her support to gay marriage," USA Today, March 3, 2004, available at http://www.usatoday.com/news/nation/2004-03-24-king-marriage_x.htm.