Court of Appeals

STATE OF NEW YORK

Albany County Clerk's Index No. 1967/04

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER MCDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARNG SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PANCHER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEDIA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR,

Plaintiffs-Appellants,

—against—

THE NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK,

Defendants-Respondents.

New York County Clerk's Index No. 103434/04

DANIEL HERNANDEZ and NEVIN COHEN, LAUREN ABRAMS and DONNA FREEMAN-TWEED, MICHAEL ELSASSER and DOUGLAS ROBINSON, MARY JO KENNEDY and JO-ANN SHAIN, and DANIEL REYES and CURTIS WOOLBRIGHT,

Plaintiffs-Appellants,

—against—

VICTOR L. ROBLES, in his official capacity as City Clerk of the City of New York,

Defendant-Respondent.

BRIEF OF GAY & LESBIAN ADVOCATES & DEFENDERS AS AMICUS CURIAE

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Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading legal rights organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. In addition to GLAD's litigation on workplace discrimination, parenting issues, access to health care, public accommodations and services, and myriad other issues in law, GLAD has challenged discrimination in marriage in several states. Most notably, these cases include GLAD's litigation as counsel in Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003), in Baker v. Vermont, 170 Vt. 194 (1999), and in Kerrigan v. Dept. of Public Health, Conn. Super. No. NNH-CV 04-4001813. GLAD has also appeared as an amicus curiae in other marriage-related litigation.

SUMMARY OF ARGUMENT

This brief responds, primarily by reference to the Massachusetts experience following the Supreme Judicial Court's decision in Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003), to arguments that have been made in these cases regarding the proper remedy and the extent to which the Court should take political considerations into account in resolving the plaintiffs' claims.

The Hernandez majority, for example, opined that even if the New York Constitution is held to be violated by depriving same-sex couples of access to civil

marriage, the courts should nonetheless delay the relief plaintiffs deserve and instead leave the remedy in the hands of the legislature. Hernandez v. Robles, 805 N.Y.S.2d 354, 362-63 (1st Dept. 2005).

Massachusetts' experience in opening marriage to same-sex couples following Goodridge demonstrates, however, that neither legislative action nor delay in effectuating a remedy is at all required to give same-sex couples their constitutional due – full access to civil marriage – in an orderly manner. Indeed, the events in Massachusetts demonstrate that a prompt, specific, and unambiguous ruling from the courts that the marriage laws should be read in gender-neutral terms and same-sex couples should be granted marriage licenses and rights without delay is the remedy that best serves the interests of justice and minimizes undue uncertainty and distraction in the State.

Opponents of opening marriage in New York to committed same-sex couples have also suggested that courts should stay clear of vindicating the constitutional rights of gay and lesbian citizens because this is a politically volatile issue that could lead to a "backlash" against those who support the rights of gay people. Again, the experience in Massachusetts, where thousands of same-sex couples have been marrying over the past two years, should put such arguments to rest. In the case of marriage equality, the best antidote to fear is reality. In Massachusetts, the previously existing base of support for treating gay and lesbian

citizens with fairness and as equals has continued to grow, and prospects for legislative approval of an amendment to overrule Goodridge, let alone popular ratification of such a state constitutional amendment, continue to dim.

ARGUMENT

I. DELAYING THE REMEDY WOULD BE UNNECESSARY AND COUNTER-PRODUCTIVE IF THIS COURT RULES IN FAVOR OF THE COUPLES.

The experience of the Commonwealth of Massachusetts in implementing that state's high court ruling ending the exclusion of same-sex couples from marriage shows that staying commencement of marriage for same-sex couples and sending the issue to the legislature is unnecessary to effectuate orderly implementation of such a ruling and would likely be counter-productive.

A. The Goodridge Ruling

On November 18, 2003, the Supreme Judicial Court of Massachusetts ("SJC") rendered its judgment and opinion in Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003) ("Goodridge"). The seven same-sex couples in that case, represented by amicus curiae GLAD, contested their exclusion from marriage based on the equality and liberty provisions of the Massachusetts Constitution. Finding that the Massachusetts Constitution "affirms the dignity and equality of all individuals" and "forbids the creation of second-class citizens," id. at 312, the SJC

"conclude[d] that the marriage ban does not meet the rational basis test for either due process or equal protection." Id. at 331.[1]

As to remedying the "long-standing statutory understanding, derived from the common law, that 'marriage' means the lawful union of a woman and a man," id. at 320, the SJC construed the definition of marriage as gender-neutral:

> We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships.

Id. at 343.

The SJC specifically rejected the remedy of striking down the Commonwealth's marriage laws because that would have been "wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society." Id. Preserving the licensing scheme avoided otherwise "chaotic consequences," id. at 326 n.14, and was also consistent with legislative rules of statutory construction, allowing "words of one gender [to] be construed to include the other gender and the neuter."

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[1] Justice Greaney joined the majority opinion and also wrote a concurrence in which he noted that he would have found unconstitutional infringement of a fundamental right and sex discrimination, id. at 345-348, issues the majority opinion did not reach. Id. at 330-331. Three justices dissented. Id. at 350 (Spina, J., dissenting); id. at 357 (Sosman, J., dissenting); id. at 363 (Cordy, J., dissenting).

Mass. Gen. Laws ch. 4, § 6, cl. (4). See Goodridge, 440 Mass. at 343 n.34.[2] Further, this method allowed the SJC to keep intact "the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources," as well as the Legislature's discretion to regulate marriage. Id. at 343.[3]

Beyond reformulating the definition of marriage and declaring the plaintiffs' rights, 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 344.[4] As the SJC reiterated several months later, the purpose of the stay "was to afford the

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[2] Similar rules exist in New York Gen. Constr. Law § 22 ("Whenever words of the masculine or feminine gender appear in any law, rule or regulation, unless the sense of the sentence indicates otherwise, they shall be deemed to refer to both male or female persons").

[3] In this vein, the SJC concurred with the remedy of the Ontario Court of Appeal when that court concluded that defining marriage to exclude same-sex partners violated the Charter of Rights and Freedoms of the Canadian Federal Constitution. Id. at 343 (citing Halpern v. Toronto (City), 172 O.A.C. 276 (2003)). While that court "refined the common-law meaning of marriage," id. at 343, it did not issue a stay of its decision and same-sex couples were marrying in Ontario within hours of the decision and have been ever since. Tracey Tyler & Tracy Huffman, Gay Men Get Married After Appeal Court Ruling, TORONTO STAR, June 11, 2003, at A4.

[4] The declaration provided:

> We declare that barring an individual from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion. See, e.g., Michaud v. Sheriff of Essex County, 390 Mass. 523, 535-536, 458 N.E.2d 702 (1983).

Goodridge, 440 Mass. at 344.

Legislature an opportunity to conform the existing statutes to the provisions of the Goodridge decision." Opinions of the Justices to the Senate, 440 Mass. 1201,1204 (Mass. 2004).[5] Notably, then, the stay did not mandate legislative action, for no legislative action was strictly speaking necessary. Rather, if the legislature failed to conform the laws of the Commonwealth during the six-month period, same-sex couples would still be able to marry upon expiration of the stay under the expanded legal definition of marriage, and as with other statutory rights, the legal incidents of marriage would be available by applying statutory rules of construction that gendered terms can be read in a gender neutral manner when the context so requires.[6]

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[5] Evidently, then, the SJC ordered the stay simply because it was taking the Commonwealth at its word, since the Commonwealth had strenuously argued that the legislature should "rewrite the hundreds of statutes governing marriage and marriage-related rights and responsibilities." Brief of Defendants-Appellees, Goodridge v. Dept. of Public Health at 127, available at http://www.glad.org/marriage/Goodridge/Appellees_Brief.pdf. At the time Goodridge was decided, there were over 500 gendered terms in Massachusetts' statutes relating to marriage. A Westlaw search conducted by GLAD on December 23, 2003 showed 224 references in the General Laws to "husband" or "husbands," 230 uses of "wife" or "wives," 114 uses of "widow" or "widows," and 7 uses of "widower" or "widowers." As it turned out, however, the legislature made no statutory amendments to the General Laws to change any of these terms, and none were needed to effectuate full marriage rights for same-sex couples in Massachusetts. See below at I(B).

[6] Nor is the Vermont Supreme Court's stay of its decision in Baker v. Vermont, 170 Vt. 194 (1999) persuasive authority for a stay in these cases. In Baker, the Vermont Supreme Court cast the plaintiffs' claim as one seeking only equal access to state-conferred marital rights and responsibilities under the Vermont Common Benefits Clause, and not to marriage itself. Id. at 224. Thus, the unconstitutional exclusion could conceivably be remedied by inclusion into marriage or some other system with equal access to state-based rights. Id. at 226. The legislature obviously needed time to assess and respond to those options.

B. Implementation Of The Goodridge Ruling Was Effectuated Solely By The Executive Branch With Only De Minimis Effort Needed.

For all the opportunity the SJC provided to the Massachusetts legislature, that body took no steps during the stay period to address any of the gendered references in laws regulating marriage licensing or the incidents of marriage. Indeed, none of the laws the legislature enacted between November 18, 2003 and the expiration of the stay on May 17, 2004 was directed toward implementing the Goodridge decision or conforming the laws of the Commonwealth to it. 2003 Mass. Legis. Serv. Ch. 110-172 (West); 2004 Mass. Legis. Serv. Ch. 1-101 (West) (164 laws passed during relevant period).

In contrast to the legislative branch of government, the executive did act during the stay period. What is notable about the measures taken by the executive branch during the stay period, however, is how very little was actually required for the Commonwealth to effectuate the Goodridge decision and commence to license marriages of same-sex couples on the appointed day, May 17, 2004. Consistent with its statutory obligation to "enforce" the marriage licensing laws, Mass. Gen. Laws ch. 17, § 4, the Department of Public Health, primarily through the Registry for Vital Records and Statistics ("the Registry"), changed marriage-related forms to address Goodridge. Specifically, the Registry amended the Notice of Intention of Marriage (akin to a marriage license) by: (1) replacing references to "Bride" and "Groom" with "Party A" and "Party B;" (2) adding fields for the sex of Party A

and Party B; and (3) creating a field that asked whether the applicants are or were a member of a civil union or a domestic partnership. Compare App. 1 (forms used prior to Goodridge) and App. 2 (forms used post-Goodridge).[7]

Beyond changes to the Notice of Intention of Marriage, there were minor changes to the (1) Certificate of Marriage," (App. 5-6) and the forms: (2) "Supplement to Notice of Intention of Marriage" (App. 7); (3) "Affidavit and Correction of a Record of Marriage" (App. 8-9); (4) "Delayed Record of Marriage" (App. 10-11); and (5) "Record of Marriage Outside Commonwealth" (App. 12-13). See generally App. 3-25.[8]

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[7] References herein to "App. __" are to the Appendix to the Brief of Gay and Lesbian Advocates and Defenders as Amicus Curiae, filed concurrently herewith.

[8] One complicating factor in Massachusetts was that, simultaneous with preparing for same-sex couples to marry, the Governor also decided to commence enforcement of a long-ignored statute – with no corollary in New York – that forbids non-residents from marrying in Massachusetts if the couple's marriage would be "prohibited" or "void if contracted" in the couple's home state. Mass. Gen. Laws ch. 207, §§ 11, 12. See Pam Belluck, Romney Won't Let Gay Outsiders Wed In Massachusetts, NEW YORK TIMES, April 25, 2004, at A1.

Due to the Commonwealth's efforts to enforce this other law, the Notice of Intention form was also amended to add requests for information about where each applicant, if not a Massachusetts resident, intended to reside, and also about age, consanguinity and affinity impediments to marriage. The Governor's Legal Counsel trained clerks on how to enforce this latter law. See, e.g., Scott S. Greenberger & Yvonne Abraham, Gay-Marriage Rule Eased, Romney Aide Says Clerks Have Discretion On Residency Proof, BOSTON GLOBE, May 5, 2004, at A1 (describing training). See also App. 26-51 (powerpoint presentation to municipal clerks by Governor's Counsel). None of these latter changes were made to implement the Goodridge decision itself, and none would be required under New York's marriage licensing laws. For similar reasons, the SJC's recent decision affirming the Superior Court's refusal to preliminarily enjoin enforcement of Mass. Gen. Laws ch. 207, §§ 11, 12, see Cote-Whitacre v. Dept. of Public Health, 2006 WL 786227 (Mass. March 30, 2006), has no bearing on the issues before this Court.

These changes demonstrate how, for all the profundity of marriage on personal and legal levels, it is effectuated by a simple government license. Given the bare recitations required on a marriage license form in New York, Domestic Relations Law § 14, and the fact that rules of construction will facilitate the inclusion of same-sex couples into the legal incidents of marriage, referring the matter of remedy to the legislature would be wholly unnecessary and (as discussed in I(C) below) may even be counterproductive.

C. Opponents Of The Goodridge Ruling Tried To Take Advantage Of The Stay To Vitiate The Ruling.

In Massachusetts, the six-month stay of the Goodridge decision proved wholly unnecessary for either the legislative or the executive branch to give effect to the SJC's ruling. Instead, particularly insofar as the stay "permit[ted] the Legislature to take such action as it may deem appropriate in light of this opinion," Goodridge, 440 Mass. at 344, it was construed by opponents of the SJC's ruling as an opportunity to vitiate the ruling or create a basis for extending the stay beyond May 17, 2004, i.e., the date same-sex couples would otherwise be able to marry. These efforts included: (1) a strategy to limit the Goodridge decision to the legal incidents of marriage rather than access to marriage itself, see I(C)(1) below; (2) a strategy to amend the state constitution to provide for civil unions rather than marriage and thereby provide a basis for an extension of the stay, see I(C)(2)

below; and (3) various other legal strategies to extend the stay or void the judgment in the underlying case.[9]

1. The Civil Union Question.

Massachusetts Senate President Robert Travaglini first used the 180-day delay to advance the tactic of supplanting the right to marry affirmed by the SJC with legislatively-conferred civil unions. By mid-December, members of the Senate had drafted a proposed "civil unions law" and then asked the SJC for an advisory opinion on that bill's constitutionality in light of Goodridge. See Opinions of the Justices to the Senate, 440 Mass. 1201, 1201 (2004). This procedure of seeking advisory opinions is authorized under the Massachusetts Constitution when, in response to requests rendered "upon solemn occasions," the SJC is authorized to provide opinions "upon important questions of law" to the Governor, Executive Council, or branches of the state legislature. Mass. Const., pt. II, ch. 3, art. 2. 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." Opinions of the Justices, 440 Mass. at 1202. Its stated purpose was to "preserv[e] the traditional, historic nature and meaning of the institution of civil marriage." Id. at 1205.

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[9] The details of these arcane, primarily state-law based challenges are described in detail in Mary L. Bonauto, Goodridge in Context, 40 Harv. C.R.-C.L. L. Rev. 1, 55-60 (2005), and are not relevant here.

Of course, there was no credible basis for reading the Goodridge opinion as limited to equalizing only the legal incidents of marriage. In Opinions of the Justices, the SJC emphasized that its previous Goodridge opinion had already considered "whether it was constitutional to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with the concomitant tangible and intangible protections, benefits, rights, and responsibilities." Id. at 1209. Its answer was again unequivocal: "Maintaining 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. (emphasis in original).

Responding to the bill's stated purpose, the SJC readily acknowledged the goal of "preserving the institution of marriage" as "a legislative priority of the highest order" and one to which the SJC owed "greatest deference." Id. at 1206. But the proposed civil unions bill "d[id] nothing to 'preserve' the civil marriage law, only its constitutional infirmity." Id. In the SJC's view,

> This is not a matter of social policy but of constitutional interpretation. As the court concluded in Goodridge, the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children.

Id. Given these purposes, the "same defects of rationality" the SJC considered in Goodridge also pervaded this proposal. Id. "Segregating same-sex unions from

opposite-sex unions cannot possibly be held rationally to advance or 'preserve'" what the Goodridge court stated were the Commonwealth's legitimate interests in procreation, child rearing and the conservation of resources any more than they justified the marriage limitation in Goodridge. Id. By forbidding same-sex couples' entry into civil marriage and requiring them to participate in something different, the proposed bill "relegate[d] same-sex couples to a different status....based on unsupportable distinctions." Id. The SJC pointedly observed: "The history of our nation has demonstrated that separate is seldom, if ever, equal." Id.[10]

The SJC scoffed at the idea that there was no pejorative message delivered by denying the word "marriage" to the unions of same-sex couples. If the words "marriage" and "civil union" were truly interchangeable, there would have been no need to use different terms or to preserve marriage's purported "historic" meaning. The difference, the SJC opined, "is more than semantic. The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." Id. at 1207.

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[10] The SJC was certainly not the first to condemn the notion of second-class citizenship for gay people. See, e.g., Romer v. Evans, 517 U.S. 620, 623 (1996) ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' Plessy v Ferguson...(dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and ... requires us to hold invalid a provision of Colorado's Constitution").

The SJC forcefully concluded as a matter of state constitutional law that neither the SJC nor the legislature had the power to remedy the denial of marriage to same-sex couples with a separate and parallel institution:

> For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. It would deny to same-sex 'spouses' only a status that is specially recognized in society and has significant social and other advantages. The Massachusetts Constitution, as we explained in the Goodridge opinion, does not permit such invidious discrimination, no matter how well intentioned.

Id. at 1208. In other words, this "purposeful" "attempt to circumvent the court's decision in Goodridge" had failed. Id.

2. The 2004 Constitutional Convention Of The Massachusetts Legislature.

Exactly one week after the SJC decision was issued on the civil union question, Senate President Travaglini convened a constitutional convention to consider a legislative response to Goodridge, including a constitutional amendment proposal proffered by a state legislator.[11] The process for such legislatively initiated constitutional amendments in Massachusetts is that the amendment must gain a majority vote of the two chambers of the Massachusetts legislature convened in a joint session (such joint session being denominated as a

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[11] Frank Phillips & Raphael Lewis, Two Marriage Amendments Fail, BOSTON GLOBE, Feb. 12, 2004, at A1.

"constitutional convention") – i.e., at least 101 of the 200 possible votes represented by the combined members of the Massachusetts House and Senate. If a measure receives majority support, it is advanced for consideration to the next legislature (i.e., after an intervening election) where it must again receive majority support at a constitutional convention. If, and only if, the requisite majority support is garnered at a second constitutional convention is the measure then referred out to the voters for ratification at the next general election. Mass. Const., Article 48, Legislative Action on Proposed Constitutional Amendments, IV, §§ 1-5.[12]

While there is much that can be said about the 2004 constitutional convention in Massachusetts, there are two key points that emerge from that convention vis-à-vis the desirability of this Court's placing the vindication of the plaintiffs' constitutional rights in the hands of the New York legislature.

First, every proposal actually considered by the convention was an alternative to the Goodridge ruling and not an implementation of it.[13] At that time,

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[12] The constitutional amendment process in New York is similar. Amendments may be proposed in the senate and assembly. The Attorney General then opines on the effect of the proposed amendment. To move forward, the amendment requires a majority vote by both chambers. After an intervening assembly election, there must be another majority vote by both chambers. The measure is then referred to the voters for possible ratification at such time as the legislature shall prescribe. N.Y. Const., art. XIX, § 1.

[13] According to the Clerk of the Massachusetts Senate, publication of the official Journal of the Senate for February 2004 through September 2005 is forthcoming. Currently, the only available records of the Senate Journals for these dates are the "Uncorrected Proofs of the

a majority of the Massachusetts legislature was simply unable to embrace the full citizenship of gay people as acknowledged in the SJC's ruling.

Second, on the other hand, the 2004 constitutional convention rejected the idea of reverting back to the pre-Goodridge era. Measures that would have vitiated Goodridge entirely did not pass.[14]

After four sessions of debate and discussion, the 2004 Massachusetts constitutional convention approved (by a vote of 105-92) a "compromise" measure providing for civil unions for same-sex couples and reversing Goodridge. Journal of the Senate in Joint Session, March 29, 2004. This measure provided:

> The unified purpose of this Article is both to define the institution of civil marriage and to establish civil unions to provide same-sex persons with entirely the same benefits, protections, rights, privileges and obligations as are afforded to married persons, while recognizing that under present federal law same-sex persons in civil unions will be denied federal benefits available to married persons.

Journal of the Senate in Joint Session." For ease of the Court, GLAD has appended the title page for each date followed by the pages cited.

In the first session of the convention, a measure was proposed to deny marriage equality but allow civil unions. Journal of the Senate in Joint Session, Feb. 11, 2004 (App. 54-57). In the third session, a similar amendment was ultimately substituted for the main amendment, Journal of the Senate in Joint Session, Mar. 11, 2004 (App. 58-60), and then passed in the fourth session of the convention. Journal of the Senate in Joint Session, Mar. 29, 2004 (App. 61-64). An amendment offered to allow marriages of same-sex couples was never voted upon. (App. 60, 65-66).

[14] Another legislative amendment under consideration limited marriage to a man and a woman and provided that "[a]ny other relationship shall not be recognized as a marriage or its equivalent." Journal of the Senate in Joint Session, Feb. 12, 2004 (App. 67-69). Further amendments to simply overrule Goodridge were defeated, Journal of the Senate in Joint Session, Feb. 11, 2004 (App. 65-66); Journal of the Senate in Joint Session, Feb. 12, 2004 (App. 67-69), or were withdrawn. Id.

> It being the public policy of this commonwealth to protect the unique relationship of marriage, only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth. Two persons of the same sex shall have the right to form a civil union if they otherwise meet the requirements set forth by law for marriage. Civil unions for same-sex persons are established by this Article and shall provide entirely the same benefits, protections, rights, privileges and obligations that are afforded to persons married under the law of the commonwealth. All laws applicable to marriage shall also apply to civil unions.
>
> This Article is self-executing, but the general court may enact laws not inconsistent with anything herein contained to carry out the purpose of this Article.

App. 61-64. But as time would tell, the bare majority of support in the Massachusetts legislature as of March 2004 for a constitutional amendment that would take away the right of same-sex couples to marry was to be short-lived. See II(B) below.

On May 17, 2004, after 180 days during which the Massachusetts executive and legislative branches expended enormous resources and energy in exploring possible ways to vitiate the Goodridge decision, but did next to nothing in order to implement that decision, the stay expired. That very day, over 1000 same-sex couples sought marriage licenses.[15] By December 31 of that year (the last date as of which comprehensive records are currently available), nearly 6000 same-sex couples had married.[16]

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[15] Yvonne Abraham & Michael Paulson, Wedding Day First Gays Marry; Many Seek Licenses, BOSTON GLOBE, May 18, 2004, at A1 (more than 1000 gay and lesbian couples sought licenses on the first day).

[16] See Massachusetts Executive Office of Health and Human Services, Dept. of Public Health, Registry of Vital Statistics, Table 1 (preliminary number of marriage certificates issued

II. THE MASSACHUSETTS CULTURAL AND POLITICAL LANDSCAPES INCREASINGLY FAVOR MARRIAGE EQUALITY.

After the Goodridge opinion issued, opponents of marriage for gay people objected vociferously, ominously predicting the most dire consequences if the decision were not somehow nullified.[17] Political leaders, including the United States President, attacked the independence of the judiciary.[18] For a time, the doomsday rhetoric partially succeeded in creating unease in Massachusetts: while polls prior to and immediately after the Goodridge ruling showed majority support for allowing marriages of same-sex couples,[19] that support dipped to 35% after the

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and registered in Massachusetts from May 17, 2004 to December 31, 2004 by month), available at http://www.glad.org/marriage/RVRSMarriageStatistics05-03-2005.pdf.

[17] See, e.g., Thomas Caywood, Right Wing Revs Up For 'Last Stand' In Bay State, BOSTON HERALD, Nov. 21, 2003, at 22 ("Ronald Crews, president of the conservative Massachusetts Family Institute, said his phone has been ringing off the hook since the SJC ruling was announced," and noting that the Christian Coalition, Family Research Council and dozens of smaller groups had already begun lobbying on a constitutional amendment to trump Goodridge); Steven Waldman, A Common Missed Conception, SLATE MAGAZINE, Nov. 19, 2003, available at http://www.slate.com/id/2091413/ (attached as App. 52-53) (quoting Brian Fahling of the American Family Association describing the SJC's ruling as "on an order of magnitude that is beyond the capacity of words. The Court has tampered with society's DNA and the consequent mutation will reap unimaginable consequences for Massachusetts and our nation.").

[18] See, e.g., President George W. Bush, State of the Union Address, January 20, 2004: "Activist judges ... have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. ... If judges insist on forcing their arbitrary will on the people, the only alternative left to the people would be the constitutional process." (available at http://www.whitehouse.gov/news/releases/ 2004/01/20040120-7.html).

[19] An April 2003 poll of Massachusetts residents showed 50% support for legalizing gay and lesbian marriages, Frank Phillips, Support For Gay Marriage Mass. Poll Finds Half In Favor, BOSTON GLOBE, April 8, 2003, at A1, a level of support that held fast in the immediate aftermath of the SJC decision. Frank Phillips & Rick Klein, 50% In Poll Back SJC Ruling On Gay Marriage, BOSTON GLOBE, Nov. 23, 2003, at A1.

first two days of the constitutional convention in February 2004.[20] Then, public support for marriage equality began to be restored and has now climbed to a substantial majority, no doubt influenced by the fact that the non-gay public has had the chance to evaluate for itself whether any of the predicted harms have come to pass.[21]

A. The Couples' Marriages Have Shown That Allowing Committed Same-Sex Couples To Marry Poses No Threat To The Commonwealth.

At the heart of the increasing acceptance of marriage equality are the couples themselves, many of whom report being changed profoundly by this experience. Increasingly common are exchanges like the one described by this couple from Lowell, Mass.: "When asked if getting married after 24 years together has made any difference, we both answer with a resounding YES! It has deepened our relationship more than we thought possible.... Our marriage (which was published in the Lowell Sun) demonstrates that EVERYTHING and NOTHING

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[20] Wayne Washington, Bush Seeks Marriage Amendment Calls Mass., S.F. Same-Sex Actions A Risk For Nation, BOSTON GLOBE, Feb. 25, 2004, at A1.

[21] Frank Phillips, Poll Backs Research On Stem Cells But Cloning Opposed In Mass Survey, BOSTON GLOBE, Mar. 13, 2005, at A1 (reporting 56% support for same-sex couples continuing to enjoy the freedom to marry nine months into the first year of marriage equality).

has changed."[22] Similarly, after 28 years together, one male couple said "Unequivocally, yes," when asked if life was now different as a married couple.

> From the smallest of incidents, such as filling out an application and legitimately being able to say I am married, to the bigger events – for example, when I was in the emergency room ... and they asked if there was anyone in the waiting room they should bring in, I said, "My husband" and no one batted an eye; they just brought Bruce back to my room.[23]

Beyond connection to one another is the tether that marriage provides these couples to the larger society. As one woman described,

> [N]ow that I have this thin gold ring on my finger, something has shifted. ... The more surprising aspect of this new state of being ... is: I feel wedded to society too. Not in a cultural way, not in a religious way, but in a very ancient primal community kind of way. When people come together in marriage, they are joining hands and in joining hands, they join with others and in joining with others they make circles which strengthen and shelter all of us, all of humanity, all over the world.[24]

Joy also spans the generations. The former Chairman of The Bank of America and his wife explained in a Boston Globe opinion editorial,

> We have now had one year of legal same-sex marriage in our state. 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

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22 MASSEQUALITY, ONE YEAR OF MARRIAGE EQUALITY 58 (2004) (Letter of Kate Tyndall and Debra Grossman) (App. 82).

23 Id. at 137 (Letter of George Smart) (App. 88).

24 Id. at 159 (Letter of Ann Creely) (App. 90).

> where the laws of our state have said, "You are equal." We have seen that joy in our son.[25]

Another father described his thirteen-year-old son's joy in being "best man" at their wedding and escorting relatives down the aisle of their Episcopal Church:

> After delivering a stirring tribute to the Supreme Judicial Court, and expressing some heart-warming thanks to us as his parents ("even though I don't always agree with them"), he ended with a statement that brought the whole assembly to their feet. "The best part of being married is that now we walk down the street, people won't just see two guys and a kid, they'll have to see a FAMILY!"[26]

Many parents and relatives of gay and lesbian children spoke in terms of these connections. "Every parent's fondest dream is that his or her child forms a loving, committed relationship," said one father officiating at his daughter's marriage.[27] Another mother celebrated that her children "live in a state where they can express their commitment to marriage and family."[28] Just as two of her children are gay, two had cancer:

> When I sat by their hospital beds, their sexual preference never came to mind. Instead I thought of how love becomes the source of solace and hope during some of life's most dark and terrifying times. And love, like families, comes in many forms and exhibits itself in many different ways. ...

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25 Anne & Chad Gifford, Our Family's Values, BOSTON GLOBE, May 17, 2005, at A15.

26 MASSEQUALITY, ONE YEAR OF MARRIAGE EQUALITY 158 (2004) (Letter of John McDargh) (App. 89).

27 Id. at 128 (Letter of Roger Feldman) (App. 86).

28 Id. at 186 (Letter of Mary P. McBride) (App. 92).

> They and the individuals they love enrich my world and the world of all who know them. As the old song goes, "Who could ask for anything more?"[29]

Another wrote about "the marriage of my two grandchildren's two moms" being a "huge" event in his life: "The two moms are fantastic parents. The supportive environment fostered by the SJC decision is so valuable. To witness the love and growth of my grandchildren is to become more committed to preserving the rights gained in the SJC decision."[30]

The good wishes spread well beyond kith and kin. A woman describing herself as "a bystander.... a straight, married, suburban mom with two kids," wrote: "From the sidelines, I watched as my children's middle school teacher planned a ... ceremony that drew attendees from all over the nation. She and her partner (another over-25-year-relationship) welcomed family and friends, who all wept at the ceremony.... I'm convinced 25 years from now my children will look back and say, 'When I was a kid, GLBT individuals couldn't even get married. Can you BELIEVE it?' And, with luck, nobody will."[31] A justice of the peace described "burly maintenance men clapping and congratulating" newly married couples at ceremonies in public parks.[32] A newly married woman described an

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29 Id.

30 Id. at 65 (Letter of Bill Malloy) (App. 83).

31 Id. at 123 (Letter of Rebecca Lynch) (App. 85).

32 Id. at 93 (Letter of J. Mary Sorrell) (App. 84).

encounter with a store clerk who appeared to be in her 70's, who said, "And by the way, I think it's great."[33]

In short, as the New York Times described the Massachusetts situation in September 2005, "There's nothing like a touch of real-world experience to inject some reason" into the debate about marriages for same-sex couples.[34]

B. Objective Measures Demonstrate That The Political Trend In Massachusetts Is Toward Supporting Marriage Equality.

Beyond polls and stories of support in the Massachusetts polity, the legislative landscape has shifted decisively in favor of equality for the Commonwealth's gay and lesbian citizens. That support blossomed into majority support for marriage equality in the 2005-2006 legislature. The prospects for reversing Goodridge are dimmer and dimmer.

The first acid test of public opinion came in the November 2004 state elections. The results were stunning. All marriage-equality supporters in the legislature were re-elected.[35] Vacated seats of opponents and supporters were won

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33 Id. at 161 (Letter of Marianne Leahy) (App. 91).

34 Editorial, The Normality Of Gay Marriages, NEW YORK TIMES, Sept. 17, 2005, at A14.

35 Laura Kiritsy, State Results Buoy Hope Of Defeating Amendment, Nov. 4, 2004, available at http://www.massequality.org/news/news_story.php?id=39.

uniformly by marriage-equality supporters.[36] One opponent of marriage-equality was defeated by an openly gay candidate.[37] In addition, marriage-equality supporters won an unusually high number of primary and special elections in 2004 and 2005, including the vote to replace Massachusetts House Speaker Thomas Finneran, who had resigned his seat.[38]

The second major test came in September 2005, upon the new legislature's second consideration of the constitutional amendment that had initially passed in March 2004. This new legislature had the benefit of some eighteen months experience subsequent to the Goodridge decision having taken effect. It showed. Senate Minority Leader Lees' introductory remarks set the tone for the convention:

> On a personal note, if I could, the amendment in question at the time was a compromise measure, one that those who support traditional marriage could accept without denying civil rights. . . . The state of affairs was much different. There have been developments that have made a reevaluation of

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36 Id.

37 Id.; Raphael Lewis, A Rift On Gay Unions Fuels A Coup At Polls – How A Somerville Activist Ousted A Fixture, BOSTON GLOBE, Sept. 26, 2004, at B1 (anti-gay marriage incumbent ousted by openly gay challenger in primary).

38 Brock Parker, Jehlen Wins Senate Seat, Sept. 29, 2005, available at http://www.massequality.org/news/news_story.php?id=136 (marriage-equality supporter elected to state Senate); The Advocate, Massachusetts Voters Support Pro-Gay Candidates In Primary, Mar. 15, 2005, available at 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).

> this action a prudent and necessary matter. 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.[39]

Senator Lees was not the only one to repudiate his past support for a constitutional amendment overruling Goodridge. Senate colleagues Frederick E. Berry and Joan M. Menard had previously announced that they were changing their votes because the negative consequences predicted by opponents of marriage equality never came to pass.[40] 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."[41]

After just two hours of debate, the 2005 Constitutional Convention emphatically rejected the previous year's proposal by a lopsided vote of 39-157. All Senators but two voted to reject the measure. Journal of the Senate in Joint

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[39] State House News Service, Constitutional Convention – Wednesday Sept. 14, 2005 (App. 76).

[40] Raphael Lewis, Key Senators Break From Travaglini Amendment, BOSTON GLOBE, Sept. 7, 2005, at B1.

[41] Pam Belluck, Massachusetts Rejects Bill To Eliminate Gay Marriage, NEW YORK TIMES, Sept. 15, 2005 at A14.

Session, September 14, 2005 (App. 70-74). Fifty-five lawmakers who had supported the 2004 amendment switched their votes to oppose the measure.[42] The campaign manager for a coalition of gay and non-gay groups dedicated to preserving Goodridge commented on the vote, "we lost count, quite frankly, at 115 solid supporters of equal marriage."[43]

C. While Efforts To Undo The Goodridge Decision Continue, There Is No Reason To Believe Those Efforts Will Succeed.

The Massachusetts legislative majority in favor of allowing marriage for same-sex couples shows no signs of abating. A notable example is the House Chairman of the Joint Committee on the Judiciary, who announced his opposition to over-riding Goodridge even after the most recent constitutional convention.[44] Two more marriage-equality supporters were elected in February 2006, while opponents won only one seat.[45]

These trends suggest that, though others in Massachusetts continue to toil within the political process with the aim of taking away the right of same-sex

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[42] Raphael Lewis, After Vote, Both Sides In Debate Energized, BOSTON GLOBE, Sept. 15, 2005, at A1.

[43] Id.

[44] Stephanie Ebbert, Lawmaker Shifts Gay Marriage Stance, BOSTON GLOBE, Nov. 11, 2005, at B3 (reporting that Eugene L. O'Flaherty is no longer backing a constitutional amendment banning marriage equality).

[45] Mass Equality, Press Release, Massequality Praises Rice And Provost Victories In Special Elections, Salutes Uphill Battle Of Naughton In Foxboro, Feb. 7, 2006, available at http://www.MassEquality.org/news/news_story.php?id=226.

couples to marry and reversing the new status quo, the situation in Massachusetts for same-sex couples and those who support them is anything but dire. It is true that a citizen-initiated amendment has garnered sufficient signatures to be considered by the Massachusetts legislature at a constitutional convention in 2006. If that proposed amendment were to gain the votes of at least 50 of 200 members of the 2006 constitutional convention, it would be advanced to the next legislature for another vote at yet another constitutional convention, and if it were to gain 50 votes again, it would then be put to the voters for a ratification decision in November 2008. Mass. Const., Article 48, The Initiative, II, § 4. But for this pending citizen-amendment process – which has no counterpart in New York – the issue of marriage equality in Massachusetts would already be finally settled.

That the citizen-initiated measure will advance to the ballot in 2008 is anything but certain. For one, there is a pending case challenging the Attorney General's certification of the ballot question in light of the Massachusetts constitution's bar on citizen-initiated amendments that reverse a judicial decision.[46] Even if the certification was proper, the measure may fail to garner the necessary votes at the 2006 constitutional convention or the 2007-2008 constitutional convention, either of which would doom it. Moreover, before the measure could ever come to a vote on the merits at either convention, it could be derailed by any

[46] Schulman v. Reilly, Mass. S.J.C. No. 09684, available at http://www.glad.org/marriage/Schulman/ Plaintiff_Brief_Final.pdf.

number of procedural roadblocks (including adjournment of the convention) that would require only majority support from the convention. See, e.g., Mass. Citizens for Marriage v. Secretary of the Commonwealth, 440 Mass. 1033 (2003) (no private right of action against legislature for adjourning before it took a vote on a citizen-initiated constitutional amendment). Finally, even assuming, arguendo, that the measure reaches the ballot in November 2008, the expected fear mongering campaign, always based on conjured-up specters of the dire consequences that ostensibly would result from marriage equality, will be countered with the reality observed by people in every community who now have married same-sex couples as neighbors, colleagues and family. Increasingly, people have seen with their own eyes and in their own communities that there is nothing to fear and much to celebrate in the marriages of their gay and lesbian colleagues, family members and neighbors. As the New York Times editorialized after the September 2005 constitutional convention, "The main reason for the flip-flop is that some 6,600 same-sex couples have married over the past year with nary a sign of adverse effects."[47]

Every day that same-sex couples are able to marry is a day when they are able to participate as full and equal citizens in our society, for the benefit of themselves, their children and the community as a whole. Just as importantly,

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[47] Editorial, The Normality Of Gay Marriages, NEW YORK TIMES, Sept. 17, 2005, at A14.

every such day, more and more of their non-gay colleagues and neighbors can experience the triumph of reality over fear, and rest easy seeing that ending the ban on marriage for same-sex couples has been good not only for those newly married couples, but for the community as a whole.

CONCLUSION

For all of the foregoing reasons, amicus curiae Gay & Lesbian Advocates & Defenders urges this Court to remedy the unconstitutional denial of marriage to the appellant couples by reformulating the eligibility for marriage in gender neutral terms and to do so without delay.

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