SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
CASE NO.: SJC-09163
REQUEST FOR AN ADVISORY OPINION (A-107) RELATIVE TO SENATE, NO. 2175, "An Act Relative to Civil Unions."

AMICUS BRIEF OF SEXUALITY AND GENDER EQUALITY (SAGE), WILLIAM S. BOYD SCHOOL OF LAW, UNIVERSITY OF NEVADA LAS VEGAS

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[1] In conformity with ALM App. Proc. Rule 20(a)(4)(1)(5), the undersigned declare under penalty of perjury that they are currently law students and do not possess Board of Bar Overseers (BBO) numbers. On Jan. 19, 2004, Chris DiEdoardo is scheduled to be sworn in as a Level Two Student Attorney by the State Bar of Nevada pursuant to NV SCR 49.5.

INTRODUCTION

I. Factual Background

On November 18, 2003 this Court reached a revolutionary decision in Goodridge v. Department of Public Health 440 Mass. 309, 798 N.E.2d 941, 2003 Mass. LEXIS 814.

This Court held in Goodridge that barring same-sex couples "the protections, benefits and obligations of civil marriage" violates the Massachusetts Constitution. This Court vacated an earlier summary judgment in favor of the Department of Public Health, but stayed the holding for 180 days to permit the Massachusetts legislature to act on the matter.

Since this Court's decision in Goodridge, Massachusetts legislators have asked this Court to provide a legal advisory to determine if Senate No. 2175 would complies with the court's opinion in that case if the bill were to become law.

Senate No. 2175 would grant same sex couples the right to form a "civil union" however, same-sex couples would still be prohibited from entering into a marriage, as defined by Massachusetts's law. Additionally, Senate No. 2175 prevents heterosexual couples from entering into a civil union.

II. SAGE's Interest As Amicus

The William S. Boyd School of Law's Sexuality and Gender Equality organization (herein "SAGE") represents the interest of thousands of people across this nation, all of whom are affected by the outcome of this case. Members of SAGE, as lesbian, gay, bisexual, transgender and heterosexual law students, have an interest in whether this Court recognizes same sex marriage in Massachusetts because:

1. SAGE members and those similarly situated cannot mount a constitutional challenge to that portion of the Nevada Constitution that denies recognition of same-sex unions entered into elsewhere until a state permits same-sex marriage;
2. There is no general acceptance of what a "civil union" means and what rights, benefits, and obligations attach to such a union and that must be recognized by other states;
3. In contrast, the rights, benefits and obligations attached to marriage are generally agreed upon between the states;
4. Thus, a "civil union" would be a lesser status than marriage, pursuant to the Court's holding in Goodridge, to enact such a status would create a "separate but equal" martial status for same sex couples.
5. The concept of "separate but equal" legal statuses have been almost universally discredited since the U.S. Supreme Court first articulated the concept in Plessy v. Ferguson, 163 U.S. 537; 16 S. Ct. 1138; 41 L. Ed. 256 (1896).

Therefore, SAGE, a law school organization aimed at ensuring sexuality and gender equality, respectfully offers this brief to provide this Court with its assistance as it

renders its advisory opinion on the constitutionality of Senate No., 2175.

SUMMARY OF ARGUMENT

Both Article 6 and 7 of the Massachusetts Constitutions stress the importance of equality, and the necessity to negate deferential treatment to any segment of society. This commitment to civil rights is echoed throughout American jurisprudence. That one group of individuals enjoys liberties not granted to other individuals is repugnant to the evolving ideology of democracy. To paraphrase Martin Luther King, Jr., a law that applies to one segment of society and not to another is an unjust law and becomes "difference made legal."[2]

This brief will address 1) how denying homosexuals marriage, and relegating them to "civil union" exile will create classism, and 2) how Senate No., 2175 endangers the rights of Massachusetts residents who travel to Nevada and other states, as well as those who own property out of state. The first section will focus on the social effects of relegating same-sex couples to "civil union" status by

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[2] Martin Luther King, Jr., "Letter from a Birmingham City Jail", A Testament of Hope: The Essential Writing and Speeches of Martin Luther King, Jr., 289 (James A. Washington, ed. 1986)

denying them the right to marry, while the second will expand upon the unintended legal perils that are likely to plague Massachusetts residents who travel or own property out of state if they enter into a "civil union" instead of a "marriage".

DISCUSSION

I. Denying homosexuals the right to marry by relegating them to civil union exile will create "classism" and foster inequality between the citizens of Massachusetts.

The history of Civil Rights legislation is fraught with incidences of changing social norms and the legal recognition of the evolving nature of American society. Civil Rights jurisprudence is in fact an instrument of social change and not a restriction on such changes. According to this court, the right to marry is considered both a civil right and a fundamental right per this Court[3].. However, this court frames the discussion of homosexual marriage narrowly and finds that only a rational relation test is necessary, thereby designating the right to homosexual marriage as an "important right."[4]. This implies that homosexuals do not have the same right to marriage as heterosexuals. Although such legal maneuvering may make

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[3] Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 325 (2003)

[4] Goodridge, 440 Mass. at 330.

homosexual unions palatable to resistant segments of society, homosexuals should be afforded their full constitutional right to marriage. Anything less constitutes "classism" and fosters inequality.

This section of the brief will discuss why civil unions constitute the "separate but equal" element in the context of homosexual marriage.

A. Civil Unions are the "separate but equal" remedy to homosexual marriage

Civil unions have been tested by other courts and found to be something other than actual marriage[5]. In *Burns* the court considered whether a Vermont "civil union" constituted a "marriage" for purposes of a family law consent decree[6]. The court in *Burns* found that "the legislative findings accompanying the enactment of the Vermont civil union statute noted that 'a system of civil unions does not bestow the status of civil marriage.'"

This distinction creates a separation between which couplings are viewed as fully legitimate (i.e. heterosexual) and those that are quasi-legitimate (i.e. homosexual). The quasi-legitimacy of civil unions creates confusion when civil union couples relocate (see II., below) and creates a marital hierarchy in which

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[5] *See generally* Burns v. Burns, 253 Ga. App. 600 (2002).

heterosexuals are superior to homosexuals. Historically, such class distinctions and the resulting prejudice have not served society and have in fact bolstered discrimination[7].

Brown put an end to 58 years of legally sanctioned discrimination by holding that the separate but equal doctrine deprived African Americans of equal protection under the Fourteenth Amendment[8]. In doing so, the Court found that the effects of the separate but equal doctrine had both tangible and intangible effects upon African Americans[9]. The tangible effects cited by the Court were the disparity in the quality of the education and the facilities available to the segregated population. However, it was the intangible effects that most persuaded the court. Disparate treatment based on race had the intangible effect of creating a feeling of inferiority among African American youth and the feeling of superiority among the white race[10]. So too will the implementation of civil unions create a legally imposed class distinction,

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[6] Burns, 253 Ga. App at 601.
[7] Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954)
[8] Brown, 347 U.S. 483 at 495
[9] Brown, 347 U.S. 483 at 492.
[10] Brown, 347 U.S. 483 at 494.

and result in further prejudice and discrimination towards homosexual persons.

At the present date, no court has recognized homosexuals as a suspect class for purposes of the Fourteenth Amendment. *See generally Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989); *High Tech Gays v. Defense Industrial Security Clearance Office,* 895 F.2d 563 (9th Cir. 1990) (reh. *en banc* denied, 909 F.2d 372, 9th Cir. 1990)

However, the American Psychological Association, the American Psychiatric Association, and the American Academy of Pediatrics all recognize that homosexuality is a lasting identity trait and attempts to alter such a trait would be detrimental to the mental health of such persons[11]. Simply put, a person who is homosexual can no more "choose" to be straight than a heterosexual can "choose" to be gay. This immutable character trait coupled with the purposeful discrimination endured by gays and lesbians (exemplified below in section I.A.1.) would suggest a suspect class; however, this brief is confined to the implications of creating a separate legal designation for homosexuals.

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[11] AMERICAN PSYCHOLOGY ASSOCIATION, "Just the Facts About Sexual Orientation & Youth: A Primer for principals, Educators and School Personnel", found at:

In *Goodridge*, this court recognized the tangible privileges of marriage, such as tax benefits and alimony, and left the legislature to decide how to address homosexual marriage. *Goodridge*, 440 Mass. 309. The legislature responded with Senate No, 2175, the creation of civil unions. Although civil unions would address the tangible privileges of marriage, they would negate the intangible ramifications of creating a separate form of marriage specifically for homosexuals. These intangible results would be; 1)the continued marginalization and discrimination of homosexuals, and 2)the adverse psychological effects on gay youth.

1. Civil Unions Would Have the Effect of Fostering Discrimination

Recent rulings involving homosexual rights have held that there has been a history of purposeful discrimination against gays and lesbians. *See Watkins*, 847 F.2d 1329 (9th Cir. 1988); *High Tech Gays,* 895 F.2d 563.

> Homosexuals have been the frequent victims of violence and have been excluded from jobs, schools, housing, churches, and even families. In any case, the discrimination faced by homosexuals in our society is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.

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http://www.apa.org/pi/lgbc/publications/just the facts.html, (Last visited Jan. 5, 2004.)

Watkins, 847 F.2d 1329.

Homosexuals, like African Americans, have been subject to legal discrimination throughout American history. As the Court has recognized in cases involving race, legal discrimination paves the way for social discrimination and prejudice. *See Brown*, 347 U.S. at 483. For homosexuals, the legal expression of sexual intimacy was not possible until the Court in *Lawrence v. Texas* decriminalized homosexual intercourse. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

This heretofore-legal barrier sanctioned social stigmatization of homosexuality by criminalizing a behavior seen as a privacy right between heterosexuals.

Although the effect of this is not quantifiable, it is easily assumable that "sodomy laws" supported the notion that homosexuals were criminals and therefore immoral, suspect, and inferior. This is evidenced in hate crimes, such as the brutal murder of Matthew Sheppard in Laramie, WY in 1998[12]. Sheppard was tortured, strung to a fence, and left to die because of his sexual orientation. A week later, the Family Research Council did not hesitate to

[12] Frank Rich, "The Road to Laramie", N.Y. TIMES, October 14, 1988, found at http://www.skeptictank.org/hs/gyhtrd1.htm, (last visited Jan. 7, 2004).

initiate a media campaign which demonized homosexuals and urged them to "change" into heterosexuals.

This incident is relevant to prejudice on two levels; 1) private members of society killed a man based on sexual orientation, and 2) a public entity ignored the tragedy and instead advocated the eradication of homosexuality. Fortunately, the Supreme Court has lifted the criminalization of homosexuality, but greater acceptance will only come with recognizing equality. Prohibiting homosexual marriage in the traditional sense will continue to allow the heterosexual majority to assume homosexual inferiority.

2. Civil Unions Will Create Adverse Psychological Effects on Homosexual Adolescents by Legally Sanctioning Discrimination

The most striking effect of creating a marital hierarchy between heterosexuals and homosexuals is the effect it will have on children. According to the American Academy of Pediatrics, children and adolescents who are homosexual experience discrimination and social pressure to conform to the heterosexual norm. This in turn creates isolation, as well as problems with self-esteem and self-confidence. Ultimately, child's rejection of their sexual orientation results in a higher rate of teenage suicides

and suicide attempts for such adolescents[13].. Furthermore, the American Psychological Association[14] has issued a primer for educators for dealing with homosexual youth and the discrimination they endure. This primer, endorsed by the National Education Association, The American School Health Association, and the National Association of Social Workers among others, states that homosexual students experience a legitimate fear of being harassed and hurt.

Their solution is for the schools to be as open and as accepting as possible. A separate legal classification for homosexual families runs counter to fostering such acceptance and equality.

Senate Bill No. 2175 ensures that there is a distinction between heterosexual and homosexual unions. This creates a "difference made legal" between the two sexual orientations. Children and adolescents that are questioning their sexual identities will be aware of this "difference" in the institution of marriage just as African American children were aware of their "difference" in the

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[13] AMERICAN ACADEMY OF PEDIATRICS, "Caring for Your School-Age Child: Ages 5 to 12", found at: http://www.medem.com/MedLB/article_detaillb.cfm?article_ID=ZZZNZ1L6W7C&sub_cat=269 (Last visited Jan. 6, 2004)

[14] AMERICAN PSYCHOLOGY ASSOCIATION, "Just the Facts About Sexual Orientation & Youth: A Primer for principals, Educators and School Personnel.

institution of education. By legitimizing the distinction between heterosexual and homosexual marriage, Senate No. 2175 will create a sense of inferiority and support the pressure homosexual adolescents' experience to conform to the heterosexual norm.

II. Senate No., 2175 Endangers the Rights of Massachusetts Residents Who Travel and Own Property In Other States

By purporting to create a "civil union" status *in lieu of* marriage for same-sex couples, Senate No., 2175 would endanger the property, inheritance and tort recovery rights of Massachusetts residents in other state forums.

Indeed, as will be set forth more fully below, the bill would place same-sex couples at a legal Ground Zero where the doctrine of *Lex Celebratonis* and the policy of letting states have a near-total amount of autonomy over family law, inheritance and tort matters collide.

A. What Is The *Lex Celebratonis* Doctrine and Why Does It Matter In The Context of Civil Unions/Same-Sex Marriage?

Commentators have generally set out eight policy goals that governments try to accomplish when deciding whether to grant or deny recognition to a particular marriage

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http://www.apa.org/pi/lgbc/publications/just the facts.html (Last visited Jan 6, 2004).

performed elsewhere[15]. First, unless specifically disqualified, marriages are presumed to be valid[16]. Second, the contractual expectations of the putative husband and wife should be protected whenever possible[17]. Third, in the interest of predictability, couples should be able to determine what the applicable law is regarding marriage using a "bright-line" test[18]. Fourth, because local marriage officials cannot be expected to be experts on international matrimonial law, they should be able to marry people in accordance with local statutes with the confidence that such marriages will generally be respected abroad[19]. Fifth, in the interest of "eugenic concerns and family stability", certain marriages where there is a danger of consanguinity or that risk causing disruption between close family members (e.g. marriages between adopted brothers and sisters) can be prohibited[20]. Sixth, moral, cultural and social mores where those mores bar certain types of marriages, such as polygamous unions[21].

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[15] Alan Reed, *ARTICLE: Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules*, 20 N.Y.L. Sch. J. Int'l & Comp. L. 387, 388-390 (2000).
[16] Reed, id., at 388.
[17] Reed, id, at 389.
[18] Reed, id, at 389.
[19] Reed, id, at 389.
[20] Reed, id., at 389.
[21] Reed, id., at 390.

Seventh, the prevention of "limping marriages" that are considered valid in country A but not in country B or C[22]. Eighth and finally, the concern that local authorities should give "due regard" to the decisions of foreign authorities in implementing foreign marriage laws[23].

The "Law where celebrated" doctrine is an admirable vehicle to reach most of the above goals. By generally respecting the decisions of a foreign jurisdiction except with regard to certain types of marriages (e.g. polygamous unions), state agencies simplify their evaluation workload considerably. If the state can accept a properly authenticated foreign marriage or divorce document at face value, it does not need to develop the expertise to interpret the marriage laws of 49 other U.S. states and 192 independent nations[24].

Unfortunately, most commentators and at least one Court of Appeals believe "civil unions" are not covered under the *Lex Celebratonis* doctrine[25]. Inspired by the

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[22] Reed, id., at 390.
[23] Reed, n6, id., at 390.
[24] "Fact Sheet: Independent States in the World", BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEPARTMENT OF STATE, Feb. 7, 2003 available at: http://www.state.gov/s/inr/rls/4250.htm (Last visited Dec 17, 2003).
[25] *See generally* Elaine M. De Franco, COMMENT: CHOICE OF LAW: WILL A WISCONSIN COURT RECOGNIZE A VERMONT CIVIL UNION?, 85 Marq. L. Rev. 251, 260 (Fall 2001) (Noting that Nevada and Nebraska explicitly deny recognition of "same-sex

federal Defense of Marriage Act of 1996 (DOMA), which is now codified at 1 U.S.C. §7 (2003) and 28 U.S.C. §1738C (2003), a majority of states have passed legislation or amended their constitutions prohibiting domestic same-sex unions and barring recognition of such unions entered into by their citizens in other states[26].

After its highest court found the practice of denying marriage licenses to same-sex couples was unconstitutional, in 2000 Vermont became the first state to pass a "civil union" law that purported to give same-sex couples many (but not all) of the rights of heterosexual married couples.[27] As with Senate No., 2175, the drafters of

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relationships") and Burns v. Burns, 253 Ga. App. 600,601 560 S.E.2d 47,49 (Ga. Ct. App 2nd Div. 2002)*cert den.* 2002 Ga. LEXIS 626 (Ga. July 15, 2002) "Susan's position, however, has a flawed premise: she and her female companion were not married in Vermont but instead entered into a "civil union"... The definitional section of that statute expressly distinguishes between 'marriage', which is defined as 'the legally recognized union of one man and one woman,' and 'civil union', which is defined as a relationship established between two eligible persons pursuant to that chapter."

[26] " SHURTLEFF SAYS UTAH MUST DETERMINE OWN MARRIAGE LAWS", News Release, Utah Attorney General Mark Shurtleff, Jan. 24, 2003, Available at http://attorneygeneral.utah.gov/PrRel/prjan242003.htm (Last visited Jan. 7, 2004)

[27] Vermont's civil union law is codified at 18 V.S.A. §5160 et seq. It differs from marriage in several key respects, most notably in that civil unions may only be "dissolved" if one or both of the parties has been a resident of Vermont for at least one year. *See* 15 V.S.A. §1206 (2003) and "The Vermont Guide To Civil Unions", OFFICE OF THE SECRETARY

Vermont's legislation attempted to provide to participants of such unions the same civil rights and obligations as are enjoyed by heterosexual Vermonters who marry[28] while simultaneously denying them the legal status of married couples.

Like Juliet Capulet in William Shakespeare's *Romeo and Juliet*, backers of such measures ask "What's in a name?"[29] They apparently believe, like Juliet, "that which we call a [marriage] by any other name would smell as sweet"[30], and so restricting same-sex couples to the sui generis status of "civil unions" is an acceptable compromise.

Unfortunately, just as Juliet ultimately learns in the play to her ultimate undoing, certain nouns are not capable of such flexible construction. Because both Vermont's "Civil Union" law and Senate No, 2175 specifically *exclude*

OF STATE, at
http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html#faq2 (Last visited on Nov. 4, 2003).

[28] Among other things, the legislation grants civil union participants the same rights as married couples in the area of intestate succession, property ownership and tort recovery for wrongful death. *See* "The Vermont Guide to Civil Unions", OFFICE OF THE SECRETARY OF STATE, Available at http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html#faq2 (Last visited on Jan. 7, 2004).

[29] *Romeo and Juliet*, Act II, Scene II. Available at http://www.bartleby.com/70/3822.html (Last visited Jan. 7, 2004).

[30] N16, id.

heterosexual couples from participating, they are not considered to be "marriages" for *Lex Celebratonis* purposes.

So far, only Georgia and New York have published decisions determining whether they will recognize a Vermont "civil union" as a marriage for domestic state law purposes.

1. Burns v. Burns (Georgia)

In Burns[31], the Georgia Court of Appeals had to determine whether a Vermont "civil union" constituted a "marriage" for purposes of a family law consent decree, which prohibited Susan Burns from having visitation with her children while she was "cohabiting" with anyone else.

Susan's former husband Darian, who had physical custody of their children, asked the court to hold Susan in contempt because she allegedly "violated the trial court's order by exercising visitation with the children 'while cohabiting with her female lover.'"[32] In rebuttal, Susan noted that she had entered into a Vermont Civil Union with her female partner and thus she was "married" for the purpose of the custody consent decree[33].The Georgia Court of

[31] Burns v. Burns, 253 Ga. App. 600, 560 S.E.2d 47, (Ga. Ct. App 2nd Div. 2002)*cert den.* 2002 Ga. LEXIS 626 (Ga. July 15, 2002)
[32] Burns, 253 Ga. App. at 600-601.
[33] Burns, 253 Ga. App. at 601.

Appeals rejected her argument with the following prescient paragraph:

> Susan's position, however, has a flawed premise: she and her female companion were not married in Vermont but instead entered into a "civil union" under 15 Vt. Stat. Ann. § 1201 et seq. The definitional section of that statute expressly distinguishes between "marriage," which is defined as "the legally recognized union of one man and one woman," and "civil union," which is defined as a relationship established between two eligible persons pursuant to that chapter. The next section reemphasizes this distinction, requiring that eligible persons must "be of the same sex and therefore excluded from the marriage laws of this state." Indeed, the legislative findings accompanying the enactment of the Vermont civil union statute noted that "a system of civil unions does not bestow the status of civil marriage." .

Burns, 253 Ga. App. at 601.

Accordingly, the Court of Appeals upheld the trial court's finding that Susan was in contempt of the visitation consent decree.

2. Langan v. St. Vincent's Hosp. (New York)

Although it also arose in the context of a Vermont civil union, Langan[34] presented the New York Supreme Court with a different set of public policy and conflict of law considerations.

After living together for nearly fourteen years, Neal Conrad Spicehandler and John Langan entered into a civil union in Vermont[35]. Several hours after the couple closed on their new home in Massapequa, Long Island, Spicehandler was hit by a car[36]. Although Spicehandler only suffered a broken leg as a result of the car accident, he died "from an embolus of 'unknown origin.'"[37] while in the hospital's care.

Under New York law as previously interpreted by that state's courts, survivors of same-sex couples did not have, standing to sue a hospital for wrongful death, although widows and widowers did have that right[38].

However, in the period between 1998's Raum v. Restaurant Assocs. 252 A.D.2d 369, 675 N.Y.S.2d 343 (Sup.Ct. N.Y. 1998), the last time the court analyzed the issue and Langan, Vermont had enacted its civil-union legislation. Since Spicehandler and Langan had entered into such a

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[34] Langan v. St. Vincent's Hosp., 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup.Ct. N.Y. April 10, 2003).

[35] Langan, 196 Misc. 2d. at 441.

[36] The driver of the vehicle was "Ronald Popadich who ran down and injured 18 people in Manhattan". Langan, 196 Misc. 2d. at 441.

[37] Langan, 196 Misc. 2d. at 441.

[38] Langan, 196 Misc. 2d. at 443. *See also* Raum v. Restaurant Assocs., 252 A.D.2d 369, 675 N.Y.S.2d 343 (Sup.Ct. N.Y. 1998) which found that the state's wrongful-death statute was facially and practically neutral, since it denied

civil-union before Spicehandler died, the facts in Langan gave the court the opportunity to distinguish it from the situation in Raum.

Noting that New York (in contrast to 35 other states) had not passed a "mini-DOMA"[39] denying same-sex couples the rights and obligations of married couples but had instead recognized the right of same-sex couples to engage in a broad spectrum of quasi-matrimonial behavior, including but not limited to succession of rent-controlled apartments and adoption of children, the court found that nothing in New York's public-policy barred recognition of a Vermont civil union[40].

Moving to the ultimate issue, i.e. whether Spicehandler's and Langan's Vermont civil-union would be recognized as a marriage for wrongful-death purposes in New York, the Langan court made two key findings. First, it noted that Langan *would have had* the right to sue for wrongful-death in Vermont if Spicehandler had died there[41]. Second, it declared that "Under principles of full faith and credit and comity, and following authority which advances the concept that citizens ought to be able to move from one

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standing to heterosexual and homosexual unmarried couples alike.

[39] Langan, 196 Misc. 2d at 445.

[40] Langan, 196 Misc. 2d. at 447.

state to another without concern for the validity or recognition of their marital status, New York will recognize a marriage sanctioned and contracted in a sister state and there appears to be no valid legal basis to distinguish one between a same-sex couple."[42]

3. Lessons Gleamed from Burns and Langan

Both Burns and Langan dramatically expose the fallacy that "civil unions", like Juliet Capulet's rose, "smell as sweet" (and have the same legal effects) as marriage. Unless those joined in a civil union permanently exile themselves to Vermont, they are faced with two unpleasant choices. At best, if the couple lives in or visits one of the 14 states[43] that has not enacted a state version of DOMA, they have to hope that the state's courts will be as conscientious in analyzing the issues as New York's was in Langan.

At worst, if the couple lives in or visits one of the 35 other states that have passed mini-DOMAs, they are likely to meet the same fate as Susan Burns, whose Vermont "civil

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[41] Langan, 196 Misc. 2d. at 449.
[42] Langan, 196 Misc. 2d. at 449.
[43] According to the Langan court, 35 states have passed mini-DOMAs, with the implication that 15 states (Vermont and 14 others) have not.

union" was brushed aside as a status inferior, rather than equivalent to, marriage[44].

Thus in the context of Senate No., 2175, a Massachusetts "civil union" couple can never be sure that their right to be secure in their to "life, liberty and property", as guaranteed by Art. X of the Massachusetts Constitution, will be respected by other states.

For example, under Nevada law, only a "male and female person"[45] are considered to be capable of marriage. Nevada's state DOMA, now codified at Nev. Const. Art. 1, § 21 (2003) declares "Only a marriage between a male and female person shall be recognized and given effect in this state."

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[44] It is true that the Burns court also found that Georgia's public-policy barred recognition of same-sex marriages due to the state and federal versions of DOMA. *See* Burns at 253 Ga. App. at 601. However, if the lesbian couple had been "married" in Vermont rather than joined in a "civil union" there, they would have had standing to initiate a federal constitutional challenge to Georgia's DOMA as well as the federal legislation. It is difficult to argue that Georgia was obligated to give "full faith and credit" to a status (civil unions) that its own courts did not recognize but since Georgia unquestionably *does* recognize the state of being married, the state would be forced to defend the practice of discrimination in such recognition on the basis of sex.

[45] NRS 122.020 (2003).

In addition, Nevada has a long history of denying legal recognition to quasi-matrimonial unions[46] and of exercising broad jurisdiction over certain probate matters[47]. As will be shown in the following hypothetical, this could have drastic effects on Massachusetts's residents if the Court were to rule that Senate No., 2175 is constitutional and the state were to enact the bill as written.

Assume Patty and Marcie are doctors and residents of Boston who enter into a Massachusetts civil union. Both are childless and their respective parents and siblings have passed away. As a birthday surprise for Marcie, Patty purchases a condominium in Turnberry Place on the Las Vegas Strip for $1.5 million[48] in an all-cash transaction using her separate property. Shortly thereafter while volunteering at a Hong Kong clinic for individuals stricken by SARS, Patty succumbs to the illness and dies intestate.

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[46] *See generally* Banegas v. SIIS, 19 P.3d 245, 117 Nev. Adv. Rep. 22 (2001) (denying Worker's Compensation to divorced spouse who later reconciled and was legal dependent of decedent).

[47] Per NRS 136.010(2) "The estate of a nonresident decedent may be settled by the district court of any county in which any part of the estate is located. The district court to which application is first made has exclusive jurisdiction of the settlement of estates of nonresidents".

[48] According to the developer's Web site, condominiums at Turnberry Place currently range from $500,000 to $5.25 million. The three-towered complex is adjacent to the Rivera Hotel and Casino. *See* http://www.turnberryplace.com/.

Under NRS 136.010(2), the Eighth Judicial District Court (which covers Clark County, where the condominium is located) can exercise jurisdiction over Patty's estate and may exercise "exclusive" jurisdiction over her entire estate if it is the first court to receive a probate petition[49]. Given that Clark County has a claim for property taxes due and owing on the condominium, it has an incentive to file a request with the Probate Court to begin proceedings in Nevada--which is where things get interesting.

If Marcie is considered a "surviving spouse" under Nevada law for probate purposes, she is entitled to inherit the entire condominium pursuant to NRS § 134.050(4), which declares "If the decedent leaves no issue, father, mother, brother or sister, or children of any issue, all of the separate property of the decedent goes to the surviving spouse."

On the other hand, if the Nevada courts were to disregard Marcie and Patty's "civil union" (as appears likely given the state's expressed public-policy on the

[49] *See also* Bergeron v. Loeb, 100 Nev. 54, 58, 675 P.2d 397, 400 (1984) *cert den.* 469 U.S. 1212; 105 S. Ct. 1182; 84 L. Ed. 2d 330"[P]robate in Nevada is in the nature of an 'in rem' proceeding. In an action in rem, the court acquires jurisdiction over the estate and all persons for the

matter, as articulated in at Nev. Const. Art. 1, § 21 (2003)) then Patty has no heirs for probate purposes. Consequently, under NRS 134.120, "...the estate escheats to the state for educational purposes." If Marcie and Patty had been "married" rather than "joined" in a "civil union", Marcie would be able to bring a federal constitutional challenge to both Nevada's DOMA and the federal legislation on the grounds that she is being deprived of property on the basis of sex.

However, given that the Nevada legislature has failed to enact a "civil union" provision and lacking the body of law friendly to same-sex couples that exists in New York and other states, it is hard to imagine Marcie's plea that her "civil union" is equivalent to a Nevada "marriage" will succeed. Instead, the Nevada Supreme Court[50] will probably adopt the Georgia Court of Appeals' reasoning in Burns, supra.

This is hardly the result intended by the parties to our hypothetical or guaranteed by Art. X of the Constitution of the Commonwealth of Massachusetts. However, given the case law so far on foreign state-acceptance of "civil unions", it appears the only likely outcome.

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purpose of determining their rights to any portion of the estate."

CONCLUSION

Just as the first shots of the American Revolution were fired at Lexington and Concord, the Commonwealth of Massachusetts again has the honor of serving as the place where a breakthrough in the development of American civil rights law is occurring.

Massachusetts is uniquely poised to set a precedent of tolerance and equality. This will not be the first time the state has chosen to ignore the forces of prejudice and hatred to forge legislation before the country has reconciled its opinion on a matter. In 1855, the Massachusetts legislature desegregated public education, eradicating the separate but equal doctrine originally established by the Massachusetts Supreme Court. Mass. Acts 1855, c. 256; *Roberts v. City of Boston*, 59 Mass. 198, 206 (1850). Senate No. 2175 is a reflection of the separate but equal doctrine; the majority is imposing a law upon a minority that the majority itself need not follow. This is an unjust law. Marriage, and the rights and privileges, both tangible and intangible should be available to all adult individuals within society. Although a homosexual may marry a member of the opposite sex, to declare the Massachusetts marriage statute neutral is to ignore the

[50] Nevada lacks an intermediate level of appellate courts.

biological and social construction of the homosexual minority.

Just as the Massachusetts legislature pre-dated the Supreme Court in desegregating public education, so too is it in a position today to end the disparate treatment of homosexuals. With the above thoughts in mind, we are confident the Court will reach a proper and just resolution of this matter.

Respectfully submitted this ___ Day of January, 2004. by:

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on behalf of Jennifer Bodnar,
Edward Magaw and Jebbie Whiteside
and SAGE