

THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

HILLARY GOODRIDGE, et al.

vs.

DEPARTMENT OF PUBLIC
HEALTH and another,

SJC-09163

**AMICUS BRIEF OF PATRICK A. JORSTAD IN RE: SJC-09163,
REQUEST FOR AN ADVISORY (A-107)**

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"Traditional" Marriage's "Cultural" and "Historic" Significance Does NOT Convey Any Monopoly on Virtue

"Any memo like this should be marked CONFIDENTIAL so as to avoid discovery. Destroy any record of this memo."¹

"I suggest we do something which is illegal ... My view is that we wouldn't be slapped too hard even if someone figured out that what we are doing is illegal."²

While the Senate is to be commended for seeking to extend the spousal evidentiary privilege that these two men enjoy to committed gay and lesbian couples (Proposed Chapter 207A, §4(g)(13)), the General Court should do so without creating a "separate but equal" framework, premised on some misguided notion that those who enter into "traditional" civil marriages have a mythical monopoly on virtue, or that their relationships have such "historical" significance, or "cultural" relevance that they warrant preferred treatment or appellation. (Proposed Senate Bill, §1).

¹ State Street Corporation executive Nicholas A. Lopardo, in handwritten instructions to a former compliance officer at the Corporation. Mr. Lopardo was, until recently, (1) a Director of State Street Corporation; (2) Vice Chairman of State Street Corporation; (3) Chairman of State Street Global Advisors, the asset management division of State Street Corporation; and (4) a Director of the Boston Stock Exchange. Please see this memo on the website ShareholdersOnline.org at: <http://www.shareholdersonline.org/pdf/destructionofevidencememo.pdf>. As the SJC will no doubt recall, Mr. Lopardo was nominated by Acting Governor Jane Swift to sit on the Board of the Massachusetts Turnpike Authority, which generated a suit that was decided by this honorable Court.

² State Street executive Doug Holmes, in an e-mail to colleagues at State Street. Mr. Holmes was formerly the head of the Enhanced Equity Management group at State Street Global Advisors, and recently took the Voluntary Separation Program offer at State Street. Please see this e-mail at: <http://www.shareholdersonline.org/pdf/tapping.pdf>.

The Friend of the Court's Background and Experience

The friend of the Court, Patrick A. Jorstad, was a citizen of the Commonwealth of Massachusetts for a number of years, most recently in 1998. He is now a citizen of the Commonwealth of Virginia, where he lives with his domestic partner of nearly 10 years, Mr. David A. Smith. Mr. Jorstad is a graduate of Northeastern University, where he earned a degree in Business Administration. Mr. Smith is a graduate of Harvard College, where he earned a degree in Government.

In April 1999, Mr. Jorstad sent his partner to Boston as his agent, to undertake certain stockholder inspection activities at State Street Corporation on his behalf. Upon his arrival at State Street, Mr. Smith was met on sight by a plainclothes Boston police officer, who threatened Mr. Smith with arrest for trespassing if he did not leave the premises.

At the 1999 Annual Meeting of State Street Stockholders later that week, Mr. Jorstad sought to have his partner accompany him into the Meeting. Mr. Smith was denied entry, and watched helplessly as married couples were allowed into the Meeting. Mr. Jorstad attended the Meeting without Mr. Smith, who waited outside.

At the 2000 Annual Meeting, the former Chairman of State Street, Mr. Marshall N. Carter, refused to permit either Mr. Jorstad or Mr. Smith to speak in favor of proposals of business that each had submitted for consideration at the Meeting,³ but allowed another stockholder to ramble on in praise of Mrs. Carter, his wife.

The Corporation videotaped Mr. Carter's inequitable actions; tellingly, to this very day, State Street and its Ropes & Gray attorneys refuse to turn over this corporate record. Mr. Carter resigned one month after the videotaped Meeting, and a Ropes & Gray partner contacted Mr. Smith to seek settlement of all claims. This Court is invited to draw the obvious inferences.

In April 2003, a proposal that Mr. Jorstad submitted to reorganize the State Street Board of Directors garnered 108,121,108 shares voted in its favor. Shares explicitly voted against it totaled 136,577,292. The measure is due to be reconsidered in 2004.

It is against this backdrop that the friend of the Court respectfully submits this brief, and thanks this honorable Court for the opportunity to weigh in on the important issue of civil unions versus civil marriage.

³ Mr. Smith became a stockholder in his own right after the 1999 Meeting, to preclude State Street's attorneys from denying him entry again. Mr. Carter was appointed by Acting Governor Jane Swift to head up the "blue ribbon" panel that investigated security lapses at Boston's Logan Airport after 9/11, and was recently named as a Director of the New York Stock Exchange.

**The Legal Community will Exploit the Ambiguity
Created by a "Separate but Equal" System of Marriage**

**An Analogous Example of How Ambiguity is Exploited:
Civil Unions = "Beneficial Shareholders"
Full Marriages = "Stockholders of Record"**

Ambiguity in appellate court rulings creates fertile ground for legal mischief. When the highest court in any given jurisdiction speaks, it should do so clearly, boldly, unequivocally, or not at all. Otherwise, the top tribunal invites decades of legal wrangling, and risks spawning a whole new cottage industry within the legal community. This is the humble view of the friend of the Court, but it is a view not without support or foundation in concrete experience.

Whole treatises are penned on how to exploit the ambiguity of the laws of the Commonwealth, as interpreted by the Supreme Judicial Court. For example, Southgate & Glazer, *Massachusetts Corporation Law & Practice*, expends more than 600 pages in giving instruction and advice to the Massachusetts corporate legal community on how to exploit such ambiguities within Chapter 156B, the Business Corporation Law. It pays special attention to those provisions that have been sparsely interpreted by this honorable Court.

For instance, the treatise plays semantic games with the most basic term, "stockholder":

Chapter 156B does not define the term "stockholder" either generally or in any particular context,⁶⁷ nor does it at any point use the term "holder of record" or "beneficial owner" ... [Southgate, §7.11]

Building upon the flimsy foundation of this absurd semantic distinction, the treatise advises Massachusetts corporations and their legal counsel on how to minimize the stockholder list data that must be turned over to a dissident under Section 32 of Chapter 156B:

Section 32 contemplates that a corporation shall maintain "stock and transfer records ... containing the names of all stockholders and the record address and the amount of stock held by each."⁶⁹ Because the statute does not require a corporation to maintain any other list of the names of stockholders (presumably, although not explicitly, the names that appear on the face of the stock certificates), it has long been thought implicit in the statute that the corporation need only recognize holders of record as those entitled to assert rights of stockholders.⁷⁰

The pending civil unions bill advanced by the Senate, while more clearly defining the terms therein, nevertheless creates the same opportunity for semantic games to be played. The holders of marriage certificates would be akin to "holders of record" in the Southgate & Glazer universe of "stockholders" - i.e., first-class citizens. The holders of civil union cer-

tificates would be akin to "beneficial owners" in the Southgate & Glazer universe of "stockholders" - i.e., second-class citizens. The lines at the town clerks' offices in the Commonwealth might as well be marked like 1950s water fountains: "Heterosexuals Only" and "Homosexuals Only" (Proposed Chapter 207A, §7).

The 1999 Preface to Southgate & Glazer says that the treatise "is by any measure a Ropes & Gray product". The fact that Ropes & Gray, the prominent Boston law firm, was on the losing end of an instructive SJC opinion undercutting the treatise's semantic distinction between "stockholders of record" and "beneficial shareholders" is glossed over in §7.11, Footnote 70:

In *Sarrouf v. New England Patriots Football Club, Inc.*, 397 Mass. 542, 552, 492 N.E.2d 1122, 1129 (1986), the Supreme Judicial Court allowed beneficial owners to assert statutory appraisal rights in their own names. Whether this exception to the general rule that corporations need recognize only holders of record will be extended to other stockholder rights may well depend on the particular right asserted. See §7.21 of this chapter for a discussion of statutory inspection rights.

In *Sarrouf*, this honorable Court touched upon, but did not squarely resolve, the definitional issue of what constitutes a "stockholder" under Massachusetts law:

The statute does not define who is the "stockholder" for purposes of perfecting a right to appraisal. Those plaintiffs denied appraisal because they were not registered stockholders were beneficial owners of stock held in what is known as a "street name," the name of a broker, or other nominee. The name of the broker would appear on the defendant's list of stockholders. The [trial court] judge held that notice of objection to corporate action by the beneficial owners of the stock was insufficient to meet the requirements of the statute.

The judge's interpretation of the statutory requirement was unduly strict. The purpose of the requirement of written notification of objection is to give the corporation notice of possible dissenters. ... The statute is designed to provide an equitable, simple, and expeditious remedy to dissenting stockholders. It should not be construed strictly against them. Notice by a stockholder, whether of legal or beneficial title, is sufficient to meet the statutory prerequisite. ...

The practical difficulties created by the defendant for the beneficial owner (and his agent) weigh against requiring notice from the record owner. [Sarrouf, 551-2]

Although it would seem that, in *Sarrouf*, this honorable Court rejected Ropes & Gray's notion of "first-class stockholders" (i.e., "record stockholders") and "second-class stockholders" (i.e., "beneficial stockholders"), Southgate & Glazer continues to advise corporations to employ this semantic device to this day:

The Massachusetts statute does not specifically provide that only stockholders of record are eligible under Section 32 to demand inspection of the stock list and other statutorily available records.¹⁷⁷ However,

the statute historically has been construed by practitioners to mean that only holders of record may demand inspection.¹⁷⁸ ... [Southgate, §7.21(b)]

Can there be any real doubt that - in the absence of clear, bold, and unequivocal guidance from this honorable Court - similar treatises will soon be published on how to exploit the semantic distinctions between civil unions and civil marriage in Massachusetts?

It is perhaps noteworthy that the lead defense attorney in *Sarrouf* was the late Edward B. Hanify, formerly a partner of Ropes & Gray and a Director of State Street Corporation (the current Board of Directors includes another former Ropes & Gray partner, Truman Snell Casner, who remains "of counsel" there).

With Mr. Hanify on the losing side in *Sarrouf* was John D. Donovan, Jr., who is currently a partner at Ropes & Gray, an author of some Southgate & Glazer chapters, and State Street's latter day champion of the "unduly strict" and narrow reading of what constitutes a "stockholder". Yes, the "unduly strict" reading of what constitutes a "stockholder" is alive and well at Ropes & Gray even today, though Southgate expresses significant misgivings as to the SJC's likely ruling, should it ever address the matter squarely:

As a procedural matter, the Supreme Judicial Court and Superior Court each have jurisdiction in equity to hear an action to compel compliance with statutory inspection rights. ... [Southgate, §7.21(c), *Procedures for Demanding Statutory Inspection*]

The permissive approach traditionally taken by the Massachusetts courts suggests that today they would permit stockholders to obtain photocopies¹⁹⁰ and computer tapes of the stockholder list and related materials.

Footnote 190: The absence of a reported case is, perhaps, attributable to the fact that, once it has been determined that stockholders are entitled to requested materials, corporations customarily fulfill their obligation by furnishing copies of those materials.

Rather than allowing this same sort of climate of ambiguity to subsist with regard to civil marriage, the SJC should speak with authority against the "separate but equal" measure proposed by the Senate. This proverbial ounce of prevention will stave off many pounds of cure.

Ambiguity, coupled with the imposition of burdensome, case-by-case litigation costs to vindicate stockholder rights, are key elements of the corporate defense strategy espoused by Southgate & Glazer:

...in *Donaldson v. Boston Herald-Traveler Corp.*,¹⁹⁷ the Supreme Judicial Court held that legal expenses incurred by a prevailing stockholder are not recoverable.¹⁹⁸ [Southgate, §7.21(g)]

...Massachusetts corporations, upon receipt of a demand ... either do not respond [to a stock-

holder] until a suit is filed or enter into negotiations concerning the terms under which corporate records, including stock records, will be made available. [Southgate, §7.21(h), *Practice under Section 32, Chapter 156B*]

This corporatist pattern of: (1) forcing every dissident to file suit to actually vindicate his or her rights as a stockholder, and to incur unnecessary litigation costs in the process, and then (2) rushing to moot out the legal issues at the eleventh hour, is one that is rooted in bad faith, in the view of this friend of the Court.

That this pattern of rascality is likely to be repeated with respect to those seeking to actually vindicate their second-class rights as members of civil unions is a practical reality to which this Court should not turn a blind eye and a deaf ear.

This pattern was certainly evident in State Street's reaction to the lawsuit that was filed with this honorable Court in March 2002 by Mr. Smith (*Smith v. State Street Corporation*, SJ-2002-0109). Within a mere four days of the filing of his Complaint, State Street's attorneys hastened to moot out many of the legal issues by providing additional shareholder list materials that the Corporation had steadfastly refused to turn over for years.

The prospect of review by this Court had a brief salutary effect upon the conduct of State Street's management and attorneys. Unfortunately, that salutary effect was lost once the single Justice of this Court remanded the case to the Suffolk Superior Court. There, State Street succeeded in petitioning the new, pro-business Business Litigation Session ("BLS") to take jurisdiction of the case. The BLS put off ruling on the matter until the afternoon following the 2002 Annual Meeting in April 2002.

Even though the presiding judge of the BLS found that the Ropes & Gray attorneys representing State Street misused a motion for a more definite statement under Rule 12(e) to buy time, he did nothing to restore the *status quo ante*, or to take remedial action. Rather, he declared that, with the passing of the Meeting, many of the issues now seemed to him to be "moot".

Mr. Donovan of Ropes & Gray was the defense attorney for State Street in *Smith*. He was also the defense attorney in *Ott v. Boston Edison*, 413 Mass. 680 (1992), when a single Justice of the SJC declined to give relief to a stockholder on the grounds of mootness:

Moreover, it is not at all apparent that the issue, if it were to arise again, could not be decided on appeal before it would become

moot. The issue would not be apt to evade review if the stockholder or stockholders are diligent in pursuing their claimed rights. ... Our appellate system has the capacity to move rapidly when circumstances warrant prompt resolution of an important issue.

That the same sort of litigation tactics will be employed, with the same sort of impunity, with respect to those same-sex couples actually seeking to vindicate their second-class rights under the Senate's proposed civil unions bill seems almost a foregone conclusion. Rather than countenance that prospect, this honorable Court should reject - out of hand and from the outset - the "separate but equal" framework proposed by the Senate.

This is not to say that the explicit provisions included in the pending Senate bill are wholly without merit. For example, requiring companies like State Street Corporation to provide equal insurance benefits to its coupled gay and lesbian employees would be a positive step (Proposed Senate Bill, §3). State Street did not offer these benefits when Mr. Jorstad last worked there, though the Company apparently has begun offering them voluntarily since Mr. Jorstad's shareholder activism began (indeed, there has been a noticeable, if cosmetic, uptick in the Company's outreach to

the gay and lesbian community in Massachusetts since Mr. Jorstad began his shareholder activism).

The other rights, privileges, and responsibilities enumerated in the Proposed Senate Bill are worthy of praise - but the very enumeration of some rights will, no doubt, be construed by some to mean that other rights are withheld. Just as Southgate & Glazer builds an entire premise of who is entitled to assert stockholder rights upon the semantic foundation of Chapter 156B's failure to define the term "stockholder", so too will others shamelessly rush to parse every word of the Proposed Senate Bill, if it becomes law.

In *Sarrouf*, this Court showed a willingness to step out of the vacuum of legal theory, and to take the novel step of allowing "practical" realities to intrude into its thinking [*Sarrouf*, 552]. Recognizing that the intermediate layers between the actual beneficial owner of a corporation's stock and the nominal record holder created "practical difficulties", this Court refused to adopt the narrow view to which the authors of Southgate & Glazer still cling to this day.

According to a list of its "record" stockholders dated November 24, 2003, a single nominal stockholder holds legal title to 310,223,871 of the 336,591,398

shares reflected on that list.⁴ This means that any stockholder seeking a list of "all" of the Corporation's stockholders under Section 32 of Chapter 156B is faced with the practical reality that - in the absence of contrary guidance from the SJC at some point in the future to remove the ambiguity - State Street passes off a list that obscures the actual beneficial ownership of 92% of its stock, and declares that the black letter of the law does not require more.

Can there be any doubt that similar obstinate, flinty pronouncements that "the black letter of the law does not require more" will be forthcoming from those resisting full equality for civil unions? Can there be any doubt that those resisting full equality will parse every word, every comma, every semicolon, every split infinitive, every undefined term, and every silence to maximum and absurd effect?

Pending before the SEC right now is State Street's argument that the black letter of the law does not require it to place shareholder-initiated By-law amendment proposals on its proxy statement for the 2004 An-

⁴ This nominal stockholder is "CEDE & CO", nominee for DTCC, which in turn holds for its participants (brokerages and other financial institutions, who in turn hold for their individual customers, who are the Corporation's real "stockholders").

nual Meeting.⁵ Section 17 of Chapter 156B reads as follows:

The power to make, amend or repeal by-laws shall be in the stockholders; provided that if authorized by the articles of organization, the by-laws may provide that the directors may also make, amend or repeal the by-laws in whole or in part, except with respect to any provision thereof which by law, the articles of organization or the by-laws requires action by the stockholders. Not later than the time of giving notice of the meeting of stockholders next following the making, amending or repealing by the directors of any by-law, notice thereof stating the substance of such change shall be given to all stockholders entitled to vote on amending the by-laws. Any by-law adopted by the directors may be amended or repealed by the stockholders.

Because the statute is silent (and un-interpreted by the SJC) as to how stockholders are to exercise their power to "make, amend or repeal by-laws", (or, indeed, who is meant by the term "stockholders") State Street and its attorneys are arguing that it has no obligation to include proposed shareholder-initiated By-law amendments on its proxy ballot.

Ambiguity, and the absence of SJC interpretation, strikes again.

The Senate's request for an advisory opinion offers this honorable Court a truly rare chance to deal a

⁵ Please see: <http://www.shareholdersonline.org/pdf/110503MulveySmithWescheProposal.pdf>.
Please also see: <http://www.shareholdersonline.org/pdf/121903noactionletterrequest.pdf>.

preemptive blow against the more creative licenses that some delight in taking with the ambiguities that inevitably riddle even the best-drafted legislation. Before this Court are two paths: one path is to give sanction and countenance to the Senate plan, in which case this Court must be prepared for many years of court battles over legislative intent, meaning, import, punctuation, grammar, and syntax to ensue; the other path is to hold fast to the principled concept that civil marriages should convey equal benefits to heterosexual couples and homosexual couples alike, and let the term "civil marriage" have harmoniously-interpreted effect for all, both under the statutes and the common law of the Commonwealth.

The Friend of the Court: Ever a Groomsman, Never a Groom

Mr. Jorstad was honored to serve as his younger brother's best man. The wedding took place in Massachusetts in 2001. Mr. Smith performed a reading.

Last month, Mr. Smith served as his best friend's best man. Mr. Jorstad served as a groomsman. This wedding, too, took place in Massachusetts.

At both weddings, the painful poignancy was not lost on the friend of the court: ever a groomsman, never a groom. This Court has the power to change that, and to

do so in a way that challenges a "separate but equal" system that is prone to endless semantic games. (Armed with full marriage rights, Mr. Jorstad could have fought State Street's exclusion of his partner from the 1999 Annual Meeting, as one "practical" example.)

Conclusion: No to Sexual Orientation Apartheid

Mr. Jorstad thanks this honorable Court for the chance to share firsthand observations that bear upon the likely outcomes of allowing the Proposed Senate Bill to pass muster. No matter how closely the Bill mimics marriage, it will not come under the purview of the Full Faith and Credit Clause, making it "separate but unequal" in that key respect (a "practical" consideration for this *amicus*, who lives in Virginia). The *amicus* urges this august tribunal to reject sexual orientation apartheid, and hold fast to your principled insistence on full civil marriage rights for committed gay and lesbian couples.

Respectfully submitted,

Patrick A. Jorstad, *pro se*⁶

January 12, 2004

⁶ The friend of the Court invites the Justices to review ShareholdersOnline.org, of which he is the Editor. Ropes & Gray and State Street are frequent and recurring visitors there (site visits are tracked, and logs could be provided to this Court).