

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. 09163

IN THE MATTER OF AN OPINION OF THE JUSTICES ON SENATE
BILL NO.2175, "AN ACT RELATIVE TO CIVIL UNIONS."

BRIEF OF THE AMICUS CURIAE
MASSACHUSETTS BAR ASSOCIATION

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PRELIMINARY STATEMENT

By announcement dated December 15, 2003, the Court invited any interested party to submit a brief in connection with a request transmitted to the Justices by the Clerk of the Senate for an advisory opinion as to questions of law arising from Senate Bill No, 2175, "An Act Relative to Civil Unions." The Massachusetts Bar Association submits this Brief in response to that invitation.

ISSUES PRESENTED

Does Senate Bill No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all "benefits, protections, rights and responsibilities" of marriage, comply satisfy the holding in Goodridge?

STATEMENT OF THE CASE

This is a proceeding in which the State Senate has requested an Opinion of the Justices as to questions of law arising from Senate Bill No. 2175.

Senate Bill No. 2175, "An Act Relative to Civil Unions," was filed in the Massachusetts Senate on December 11, 2003 by Senator Frederick E. Berry and

Senator Joan M. Menard and was referred to the Senate Ethics and Rules Committee, which reported the bill favorably. Senate Bill No. 2175 was then placed in the Orders of the day, and the Senate on voice vote ordered the bill to a third reading.

On December 12, 2003 Senator Steven A. Tolman offered an Order before the Senate, embodied in Senate Bill No. 2176. The Order, which requests an advisory opinion of the Justices stated that Senate Bill No. 2175, that the Civil Unions bill was pending before the Senate and would, if enacted, insert a new Chapter 207A in the General Laws providing that eligible same-sex couples may form civil unions with all "benefits, protections, rights and responsibilities" of marriage, but may not enter into a marriage. The Order seeking an advisory opinion was filed in light of the Court's decision of November 18, 2002 in Goodridge, et al v. Department of Public Health, et al. 440 Mass. 309 (2003) which reformulated the definition of marriage and declared that statutes may not ban same-sex couples from "the protections, benefits, and obligations of civil marriage," but delayed entry of the judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in

light of this opinion." The Senate Order further stated that grave doubt existed within the Senate as to whether Senate Bill No. 2175, if enacted, would violate the equal protection and due process requirements of the Commonwealth's Constitution and Articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights.

STATEMENT OF FACTS

The Massachusetts Bar Association ("MBA") respectfully submits this brief as Amicus Curiae pursuant to Rule 17 of the Massachusetts Rules of Appellate Procedure and the invitation of this Court dated December 15, 2003.

The MBA, amicus curiae, is a voluntary, non-profit, statewide professional association of attorneys in the Commonwealth of Massachusetts. It presently has more than 18,500 members, including lawyers and judges. The purpose of the MBA is to promote the administration of justice and reform in the law, to uphold the honor of the profession of law; to seek advancements in the field of jurisprudence in this commonwealth; to promote the public good; and to

insure that all citizens of the Commonwealth who seek justice are afforded an opportunity to obtain it.

Although the MBA House of Delegates has not yet discussed Senate Bill No. 2175, the MBA House of Delegates has considered and twice voted on issues which are core to those present herein. (see addendum) In this regard, the MBA House of Delegates has voiced its strong opposition to defining the term "marriage" as a legal contract between a man and a woman, as well as to prohibiting recognition of any other relationship as marriage or its legal equivalent. In particular, the MBA House of Delegates voted to oppose House Bill No. 472 and House Bill No. 3375 at its July 15, 1999 and June 20, 2001 Meetings, respectively.

House Bill No. 472, filed in 1999, provided as follows:

Chapter 207 of the General Laws is hereby amended by inserting after section 4 the following section:

Section 4A. A purported marriage contracted between persons of the same sex shall be neither valid nor recognized in the Commonwealth of Massachusetts.

House Bill No. 472.

House Bill No. 3375, filed in 2001 provided, in pertinent part, as follows:

Chapter 207 of the General Laws is hereby amended by inserting after section 4 the following section:

Section 4A. A marriage is a civil contract and shall be defined as a legal relationship between one man and one woman, who consent to take each other exclusively as husband and wife, provided that each person has attained the age of 18 years, is of sound mind, and is not related by consanguinity whether by half of whole blood, not closer than the fourth degree.

Section 4B. Any other relationship shall not be recognized as a marriage or its legal equivalent, or receive the benefits exclusive to marriage in the Commonwealth of Massachusetts as a matter of public policy.

House Bill No. 3375.

While some of the policies relating to House Bill No. 472 and House Bill No. 3375 fall outside the purview of issues presented herein¹, many of the fundamental concerns the MBA House of Delegates articulated in opposition to House No. 472 and House No. 3375 merit this Court's attention.

The MBA House of Delegates based its opposition to House Bill No. 472 and House Bill No. 3375 upon the argument that the proposed legislation:

1. violated equal protection of the law;
2. constituted discrimination based on gender;
3. may have constituted discrimination based upon sexual orientation;
4. disregarded the understanding that marriage has come to be regarded as a basic human right; and
5. failed to promote the legal security a marriage lends to a family.

¹ Issues pertaining to the Full Faith and Credit Clause and other federalist clauses of the U.S. Constitution, while pertinent to H472 and H3375, are not addressed herein.

As this Court recently recognized in Goodridge, 440 Mass. At 318-20, marriage existed traditionally as a relationship between one man and one woman and this *de facto* prohibition against marriage between persons of the same gender was violative of the Massachusetts Constitution. Senate Bill No. 2175 suffers the same Constitutional infirmities in its inclusion of a similar prohibitive ban on same sex marriage.

SUMMARY OF THE ARGUMENT

Senate Bill No. 2175 does not comply with the equal protection and due process requirements of the Constitution of the Commonwealth and Articles I, VI, VII, X, XII, and XVI of the Declaration of Rights. This court's ruling in Goodridge, et al v. Department of Public Health, et al, 440 Mass. 309 (2003), establishes that the denial of the right to marry to individuals of the same gender is fundamentally unconstitutional. The incorporation of such a ban in Senate Bill No. 2175 is similarly unconstitutional regardless of the stated effort in the Senate bill to provide "all benefits, protections, rights and responsibilities" of marriage.

ARGUMENT

I. Senate Bill No. 2175 Does Not Provide All the Benefits, Protections, Rights and Responsibilities of Marriage.

Senate Bill No. 2175 lays the false premise that it would provide same gender couples "all "benefits, protections, rights and responsibilities" of marriage. While Senate No. 2175 recognizes the extension of the material benefits which flow from marriage, it deprives same gender couples of the intangible benefits of marriage. This Court in Goodridge recognized the wealth of intangible benefits derived from marriage. "Marriage also bestows enormous private and social advantages to those who choose to marry.... Tangible as well as intangible benefits flow from marriage." Goodridge et al v. Department of Public Health et al. 440 Mass. 309, 322-7 (2003). In many respects, such intangible benefits exceed the material benefits of marriage.

Senate Bill No. 2175 itself recognizes the importance of such intangible benefits including the "traditional, historic nature and meaning of the institution of civil marriage." Yet, Senate Bill No. 2175 unconstitutionally "preserves" such benefits exclusively for opposite gender couples. See

Goodridge, 404 Mass. at 329 (“the liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage”). The benefits Senate Bill No. 2175 provides are a reflection of only some of the benefits that this “unique institution” (marriage) embodies and provides. This Court’s decision extends the full extent of all that marriage provides to all couples regardless of the gender of the individuals involved. The decision simply cannot be read to permit the Legislature to relegate same gender couples to something less than marriage.

In denying same gender couples the full weight and import which the institution of marriage carries, Senate Bill No. 2175 establishes a two-tier system which deprives same gender couples of the “benefits, protections, rights and responsibilities afforded to opposite sex couples by the marriage laws of the Commonwealth....” See Goodridge et al v. Department of Public Health et al. 440 Mass. 309, 327 (2003) (comparing the unconstitutional nature of our nation’s

historic racial miscegenation statutes with Massachusetts's statutory prohibition based on the single trait of sexual orientation... "history must yield to a more fully developed understanding of the invidious quality of the discrimination." At 327). As such, Senate No. 2175 does not provide all of the benefits of civil marriage despite its pronouncement to the contrary.

II. This Court's Decision in Goodridge Establishes that Anything Less than the Extension of the Right to Marry to Same Gender Couples is Fundamentally Unconstitutional.

This Court's Decision in Goodridge clearly reformulates the definition of marriage to include all couples who form a voluntary union to the exclusion of others. This Court's Decision may not be read to deprive same gender couples of the right to marry by providing some lesser or different form of relationship. As stated in Goodridge:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage

restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. 'The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'

(citations omitted) 440 Mass. 341-42.

As such, Senate Bill No. 2175 fails to pass constitutional muster under Goodridge. In this regard, this Court's declaration "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" cannot be read to permit the relegation of same gender couples to civil unions and preclude them from marriage.

In further support, the MBA herein incorporates by reference the arguments set forth in its *amicus brief* filed in Goodridge on December 6, 2002.

CONCLUSION

Senate Bill No. 2175 impermissibly denies same gender couples the right to marry. Contrary to its premise, Senate Bill No. 2175 denies same gender couples "all benefits, protections, rights and responsibilities" of marriage. This Court should

respond to the inquiry of the Senate by declaring
Senate Bill No. 2175 unconstitutional.

Respectfully submitted,

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ADDENDUM