

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

No. SJ-C-09163

REQUEST FOR AN ADVISORY OPINION

12A-107

**BRIEF AMICURIAL OF
ALLIANCE DEFENSE FUND AND
CENTER FOR MARRIAGE LAW**

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Interest of <u>Amici Curiae</u>	1
Statement of the Issue	2
Statement of the Case and Facts	2
Argument	3
I. In light of the potential that an opinion will alter the final outcome of <u>Goodridge</u> , a solemn occasion does not exist and the Justices should request to be excused from rendering an advisory opinion to the Senate.	3
II. If <u>Goodridge</u> were followed to its logical conclusion, Senate Bill, No. 2175 would be unconstitutional for restricting the relationships that may receive the benefits of marriage.	14
A. The message of <u>Goodridge</u> : marriage may not be defined by its structure, but by its benefits.....	15
B. If taken to its logical extreme, <u>Goodridge</u> removes all traditional bases upon which to justify restrictions on who may marry.....	24
Conclusion	31

TABLE OF AUTHORITIES

Cases

<u>Answer of the Justices, 214 Mass. 602,</u> 102 N.E.2d 644 (1913)	4, 13
<u>Answer of the Justices, 319 Mass. 731,</u> 66 N.E.2d 358 (1946)	4
<u>Answer of the Justices, 362 Mass. 914,</u> 291 N.E.2d 598 (1973)	5
<u>Answer of the Justices, 364 Mass. 838,</u> 302 N.E.2d 565 (1973)	6
<u>Answer of the Justices, 426 Mass. 1201,</u> 686 N.E.2d 444 (1997)	6
<u>Goodridge v. Department of Public Health,</u> 440 Mass. 309, 798 N.E.2d 941 (2003)	passim
<u>Lawrence v. Texas, 156 L.Ed.2d 508,</u> 123 S.Ct. 2472 (2003)	25, 26
<u>Loving v. Virginia, 388 U.S. 1,</u> 18 L.Ed.2d 1010, 87 S.Ct. 1817 (1967)	22
<u>Milford v. Worcester, 7 Mass. 48, 56 (1810) ...</u>	22
<u>Opinion of the Justices, 261 Mass. 556,</u> 159 N.E. 70 (1927)	13
<u>Opinion of the Justices, 269 Mass. 611,</u> 168 N.E. 536 (1929)	13
<u>Opinion of the Justices, 328 Mass 679,</u> 106 N.E.2d 259 (1952)	7
<u>Opinion of the Justices, 347 Mass. 797,</u> 197 N.E.2d 691 (1964)	7
<u>Opinion of the Justices, 364 Mass. 838,</u> 302 N.E.2d 565 (1973)	11
<u>Opinions of the Justices, 383 Mass. 895,</u> 424 N.E.2d 1092 (1981)	6

<u>Opinion of the Justices</u> , 386 Mass. 1201, 436 N.E.2d 935 (1982)	5
<u>Perez v. Sharp</u> , 32 Cal.2d 711, 198 P.2d 17 (1948)	19, 22
<u>Zablocki v. Redhail</u> , 434 U.S. 374, 54 L.Ed.2d 618, 98 S.Ct. 673	19, 22
Constitution and Statutes	
Mass. Const., Pt. I, art. 30	5, 8
Mass. Const., Pt. II, c. 3, art. 2	3
Mass. Const., Pt. II, c. 3, art. 5	11



STATEMENT OF INTEREST OF AMICI CURIAE

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations represent thousands of Massachusetts residents who have a right to express and practice their religious beliefs about the nature of marriage. Its membership includes hundreds of lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including cases before the U.S. Supreme Court such as Good News Club v. Milford Central Schools, 533 U.S. 98 (2001), Mitchell v. Helms, 530 U.S. 793 (2000), Troxel v. Granville, 530 U.S. 57 (2000), Agostini v. Felton, 521 U.S. 203 (1997), Dale v. Boy Scouts of America, 530 U.S. 640 (2000), City of Erie v. Pap's A.M., 529 U.S. 277 (2000), National Endowment for the Arts v. Finley, 524 U.S. 569 (1998), Vacco v. Quill, 521 U.S. 793 (1997), and Washington v. Glucksberg, 521 U.S. 702 (1997).

CENTER FOR MARRIAGE LAW ("CML") is a not-for-profit public interest organization that provides legal assistance to individuals and organizations seeking to uphold traditional marriage throughout the country. CML also advise attorneys and pro-family groups on their legal options when same-sex marriage is sought in their jurisdiction.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

"Does Senate, 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 with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?"

STATEMENT OF THE CASE AND FACTS

On December 11, 2003, Senate, No. 2175, "An Act Relative to Civil Unions," (the "bill") was introduced in the Senate by Senators Frederick E. Berry and Joan M. Menard. The bill would allow qualified individuals to enter into state-sanctioned "civil unions" with members of the same-sex, thereby affording them all of the legal "protections, benefits, and obligations" that accompany "civil marriage" in the Commonwealth.

Notably, the Act would for the first time in the history of the Commonwealth expressly prohibit same-sex marriage under chapter 207 of the General Laws. Because the Senate purportedly has "grave doubts" about whether the bill, if enacted, would comply with the Supreme Judicial Court's interpretation of the applicable provisions of the Massachusetts Constitution as announced in Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003), the Senate adopted an Order (Senate, No. 2176) requesting the opinions of the Justices of the Supreme Judicial Court on that question.

ARGUMENT

I. In light of the potential that an opinion will alter the final outcome of Goodridge, a solemn occasion does not exist and the Justices should request to be excused from rendering an advisory opinion to the Senate.

The authority for the Justices of this Court to issue advisory opinions is found in Part II, c. 3, art. 2 of the Constitution of the Commonwealth. That Article provides:

Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.

The Justices' constitutional duty is to render opinions only when they are properly required, and to abstain from answering questions of law not required under this provision. Answer of the Justices, 319 Mass. 731, 733-734, 66 N.E.2d 358 (1946). While it is the duty of the Justices to render opinions in all those cases in which the Legislature may properly require them, "it is not the less [their] duty, in view of the careful separation of the executive, legislative, and judicial departments of the government, to abstain from doing so in any case which does not fall within the constitutional clause relating thereto." Id.

Whether the Justices issue an advisory opinion is "an important question" because "the Justices are forbidden to go beyond the requirement of the Constitution." Answer of the Justices, 214 Mass. 602, 603, 102 N.E.2d 644 (1913).

The Constitution not only limits their duty, but bounds their right to express opinions. By traveling outside these bounds injustice might be done to private litigants and to public interests in an attempt by the Justices to give opinions without the benefit of argument as to the law and an opportunity to vindicate their views to those whose rights might be affected.

Id. The right of the Justices to render advisory opinions under the Massachusetts Constitution "is limited by the separation of powers doctrine embodied in art. 30 of the Declaration of Rights. Opinion of the Justices, 386 Mass. 1201, 1219, 436 N.E.2d 935 (1982). "The Constitution expressly prohibits each of the three departments of government from intermeddling with either of the others. This applies as strongly to the judicial department as to either of the others." Id. at 604, citing Mass. Const., Pt. I, art. 30. See, also Answer of the Justices, 362 Mass. 914, 917, 291 N.E.2d 598 (1973) ("The jurisdictional limitations imposed by the Constitution must be strictly observed in order to preserve the fundamental principle of the separation of the judicial from the executive and the legislative branches of government.").

Although a request for an opinion may contain an "important question[] of law," the Constitution does not permit the Justices to answer even important questions unless they are presented in the context of "solemn occasions." This requirement is to be strictly construed. Answer of the Justices, supra, 362 Mass. at 916.

A "solemn occasion" exists "when the Governor or either branch of the Legislature, having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes." Answer of the Justices, 364 Mass. 838, 844, 302 N.E.2d 565 (1973). When an opinion of the Justices "would not assist the requesting body in carrying out a present duty ... no solemn occasion exists and the Justices are constitutionally constrained from rendering an advisory opinion regardless of the importance of the particular questions." Answer of the Justices, 426 Mass. 1201, 1203-1304, 686 N.E.2d 444 (1997).¹

The question presented by the Senate asks the Justices to posit their opinion on the constitutionality of a pending bill, Senate, No. 2175. Historically, the Justices have answered questions of this nature, as long as they are presented with sufficient particularity. See, e.g., Opinions of the Justices, 383 Mass. 895, 424 N.E.2d 1092 (1981);

¹ An additional limitation on the Justices' duty to give advisory opinions, closely related to the "present duty" requirements, is that answers should not be provided "to abstract questions of law or hypothetical questions." Answer of the Justices, supra, 364 Mass. at 846.

Opinion of the Justices, 347 Mass. 797, 197 N.E.2d 691 (1964); but, see Opinion of the Justices, 328 Mass 679, 691, 106 N.E.2d 259 (1952) ("The Justices have always believed that they cannot be required to answer general questions as to constitutionality, even with reference to a specific bill.")

However, under the circumstances this is no ordinary request for an advisory opinion. In fact, no reported advisory opinion that could be found has arisen in such a context. Essentially, the Justices are being asked to interpret the Court's recent decision in Goodridge while the case is still pending.

In Goodridge, the Court declared 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." Id., 440 Mass. at 344. The Court then vacated the summary judgment previously granted in favor of the Department of Public Health and remanded the case to the Superior Court "for entry of judgment consistent with [its] opinion." Id. The Court directed, however, that the 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." Id.

The Court did not instruct the Legislature to take any particular action within 180 days, nor could it have. See Mass. Const., Pt. I, art. 30. Yet, the Court's radical departure from well-established methods of constitutional interpretation certainly grabbed the Legislature's attention, forcing them to act quickly to attempt to preserve the institution of marriage. To date, the Legislature has responded with Senate, No. 2175, a bill that would, for the first time in the history of the Commonwealth, specifically prohibit same-sex marriage, while at the same time, ironically, affording a same-sex couple the right to enter into a "civil union" that is virtually identical to marriage. Although the bill's proposed establishment of "civil unions" is reprehensible to many (including these amici), regardless of one's particular view of the bill, if enacted it will significantly alter the "marriage landscape" in the Commonwealth and, of greater significance, potentially alter the final outcome of Goodridge. A fortiori, an intervening opinion by the Justices, to the extent it

could alter the course of Senate, No. 2175, could also alter the final outcome of Goodridge.

As indicated above, enactment of Senate, No. 2175 would mark a significant change in the General Laws of Massachusetts. In the history of the Commonwealth, no statute has specifically prohibited same-sex marriage (nor has one defined "marriage" as the union of one man and one woman). That is not to say that same-sex couples have been permitted to marry in the Commonwealth. Rather, as acknowledged by the majority in Goodridge, the prohibition on same-sex marriage is a negative implication of the common-law definition of marriage as the union of one man and one woman, which definition has always informed the Legislature's understanding when enacting laws regulating marriage. In rejecting (or "reformulati[ng]," id. at 343) the common law definition of marriage, the majority in Goodridge limited its analysis to the three "rational bases" offered by the Department of Public Health in support of the traditional definition of marriage, rather than examining each and every conceivable rational basis that could support that definition, as required under the deferential rational basis test

ordinarily employed by the Court in due process and equal protection cases.

Nevertheless, the decision says what it says, and it is not the province of the Justices to re-examine it in this context (even if they had an inclination to do so). If, however, Senate, No. 2175 is enacted, the marriage law in the Commonwealth will be substantially altered, and Goodridge conceivably could be rendered moot. New arguments supporting the rational basis of traditional marriage may surface in the legislative debate. Or, as often happens in the legislative process, the bill could be amended, perhaps to eliminate "civil unions" or to codify the prior common law, i.e., marriage is the union of one man and one woman and same-sex marriages are prohibited. In light of these many possibilities, it would be imprudent for the Justices to render an opinion on the constitutionality of the bill, when that opinion could impact the final resolution of the plaintiffs' complaint in Goodridge.

Moreover, Senate, No. 2175 is not the only option available to the Legislature. Indeed, it has several other options, including taking no action, and instead waiting to see whether the Governor will acquiesce to

the Court and enforce the holding in Goodridge (by allowing same-sex "couples" to marry), or exercise his constitutional right to ignore the Court's lawless mandate.²

Ultimately, the Superior Court still has to enter a declaratory judgment "consistent with this opinion" as instructed by the majority in Goodridge, and it is by no means a foregone conclusion what that judgment entry will declare. In light of the myriad of events that could occur prior to the expiration of the 180 days (the final effect of any of which cannot be known), the Justices should not render an advisory opinion that will potentially infect the final resolution of the case. See, generally, Opinion of the Justices, 364 Mass. 838, 846, 302 N.E.2d 565 (1973) (Justices ask to be excused from rendering opinion where, although "at first glance [the question presented] appears to be a specific, concrete issue[,] [a]ny answer to the apparently simple question ... would certainly affect a broad range of activities and interests, many of which cannot presently be foreseen

² See Mass. Const., Pt. II, ch. 3, art. 5 ("All causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision.")

and are therefore not here represented.") Although advisory opinions are "not conclusive upon the rights of parties" and "open to argument in any judicial proceeding regularly brought before the courts," they "presuppose such examination and consideration by the Justices as the limitations of time and other contemporaneous duties permit, and the formulation of a deliberate conclusion, and hence are accorded weight by the public and profession, as indicating what the law is." In other words, the issuance of an advisory opinion, especially in light of the proximity to the Court's decision in Goodridge, will undoubtedly have considerable influence on future events, including those that may occur prior to expiration of the 180 day stay.³

In light of the foregoing discussion, it seems appropriate for the Justices in this instance to announce an additional criteria for ascertaining the existence of a "solemn occasion" under Part II, c. 3, art. 2 of the Constitution, to wit: a solemn occasion does not exist where the question presented would

³ In the Goodridge opinion alone, the Court cites to advisory opinions ("Opinions of the Justices"), no less than six times as authority for a particular premise or proposition.

require the Justices to comment on a case pending before the Supreme Judicial Court or any lower court of the Commonwealth.

In the alternative, if the Justices are not inclined to narrow the meaning of "solemn occasion," but nevertheless wish to refrain from rendering an opinion in this instance, the Justices can find support in several prior opinions issued by the Justices wherein they rendered an advisory opinion despite the absence of constitutional authority. See, e.g., Opinion of the Justices, 269 Mass. 611, 168 N.E. 536 (1929); Answer of the Justices, 214 Mass. 602, 102 N.E. 644 (1913); Opinion of the Justices, 261 Mass. 556, 612, 159 N.E. 70 (1927). In each case, the Justices attached the caveat to their opinion that "this is not to be regarded as establishing a practice." See id. A similar, although converse, situation is present here. Even though the Justices might appear to have jurisdiction to answer the question presented, in light of the pendency of Goodridge, and the potential that an advisory opinion could alter the final decision in that case (absent the direct participation of the parties), the better part of wisdom dictates that the Justices should

exercise restraint and ask to be excused from rendering an opinion.

II. If Goodridge were followed to its logical conclusion, Senate Bill, No. 2175 would be unconstitutional for restricting the relationships that may receive the benefits of marriage.

If this Court chooses to issue an advisory opinion, it should not follow the Goodridge ruling to its logical conclusion.⁴ The response as to the constitutionality of the proposed legislation, using the analysis presented in Goodridge, is evident: Senate, No. 2175 would clearly be unconstitutional, not because it withholds the term "marriage" from same-sex couples, but because it denies the benefits of marriage to individuals that seek relational configurations other than the limited sort permitted in the text of the bill (e.g., incest and polygamy).

⁴ Amici disagree with the majority's interpretation of the Massachusetts Constitution in Goodridge, as they steadfastly believe that marriage is properly limited to the union of one man and one woman. Nothing in this Brief should be construed to suggest that Amici favor same-sex marriage, civil unions, polygamy or incest, or the extension of marital benefits to anyone other than opposite-sex couples.

A. The message of Goodridge: marriage may not be defined by its structure, but by its benefits.

The issue of committed polygamous and incestuous relationships was not presented by the Plaintiffs' challenge to the Massachusetts marriage law.⁵ However, every consideration this Court presented in support of its decision, indeed even the particular jurisprudential interpretive methodology it utilized, implied that it is necessary to open the doors to marriage benefits for polygamous and incestuous relationships. Goodridge is not necessarily a case which affirms marriage as a union restricted to only particular members (which now would include same-sex as well as opposite-sex consanguineous-distant couples). Goodridge, taken to its logical conclusion, appears to annihilate what the Court viewed as the

⁵ It is for this reason that the Court stated that "[n]othing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of our marriage laws." Id. at 343, n.34. The Court was unable to accomplish this abrogation, because the facts of Goodridge did not give rise to an opportunity to do so. See id. at 337 ("[The Plaintiffs] do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law.") What is clear, however, is that the principles expounded in the case would lead to the abrogation of all limits on the traditional marriage structure when the opportunity properly presents itself.

outmoded and irrational suggestion that marriage can, by definition, be restricted to a particular membership.

Under that view of Goodridge, the proposed legislation would be unconstitutional because it limits the extension of the benefits of marriage to only a limited group of people in a particular structure of relationship. As the Court repeatedly announced throughout the Goodridge opinion, marriage is a fundamental right too precious to restrict its enjoyment to only certain persons and restricted relations, based on extra-constitutional considerations. The constitutional decrees of due process and equal protection are the relevant governing standards, and Goodridge placed these standards in contradistinction to what it viewed as the divisive and stereotypical dictates of tradition, history, morality, and democratic conviction. It seems possible from the analysis and language that the Court employed in Goodridge that it would rule that the marriage law therein analyzed suffers from more than just its denial to certain same-sex couples of the incidents of marriage, but of restricting other interested parties as well.

This Court in Goodridge noted that

[t]he history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded.' * * * This statement is as true in the area of civil marriage as in any other area of civil rights.

Id. at 339 (citation omitted). As this Court further explained in Goodridge,

Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family -- these are among the most basic of every individual's liberty and due process rights.

Id. at 329 (emphasis added). In another vague statement, the Court explained that an exclusion from marriage "is incompatible with the constitutional principles of respect for individual autonomy and equality under law." Id. at 313. Moreover, those who are excluded from the benefits of the marital relation (such as those then spoken of in Goodridge which sought same-sex marital benefits) are "arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions." Id. (Emphasis added.)

Of course, on the pre-Goodridge conception of marriage there would be nothing "arbitrary" about Plaintiffs being deprived of membership in that

institution. The very concept of an institution implies a structure and design which would restrict those from membership who do not conform to its character and standards. But by reversing that restriction, the Court in Goodridge signaled a new conception of marriage: marriage is not a relation of a particular structure and membership, but rather is a vehicle to obtain benefits. (And these benefits should be available to every individual, as a consequence of their liberty and due process rights). This revolutionary turn not only has tremendous implications for the innovative who seek these benefits, but also resolves the riddle of how the Court could derive the conclusions it did from the otherwise inapposite case law it consulted (as will be discussed, below).

The Court reiterates throughout its opinion the great benefit of marriage, and the great loss suffered by those left outside its boundaries. "It is undoubtedly for these concrete reasons [i.e., hundreds of legal benefits] as well as for its intimately personal significance, that civil marriage has long been termed a 'civil right.'" Id. at 325. "Marriage also bestows enormous private and social advantages on

those who choose to marry." Id. at 322 (emphasis added). "The benefits accessible only by way of marriage license are enormous, touching nearly every aspect of life and death." Id. at 323 (emphasis added).⁶ "Without the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'" Id. at 326 (citation omitted, emphasis added). Having in mind what it apparently viewed as the horrible specter of anyone being denied the "full range of human experience," the court announced that "[l]aws may not 'interfere directly and substantially with the right to marry.'" Id., citing Zablocki v. Redhail, 434 U.S. 374, 54 L.Ed.2d 618, 98 S.Ct. 673 (1978), Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948).

It would seem that if the Court believed there could be any legitimate restrictions on who may take advantage of membership in marriage, then this recitation of the benefits of marriage would be irrelevant—for it would only speak to the benefits enjoyed by those legitimately within its confines. The

⁶ See enumeration of benefits, id. at 323-326.

benefits, of themselves, say nothing about whether there would be required a change in its membership constituents receiving those benefits. But, again, on this issue Goodridge broke new ground: the Court's use of the "benefits" concept to establish the mandate removing the historic restrictions on those amenable to marriage thereby demonstrates that the positive enjoyment of marital benefits is the key to why marriage must be available to all those who seek it. The supposition driving the Court in Goodridge was that the existence of the beneficial and enjoyable status of marriage requires the distribution of its benefits to all who seek them. If taken to its logical conclusion, the Court's opinion means that marriage no longer is defined by membership, but rather by benefits; it is not a structure, it is a means of obtaining desired blessings. By expounding that one of the components of the marriage right is the ability to choose the format to which the benefit applies (id. at 328-29), the Court unwittingly adopted an open-door, non-structural view of this right.

Goodridge effectively abandoned the concept that the benefits of marriage as historically recognized are connected in any way to the historic composition

of the marriage relation, and instead posits that a different relation, still called "marriage," can lay claim to the same revered and socially essential role (no matter that the design at issue may have not previously been countenanced by the State). Therefore there is not only no necessary connection between the marital right as offered by this Court and the factual scenario presented in Goodridge, such a limitation is inconsistent with the marriage right. One cannot logically, under the "benefits rationale" of Goodridge, constitutionally maintain that only the historic marital relation, plus the novel same-sex variety produced in Goodridge, exhaust the acceptable forms. A "form" to marriage is precisely what Goodridge appears to forbid. For forms exclude certain individuals from the benefits that Goodridge seems to say must be handed out to all who want them.

The operation of this anti-structural view of marriage is evident in this Court's discussion. Throughout its presentation in Goodridge, this Court relied for support on case law that affirmed the fundamental status of marriage. But the cases to which it appealed conspicuously spoke only of the historic,

opposite-sex marriage.⁷ Yet this Court used those sources as authority for establishing the ostensive constitutional mandate which condemned a law that restricts marriage to that traditional form. There is instructive significance to this unique manner of handling case law. This Court thereby gave precedent encouragement, and even necessary authority, to the same application of Goodridge itself. It may not matter that Goodridge did not specifically include polygamous and incestuous relations in its expansion of what relations should receive the benefits of marriage. After all, none of the cases this Court cited in Goodridge in support of its ruling on same-sex relationships included same-sex relationships in its understanding of marriage. Thus, the analytical methodology of Goodridge may extend the marriage benefits to other relational designs. The Goodridge analysis could readily be extended to mean that marriage benefits cannot be restricted because of any purported exclusive structure.

⁷ E.g., Loving v. Virginia, 388 U.S. 1, 12, 18 L.Ed.2d 1010, 87 S.Ct. 1817 (1967); Milford v. Worcester, 7 Mass. 48, 56 (1810); Zablocki v. Redhail, 434 U.S. 374, 384, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978). Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948).

Indeed, it is a distinguishing emphasis of this Court's Goodridge ruling that it is an offensive and unconstitutional legislative intrusion to seek to maintain a single design on the marital relation, such that sincere participants in otherwise-organized sexual and relational groupings would be excluded.⁸ "[I]t is a circular reasoning, not analysis, to maintain that marriage must remain a [certain sort of] institution because that is what it historically has been." Id. at 332, n.23. One of the preeminent errors of the Goodridge decision was its disavowal of the notion that marriage could be defined by who has in the past enjoyed its benefits. As concurring Justice Greaney expounded on the point:

A comment is in order with respect to the insistence of some that marriage is, as a matter of definition, the legal union of a man and a woman. To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide.

⁸ This Court's occasional reference in Goodridge to marriage as an "exclusive" commitment (see, e.g., id. at 312), must be seen as an improvident slip, perhaps resulting from the subconsciously permeating effect of our legal and social history. At any rate, such casual, inadvertent mention implying a traditional structural understanding of the marital relation is refuted by the Court's intentional legal discussion.

Id. at 348. So the historically unprecedented nature of any newly-proposed "marital" relationship cannot, consistent with the analysis in Goodridge, in any way influence the determination of whether to grant to it the benefits of marriage.

B. If taken to its logical extreme, Goodridge removes all traditional bases upon which to justify restrictions on who may marry.

Throughout Goodridge the Court impugned and denied legitimacy to history as an informative source of authority for the legislature. It was of no concern to the Court that "[c]ertainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries." Id. at 337. This Court also explained that "[a]s a public institution and a right of fundamental importance, civil marriage is an evolving paradigm" (id. at 339), thereby again demonstrating that marriage is unmoored from any historic measure. Likewise (as noted above), this Court rejects as "circular" any reasoning which seeks to maintain a certain structure to marriage "because that is what it historically has been." Id. at 332, n.23. This Court stated: "As it did in Perez

and Loving, history must yield to a more fully developed understanding of the invidious quality of the discrimination." Id. at 328.

A "more fully developed understanding" that overcomes history however, precludes from its understanding more sources than just history. As Justice Greaney stated in his concurring opinion in Goodridge:

But, as a matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.

Id. at 349.

"Individual conviction," then, likewise finds itself banished from having a speaking role in the constitutional drama. This is excellent news for those seeking marriage benefits for relationships such as incest and polygamy. Reinforcing this point was this Court's statement in Goodridge (quoting the United States Supreme Court in Lawrence v. Texas, 156 L.Ed.2d 508, 123 S.Ct. 2472, 2480 (2003) (original quotation citation omitted)), that "[o]ur obligation is to define the liberty of all, not to mandate our own

moral code." Goodridge, at 349. The Court thereby divorces moral considerations from the application of constitutional provisions to the matter. In making application of this regulation, the Court in Goodridge cites to Palmore v. Sidoti, 466 U.S. 429, 433, 80 L. Ed.2d 421, 104 S.Ct. 1879 (1984): "The Constitution cannot control ... 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." Id. at 341-42.

This concept sees additional application and reinforcement as this Court applauds the immunity from state interference that citizens enjoy for their sexual pursuits (which pursuits, of course, have historically been regulated in great measure because of community moral disapproval). The Court identifies the rule in Lawrence v. Texas which prohibits a state from regulating homosexual sodomy, as a rescue from state intrusions that "demean[] basic human dignity." Id. at 328, n.17. With such a strong view (as demonstrated by the chosen phraseology) of the importance of insulating sexual behavior from state judgment, it is essentially a necessary consequence that consideration of the merits of polygamous or

incestuous relations, for instance, be disqualified as affecting whether these intimate and committed relationships are worthy of the benefits of marriage.

The moral disapprobation for such relationships, after all, arises from the same category of ethical views which condemn homosexual relations. As the latter was explicitly rejected in Goodridge as a grounds for limiting the application of marriage benefits to those gathering in this aberrant fashion, and the dismissal of relevance of "moral codes" from the realm of constitutional propriety, the point is plainly communicated. This Court decried the "punitive notions of ... homosexual identity" which "cemented the common and legal understanding of marriage as an unquestionably heterosexual institution." Id. at 332, n.23. If "punitive notions" of polygamous and incestuous relations buttress the view of marriage that excludes these formulations from that relation, then Goodridge may well mean that these exclusions may not be maintained either.

Similarly, any interjection of concerns over offspring and procreation issues related to the unions in question are likewise ruled out of court. This Court in Goodridge disavowed procreation as a

necessary constituent of civil marriage. Id. at 332-33.⁹ The attribution of significance to procreative issues in evaluation of the propriety of allowing marriage benefits to certain relations, then, can only receive condemnation by this Court for being constitutionally irrelevant.

Beyond being irrelevant, in the Court's view it seems also to be mean spirited. Tying marriage to procreation, and assigning legal significance to that connection when designing marriage law standards,

identifies persons by a single trait and then denies them protection across the board. *** In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.

Id. at 333 (internal citation and quotation marks omitted). This Court, then, has instructed that a critical view of particular sexual relationships is "stereotypical" and "destructive," and thus improper. This redemption from destructive stereotypes is great news for those of historically aberrant relationships

⁹ Indeed, the Court cryptically suggested that adoption is a means distinct from the coital method of bringing children into the world. Id. at 332 ("until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world.")

seeking the benefits of marriage. Also liberating is another principle found in the foregoing excerpt: the prohibition on legislating what appears to be a moral position with respect to certain relationships is a prohibition that runs in only one direction. That is, the constitutional concern is not with whether conduct might appear to be receiving government imprimatur (by its qualification for the benefits of marriage), but is only concerned with and prohibits legislation that suggests government disapproval (for apparently concurring with destructive stereotypes).

The foregoing show how Goodridge, taken to its logical conclusion, rules out the constitutional propriety of any restrictions which limit the right to the benefits of marriage to couples only, or only to those of a sufficiently distant consanguinity. Any objection that could be lodged against additional relationship configurations that might (insensitively) be identified as perverse has been repudiated by Goodridge. No objection that could be raised to those relationships is conceptually and constitutionally distinguishable from those objections already registered against the same-sex marriage notion, which

objections were considered and rejected each in turn by this Court in Goodridge.

While eliminating from proper legislative consideration in regard to marriage the matters of tradition, history, morals, and procreation is somewhat stupefying, that is what Goodridge appears to have accomplished. If those elements are banished from service, and the legislature truly is forbidden to conceive of marriage as a structurally fixed relation, any legislation that either limits those who can group-up with state blessing, or offers a conventional reason for such a limitation, will be unconstitutional. Lest there be concern over this state of affairs, the Court in Goodridge reassures all that marriage is actually reinforced by expanding the list of relational arrangements welcome in its ranks:

If anything, extending civil marriage to same sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.

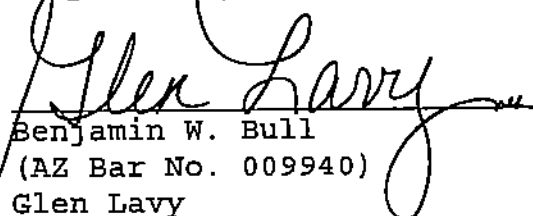
Id. at 337. So then: come one, come all, and gather as ye wish, thereby to "reinforce the importance of marriage." And do so freely, for this Court allows no

principles upon which the legislature may object to your varied and imaginative configuring.

CONCLUSION

Under these very extraordinary circumstances, the Justices should request that the Senate excuse them from rendering an opinion. Any opinion the Justices could render would likely undermine the rule of law and the legitimacy of the Court. If the Justices do render an opinion, the logical ramifications of Goodridge, as disturbing as they are, seem to lead to the inevitable conclusion that Senate, No. 2175 is unconstitutional for failing to extend the benefits of marriage to incestuous and polygamous relationships.

Respectfully submitted



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