

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-09163

REQUEST FOR AN ADVISORY OPINION (A-107)
TRANSMITTED BY THE SENATE RELATIVE TO
SENATE, NO. 2175, ENTITLED,
"AN ACT RELATIVE TO CIVIL UNIONS."

BRIEF OF *AMICI CURIAE*
MASSACHUSETTS FAMILY INSTITUTE, INC.,
MASSACHUSETTS CATHOLIC CONFERENCE,
CONCERNED WOMEN OF AMERICA,
FAMILY RESEARCH COUNCIL,
NATIONAL LEGAL FOUNDATION,
INSTITUTE FOR FAMILY DEVELOPMENT, INC.,
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(West 2000); SC. Code Ann. §20-1-15 (West 2000); S.D. Cod. Laws §25-1-1 (1968); Tenn. Code Ann. §36-3-113 (1955); 2003 Texas Senate Bill 7 (enacted May 27, 2003); Utah Code Ann. §30-1-4 (1953); Va. Code §20-45.2 (West 2000); Wash. Rev. Code §26.04.020 (2000); W. Va. Code §48-2-603 (2000)
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ISSUE PRESENTED

Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all the '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?

INTEREST OF THE AMICI

Massachusetts Family Institute, Inc. (MFI), is a not-for-profit research and education corporation organized under the laws of the Commonwealth of Massachusetts that is dedicated to strengthening the family and restoring moral principles to the public policy and cultural arenas. Founded in 1991, MFI is a strong supporter of male-female marriages and mother-father-children families. MFI seeks to carry out its mission by a team of professional staff and volunteers made up of physicians, lawyers,

and university professors. The case at bar is of the utmost interest to MFI. MFI is concerned with the untold consequences same-sex "marriages" will have on society, moral principles, and the family.

The Massachusetts Catholic Conference is the public policy office for the Roman Catholic Church in the Commonwealth, governed by the Ordinary Bishops of the Archdiocese of Boston and the Dioceses of Fall River, Springfield, and Worcester. The Massachusetts Catholic Conference advocates the Roman Catholic Church's social justice teaching as applied to public policy issues before the state legislature and courts. The Bishops have consistently spoken out in favor of maintaining the long-standing definition of marriage as the union between one man and one woman.

Concerned Women for America (CWA) is the nation's largest public policy organization for women. Located in Washington, D.C., CWA is a non-profit organization that provides policy analysis to Congress, state and local

legislatures, and assistance to pro-family organizations through research papers and publications. CWA seeks to inform the news media, the academic community, business leaders and the general public about marriage, family, cultural and constitutional issues that affect the nation. CWA has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts.

Family Research Council (FRC) is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. FRC, headquartered in Washington, D.C., is a voice for the pro-family movement and provides policy analysis, legislative assistance, and research for pro-family organizations. It also seeks to educate legislators on issues that affect American families. In addition to providing policy research and analysis for the legislative, executive, and judicial

branches of the federal government, FRC works to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. Its research, publications, and films on the impact of pornography have been distributed to over 400,000 scholars, students, organizations, and citizens. FRC's legal and public policy experts are continually sought out by members of Congress and State legislators for assistance and advice on the unique relationship between parents and their children.

The National Legal Foundation is a public interest law firm, founded in 1985, which has been involved with the legal defense of the traditional family since 1990. The National Legal Foundation and its donors and supporters believe that the resolution of the issue before this Court in the present Request for an Advisory Opinion will have a profound impact on the debate over same-sex marriage and civil unions throughout this

country. The National Legal Foundation participated before this Court in Goodridge v. Dep't of Public Health, 400 Mass. 309 (2003), as an *amicus curiae*, and was served with a copy of this Court's order soliciting *amicus* briefs in the present Request for an Advisory Opinion. The National Legal Foundation thus believes that its expertise on this issue will be of assistance to this Court in rendering its Advisory Opinion.

The Institute for Family Development, Inc. (IFD) is a not-for-profit educational corporation organized under the laws of the Commonwealth of Massachusetts. IFD is a member of a federation of similar educational organizations which operate in 47 countries, under the name International Federation for Family Development (IFFD). IFFD is accredited as an NGO in consultative status to the United Nations, and advocates for international policies which support strong families and healthy children. IFFD is familiar with the research that establishes that children are best raised in

healthy households, with a natural mother and father taking responsibility for their education. IFD is in favor of public policy that supports marriage as a union between a man and a woman, committed to each other and to the upbringing of their children, which is undermined by the view that "same-sex marriages" are equivalent.

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SUMMARY OF THE ARGUMENT

The Court's decision in Goodridge should be interpreted only to require the Legislature to clarify the rational basis for the Commonwealth's marriage laws. It should not be interpreted broadly to require the Legislature to afford any legal recognition to same-sex relationships. The broad interpretation of Goodridge would be radical and unprecedented for at least three reasons. First, it would intrude upon the

traditional and constitutionally guaranteed power of the Legislature to define marriage. It would thus create an entirely novel constitutional principle that runs roughshod over the values of democracy, traditional morality, family stability, and child welfare that lie at the heart of legislative competence. It would also preempt and sidetrack the currently pending democratic process to amend the Commonwealth's Constitution to clarify the definition of marriage. (pp. 10-27.)

Second, a broad interpretation of Goodridge would apparently direct the General Court to graft a legal framework (civil marriage) which was tailored and developed to promote one social relationship (husband-wife marriages) onto two other social relationships (male unions and female unions, the former obligatorily motherless, the latter fatherless), that are substantially different. Even if Goodridge requires the Commonwealth to provide some legal recognition to same-sex relationships,

which your *amici* deny, this goal must be achieved by means of different frameworks than civil marriage. (pp. 27-39.)

Third, Goodridge would allow only 180 days for the Legislature to perform the complex and difficult task of deliberating about what form of legal framework might be appropriate to stabilize or promote same-sex unions. (pp. 39-40.)

On the issue presented, therefore, the Court should rule that any of the following legislative actions would satisfy the demands of Goodridge.

(1) The Legislature and/or Executive articulate a clearer version of the rational basis for defining marriage in terms of one man and one woman. This would assuage any concerns raised in Goodridge about the perceived insufficiency of the Commonwealth's justification for its definition, because any rational basis (not just the one asserted) suffices for deferential scrutiny. (pp. 41-45.)

(2) The Legislature indicates that it is considering amending the Commonwealth's Constitution, as voters in other states have done. This justifies staying the judgment until this constitutional amendment process is completed, to prevent a vested-rights problem. The promptness with which other states have amended their constitutions after similar rulings should persuade the Court to abstain from enforcing its judgment until democracy is allowed to function. (pp. 46-48.)

(3) The Legislature indicates that it is considering what sort of legal protection should be given to same-sex unions, without the unrealistic 180-day time constraint. (pp. 48-49.)

(4) The Legislature passes S.B. 2175, the civil unions bill. This would be both unnecessary and inappropriate. But it would be superior to requiring the legislature to include same-sex unions in civil marriage for four reasons. It would intrude less into the Legislature's sphere of competence.

It would allow independent development of the law of same-sex unions and husband-wife marriages. It would threaten the sovereignty of other states less. And the alternative broader reading—including same-sex unions in civil marriage—would constitute an impermissible “mandate of [the Court’s] own moral code.” (pp. 49-56.)

ARGUMENT

I. THE GOODRIDGE DECISION UPSETS THE CONSTITUTIONALLY MANDATED BALANCE BETWEEN LEGISLATURE AND COURTS, AND CALLS FOR AN INAPPROPRIATE AND UNREALISTIC REMEDY.

Some argue that the Court’s decision in Goodridge v. Dep’t of Public Health, 440 Mass. 309 (2003), should be interpreted broadly to force the Legislature to abandon the traditional definition of marriage as only the union of one man and one woman. On such interpretation, Goodridge would be radical and unprecedented for at least three reasons. First, it would obliterate the traditional and constitutionally guaranteed power of the Legislature to define marriage.

Second, although unclearly stated in the majority opinion, it can be read as apparently directing the Legislature to graft a legal framework (civil marriage) which has developed over centuries to promote one kind of relationship (conjugal unions) onto two other relationships (same-sex male unions and female unions) which are radically different from the first. Third, in light of substantial differences among all three relationships, a broad interpretation of Goodridge would impose upon the Legislature an impossibly limited time period to perform the complex and difficult task of melding three distinctly different relationships into the one legal status that a broad reading of Goodridge would require.

The Goodridge ruling can be more narrowly interpreted. By recognizing that "[t]he Legislature in the first instance ...must ascertain whether ... a rational basis exists," 440 Mass. at 338, and then by giving the Legislature 180 days to respond

"as it may deem appropriate in light of this opinion," 440 Mass. at 344, the majority acknowledged the right of the Legislature to ascertain a rational basis or bases different from the ones proffered by the Department of Public Health, and to then enact a statutory reaffirmation of marriage as the union between one man and one woman. Such a legislative response, as a means of avoiding the radical features of the broad interpretation of the Goodridge ruling, is eminently "appropriate in light of this opinion" given the majority's recognition of the Legislature's constitutional right, duty, and power to explicate the underlying rational bases for any legislative policy. The Legislature should be afforded such opportunity in deference to its coequal status under the Constitution.

The proposed "civil union" legislation submitted for an advisory opinion in this case maintains a distinction between male-female and same-sex unions for the purposes of "preserving the traditional, historic

nature and meaning of the institution of civil marriage" S.B. 2175, p. 1, lines 23-24, and to make it so that "[p]ersons eligible to form a civil union with each other under this chapter shall not be eligible to enter into a marriage with each other under chapter 207." S.B. 2175, p. 3, lines 34-35. However, the legislation nowhere attempts to make any finding as to an independent rational basis for such a distinction. The legislation fails to contest the rational basis determination of the Goodridge ruling, and therefore would, if enacted, abdicate the Legislature's right to make its own independent findings.

As a result, the proposed legislation fails to satisfy both the broad and the narrow interpretations of the Goodridge ruling. On the one hand, the legislation declines to eliminate all legal distinctions between the three relationships as the broad interpretation would require. On the other hand, the legislation lacks any asserted rational basis alternative to the ones

raised by the Department of Public Health, thus failing to satisfy the narrow interpretation.

Regardless of which interpretation is the correct one, and it is difficult to discern, given the vagueness of the majority opinion's reference to action deemed by the legislature to be "appropriate to [the majority's] opinion," your *amici* are gravely concerned with the far-reaching implications of Goodridge as it is broadly interpreted for the following reasons.

A. The Goodridge Decision Invades the Legislature's Constitutional Sphere of Competence and Violates the Constitutionally Mandated Balance of Power.

1. The Constitution of the Commonwealth Grants Jurisdiction To Define Marriage to the Political Branches, Not to the Courts.

The Massachusetts Constitution explicitly denies the courts jurisdiction over marriage. "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." Mass. Const. Pt. 2, C. III, Art. V. This Court has historically acknowledged that this provision of the Constitution entails that the Legislature and the Executive have exclusive jurisdiction over matters concerning marriage. See Loring v. Young, 239 Mass. 349, 366 (1921) (holding that Massachusetts courts do not have general jurisdiction to decide cases relating to marriage without specific grant of jurisdiction from the Legislature); Kelley v. Kelley, 161 Mass. 111, 111 (1894) (acknowledging the limits on the jurisdiction of the courts that arise from Mass. Const. Pt. 2, C. III, Art. V); Shannon v. Shannon, 68 Mass. 285, 286 (2 Gray 285) (1854) ("Since the time of the province charter, however, thus [*sic*] much is plain: ... that all controversies concerning marriage and divorce should be heard and determined by the governor and council."). The Supreme Judicial Court has noted that this constitutional principle, establishing civil marriage as the special

domain of the political branches, carried over from colonial times. See Gottsegen v. Gottsegen, 397 Mass. 617, 621 (1986) (noting that the colonial legislature “vested jurisdiction over all questions of marriage and divorce in the Governor and Council”). The very kernel of the definition of marriage, as the union of one man and one woman, is embedded in the Massachusetts Constitution as a special legislative domain.

Moreover, this constitutional principle is not an obsolete tradition, but is strongly supported by the unique competence of the democratic branches to deal with complicated questions of marriage and family law. Accordingly, the principle is buttressed by Article 30 of the Massachusetts Declaration of Rights, which provides that “the judicial [department] shall never exercise the legislative and executive powers, ... to the end that it may be a government of laws and not of men.” Mass. Const. Pt. 1, Art. 30. The Supreme

Judicial Court acknowledges the Legislature's special competence over marriage law: "Adjustments in the legislation [concerning marriage and family] to reflect these new social and economic realities *must come from the Legislature.*" Connors v. City of Boston, 430 Mass. 31, 42-43 (1999) (emphasis added). Other states likewise have recognized that changes in the marriage laws, especially those which concern the very definition of marriage, are the province of the legislature, not the courts. See, e.g., Joan S. v. John S., 427 A.2d 498, 499 (N.H. 1981) ("If a common-law marriage is to be more broadly recognized in this State, a request for such a determination should be addressed to the Legislature."); Souza v. O'Hara, 395 A.2d 1060, 1062 (R.I. 1978) (asserting legislature's power to define common-law marriages); Blake v. Stradford, 725 N.Y.S.2d 189 (N.Y. Dist. Ct. 2001) (emphasizing legislature's power and discretion in

abolishing common-law marriage and declining to recognize domestic partnerships).

Most recently, several Justices of the Supreme Judicial Court in Goodridge attested to the strong rationale supporting the principle of legislative control over the definition of marriage. See, e.g., Goodridge, 440 Mass. at 350-51 (Spina, J., dissenting) ("What is at stake in this case is not the unequal treatment of individuals ..., but the power of the Legislature to effectuate social change without interference from the courts ..."); id. at 362 (Sosman, J., dissenting) ("Through the political process, the people may decide when the benefits of extending civil marriage to same-sex couples have been shown to outweigh whatever risks ... are involved."); id. at 395 (Cordy, J., dissenting) ("[T]he issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.").

No one can deny that Goodridge purported to radically revise the Commonwealth's definition of marriage, in a fashion entirely unprecedented in American jurisprudence.¹ This radical revision

¹ Some might argue that the exclusion of racial qualifications for marriage in Loving v. Virginia, 388 U.S. 1 (1967), and Perez v. Sharp, 198 P.2d 17 (Cal. 1948), constituted a revision of the definition of marriage by the courts. But this is not true. Even the most white-supremacist courts enforcing miscegenation statutes did not believe that racial uniformity was part of the *definition* of marriage. Thus they afforded recognition to out-of-state interracial marriages in many circumstances. See, e.g., State v. Ross, 76 N.C. 242 (1877) (recognizing an interracial marriage contracted out-of-state, despite the forum's miscegenation laws); Miller v. Lucks, 36 So. 2d 140, 141-42 (Miss. 1948) (same); Whittington v. McCaskill, 61 So. 236, 236-37 (Fla. 1913) (same); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 109 (1996) (noting that "[i]n every case that did not involve cohabitation within the forum," courts in anti-miscegenation states still "recognized interracial marriages"). This contrasts with the statutes of current jurisdictions which define marriage as only the union of one man and one woman. See, e.g., ALASKA STAT. § 25.05.013(a) (holding that an out-of-state same-sex marriage is "void in this state, and contractual rights granted by virtue of the marriage ... are unenforceable in this state"); LA. CIV. CODE ANN. art. 96 (West 1999) (holding that a "purported marriage between parties of the

constitutes an equally radical disruption of the balance of power among the branches of state government, and an equally radical invasion of the Legislature's sphere of competence.

2. Thirty-Eight Jurisdictions Have Resolved the Definition of Marriage As the Union of One Man and One Woman Through the Action of the Legislature.

Needless to say, such a radical revision of the Commonwealth's marriage laws sticks out like a sore thumb from the guiding hand of American law. Thirty-eight American jurisdictions, including the federal government, have resolved the question of the definition of marriage as the union of one man and one woman through legislative action.

First, not a single state has afforded marital recognition to male (intrinsically motherless) and female (intrinsically fatherless) unions. But thirty-seven states have enshrined the definition of marriage as the union of one man and one woman, and all

same sex" enacted out-of-state "does not produce any civil effects").

have done so through legislative action, whether by statute or by constitutional amendment. See, e.g., ALASKA STAT. § 25.05.013(a) ("A [same-sex marriage] is void in this state, and contractual rights granted by virtue of the marriage ... are unenforceable in this state."); LA. CIV. CODE ANN. art. 96 (West 1999) ("A purported marriage between parties of the same sex does not produce any civil effects").²

² See Ala. Code §30-1-19 (2000); Alaska Stat. Ann. §25.05.013 (1998); Ariz. Rev. Stat. Ann. §25-101 (West 2000); Ark. Code Ann. §9-11-107 (1987); Cal. FAMILY CODE §3085 (2000); Colo. Rev. Stat. §14-2-104 (2000); 13 Del. Code Ann. §101 (1975); Fla. Stat. Ann. §741.212 (West 2000); Ga. Code Ann. §19-3-3.1 (1982); Haw. Rev. Stat. §572-3 (1999); Idaho Code §32-209; 750 Ill. Comp. Stat. Ann. §5/212 (West 2000); Ind. Code §31-11-1-1; Iowa Code §595.2 (1998); Kan. Stat. Ann. §23-101 (1999); Ky. Rev. Stat. §402.00 (2000); La. Civ. Code Ann. art. 89 (West 2000) amended by 1999 La. Act of July 2, 1999, No. 890 §1; 19-A Me. Rev. Stat. Ann. §701 (West 2000); Mich. Comp. Laws Ann. §551.1 (West 2000); Mich. Comp. Laws Ann. §551.271 (West 2000); Minn. Stat. Ann. §517.01; Miss. Code Ann. §93-1-1; Mo. Rev. Stat. §415.022 (2000); NEB. CONST., Art. I, §29; NEV. CONST., Art. I, §21; N.C. Gen. Stat. §51-1.2 (West 2000); N.D. Cent. Code §14-03-01 (1960); 43 Okla. St. Ann. §3.1 (West 2000); Pa. Consol. Stat. Ann. §1704 (West 2000); SC. Code Ann. §20-1-15 (West 2000); S.D. Cod. Laws §25-1-1 (1968); Tenn.

These jurisdictions unanimously attest that the legislature is the proper source for the definition of marriage. Moreover, even Vermont's creation of civil unions for same-sex couples recognized that the legislature is the proper forum for making decisions about the nature of marriage. See Baker v. State, 744 A.2d 864, 887 (Vt. 1999) (upholding the legislature's power to afford the required benefits to same-sex couples without redefining marriage).

Likewise, the federal government has codified the definition of marriage as the union of one man and one woman through Congressional action. The federal Defense of Marriage Act, signed into law in 1996 by President Clinton, provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States,

Code Ann. §36-3-113 (1955); 2003 Texas Senate Bill 7 (enacted May 27, 2003); Utah Code Ann. §30-1-4 (1953); Va. Code §20-45.2 (West 2000); Wash. Rev. Code §26.04.020 (2000); W. Va. Code §48-2-603 (2000).

the word 'marriage' means only a legal union of one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2001) (emphasis added). Admittedly, federal law does not control the definition of marriage for Massachusetts. See Goodridge, 440 Mass. at 313. But the *legislative* resolution of marriage's definition by every other authority demonstrates how remarkable, and remarkably misguided, would be any broad construal of the remedy required by Goodridge.

To justify its solitary and radical departure from the considered judgment of thirty-eight American jurisdictions, the Court in Goodridge had to rely on two entirely novel constitutional principles. First, it held that the power to define marriage lies with the courts, not the legislature. As noted above, this new principle of absolute judicial control over the scope of marriage is contrary to the

text of the state constitution, long tradition, wise policy, and common sense. Second, the Court also created a new form of "rational basis" scrutiny, which appears nearly indistinguishable from strict judicial scrutiny. "As a matter of constitutional jurisprudence, ... the case stands as an aberration. To reach the result it does, the court has tortured the rational basis test beyond recognition." Goodridge, 440 Mass. at 363 (Sosman, J., dissenting). Instead, the Court incorporated the shadows of values that give rise to strict scrutiny, such as fundamental liberty and equal protection, to tilt the scales of its rational-basis scrutiny. See id. at 361 (noting that the Court relied on "emotion-laden and value-laden rhetoric" to transform rational-basis scrutiny). The Court should disavow the astounding proposition that the traditional definition of marriage as the conjugal union of man and woman—affirmed by thirty-seven American

legislatures and the Congress of the United States—lacks any rational basis whatsoever.

3. The Court Lacks Institutional Competence To Define Marriage.

The constitutional command and the unanimous consensus of authorities indicate that defining marriage is the province of the Legislature. Such an overwhelming accord could only be supported by strong reasons. Indeed, it is clear that the Legislature should define marriage because only the Legislature, not the courts, has the institutional competence required to examine the complicated and delicate social issues surrounding the law and family life. We provide illustrations of this complexity immediately below. See infra Part I.B.

The Supreme Judicial Court has repeatedly acknowledged its own inability, and the Legislature's superior competence, to craft the definition of marriage. The Court has stated that "[a] sovereign state has authority in general to decide what marriages between its own citizens it will

recognize." Hanson v. Hanson, 287 Mass. 154, 157 (1934). It has approved the Legislature's exercise of this power: "The Commonwealth has extensively exercised this power to regulate numerous aspects of the marriage relationship. Given this broad concern with the institution of marriage, the State has a legitimate interest in prohibiting conduct that might threaten that institution." Commonwealth v. Stowell, 389 Mass. 171, 175 (1983) (citation omitted). This competence includes the power to defend the marriage institution from subversion and decay through destabilizing redefinition: "Massachusetts has a strong public interest in ensuring that its rules governing marriage are not subverted." Green v. Richmond, 369 Mass. 47, 51 (1975). "Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad ..." Goodridge, 440 Mass. at 326-27. One Justice of the Supreme Judicial Court recently summarized the Legislature's unique institutional competence: "Before making a

fundamental alteration to [marriage], it is eminently rational for the Legislature to require a high degree of certainty as to the precise consequences of that alteration, to make sure that it can be done safely, without either temporary or lasting damage to the structural integrity of the entire edifice [of marriage law]." Goodridge, 440 Mass. at 362 (Sosman, J., dissenting). By forcing such a fundamental alteration upon the Legislature, the Court would plunge recklessly into an area where it is institutionally blind, and preempt the governance of an institution that can see.

It is thus plain that the Legislature must define marriage. No one can pretend that including same-sex unions merely changes the entry conditions of marriage. As the Court noted in Goodridge, Black's Law Dictionary joins countless other authorities in defining marriage simply as "[t]he legal union of a man and woman as husband and wife." Goodridge, 440 Mass. 319 (quoting Black's Law Dictionary 986 (7th ed. 1999)).

This definition shows that monogamy and gender diversity are the two core elements of the definition of marriage. To eliminate gender diversity thus constitutes the most radical possible redefinition of marriage.

B. The Decision Seems To Direct the Legislature To Graft a Legal Institution onto a Social Relationship For Which It Was Not Designed.

Second, the Goodridge decision is extraordinary because it apparently directs the Legislature to graft the legal institution of civil marriage onto same-sex relationships. This is surprising because that legal institution was designed and evolved over centuries to promote and support gender-diverse marriages, which are significantly different from same-sex unions. To apply the legal rules of civil marriage to same-sex relationships would thus be like trying to put your shoe on the wrong foot: it just does not fit.

1. Same-Sex Unions Are Significantly Different From Marriages, and Civil Marriage Is Not Designed To Account for These Differences.

Same-sex unions are significantly different from marriages. Beyond obvious differences like lack of biological complementarity and the ability to reproduce naturally, for example, same-sex relationships have different norms of stability, fidelity, and parenting structures than gender-diverse marriages. Marriage's legal rules thus do not fit same-sex relationships. If the Commonwealth wishes to promote same-sex unions, it would have to develop legal rules that are tailored to reflect the unique social and psychological issues raised by these relationships.

First, for example, same-sex unions have different norms of stability than heterosexual unions. Social scientists admit that "[l]ittle empirical work is currently available on commitment and permanence in homosexual relationships." Letitia Anne Peplau & Susan D. Cochran, *A Relationship Perspective on Homosexuality* 321, 335 in *HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS*

OF SEXUAL ORIENTATION (1990). However, perhaps the most extensive study available indicates that same-sex relationships tend to be of much shorter duration than heterosexual relationships, with the vast majority terminating in less than one year. Marcel T. Saghir, M.D. & Eli Robins, M.D., MALE AND FEMALE HOMOSEXUALITY: A COMPREHENSIVE INVESTIGATION 57, Table 4.13; 225, Table 12.10 (1973). Only 15 percent of homosexual men and 17.3 percent of homosexual women surveyed had ever had relationships lasting more than three years. Id.

Given this likelihood of starkly different norms of stability for same-sex relationships, the Legislature faces deliberative options. It might want to make the exit conditions for legally recognized same-sex unions more restrictive than for civil marriage, in order to counteract the established trend toward instability. Or, it might want to make the exit conditions less restrictive, to match and promote the pre-existing social norms of stability.

Either way, the wholesale and unreflective adoption of the dissolution law for civil marriage for same-sex unions is unwise and inappropriate. See, e.g., Mass. G.L. c. 208 § 1A (providing for divorce on the ground of irretrievable breakdown of the marriage). Much investigation and deliberation—the sort of investigation and deliberation that the Court is unfit to perform effectively—is required to develop a legal framework that fits actual social practices among same-sex relationships.

Second, there is similar evidence that same-sex relationships have different norms of fidelity than do heterosexual couples. Even self-selecting studies of same-sex relations indicate a much higher degree of infidelity among same-sex couples. See, e.g., Lawrence A. Kurdek, *Relationship Stability and Relationship Satisfaction in Cohabiting Gay and Lesbian Couples: A Prospective Longitudinal Test of the Contextual and Interdependence Models*, 9 JOURNAL OF SOCIAL AND PERSONAL RELATIONSHIPS 125,

130-31 (1992) (finding that 61 percent of male same-sex couples studied were not sexually exclusive in the first year studied). Disinterested research abundantly supports this trend. See, e.g., Joseph Harry, GAY COUPLES 115 & Table 6.1 (1984) (finding that about 90 percent of male same-sex couples in five-year relationships treated such relationships as "nonexclusive"); David P. McWhirter & Andrew H. Mattison, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252-53 (1984) (finding that all male couples studied in five-year relationships "incorporated some provision for outside sexual activity"). This norm of fidelity is far less stringent than the norm of fidelity in heterosexual couples. See Robert T. Michael et al., SEX IN AMERICA: A DEFINITIVE STUDY 101 (1994) (finding that 94 percent of marriages and 75 percent of unmarried cohabitants were faithful to each other in the previous year). In male same-sex couples, this norm of infidelity also has public health implications, as men who

engage in promiscuous sex with other men risk losing up to 20 years of life expectancy. R.S. Hogg *et al.*, *Modeling the Impact of HIV Disease on Mortality in Gay and Bisexual Men*, 26 INTERNATIONAL J. OF EPIDEMIOLOGY 657, 659 (1997). Moreover, it is plausible that there is a disparity between norms of fidelity for male same-sex couples and for female same-sex couples.

Civil marriage law assigns particular legal consequences to infidelity in marital relationships. See, e.g., Mass. G.L. c. 208, § 1 (adultery as primary grounds for divorce). These legal consequences arise from and reinforce the norms of fidelity for marriages between husband and wife. But it is not clear how legally recognized same-sex unions should treat the issue of fidelity. Should it be the same as for civil marriage? Should it be the same for gay couples as for lesbian couples? On the one hand, the Legislature might want to *emphasize* the importance of fidelity to counteract the laxer norms of fidelity in same-sex couples.

On the other hand, the Legislature could conceivably decide to *de-emphasize* the legal significance of fidelity to accommodate the variation in practices among same-sex couples: one advocate of same-sex marriage argues that "there is more likely to be a greater understanding of the need for extra-marital outlets between two men than between a man and a woman." Andrew Sullivan, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 202 (1995). This illustrates the danger of "lumping together" same-sex unions and heterosexual marriages in the same legal institution. The norms of fidelity of one relationship will inevitably influence the norms of fidelity governing the other. "Marriage" might come to be perceived as involving a greater tolerance for infidelity—which is obviously not a positive result. The Court, at least, has no special competence to decide this question. Same-sex relationships, because they are so different from heterosexual commitments, are

ill-adapted to share the same legal institution.

Third, and most dramatically, the structures of parenthood in same-sex unions are radically different from those in gender-diverse marriages. Notably, and obviously, any same-sex couple with children is intrinsically either *motherless* or *fatherless* in its family structure. A gay couple with children is permanently and obligatorily a motherless family. A lesbian couple with children is permanently and obligatorily a fatherless family. In such cases, motherlessness and fatherlessness arise neither incidentally nor tragically (as in divorce or death), nor in accepting a good but less-than-perfect situation for a child (as in single-parent adoption), always holding out hope for the future. Instead, it arises deliberately and with no regard for the children's best interests, but only for those of the adults. These features alone indicate that the Legislature is rational to conclude that male couples and

female couples are not optimal sources of procreation and childrearing. But they also indicate that legal marriage does not fit same-sex relationships. For example, Justice Cordy in Goodridge noted that Commonwealth law creates a presumption of paternity for the husband of his wife's children—legal marriage functions to reinforce the “normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other.” Goodridge, 440 Mass. at 382 (Cordy, J., dissenting) (citing Mass. G.L. c. 209C, § 6). Clearly this presumption of paternity will not operate for either gay or lesbian couples. And it is difficult to judge what should replace it: Should the biological mother in a lesbian couple have privileges over the adoptive mother? Should the sperm-donating father have privileges over the adoptive father in a gay couple? Again, foisting the legal rules of civil marriage on these different relationships is like forcing one's shoe on the wrong foot.

Therefore, if any legal recognition of same-sex unions is required, it should look quite different from civil marriage. Moreover, it will be a difficult and time-consuming legislative process to hash out the legal implications of these differences. Husband-wife marriages are different from gay couples and lesbian couples; and gay couples and lesbian couples are different from each other.

2. These Differences Indicate That All-Male and All-Female Unions Are Not the Optimal Milieu For Child-Bearing and Child-Rearing.

This contrast between same-sex unions and civil marriage highlights one important feature of same-sex unions which makes the Court's opinion in Goodridge all the more surprising and remarkable: it is overwhelmingly likely that motherless and fatherless unions are sub-optimal venues for child-rearing. This demonstrates the Legislature's rationality in promoting husband-wife marriages in a special way.

Abundant research indicates that motherless and fatherless families are not optimal venues for child-rearing. Studies indicate that the mother-father-child triple relationship is necessary and desirable to foster healthy growth and development. See, e.g., Richard N. Atkins, *Discovering Daddy: The Mother's Role*, in FATHER AND CHILD 139, 144 (Stanley Cath et al. eds. 1982). The research is especially well-established for children raised without fathers. "If a young boy is deprived of his father's presence, the result can be deeply traumatic ..." Alfred A. Messer, *Boys' Father Hunger: The Missing Father Syndrome*, 23 MEDICAL ASPECTS OF HUMAN SEXUALITY 44, 45 (Jan. 1989). Children raised fatherless have poorer physical health, poorer mental health, and a greater risk of drug abuse, crime, and suicide. See, e.g., Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health*, 29 JOURNAL OF HEALTH AND SOC. BEHAVIOR 38, 48-49 (1988) (physical health); Ollie Lundberg, *The Impact of Childhood Living*

Conditions on Illness and Mortality in Adulthood, 36 SOCIAL SCIENCE AND MEDICINE 1047, 1050&tbl.3 (1993) (mental health); Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Abuse and Sexual Intercourse in Early Adolescence*, 52 JOURNAL OF MARRIAGE AND THE FAMILY 171, 175 & tbl.2 (1990) (drug abuse); David M. Cutler et al., *Explaining the Rise of Youth Suicide*, Working Paper 7713 at 32, National Bureau of Economic Research (May 2000) (suicide); Linda J. Waite & Maggie Gallagher, *THE CASE FOR MARRIAGE* 134 (2000) (crime). These studies raise troubling questions about the appropriateness of applying full legal recognition to same-sex unions. Intrinsically motherless and fatherless unions do not fit into the same legal institution that “developed historically as a means to regulate heterosexual conduct and to promote child rearing” by mothers and fathers together. Goodridge, 440 Mass. at 332 n.23.

C. The Decision Imposes an Unrealistic Time-Span for Legislative Deliberation.

The third extraordinary feature of the Goodridge opinion, under the proposed broad interpretation, is that it imposes an unrealistic deadline on the Legislature to craft a response to its assertion of recognition for same-sex unions: "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. at 344 (emphasis added). As argued above, the Court here appears to blunder blindly into the sphere of Legislative competence. The Court implies that the Legislature should graft the institution of civil-marriage wholesale and unaltered onto same-sex relationships, which are demonstrably different and ill-adapted to that legal institution. Clearly, the Legislature requires much more time than a mere six months, if it is to craft a parallel legal institution for same-sex unions. It will need to investigate, weigh,

and deliberate about the policy goals and means to achieve them appropriate to any legal promotion of same-sex unions. It will need to receive feedback from the public at large, including the gay and lesbian community and from community leaders. It will need time to consider other democratic options, such as amendment to the state constitution to clarify the definition of marriage.

II. BECAUSE OF THE RADICAL AND UNPRECEDENTED NATURE OF THE BROAD READING OF GOODRIDGE, THE COURT SHOULD RULE THAT ANY OF FOUR LEGISLATIVE COURSES OF ACTION SATISFY THE DECISION.

These three radical characteristics of the Goodridge opinion—intrusion into the Legislature's sphere of competence, unsuitable remedy, and short-term time frame—suggest that any of the following four legislative options should suffice to satisfy its demands.

A. A Legislative or Executive Statement Clarifying the Rational Basis For Restricting Marriage To Husband-Wife Unions Satisfies Goodridge.

First, the Court should hold that a statement by the Legislature or Executive, formally articulating the rational basis for the definition of marriage as husband and wife, suffices to satisfy Goodridge. Goodridge ruled that the Department of Public Health failed to proffer an adequate rational basis to justify excluding same-sex couples from the protections of legal marriage. See Goodridge, 440 Mass. at 341. But it is well settled that, under rational basis scrutiny, not only the proffered rationales, but any conceivable rationale for the legislative distinction is adequate. See, e.g., Paro v. Longwood Hosp., 373 Mass. 645, 650 (1977) (reviewing court makes all rational inferences in favor of a statute's validity, and the Legislature need not provide a record or finding in support of it); Fine v. Contributory Retirement Appeal Bd., 401 Mass. 639, 641 (1988) (a statute "only need be supported by a conceivable rational basis"). In light of Goodridge's

radical intrusion into the realm of legislative competence, see supra Part I.A, and because any rational basis should suffice, the Court should hesitate to impose its mandate upon the Legislature until the Legislature has had a chance to speak explicitly on the issue. Just as the political process is superior for regulating marriage, the political process may be superior to the litigation process for explaining the basis of marriage. In fact, such proposals are currently being considered by the Legislative and Executive branches. See Mary Ann Glendon & Hadley Arkes, *Goodridge Case Has Alternative to Gay Marriage*, BOSTON HERALD, Jan. 8, 2004, at 33. Clearly, any such bill that successfully lays out its rational basis would be constitutional under Goodridge.

Such deference to the Legislature would not only help mitigate Goodridge's remarkable intrusion into legislative competence. It would also serve to allay the violence that Goodridge wreaked on the

rational basis standard. As the Supreme Judicial Court noted in Shell Oil Co. v. Revere, it is "the judge's duty ... to give effect to the will of the people as expressed in the statute by their representative body." 383 Mass. 682, 687 (1981) (quoting Commonwealth v. Leis, 355 Mass. 189, 202 (1969) (Kirk, J., concurring)). Granting the people and their representatives the democratic right to express their will and view on this issue could help restore both the proper separation of powers and the proper degree of judicial deference.

Moreover, a legislative articulation of the basis for the Commonwealth's marriage laws is appropriate because Goodridge provides no principled boundary nor limiting principle for the scope of marriage. Apparently Goodridge would extend marriage to any relationship that involves "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship,

intimacy, fidelity, and family." Goodridge, 440 Mass. at 322. Such a formulation is open-ended and boundless. For example, it includes no rationale for excluding roommates living together temporarily from enjoying the benefits of "marriage." This point is driven home by the fact that such couples would apparently be eligible for civil unions under S. 2175. See S.B. 2175, § 5 (limited criteria for entry into civil unions). This result undermines the familial nature of the marriage institution. The Legislature should have the opportunity to eliminate this uncertainty and restore principled boundaries to the fundamental institution of marriage.

In fact, Goodridge itself suggests this most desirable, least intrusive resolution. As two prominent constitutional scholars recently noted of the opinion:

[N]owhere does the Court say the current statute cannot have a rational basis. ... [T]he Court's considered position is quite different, conditional, and limited: the Department of Public Health did not adequately justify the law, and the law itself does not set forth the grounds on

which it was based. The Court did not deny the adequacy, in principle, of those or other grounds. As a result, the Court left open the possibility that the statute could have been supported by clearer evidence.

Mary Ann Glendon & Hadley Arkes, *Goodridge Case Has Alternative to Gay Marriage*, BOSTON HERALD, Jan. 8, 2004, at 33. Thus, in employing rational basis scrutiny, Goodridge naturally calls for the Legislature to clarify its rational basis for the centuries-old definition of marriage: "the Court would be bound to stay enforcement of its Goodridge judgment for as long as it takes to litigate the adequacy of the grounds for a re-enacted statute." Id.

B. The Court Should Stay Any Issue of Judgment Pending Completion of the Democratic Process To Amend the State Constitution To Clarify the Definition of Marriage.

Second, the Court should stay its judgment pending the resolution of the democratic process to amend the Commonwealth's Constitution. Other courts ruling on same-sex unions have abstained from mandating legislative action until the issue was resolved by constitutional

amendment. See, e.g., Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (raising constitutional concerns but remanding the case for further findings, during which democratic procedures to amend the state constitution took effect); Krause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. 1998) (decision overruled by constitutional amendment while appeal was pending). A proposal to amend the State Constitution is currently before the Legislature. H.B. 3190. Just as it is prudent for an appellate court to abstain from deciding a case that is pending before a higher court in its jurisdiction, it is prudent for the Supreme Judicial Court to await the outcome of the constitutional amendment process before mandating final judicial action.

A stay of final decision is particularly appropriate here where there is the risk of creating a novel problem of unconstitutional vested rights. If the Court commands the Legislature to execute

legal recognition of same-sex unions immediately, and the people of the Commonwealth then amend the Constitution to outlaw such marriages, then the legal status of unions enacted after the remedy but rendered retroactively unconstitutional by the later amendment creates a question of grave doubt. Same-sex couples, who may commingle property and artificially procreate children in reliance on the statute, could be left "high and dry" by the outcome of the democratic process outlawing their unions. The Court can easily avoid this legally awkward outcome by abstaining from entering a final decision until the people of the Commonwealth have spoken through the democratic process.

C. The Court Should Grant the Legislature a Significant Extension of Time To Deliberate and Design Any Required Remedy for Same-Sex Unions.

The civil unions bill, Senate, No. 2175, indicates the Legislature's good faith in attempting to comply with the demands of Goodridge. However, as noted above in Part

I.C., the six-month window provided by Goodridge is far too short a time to develop an appropriate response to the problem of legal recognition of same-sex unions, even if affirmative legal recognition is required, which your *amici* here deny. The peremptory and simplistic nature of Senate, No. 2175 indicates that the Legislature has felt unnecessary compulsion and has had inadequate time to consider the complexity of motherless and fatherless unions, their similarities and differences to husband-wife marriages. Contrast, e.g., S.B. 2175, § 5 (proposed G.L. c. 207A, § 4(a)) (grafting the legal incidents of husband-wife marriage wholesale onto same-sex relationships) with supra Part I.B. Even if Goodridge were interpreted to require some affirmative legal recognition to same-sex unions, which would be erroneous, the Court would have to provide a lengthy or indefinite extension to the Legislature to develop its approach to this complex problem. It should not impose arbitrary constraints on the format or the

timing of legal recognition of same-sex relationships.

D. The Current Civil Unions Bill Goes Far Beyond the Requirements of Goodridge.

Senate, No. 2175 is ill-advised policy. See supra Part I.B. Any of the three legislative alternatives listed above would be preferable policy. Moreover, no constitutional principle requires the Legislature to enact it. Goodridge expressly did *not* hold that the exclusion of same-sex relationships from civil marriage implicated a fundamental right, or violated principles of equal protection. Indeed, any such holding would have been untenable. See, e.g., Goodridge, 440 Mass. at 370, (Cordy, J., dissenting) ("While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not [The equal-protection argument] is analytically unsound and inconsistent with the legislative history of the ERA."). In addition, the majority

opinion did not hold that rational basis scrutiny demands immediate legal recognition for same-sex relationships, because it acknowledged the Legislature's right to clarify its rational basis for the Commonwealth's long-standing marriage laws. See supra Part II.A.

But, under the untenable broad interpretation of Goodridge, Senate, No. 2175 provides more than sufficient legal recognition to same-sex relationships, and the inclusion of same-sex relationships in husband-wife civil marriage would still be radically improper. Four reasons make this clear. First, Goodridge on its face demands, at most, the provision of parallel or equivalent legal benefits and protections to same-sex couples. "We are concerned only with the withholding of the benefits, protections, and obligations of civil marriage from a certain class of persons for invalid reasons." Goodridge, 440 Mass. at 337 n.29. Cf. Baker v. State, 744 A.2d 864, 886 (Vt. 1999) ("We hold only that

plaintiffs are entitled ... to obtain the same benefits and protections."). Goodridge should not be construed to extend to the definition of husband-wife marriage, because it would then maximally infringe upon legislative competence to define marriage and thus create constitutional difficulties. See supra Part I.A. Cf. Harris v. United States, 536 U.S. 545, 555 (2002) (When "a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)); Baker v. State, 744 A.2d at 886 (Vt. 1999) ("We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate."). So the opinion is best and most naturally interpreted as requiring civil unions, not civil marriage.

Second, though it makes little sense to graft the legal incidents of civil marriage upon same-sex relationships wholesale and unaltered, see supra Part I.B., it makes still less sense to bind the future legal development of these disparate types of relationships. In some areas, it will no doubt make sense for the legal rules governing same-sex unions and husband-wife marriages to converge. But in other areas, it will make sense for them to diverge; "civil marriage is an evolving paradigm." Goodridge, 440 Mass. at 339. Such divergent development would be cramped by shoehorning both relationships into the same legal framework, hampering the development of both. Indeed, it may well be preferable to provide separate legal frameworks for gay couples and lesbian couples, to accommodate the disparate issues raised by male and female same-sex unions—so three separate legal forms may be necessary. The flexibility for future divergent development makes the provision of a formally separate

legal framework for same-sex couples desirable.

Third, unlike same-sex marriages, civil unions will intrude less upon the sovereignty of other states. The status of other states' legal duties to recognize the Commonwealth's same-sex marriages is an open question, and it appears that even states with Defense of Marriage Acts may be required to recognize them under some circumstances. See generally *Developments in the Law—The Law of Marriage and Family, Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028 (2003). But civil unions are not subject to preexisting marriage choice-of-law rules, which tend to favor recognition, and thus intrude less on the public policies of other states. See, e.g., Rosengarten v. Downes, 802 A.2d 170, 179-82 (Conn. App. Ct. 2002) (denying recognition to foreign-state same-sex civil unions); Burns v. Burns, 560 S.E.2d 47, 48-49 (Ga. Ct. App. 2002) (same). Likewise, the creation of legal rights

incident to same-sex marriages in other states would greatly complicate and aggravate the vested-rights problem for same-sex unions abrogated by later constitutional amendment.

Fourth, aside from these differences of flexibility and interstate recognition, there is no legally substantive distinction between the civil unions established by Senate, No. 2175 and the "benefits, protections, and obligations of civil marriage." Goodridge, 440 Mass. at 339 n.29; see also Senate, No. 2175, § 2. The only difference pertains to the *moral and cultural* significance of the word "marriage," which has long been reserved for husband-wife conjugal unions. Defenders of husband-wife marriage justly fear the incursion of novel innovations and untested relationships into the extra-legal, cultural institution "marriage," for they threaten to undermine or dilute the solemnity, endurance, and sacredness of that institution. See, e.g., Maggie Gallagher,

"Marriage Defeatists," THE WEEKLY STANDARD, Dec. 15, 2003 ("The social norm that needs reinforcing, in the law and in the culture, is not: Soul mates should marry. It is: Children need fathers and mothers."). So the moral and cultural significance of that word is by no means trivial. But, by the Court's own admission, it lies outside the Court's authority to pronounce on matters of strictly moral and cultural significance: "Our obligation is to define the liberty of all, *not to mandate our own moral code.*" Goodridge, 440 Mass. at 312 (emphasis added) (quoting Lawrence v. Texas, 123 S.Ct. 2472, 2480 (2003) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992))). This liberty extends as far as the legal rights and obligations of civil marriage extend, and no further. Beyond that, in the realm of the moral and cultural definition of marriage, the Court would truly be mandating its own code.

III. CONCLUSION

For the foregoing reasons, the Court should adopt the narrow interpretation of its opinion in Goodridge. It should issue a stay of judgment until the Legislature and the People democratically decide what course to take with respect to marriage, by way of constitutional amendment or an alternative or supplemental statutory solution.

Respectfully Submitted,

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