COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

DOCKET NO. 08860

HILLARY GOODRIDGE, et al.,
Plaintiffs-Appellants

v.

DEPARTMENT OF PUBLIC HEALTH, et al.,
Defendants-Appellees

ON APPEAL FROM SUMMARY JUDGMENT
OF THE SUPERIOR COURT

BRIEF OF THE AMICI CURIAE PROFESSORS OF REMEDIES, CONSTITUTIONAL LAW AND LITIGATION, LIBBY ADLER, MARIE ASHE, MICHAEL AVERY, JACK M. BEERMANN, PATRICIA A. CAIN, ERWIN CHEMERINSKY, MARTHA F. DAVIS, KATE NACE DAY, ANTHONY PAUL FARLEY, TAYLOR FLYNN, LEORA HARPAZ, JEAN C. LOVE, BRUCE K. MILLER, RUSSELL PEARCE, WILLIAM RUBENSTEIN, ELIZABETH SPAHN, ROBERT VOLK, TIMOTHY WILTON, ARTHUR D. WOLF, AND LARRY YACKLE

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INTEREST OF THE AMICI CURIAE

Amici are law professors of Remedies, Constitutional Law and Litigation, who present this brief to bring before the Court materials that will demonstrate that the plaintiffs have a constitutional right to marry and that the remedy doctrine of this Court entitles them to an immediate judicial remedy.

The interests of the amici are to ensure that the law develops in such a way that constitutional principles are upheld, and that the courts effectuate an appropriate remedy for constitutional deprivations.[*]

STATEMENT OF THE ISSUES

Amici adopt the Statement of the Issues as set forth by the plaintiffs.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amici adopt the Statement of the Case and the Statement of Facts as set forth by the parties.

[*] The Professors of Remedies, Constitutional Law and Litigation are signing as amici in their individual capacities and not as representatives of their respective institutions. Their institutional affiliations are provided for identification purposes only.

ARGUMENT

Introduction

In *Goodridge*, the plaintiffs challenge the constitutionality of the legislative scheme governing the civil institution of marriage as well as the constitutionality of the actions of the Department of Public Health (DPH), the executive agency charged with administering the marriage scheme and its Commissioner, presently a defendant. The Superior Court agreed with the defendants that the plaintiffs' exclusion from marriage does not violate their constitutional rights and instead is a matter that should be directed to the Legislature. Record Appendix ["R.A."] at 133 n. 25, 134. Amici respectfully disagree that the Court should decline to adjudicate the constitutional issues raised by the plaintiffs. This Court is the proper place to address the constitutionality of the defendants' denial of marriage rights. The Massachusetts Constitution confers on the judiciary the duty to determine if plaintiffs' liberty and equality rights are violated by the defendants' denial of a marriage license to an individual who wishes to marry a person of the same sex.

If the Court finds a constitutional violation, it is the Court, not the Legislature, that should determine the appropriate remedy. Under this Court's well developed remedy doctrine, where it finds a statute as applied to be underinclusive, this Court can provide an immediate remedy by extending the statute to include those persons excluded. Here, if the Court finds that the marriage statutes as applied are underinclusive then it should remedy this unconstitutional deprivation by extending the marriage statutes to include individuals who wish to marry a person of the same sex. This can be accomplished by construing the marriage statutes in a gender-neutral fashion and directing the issuance of marriage licenses to qualifying same-sex couples who apply for them. This judicial remedy cures the constitutional violation while permitting the Commonwealth's statutory scheme for marriage to remain intact.

I. This Court should exercise its authority to declare the marriage statutes unconstitutional as applied.

The question of whether an individual has the right to marry the person of his or her choice, including persons of the same sex, presents a

constitutional question that this Court, not the Legislature, should decide.

A. The Court has the obligation to invalidate unconstitutional actions of the Legislature and Executive.

By arguing that the issue before the Court is a policy matter and that it is the Legislature, not the Court, that should decide whether an individual may marry another person of the same sex, the defendants question the very legitimacy of judicial review. The right to marry is not a matter of policy.[1] Plaintiffs' right to marry is a fundamental right recognized under both the federal and state constitutions. S*ee Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men" under the Fourteenth Amendment); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) ("prior and subsequent decisions of this Court confirm that the right to marry is of fundamental

[1] The Superior Court found it significant that our Legislature and other state Legislatures have not yet interpreted their respective marriage statutes to apply to individuals who wish to marry a person of the same sex. R.A. at 112. Its reliance on this point was misplaced. When directly confronted with the issue framed for the first time as a constitutional question, the Court should not avoid its judicial duty to determine whether the marriage statutes as applied violate the plaintiffs' constitutional rights.

importance to all individuals."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (*Zablocki* applies to restrictions on prisoners' right to marry); *Opinion of the Justices*, 375 Mass. 795, 806 (1978) (recognizing "fundamental matters relating to marriage" as within a zone of individual privacy in which government may not intrude absent compelling interest). Plaintiffs' right to marry is also grounded in the equality principles of the Declaration of Rights, which are found in articles 1, 6, 7 and 10. *See Lavelle v. MCAD*, 426 Mass. 332, 336 n.6 (1997) ("We have recognized equal protection of law principles in arts. 1, 6, 7 and 10 of the Massachusetts Declaration of Rights"); *Attorney Gen. v. Massachusetts Interschol. Ath. Ass'n*, 378 Mass. 342, 351 (1979) (equal rights amendment condemns discrimination based on sex) ["MIAA"]. This Court has long played an integral role in developing the law of marriage and in ensuring that individual choice in marriage is recognized and protected. *See*, *e.g.*, *Van Houten v. Morse*, 162 Mass. 414 (1894) (applying commercial law principles in defining scope of breach of promise to marry); *Wightman v. Coates*, 15 Mass. 1, 3 (1818) (action for breach of promise to marry); *Inhabitants of Medway v. Inhabitants of*

Natick, 7 Mass. 88, 89 (1810) (narrowly reading state's statute barring interracial marriages to uphold the marriage of a white man and a woman born of white mother and half-white, half-black father); s*ee also* Amici Curiae Brief of Historians Nancy F. Cott, Michael Grossberg, *et al*. ["Historians' Brief"], Parts III(C) & IV(D)(describing central role of marriage in our society and role of courts in protecting marriage as a civil right).

This Court has an obligation that lies at the very heart of judicial power to invalidate laws that conflict with "the fundamental law of the people" as expressed in the Constitution of the Commonwealth.[2] *Loring v. Young*, 239 Mass. 349, 358 (1921). As this Court has recognized:

> without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have the duty, certainly since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), to adjudicate a claim that a law and the action undertaken pursuant to that law conflict with the requirements of the

[2] The Court's power lies in its legitimacy, which rests on an acceptance of the role of the Judiciary "to determine what the Nation's law means and to declare what it demands." *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992). For the Court to submit to "social and political pressures" which should have "no bearing on the principled choices that the Court is obliged to make" *id.*, would undermine its legitimacy.

> Constitution. 'This,' in the words of Chief Justice Marshall, 'is of the very essence of judicial duty.'

Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 642 (1981) (quoting *Colo v. Treasurer & Receiv. Gen.*, 378 Mass. 550, 552-53 (1979)); *see also Bowe v. Secretary of the Comm.*, 320 Mass. 230, 243-45 (1946) ("The nature of the power of courts to enforce the provisions of the Constitution of Massachusetts as against a conflicting Massachusetts statute . . . is a necessary function, if constitutional provisions are to be the supreme law, and not mere declarations of policy to be disregarded by the Legislature at will").

B. The Court has a long history of deciding constitutional cases that raise potentially controversial questions.

There is no exception to the exercise of judicial power for potentially controversial or politically-charged questions. This is not that rare case that implicates elections or the political process and could be considered a "political question."[3] Further,

[3] In fact, the "political question doctrine" has been disapproved of by this Court. *See Backman v. Secretary of Comm.*, 387 Mass. 549, 554 (1982)(finding that the federal doctrine has "never been explicitly incorporated" into the Commonwealth's jurisprudence since "this court has an obligation to adjudicate claims that particular actions conflict with constitutional requirements."). Federal courts themselves rarely find that the political question

the Court routinely hears and decides what could be considered "controversial" constitutional cases.[4]

It is the Court's role to safeguard the rights of the minority from the tyranny of the majority. John Adams, the main author of the Massachusetts Constitution, feared unmoderated majoritarianism and its affect on the rights of the minority. *See* Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 288-90 (1967) (discussing Adams' pamphlet *Thoughts on*

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doctrine inhibits judicial review even in cases regarding elections. *See* Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine*, 100 Dickinson L. Rev. 303, 305 & accompanying notes (1996) (discussing the sixteen cases since 1962 in which the Supreme Court faced the political question doctrine). Even in *Bush v. Gore*, a case which directly addressed the election process, no Justice mentioned the doctrine. *See Bush v. Gore*, 531 U.S. 98 (2000).

[4] *See*, *e.g.*, *Bates v. Director of Off. of Campaign & Pol. Fin.*, 436 Mass. 144, 168 (2002) (legislative funding of Clean Elections law); *A.Z. v. B.Z.*, 431 Mass. 150, 162 (2000) (unconsented use of frozen embryos impinged on "freedom to decide whether to enter into a family relationship"); *John Doe v. Attorney Gen.*, 430 Mass. 155 (1999) (registration of sex offenders); *Moe*, 382 Mass. at 642 (public funding of abortion; acknowledging the Legislature had a "deep-seated resistance to public funding for abortion"); *Superintendent of Belchertown St. Sch. v. Saikewicz*, 373 Mass. 728, 742 (1977) (right to refuse medical treatment); *Bowe*, 320 Mass. at 252 (forbidding political contributions by labor unions violate freedom of press and assembly); *Loring*, 239 Mass. at 375-77 (whether ballot initiative 'Rearrangement of Constitution of 1919' validly replaced original Constitution).

Government). To protect minority rights, he advocated for the establishment of a republican government that split governmental power between the legislative, executive and judicial branches. *Id.* The judiciary was the branch of government "composed of men [and now also women] of learning, legal experience and wisdom" whose "minds should not be distracted with [the] jarring interests" of the political arena. *Id*. at 290 (quoting Adams, *Thoughts on Government*).

The courts have long recognized their instrumental role in protecting minority rights and interpreting the Constitution (state and federal) to respond to "radical changes in social, economic and industrial conditions." *Cohen v. Attorney Gen.*, 357 Mass. 564, 570 (1970) (quoting *Tax Comm'r v. Putnam*, 227 Mass. 522, 523-24 (1917)); *see, e.g., Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 203 (1836) (slavery violates equal protection prohibition of Article I); *Saikewicz*, 373 Mass. at 742 (recognizing fundamental right to refuse medical treatment); *Moe*, 382 Mass. at 642 (public funding of abortion); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (local ordinance regarding wooden laundries applied only against Chinese violated Fourteenth Amendment); *Brown v. Board*

of Educ., 347 U.S. 483 (1954) ("separate but equal" education laws segregating the races are unconstitutional); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing fundamental right to seek abortion). The rights protected by the Massachusetts Constitution are not static, but will continue to evolve together with our society. It is the role of this Court to interpret the Constitution "in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning." *McDuffy v. Secretary of Exec. Off. of Educ.*, 415 Mass. 545, 620 (1993) (citations omitted) (discussing the education clause). As Justice Holmes explained:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Id. (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

The right to marry the person one chooses is a right protected by the substantive due process and equality provisions of the Massachusetts Constitution. This Court must exercise its judicial duty to determine that the marriage statutes and the actions of the defendants violate the Constitution and order an immediate remedy to cure the constitutional violation.

II. The Court should remedy the constitutional violation by extending the marriage statutes to same-sex couples

Just as the Court has the power to interpret the Constitution, it has both the authority and an obligation to provide a remedy that immediately provides relief to the plaintiff class.

A. The plaintiffs have a right to have the Court remedy the constitutional violation.

A "fundamental principle" of the Commonwealth's administration of justice system is the right to seek judicial resolution of a dispute. This right is grounded in the First Amendment of the United States Constitution[5] and article 11 of the Massachusetts

[5] "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Am. 1. This right was incorporated into the Fourteenth Amendment by *Wallace v. Jaffree*, 472 U.S. 38, 49 & n.32 (1985).

Declaration of Rights.[6] *See Sahli v. Bull HN Info. Sys.*, 437 Mass. 696, 700-01 (2002); *Woodworth v. Woodworth*, 273 Mass. 402, 407 (1930). An integral part of this right is obtaining a complete and immediate legal remedy for the plaintiff's injuries. *See King v. Grace*, 293 Mass. 244, 246 (1936); *Service Wood Heel Co. v. Mackesy*, 293 Mass. 183, 189 (1936).

When ruling on the constitutionality of legislative and executive action, the Court has the ability to correct any unconstitutional statutes or policies.[7] Once a right has been violated, the Court has recognized the need to fashion a remedy for the

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[6] "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." Mass. Const. Pt. 1 Art. 11.

[7] *See, e.g., Perez v. Boston Housing Auth.*, 379 Mass. 703, 738 (1980) ("it is a function of the judicial branch to provide remedies to violations of law"); *School Com. of Boston v. Board of Educ.*, 363 Mass. 20, 35 (1973) (recognizing that broad judicial remedial powers are invoked in response to a constitutional violation); *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414, 422 (1965) (where plaintiffs challenged law prohibiting the misbranding of imitation foods, court declared that where a challenged law is unconstitutional, "the act must be declared unconstitutional because enforcement of it will deprive plaintiff of rights secured under the Constitution") (quotations and citations omitted).

plaintiff and all others similarly situated. *See*, *e.g.*, *Lavelle*, 426 Mass. at 337-38; *Murphy v. Commissioner of Dep't of Indus. Accidents*, 415 Mass. 218, 233-34 (1993); *In re Jadd*, 391 Mass. 227, 237 (1984); *Moe*, 382 Mass. at 659-60; *Perez*, 379 Mass. at 738; *MIAA*, 378 Mass. at 364; *Holden v. James*, 11 Mass. 396, 402 (1814) (where a plaintiff has valid claims against a defendant "it was undoubtedly regular and necessary to send him to the courts of law for the recovery of such claims . . . There is no other mode in which, by our constitution and laws, he could effectually enforce his claims, and no other tribunal competent to afford him redress.").

B. The appropriate remedy is to extend the existing marriage statutes, not invalidate the existing statutory scheme.

Where a statute is unconstitutional because of underinclusion, the Court "may either declare the entire statute void, or extend its coverage to those formerly excluded." *Commonwealth v. Chou*, 433 Mass. 229, 238 (2001) (citing *Califano v. Wescott*, 443 U.S. 76, 89 (1979)); *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)); *Commonwealth v. Petranich*, 183 Mass. 217, 220 (1903). This analysis is applied regardless of whether the statute violated

equal protection or due process principles. *See Chou*, 433 Mass. at 238; *Moe*, 382 Mass. at 659-60.

This Court favors extension over invalidation. *See Chou*, 433 Mass. at 238 (stating *in dicta* that a statute that violated equal protection rights could be remedied by removing the gender-specific language and applying the statute gender neutrally); *Moe*, 382 Mass. at 659-60 (extending statute by severing provision violating plaintiffs' due process rights rather than nullify whole statute); *Boston Gas Co. v. Department of Pub. Util.*, 387 Mass. 531, 540 (1982)("the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part.").[8]

[8] A further reason that invalidation is not appropriate is that the plaintiffs do not challenge the underlying laws concerning the eligibility to marry in Mass. Gen. L. c. 207. The plaintiffs only challenge the state's application of those laws to exclude them from marriage. Thus this is not a case that turns on invalidation of a statutory scheme or the severability of a particular statutory provision.

There are three factors the court considers in determining whether to extend a statute to cure a constitutional violation: the legislative intent as to what the Legislature would have done had it known the statute was constitutionally defective; the social cost of invalidating the offending provision; and the feasibility of extending the law to include the excluded group. *See Califano*, 443 U.S. at 92-93; *Moe*, 382 Mass. at 659-60; *Murphy v. Department of Corrections*, 429 Mass. 736, 743 n.5 (1999).

By examining the statute, the Court should be able to ascertain whether the Legislature intended that, if a portion of the statute were held unconstitutional, the remainder of the statute should survive or die with the unconstitutional portion. *See Chou*, 433 Mass. at 238*; Boston Gas Co.*, 387 Mass. at 540; *Pedlosky v. MIT*, 352 Mass. 127, 129 (1967) (where the Court was unable to determine legislative intent, the Court invalidated the entire statute); *Petranich*, 183 Mass. at 220. In *Moe*, this Court declared that

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Cf. ABCD, Inc. v. Commissioner of Pub. Welfare, 378 Mass. 327, 338-39 (1979) (refusing to construe challenged welfare provisions as requested by plaintiffs where such action would require "major surgery" to the statutory scheme and the "sheerest speculation" about legislative intent).

the state's prohibition on Medicaid funding for abortions was unconstitutional and enjoined the state from enforcing this provision of the Medicaid funding scheme. *See Moe*, 382 Mass. at 658-59. The Court, however, rejected voiding the entire Medicaid funding scheme due to the Legislature's expressed "strong commitment" to providing healthcare to the poor and the consequent suffering that action would have created.[9] *Id*. at 660. Similarly, in *Califano*, the U.S. Supreme Court recognized that invalidating the entire family welfare system to cure the unconstitutional gender classification would wreak unnecessary hardship on hundreds of thousands of needy families. *See*

[9] It is not only in cases of poverty where the Court prefers extension over invalidation. In *Mueller v. Commissioner of Public Health*, 307 Mass. 270 (1940), a statute requiring out-of-state manufacturers of upholstered furniture to obtain a permit and pay a $50 fee to sell such furniture in the Commonwealth, but imposing no fee or permit requirement on in-state manufacturers, was held to violate the Commerce Clause. *Id*. at 280. The Court stated that, where a statute violates the Constitution, "there is nothing for the court to do except to sustain the fundamental law by declaring the statute unconstitutional and void." *Id*. at 275. The Court, however, did not strike down the entire statutory scheme regulating the sale of furniture in the Commonwealth. Instead, the Commissioner of Public Health was enjoined from enforcing only the unconstitutional permit and fee requirements. *Id*. at 281.

Califano, 443 U.S. at 90 ("extension, rather than nullification, is the proper course.").

In the present case, applying the first factor, the test of legislative intent, militates against nullification. Nullifying the state's marriage laws would disrupt the lives of many families in the Commonwealth. The legal status of families and married couples would become gravely uncertain - much like that of today's gay and lesbian families - and would remain in doubt until the Legislature enacted an entirely new statutory marriage system. Such a result could not conceivably be the Legislature's intent.

Applying the second factor, the social cost of nullification, militates against nullification for the same reasons. The social cost to married couples and their families, who would be without the benefits and protections of marriage, would be staggering and highly disruptive.

Finally, applying the third factor, the feasibility of extending the law to include the formerly excluded group, supports extension because it is unquestionably feasible to extend the current marriage statutes. By applying common principles of statutory construction, any gender-specific terms such

as “man,” “woman,” “husband,” or “wife,” can be read in a gender-neutral fashion. *See* Mass. Gen. L. c. 4, § 6, cl. 4, which states in pertinent part: “In construing statutes the following rules shall be observed . . . words importing the masculine gender may include the feminine and neuter.” As discussed in the Historians’ Brief, Part IV(B), the marriage statutes and other statutes that concern married persons are now largely gender neutral. *See* Part II(E) *infra*.

The situation here is similar to that in *Califano* where the U.S. Supreme Court declined to nullify the challenged statute, but instead read the statute in a gender-neutral fashion to cure the constitutional violation. The Court held that the statute providing welfare benefits violated the plaintiffs’ equal protection rights because benefits were provided to families where the father was unemployed, but not where the mother was unemployed. *Califano*, 443 U.S. at 89. To cure the unconstitutional underinclusiveness, the Court ordered that the gender-specific term “father” be replaced by the gender-neutral term “parent.” *Id.* at 92-93; *see also Chou*, 433 Mass. at 238-39 (had the defendant succeeded in proving an

equal protection violation, the Court could sever the gender-specific language so that the statute could be read gender neutrally).

In *Moe*, the Court refused to nullify the Medicaid funding system to cure its underinclusiveness. The Court instead extended the statute to include funding for all Medicaid-eligible women requiring medically necessary abortion services. *Moe*, 382 Mass. at 660.

In another extension decision, *In re Jadd*, 391 Mass. 227 (1984), the Court held the Commonwealth's residency requirement for admission to the bar violated the federal Constitution's privileges and immunities clause. *Id.* at 228. The Court entered judgment declaring the rule unconstitutional and extended benefits to Mr. Jadd by ordering the Board of Bar Overseers to consider Mr. Jadd's application without regard to his residency. *Id.* at 228, 237. *See also Lavelle*, 426 Mass. at 335-37 (extending article 15 right to jury trial in discrimination suits to respondents).

As this discussion indicates, extension of the Commonwealth's marriage laws, not invalidation, is the appropriate and most feasible remedy.

C. The Court has the authority to issue a declaratory order to cure the constitutional violation.

Issuing an order declaring the rights of the plaintiffs and ordering the issuance of marriage licenses to individuals who wish to marry a person of the same sex would not violate separation of powers principles. This Court has repeatedly ordered state actors to refrain from taking unconstitutional actions or enforcing unconstitutional laws.[10]

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[10] *See, e.g., Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 436 Mass. 132 (2002) (declaring state's criminal sodomy laws as unenforceable against private consensual conduct); *John Doe v. Attorney Gen.*, 430 Mass. 155 (1999) (state's failure to provide a hearing to determine the threat an individual required to register as a sex offender posed to community violated due process; court enjoined Commonwealth from requiring plaintiff to register or from releasing any information about him until it allowed him the opportunity to be heard); *Horsemen's Benevolent & Protective Ass'n, Inc. v. State Racing Comm'n*, 403 Mass. 692 (1989) (State Racing Commission's rule requiring employees to submit to drug testing violated art. 14 of the Massachusetts Declaration of Rights; court enjoined Commission from requiring employees to submit to drug testing); *Cabaret Enterprises, Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13 (1984) (revocation of plaintiffs' liquor licenses for permitting nude dancing in establishments violated free speech clause of the Massachusetts Constitution; enjoined revoking plaintiffs' licenses); *In re Jadd*, 391 Mass. at 228, 237(exclusion of nonresident attorneys from bar admission procedure unconstitutional and court ordered Board of Bar Examiners to consider nonresident attorney applications the same as resident attorneys); *MIAA*, 378 Mass. at 364 (state athletic association rule barring males from participating in female sports was

In *Blanley v. Commissioner of Correction*, 374 Mass. 337 (1978), prisoners alleged that prison conditions violated their constitutional rights. The trial court ordered the prison officials to take specific steps to remedy certain constitutional violations and the Commissioner of Corrections challenged the court's authority to order the executive branch to act. The Court addressed the Commissioner's separation of powers argument as follows:

> We see no merit in the claim that the scope of the judgment intrudes into the executive branch in violation of art. 30 of the Declaration of Rights of the Constitution of the Commonwealth concerning separation of powers. Courts traditionally have issued orders, formerly called writs of mandamus, directing public officials to carry out their lawful obligations. If such an official fails to obey the order to fulfill his obligations, he risks contempt of court. . . . As to judges' authority to fashion detailed orders to correct established violations of constitutional rights, . . . such functions are judicial, and in no way usurp the power of the executive.

Id. at 343. The Court further stated that "[i]ndeed, the executive's refusal to obey such judicial orders itself seems a violation of art. 30, by abrogating

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state action and violated Massachusetts Constitution; court enjoined association from enforcing the ban).

judicial decrees, an exclusive judicial function." *Id*. at 343 n.4.

Issuing a declaratory order, therefore, to order the issuance of marriage licenses to individuals with same-sex partners is a remedy that is well within the core of the judicial function.

D. This is not that rare case where the Court should defer to the Legislature.

Only on rare occasions have courts delayed remedying constitutional violations to give the Legislature the opportunity to act. This approach has been adopted in situations where, unlike *Goodridge*, an entire statutory scheme was invalidated and needed to be replaced and to do so would intrude substantially into the legislative sphere. This Court has expressed the principle that it will "seek to minimize the scope of any necessary intrusion into the legislative sphere." *Moe*, 382 Mass. at 660; *see also Califano*, 443 U.S. at 92 (choosing remedy that least "risks infringing legislative prerogatives"). Thus the Court has declined to fashion a remedy for a constitutional violation where it involved "massive rewriting" of a statute, *see Aime v. Commonwealth*, 414 Mass. 667, 684 (1993) (1992 amendments to the bail statute), or the enactment of a new statutory scheme involving the

appropriation of funds, *see McDuffy v. Secretary of Exec. Off. of Educ.*, 415 Mass. 545 (1993) (state's public school-financing scheme), or choosing among a multiplicity of permissible statutory solutions, *see Cepulonis v. Secretary of Comm.*, 389 Mass. 930 (1983) (prisoners' voting statutes).[11]

In *McDuffy v. Secretary of Executive Office of Education*, the Court held that the public school funding system violated the plaintiffs' rights to receive an adequate education. However, the Court declined to create a constitutional public school funding system from scratch, and instead articulated "broad guidelines" for the Legislature to follow in enacting a new scheme to remedy the constitutional violations. *McDuffy*, 415 Mass. at 618. The Court recognized its ability to monitor the Legislature and determine if "within a reasonable time, appropriate

[11] Similarly, the U.S. Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), delayed the implementation of a plan to desegregate the Nation's public schools until it heard further argument. *Id*. at 495. The Court justified its unusual decision due to "wide applicability" of any national desegregation plan that would need to take into account "the great variety of local conditions." *Id*. The following year the Court issued its remedy: entrusting federal district judges to ensure that desegregation occurred "with all deliberate speed." *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

legislative action has been taken." *Id*. at 621. The Court also pointed out that it was the Legislature's constitutional duty to educate the children of the Commonwealth. *Id.* The remedy in *McDuffy* involved core legislative functions, that is, the appropriation of funds and a substantial rewriting of the statutory scheme. Thus, the Court's decision not to issue an immediate remedy and instead allow the Legislature to act was in keeping with the Court's remedy doctrine of minimizing its intrusion into the legislative sphere.

Similarly, in *Aime v. Commonwealth,* in which the Court struck the bail statute's amendments for their failure to provide due process, the Court declined to issue a remedy that would require both "a massive rewriting of the statute" to add the procedures constitutionally required as well as the need for a legislative appropriation of funds for the "additional personnel and resources necessary" to carry out the procedures. *Aime*, 414 Mass. at 684.

In *Cepulonis v. Secretary of the Commonwealth*, the Court declined to issue a remedy that required choosing among alternative permissible statutory schemes. After finding that the voting registration procedures unconstitutionally denied inmates the right

to vote, the Court determined that the remedy necessitated a new absentee registration system for inmates. However, the Court declined to determine how such a voter registration system should be enacted as there were a number of permissible alternatives to remedy the constitutional violation. *Cepulonis*, 389 Mass. at 936-38. The court noted, for example, that the state could "require local registrars to visit prisons;" arrange for the prisoner to "be transported to the town he claims as his domicile in order to register;" "permit prisoners to register by an absentee process;" or "permit [them] to vote in the same manner as Federal service personnel." *Id.* at 936 n.10. Explaining that "[l]egislation providing for an absentee registration process 'is primarily a matter for legislative consideration and determination,'" the Court permitted the Legislature "an adequate opportunity" to create a new absentee registration process "in a timely fashion." *Id*. at 937-38 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).[12]

[12] *Goodridge* is also distinguished from a case like *Whitney v. Worcester*, 371 Mass. 208 (1977), where there was no constitutional law violation. There, the Court had expressed its disapproval of the common law governmental tort immunity rule four years before in *Morash & Sons v. Commonwealth*, 363 Mass. 612, 619

Goodridge does not present the intrusion into the legislative sphere that the Court faced in these cases. Permitting an individual to marry a person of the same sex does not involve choosing among numerous statutory alternatives or systems. *Cf*. *Cepulonis*, 389 Mass. at 937-38. The remedy does not require an appropriation of new state funds. *Cf. Aime*, 414 Mass. at 683-84; *McDuffy*, 415 Mass. at 618-21. It does not demand the creation of a new and complicated statutory system or administrative procedure. *Cf. Aime*, 414 Mass. at 683-84; *McDuffy*, 415 Mass. at 618-21; *Cepulonis*, 389 Mass. at 937-38. Thus, the Court should follow its well-established remedy doctrine. Applying the three-factor test discussed in Part B *supra*, the Court should not invalidate the existing Massachusetts marriage licensure system. It should extend the existing system to same-sex couples, thereby rectifying their unconstitutional exclusion. The Commonwealth's statutory scheme for marriage can and should remain intact, as gay men and lesbian women

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(1973), but declined to act because of the overlapping legislative and judicial functions required to fashion a new common law immunity rule. While the Court may defer to the Legislature on a common law issue, it should not do so when constitutional rights are at stake.

can be absorbed into the present marriage system with relative ease. *See infra* Part II(E).

This case is more analogous to *Watson v. City of Memphis*, 373 U.S. 526 (1963), where the Supreme Court declared state-sponsored segregation of municipal parks to be unconstitutional. The remedy for this exclusion was straightforward: inclusion of the class of people who were unconstitutionally excluded from the existing park system. *Watson*, 373 U.S. at 539. The *Watson* Court recognized that *Brown* was an "adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification." *Id*. at 532. Constitutional rights are "*present rights*" and "not merely hopes to some *future* enjoyment of some formalistic constitutional promise." *Id*. at 533 (emphasis in original). "The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelming reason, they are to be promptly fulfilled." *Id*.

Similarly, *Goodridge* may be compared to *Lavelle v. MCAD*. There, the plaintiff, a respondent in a sex discrimination suit, complained that his article 15 right to a jury trial and equal protection rights were violated because only petitioner was given the option

of electing a jury trial of the claim. *See Lavelle*, 426 Mass. at 335. The Court agreed. *Id*. at 337. Even though the Court recognized that the Legislature might choose to act in the future, the Court did not defer the remedy to the Legislature. *Id*. at 339. It decided to remedy the violation by extending the right to a jury trial to respondents as well as petitioners. *Id*. at 338-39.

This Court should not force the plaintiffs to wait for a legislative remedy when the Court has the capacity to grant immediate judicial redress for the present violation of the plaintiffs' constitutional rights. The granting of such relief lies within the traditional powers of the courts.

E. Implementation of the remedy of extension is eminently feasible.

It is eminently feasible to extend the marriage statutes to individuals who wish to marry a person of the same sex, leaving the present statutory scheme intact. Same-sex couples can easily be absorbed into the present marriage system because that system is

currently constructed in a way that does not depend on spouses being of different genders.

The vast majority of the marriage statutes use gender neutral terms, such as “spouse,” “party,” “person,” or “parent,” and thus could easily be extended to include same-sex couples. *See, e.g.,* Mass. Gen. L. c. 207, §§ 7, 11, 14, 16 & 17 (party), §§ 10, 12 & 19 (person), §§ 16 & 17 (parent). Section 19 of Chapter 207 speaks of “persons” intending to join in marriage. It does not specify “a man” and “a woman.” Mass. Gen. L. c. 207, § 19. To the extent a statute uses a gender-specific term, such as “husband,” “wife,” “man,” or “woman,” such terms can be construed in a gender-neutral fashion. *See* Mass. Gen. L. c. 4, § 6, cl. 4 (statutory construction dictates that words of a statute shall be construed in a gender-neutral fashion); *see also Califano*, 443 U.S. at 92-93 (the term “father” construed neutrally as “parent”). By way of illustration, such terms have already been applied to same-sex couples in the adoption context. *See Adoption of Tammy*, 416 Mass. 205 (1993); *Adoption of Susan*, 416 Mass. 1003 (1993). Other examples include the vast majority of divorce and intestacy statutes, which use gender neutral

terms, such as "spouse," or "party." *See, e.g.,* Mass. Gen. L. c. 208, §§ 1 & 12 (divorce provisions speak in terms of spouse), §§ 6B, 17 & 19 (party or parties); Mass. Gen. L. c. 190, § 1 (intestacy provision speaks of surviving spouse); Mass. Gen. L. c. 191, § 15 (same).

The benefits and obligations of marriage should not change just because they are extended to same-sex couples. The societal rationales underlying the benefits and obligations of marriage apply equally to same-sex couples and their families as they do to opposite-sex couples and their families. *See* Amici Curiae Brief of Boston Bar Association *et al.,* Parts IV, V(A),(C) & (D) (discussing the myriad statutes which provide rights, benefits and obligations to married persons). Statutes relating to the rights and obligations of married persons over the years have been stripped of their gender specificity. *See* Historians' Brief, Part IV(B). Indeed, none of the impediments to marriage (being closely related, already being married, or being underage) prohibit a person from marrying a person of the same sex.[13]

[13] *See* Mass. Gen. L. c. 207, §§ 1 & 2 (barring marriage between persons closely related), § 4

As the Court recognized in *Lavelle*, subsequent legislative action is always a possibility if the Legislature wishes to alter the rights or obligations of marital partners, or to clarify particular provisions. *Lavelle*, 426 Mass. at 337-38; *see also Lowell v. Kowalski*, 380 Mass. 663, 670 (1980) (Court struck down the intermarriage requirement for an illegitimate child to inherit from the father by severing the unconstitutional portion of the statute from the rest of the statute, and recognized that the Legislature may decide to revise the statutes). This, however, is neither a bar to current action, nor a reason to permit a continuing constitutional violation that can be promptly remedied. There are very few gender-specific statutes that give different responsibilities to husbands and wives. *Compare* Mass. Gen. L. c. 209 § 7 (financial liabilities of married women) *with* § 8 (liability of husbands for wives' debts); *compare* Mass. Gen. L. c. 207 § 1 (male consanguinity limits) *with* § 2 (female consanguinity limits). For example, the consanguinity laws, which have gender specific obligations, can be read

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(barring marriage if one is already married), § 7 (barring marriage of a minor in most circumstances).

reciprocally. Initially, these statutes may be interpreted in a gender-neutral way in accord with the equal rights amendment to article 1 of the Declaration of Rights. If the Legislature is dissatisfied with this construction, it may amend these statutes to override the proposed judicial interpretation. In any event, any potential legislative action sometime in the future is not properly considered as a substitute for an immediate judicial remedy to the present constitutional violation in the instant case.

III. A civil union scheme, similar to that of Vermont, is not the appropriate remedy for the *Goodridge* plaintiffs.

This Court should not follow the path the court took in *Baker v. State*, 744 A.2d 864 (Vt. 1999), because the remedy – a legislatively enacted civil union law – is not the relief the *Goodridge* plaintiffs are seeking. The plaintiffs want the right to marry, not the right to enter a civil union.

In *Baker*, the Vermont Supreme Court held that under the Common Benefits provision of the Vermont Constitution, individuals who choose to marry persons of the same sex cannot be deprived of the same rights and benefits provided to individuals who choose to marry persons of the opposite sex. *Id*. at 886. It

declined, however, to determine the remedy itself. It left the Vermont marriage statute intact, and ordered the Legislature to extend the same benefits to same-sex couples, whether by including them in the marriage scheme or by enacting an equivalent statutory alternative. *Id.* at 867. The Vermont Legislature chose to enact a parallel statute, passing the civil union bill in the following legislative session. *See* 1999 Vt. Acts & Resolves 91.

If this Court finds a constitutional violation in this case, and, like Vermont, defers the remedy to the Legislature, that may not resolve the problem the *Goodridge* plaintiffs face. Our Legislature may not act at all, or, if it does act by going so far as to enact a civil union scheme, that may not cure the constitutional deprivation.[14] Some commentators have suggested that a separate civil union statute for same-sex couples is inherently unequal, analogizing to the "separate but equal" education laws struck down in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See*

[14] If neither the Court nor the Legislature acted, that could provoke a constitutional crisis and could threaten the Court's legitimacy by undermining the public's faith that the Court will protect and uphold constitutional rights.

Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 Vt. L. Rev. 113, 123-47 (2000); David B. Cruz, *The New "Marital Property": Civil Marriage and the Right to Exclude?* 30 Cap. U. L. Rev. 279, 282-92 (2002).

In addition, questions have been raised about whether civil unions are truly equal to marriage. For example, it is uncertain whether civil unions will be recognized in other states or by the federal government. It is unclear whether a civil union is portable to another state. Amici are aware of at least two cases in which the plaintiffs who entered a civil union in Vermont are challenging another state's refusal to recognize the civil union under the law of their state. *See Burns v. Burns*, 560 S.E.2d 47 (Ga. 2002), *recon. denied* (Feb. 7, 2002); *Rosengarten v. Downes*, 71 Conn. App. 372, *cert. granted*, 261 Conn. 936 (2002). Further, it is uncertain whether a challenge to the federal Defense of Marriage Act (DOMA)[15] by a same-sex couple who enters into a civil

[15] DOMA allows states to refuse to recognize a same-sex marriage from another state, and defines "marriage" as

union will stand on a different footing compared to a challenge by a same-sex couple who is married.

Consequently, it is the Amici's position that this Court should not defer the remedy to the Legislature. If the Court defers the remedy to the Legislature, the Court may have to act in the future regardless of whether the legislature does nothing or enacts even a parallel statute that does not cure the constitutional violation.

Conclusion

This Court has the opportunity to advance the goal of guaranteeing true liberty and equality for all of Massachusetts' citizens. It may do so by interpreting the statutes at issue in a way that make them constitutional, by extending the Massachusetts marriage statutes to include the plaintiffs. Or it may reach the constitutional question and recognize the liberty and equality rights of an individual to marry the person of his or her own choosing, regardless of gender or sexual orientation. Amici believe that it is the responsibility of this Court, not the Legislature, to determine the scope of

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the "legal union between a man and a woman" for federal law purposes. 1 U.S.C. § 7.

constitutional rights and liberties, and that settled doctrine requires that the Court provide a remedy to the plaintiffs.

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November 8, 2002

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