SUPREME JUDICAL COURT
for the
COMMONWEALTH OF MASSACHUSETTS

No. 09163
(Request for Advisory No. A-107)

IN THE MATTER OF A REQUEST FOR AN ADVISORY OPINION FROM THE PRESIDENT OF THE SENATE

BRIEF OF INTERESTED PARTY/AMICUS CURIAE

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STATEMENT OF THE QUESTION PRESENTED

In SJC-09163 (Request for Advisory No.A-107), the Question transmitted to the Justices from the Senate is:

> Does Senate No. 2175, which prohibits same-sex couples from entering into a marriage but allows them to form civil unions with all "benefits, protections, rights and responsibilities" of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?

Senate Bill No. 2176, 183rd General Court (2003) ("S. 2176").

STATEMENT OF THE CASE

Amicus curiae Gay & Lesbian Advocates & Defenders (GLAD) submits this brief in response to S. 2176.

On November 18, 2003, the Supreme Judicial Court rendered its judgment and opinion in Goodridge v. Department of Public Health, 440 Mass. 309 (2003) ("Goodridge"). The seven same-sex couples in that case, represented by amicus curiae GLAD, contested their exclusion from marriage. As discussed infra, this Court found the marriage ban lacked any rational basis for either due process or equal protection and proceeded to reform the common law definition of marriage "to mean the voluntary union of two persons

as spouses, to the exclusion of all others." Id. at 343. Beyond that, the Court also declared "that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." Id. at 344. Accordingly, the Court vacated the summary judgment for the defendant-appellee Department of Public Health, and remanded the case to the Superior Court for entry of judgment in 180 in order to allow the Legislature time to take actions it might deem appropriate. Id.

Justice Greaney concurred, agreeing "with the result reached by the court, the remedy ordered, and much of the reasoning in the court's opinion." Id. at 344. Three justices dissented. Goodridge, 440 Mass. at 350 (Spina, J. dissenting); at 357 (Sosman, J., dissenting); at 363 (Cordy, J., dissenting).

Less than a month after the Court rendered its decision in Goodridge, the Senate asked whether Senate Bill No. 2175 would be constitutional. S. 2175 reinstates a ban on marriage for same-sex couples by virtue of establishing a new chapter of the General Laws entitled "Chapter 207A - Civil Unions." Senate

Bill No. 2175, 183rd General Court (2003) at § 5, subsections 2, 3 ("S. 2175"). Chapter 207A would also allow only same-sex couples to join in civil union on the same terms that all other couples are allowed to join in a marriage. See § 5, subsec. 2 & 2(i).[1] The crux of the protections afforded by civil unions are as follows:

Section 4.

> (a) A civil union shall provide those joined in it with a legal status equivalent to marriage and shall be treated under law as a marriage. All laws applicable to marriage shall also apply to civil unions.
>
> (b) Spouses in a civil union shall have all the same benefits, protections, rights and responsibilities under law as are granted to spouses in a marriage.
>
> (c) Spouses in a civil union shall be included in any definition or use of the terms "spouse," "family,"

[1] It clarifies that one enters and exits a civil union as a marriage, may modify its terms as an antenuptial agreement may modify the terms of a marriage, and imposes record keeping requirements on the department of public health. S. 2175, § 5, subsections 5-7. Substantively, it amends G.L. chapter 151B by extending that law's marital status non-discrimination protections to civilly united couples. S. 2175, § 3. See also id. at § 4 (nondiscrimination with respect to the offering of insurance benefits). It attempts to foreclose arguments about federal preemption of state law in hybrid state-federal programs. S. 2175, § 5, subsection 8. Finally, it requires a liberal construction. S. 2175, § 5, subsection 9(a).

> "immediate family," "dependent," "next of kin," "husband," "wife," and other terms that denote the spousal relationship, as those terms are used in any law.

SUMMARY OF THE ARGUMENT

Senate No. 2175 prohibits same-sex couples from marrying, a ban this Court already ruled lacks any rational basis in Goodridge. S. 2175 would revive the governmental discrimination that Goodridge just ended. (pp. 6-10). The declaration requires marriage and the stay of the Court's judgment simply anticipates the chasm between the reformulated common law of marriage and the hundreds of gendered statutes in the General laws, thereby giving the Legislature the opportunity to conform the laws. (pp. 10 – 20).

Senate No. 2175 fails to meet the required thresholds of equality and liberty because S. 2175 is less than marriage. Nothing but marriage can provide the same protections, benefits and obligations as marriage. (pp. 21-36). Moreover, joining in marriage and participating in marriage confers a unique status that legally and socially confirms and strengthens the private commitment of the couple. (pp. 21-28). Tangible protections of marriage largely (or nearly totally) lacking from joining in civil union include

the portability of the status and access to federal legal protections. (pp. 28-36).

Separating out only same-sex couples into a civil union status is tantamount to state-imposed segregation -- a separate and unequal regime for gay people. Equality means more than equal accommodations, even if, arguendo, civil unions were equal to marriage; it means no second-class citizenship. (pp.36-42).

Since tradition has already been rejected as a rational basis for marriage discrimination, the Senate's proposed notion of "preserving" the traditional meaning of marriage cannot justify a new marriage prohibition. The equality and liberty promises of our Constitution require past discriminatory practices -– whether race, sex or sexual orientation -– to yield, no matter how attached some may be to those practices. (pp. 42-46).

ARGUMENT

I. THIS COURT SHOULD ANSWER "NO" TO THE SENATE'S QUESTION BECAUSE A PROHIBITION ON MARRIAGE FOR SAME-SEX COUPLES VIOLATES THE STATE CONSTITUIONAL GUARANTEES OF EQUALITY AND LIBERTY EVEN WHEN THE PROHIBITION IS JOINED WITH A CIVIL UNION MEASURE AS PROPOSED IN SENATE BILL SENATE NO. 2175.

A. Senate No. 2175 Restricts Access to Marriage for Same-Sex Couples, A Restriction this Court Already Held To Be Unconstitutional in Goodridge.

For all of the meaningful state-law protections it would provide to same-sex couples who could join in civil union under its provisions, S. 2175's fatal flaw is that it also restricts marriage from those same civil union-eligible couples.[2]

This Court has already "conclude[d] that the marriage ban does not meet the rational basis test for either due process or equal protection." Goodridge, 440 Mass. at 331. It said so repeatedly.[3] It explained that both the "'freedom from' unwarranted government intrusion into protected spheres of life

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[2] The new chapter 207A created by S. 2175 would allow only same-sex couples to join in civil union and parties in a civil union "shall not be eligible to enter into a marriage with each other under c. 207." S. 2175, § 5, subsection 3. See also S. 2176: "Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions" comply with the law?"

[3] See, e.g., id. at 312 (the Commonwealth "has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples"); id. at 341 ("The department has had more than ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions. ... It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex.").

and 'freedom to' partake in benefits created by the State for the common good. ... are [both] involved here." Id. at 329.

> Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family –- these are among the most basic of every individual's liberty and due process rights. And central to personal freedom and security is the assurances that the laws will apply equally to persons in similar situations. 'Absolute equality before the law is a fundamental principle of our own Constitution.' Opinion of the Justices, 211 Mass. 618, 619, 98 N.E. 337 (1912). The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.

Id. at 329. The Court's rationale -- its exposition of the liberty interest in choosing to marry and the equality principle of equal application of the law -- has no stopping point short of marriage.

In Goodridge, the ban was simply the common law meaning of "marriage" as the union of one man and one woman as it carried over into the marriage licensing laws of G.L. c. 207. Id. at 319-320 & 341 n.33 (common law incorporated into the statutory scheme of c. 207). But it matters not whether the ban derives from the common law or by express statutory directive

as with S. 2175: in either event, "the marriage restriction impermissibly identifies persons by a single trait and then denies them protection across the board. In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect." Goodridge, 440 Mass. at 333 (internal citation omitted).

Constitutionally compelled to alter the status quo, the Court reformulated the common law definition of marriage:

> We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships.

Goodridge, 440 Mass. at 343.

In this vein, this Court noted its "problem" was similar to the one confronted by the Ontario Court of Appeal when that court concluded that the common law definition of marriage violated the Charter of Rights and Freedoms of the Canadian Federal Constitution. Id. at 343 (citing Halpern v. Toronto (City), 172 O.A.C. 276 (2003)). Just as that Court "refined the

common-law meaning of marriage[,]" so did this Court "concur with this remedy" and refine the Massachusetts common law as it had done in widely varying circumstances over the centuries. Id. at 343.[4] By expanding the common law definition of marriage, it also effectively altered "G.L. c. 207, the marriage licensing statute, which controls entry into civil marriage." Id. at 317. In other words, neither the department nor municipal clerks will henceforth have the authority to refuse to issue marriage licenses to

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[4] Two principles predominated the Court's approach to remedying the unconstitutional ban: first, preserving as much of the marriage licensing laws as possible rather than voiding them in their entirety; and second, reformulating the common law in order to meet constitutional standards rather than having the court rewrite the statute. Goodridge, 440 Mass. at 342-343.

Although the most common form of relief when a law is deemed unconstitutional is to strike it down, the Court found this approach "wholly inconsistent with the Legislature's deep commitment to fostering stable families and [one which] would dismantle a vital organizing principle of our society." Id. at 342-343. Moreover, striking the licensing scheme would have "chaotic consequences," because of marriage's dual nature as a state-conferred benefit and a legally protected personal interest. Id. at 326 n.14.

Instead, by reforming the common law and retaining civil marriage, this Court "advance[d] the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources." Id. at 343-344. This approach also left intact the Legislature's discretion to regulate marriage. Id. at 343-344.

same-sex couples who meet the legal requirements for marriage in G.L. c. 207.

In sum, through S. 2175 or other legislation, the General Court may not reinstate the marriage ban just voided in Goodridge and remedied by reforming the common law without again violating the liberty and equality guarantees of the Massachusetts Constitution for those who wish to marry someone of the same sex.

For this reason alone, this Court should answer Senate's Question in S. 2176 "No."[5]

B. Neither the Declaration Nor The Stay Compromise the Remedy of Marriage.

After finding void the marriage ban for same-sex couples, e.g. id. at 331, and reformulating the common law definition of marriage in a way that accommodates otherwise qualified same-sex couples, id. at 343, the Court also stated:

> We declare that barring an individual from the protections, benefits and obligations **of civil marriage solely because that person would marry a person of the same sex** violates the Massachusetts Constitution. We vacate the summary judgment for the

[5] Indeed, there may be no solemn occasion present here warranting an advisory opinion because this Court has already spoken to the issue raised. Opinion of the Justices to the Acting Governor, 438 Mass. 1201, 1206 (2002); Answer of the Justices, 413 Mass. 1219, 1225 (1992) (citing cases); Answer of the Justices, 375 Mass. 790, 794 (1978).

> department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. 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. See, e.g., Michaud v. Sheriff of Essex County, 390 Mass. 523, 535-536, 458 N.E.2d 702 (1983).

Goodridge, 440 Mass. at 344 (emphasis added).

1. The Declaration

The Goodridge plaintiffs understand the Senate reads this Court's declaration in Goodridge as limited to the legal incidents of marriage rather than as about access to marriage itself. The plaintiffs and amicus do not understand how the Court's Opinion and Judgment can be read that way.

To read "marriage" out of the declaration is to selectively read the declaration. By its terms, the declaration refers to protections, benefits and obligations that arise "because that person would marry a person of the same sex ..." Goodridge, 440 Mass. at 344. From a liberty perspective, depriving an individual of the choice to "marry a person of the same sex" as S. 2175 does also deprives him or her of the protections, benefits and obligations of the core personal choice to join with another in the institution of marriage. Moreover, from an equality

perspective, the declaration links marriage and its associated protections by holding that the plaintiffs are entitled to the protections, benefits and obligations that arise because *that person would marry a person of the same sex.*[6]

Second, the declaration must also be read in conjunction with the whole of the Court's opinion which repeatedly weaves together access to marriage with the protections, benefits and obligations of marriage. Starting with the very first paragraph of its opinion, the Court states,

> Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of **legal, financial and social benefits**. In return it imposes **weighty legal, financial and social obligations.**

Goodridge, 440 Mass. at 312 (emphasis added). The question presented and answer provided also necessarily link the two:

> The question before us is whether, consistent with the Massachusetts

[6] Significantly also, in the paragraph immediately preceding the declaration, the Court holds: "We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others," id. at 343, in order to "redress[] the plaintiffs' constitutional injury." Id.

> Constitution, **the Commonwealth may deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not.** The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. **But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples**.

Goodridge, 440 Mass. at 312 (emphasis added).[7]

Third, myopically reading the declaration renders a great deal of the Court's opinion superfluous –- or even nonsensical. If the Court's remedy for the

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[7] See also, e.g., id. at 312-313 ("Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage is a question not previously addressed by a Massachusetts appellate court"); at 313 ("Barred access to the protections, benefits and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law"); at 320 ("The plaintiffs' claim that the marriage restriction violates the Massachusetts Constitution can be analyzed in two ways"); at 341-342 ("The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. ... Limiting the protections, benefits and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.").

plaintiffs' constitutional injury was meant to provide access to a new institution that is purportedly the sum of marriage's tangible legal parts, as S. 2175 attempts to provide with respect to civil unions, it would have had no need to talk about marriage from the due process and liberty perspectives. The fact that marriage is a defining personal choice would have been irrelevant. See, e.g., Goodridge, 440 Mass. at 327-28. Its repeated examination of the meaningful role of marriage as a social institution and in people's lives would be mere philosophizing. Id. at 322 (civil marriage ... is a "social institution of the highest importance.").[8] The Court would have had no need to note that marriage is both a "personal commitment ... and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity and

[8] See also id. at 322("civil marriage is an esteemed institution"); at 328 ("In this case, as in Perez and Loving, a statute deprives individuals of access to an institution of fundamental legal, personal and social significance –- the institution of marriage -– because of a single trait: skin color in Perez and Loving, sexual orientation here ..."); at 330 ("the unique institution of civil marriage"); at 339-340 ("As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm. ... [W]e have no doubt that marriage will continue to be a vibrant and revered institution.").

family." Id. at 322.[9] Describing and analyzing marriage as a civil right would have been unnecessary. Id. at 325-326. In short, it is impossible to explain many passages of the Court's opinion if it didn't mean to extend marriage to the plaintiff couples. Among others is its reassurance that Goodridge *strengthens* the institution of marriage:

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

Id. at 337. If the Court had meant to condemn the plaintiffs' exclusion from only the discrete legal rights associated with marriage, the Court would have had no need to find the "marriage ban" unconstitutional or to reformulate the common law to include the plaintiffs. The dissenting justices could have rested more easily, too, since they understood

[9] Federal case law is similar. See, e.g., Turner v. Safley, 482 U.S. 78, 96 (1987) (marriage as a relationship of personal dedication and public commitment).

the Court to be making marriage available to same-sex couples.[10]

Finally, the Vermont Supreme Court's decision in Baker v. Vermont, 744 A.2d 864 (Vt. 1999), a decision not once cited in the remedy section of Goodridge, provides no safe harbor for S. 2175. As to remedy, the Goodridge Court specifically concurred with the Halpern case that also reformulated the common law definition of marriage to redress the couples' constitutional injuries, id. at 343, and not the Vermont court in Baker. In further contrast to Goodridge, the first paragraph addressing remedy section in Baker casts the plaintiffs' claim as one seeking only equal access to state-conferred marital rights and responsibilities and not to marriage itself. Id. at 886.[11] Moreover, without a due process

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[10] See e.g., id. at 353 (Spina, J.) (court "redefined marriage"); at 354 (disagreeing with majority's "recogniz[ing] same-sex marriage as a constitutionally protected right"); at 362 (Sosman, J.) (arguing it would be rational for legislature to "postpone any redefinition of marriage that would include same-sex couples); at 365 (Cordy, J.) (characterizing majority decision as "conclud[ing] that a marriage license cannot be denied to an individual who wishes to marry someone of the same sex.").

[11] The Baker Court stated,

violation to remedy, the Baker court held that either marriage or some parallel system could provide "the same benefits and protections afforded by Vermont law to married opposite-sex couples." Id.[12]

2. The Stay

> It is important to state clearly the parameters of today's ruling. Although plaintiffs sought injunctive and declaratory relief designed to secure a marriage license, **their claims and arguments here have focused primarily upon the consequences of official exclusion from the statutory benefits, protections and security incident to marriage under Vermont law. While some future case may attempt to establish that -- notwithstanding equal benefits and protections under Vermont law -- the denial of a marriage license operates per se to deny constitutionally protected rights, that is not the claim we address today.**

Baker, 744 A.2d at 886 (emphasis added).

[12] While leaving to the Legislature the means of "craft[ing] an appropriate means of addressing this constitutional mandate," the Vermont court specifically "noted" foreign laws "which generally establish an alternative legal status to marriage for same-sex couples," id. at 886, and stated the mandate could be met by marriage, but need not be. Id. at 887.

In further contrast to Goodridge, the Vermont court retained jurisdiction of the case, held "that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion," id. at 887, and warned that if the Legislature failed to act, then the "plaintiffs may petition this Court to order the remedy they originally sought." Id.

As in S. 2175 and S. 2176, some have pointed to the stay of judgment for 180 days as a basis for suggesting a remedy other than marriage is constitutionally permissible.

The plaintiffs have assumed that the stay was designed to afford the Legislature an opportunity to conform the General Laws with the reformulated common law definition of marriage. Massachusetts laws presently use over 500 gendered terms.[13] If the legislature fails to act, the system is still workable and couples can marry in light of the common law definition. But this would leave some of the public and some public officials confused because of the mismatch between the common law definition (reflecting the inclusion of same-sex couples) and hundreds of statues (which do not reflect that inclusion).[14] In 1975, in anticipation of ratification of the Equal

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[13] A Westlaw search conducted by GLAD on December 23, 2003 shows that 224 of the General Laws use the term "husband" or "husbands", 230 use "wife" or "wives," 114 use "widow" or "widows," and 7 use "widower" or "widowers."

[14] As the Attorney General argued to the Court in Goodridge, it is for the legislature, and not the Court, to "rewrite the hundreds of statutes governing marriage and marriage-related rights and responsibilities." Brief of Defendants-Appellees, Goodridge ("Defs' Br."), at 127.

Rights Amendment to the state Constitution in 1976, the Legislature appointed a study commission to examine its effect on the general laws. Acts & Resolves of 1975, ch. 26 (appointing special study commission). The plaintiffs assume this Court gave the Legislature time to make this process as orderly as possible.

Assuming the Court cited Michaud v. Sheriff of Middlesex County as a guide to its reasoning, the duration of the stay is not an opportunity to dilute the remedy for a determined constitutional violation, but to give public officials the opportunity to put their house in order. In Michaud, prison officials were given a defined period of time to fix identified problems that made prison conditions cruel and unusual (lack of sinks with running water and lack of flush toilets), but officials were not permitted to use the time to come up with alternative methods for addressing prisoner hygiene, such as better buckets, covers for buckets, more frequent access to running water, etc.[15]

[15] This Court's stay is very much like the stay of the British Columbia Court of Appeal in Barbeau v. Attorney General of Canada, 2003 B.C.C.A. 251 (2003). In a Goodridge-like case, that court also reformulated

During this time, the Legislature may also reevaluate policy choices regarding particular incidents of marriage in order to meet its legitimate objectives, such as conserving State resources. [16]

In short, the purpose of the stay is for an orderly transition, not to resurrect the very marriage ban just struck in Goodridge.

C. A Civil Union Regime Cannot Satisfy the Massachusetts Constitution.

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the common law definition of marriage, id. at ¶ (156), but emphasized the purpose of the stay was not to give the federal Parliament time to consider alternative remedies, but "solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision. This period of suspension ... is necessary ... to avoid confusion and uncertainty in the application of the law to same-sex marriages." Id. at ¶ (161).

The practice of issuing a stay to allow a legislative body to conform legislation to a court ruling is also practiced at the federal level. See e.g. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982); Buckley v. Valeo, 424 U.S. 1, 143 (1976).

[16] This argument was generally presented in Goodridge. Reply Brief of Plaintiffs-Appellants, Goodridge ("Pls' Reply Br."), at 18; Defs' Br. at p. 127. Moreover, the Baker case, the proper scope of remedy in the event this Court found a constitutional violation, and the proper role of the legislature in remedying such a violation were all discussed in the briefs of the parties, and by Plaintiffs' counsel at oral argument. See, e.g., Pls' Br. generally & at 96-97; Defs' Br. at 23-26, 127-28.

While Senate No. 2175 attempts to support in law the families of same-sex couples throughout the Commonwealth, it prohibits marriage and all the legal and social protections marriage would otherwise provide. By creating a separate and unequal legal institution for gay people, S. 2175 would impose legally mandated segregation between otherwise equal citizens solely on the basis of sexual orientation. Finally, even if civil unions as described in S. 2175 provided a one-to-one correspondence with marriage in every way, "preserving the traditional, historic nature and meaning of the institution of civil marriage" is no basis for withholding the name and the institution "marriage" from same-sex couples. S. 2175, § 1 (g).

1. Only Marriage Can Provide the "Protections, Benefits and Obligations" of Marriage; Anything Else is Less Than Marriage.

> Because obtaining a marriage license is a necessary prerequisite to civil marriage in Massachusetts, denying marriage licenses to the plaintiffs was tantamount to denying them access to civil marriage itself, with its appurtenant social and legal protections, benefits and obligations.

Goodridge, 440 Mass. at 315.

As this Court emphasized, marriage is more than a bundle of legal protections, but also a cultural and

social institution, in which each facet reinforces the others. The very first line of the Court's opinion in Goodridge -- "Marriage is a vital social institution," id. at 312 -– dooms any attempt to recraft marriage as the tangible sum of legal rights and responsibilities, as in S. 2175. It is the "depriv[ation] of membership in one of our community's most rewarding and cherished institutions" that is "incompatible with the constitutional principles of respect for individual autonomy and equality under law." Id. at 313.

The Court addressed the plaintiffs' claims in Goodridge the only way it could: by "expanding the institution of civil marriage in Massachusetts," id. at 340, and not by dissecting marriage because breaking marriage into its constituent parts vitiates the power and protection conferred by the whole. As impressive as S. 2175 might be compared to the legal rights enjoyed by same-sex couples prior to November 18, 2003, Senate No. 2175 is not marriage and would fail to bestow the "enormous private and social advantages" conferred "on those who choose to marry." Id. at 322. No bill creating rights for same-sex couples (other than allowing same-sex couples to

marry) can replicate marriage as the unique legal and cultural institution it is.

a. The Intangibles of Marriage

The plaintiffs in Goodridge sought marriage *and not* only a bundle of legal rights precisely because the word and the institution represented by that word are meaningful. Attempts to withhold the name "marriage" from the legal commitments of same-sex couples underscores that the word has independent significance.

If S. 2175 were to become the law of the Commonwealth, none of the Goodridge plaintiffs' children would enjoy the social recognition and security which comes from having married parents.[17] As this Court has already noted, the social status of marriage is a direct benefit to children whose parents are married. Id. at 325 ("enhanced approval ... still attends the status of being a marital child"). Annie Goodridge, along with Paige Chalmers, Kate Wade-Brodoff and Avery and Quinn Nortonsmith would all still have to answer "No" when asked if their parents are married. As the Court pointedly noted in

[17] See Verified Complaint, Goodridge ("Complaint"), at ¶¶ 31, 91, 107.

Goodridge, this dividing line between children has consequences for them in the realm of family stability and economic security. Id.

After nearly 33 years together, Linda Davies and Gloria Bailey seek marriage to allow "the world to see them as they see themselves -– a deeply loyal and devoted couple who are each other's spouses in all ways[?]" Complaint, at ¶ 121. As this Court noted, it is marriage alone that "is at once 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.[18]

The fact that civil unions would not answer these concerns underscores the correctness of this Court's decision in Goodridge. For all of the plaintiffs, joining in "marriage" would allow them to define

[18] Two New York men, 88 and 84, joined as a couple for 58 years, "eloped" to Canada when marriage became a possibility there. As one explained, "What we did was finally cap it all up -- make it seem complete ... It was about fulfilling this desire people have to dignify what you have done all your life –- to qualify it by going through the same ceremony so that it has the same seriousness, the same objective that anybody getting married would be entitled to." Andrea Elliott, After 6 Quiet Decades as 'Friends' and Partners, Gus and Elmer Eloped, New York Times, Dec. 16, 2003, at B1.

exactly who they are to one another. The importance of marriage as an act of self-definition -– an act that is understood by anyone who has made the decision to marry -- was also stressed by this Court:

> Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Id. at 322. By withholding this choice, one "at the core of individual privacy and autonomy," id. at 326 n.15, S. 2175 perpetuates the exclusion from marriage that this Court condemned in Goodridge: "The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage." Id. at 329.

Nancy F. Cott, a "prominent historian of marriage," Goodridge, 440 Mass. at 340 n. 32, also recently wrote of the ways in which marriage as an institution transcends its formal legal protections and differs from laws like S. 2175 that provide a access to a bundle of rights.

As part of my work, I have spent many years researching marriage, including its history, its rights and obligations, and its social meaning. I have concluded that there is nothing that has all the same obligations, rights and benefits as marriage but marriage. Through my research, I have found that Federal law confers over 1000 kinds of benefits, responsibilities and rights connected with marriage. However, marriage is not just a bundle of rights. Legal marriage is, and has been for hundreds of years, a privileged status.

My years of research have led me to conclude that the title of “marriage” brings with it not only legal rights, but also a special status, which exists in large part because marriage has been authorized by governments for so many years. The idea that marriage is the happy ending, the ultimate reward and a definitive expression of love and commitment is deeply ingrained in our society. It is reflected in and perpetuated through law, custom, literature, and even folk tales. Marriage has an attribute of legitimacy that has been earned through many years of validation and institutionalization.

I have also concluded from my extensive research that marriage has changed over the last century, so that it demarcates a recognized boundary between a couple and the public world. “Marriage” has become a zone where freedom and privacy are widely expected and respected, both legally and socially. It is a place where a reciprocal commitment between two individuals unites public honor with private freedom. The hold of marriage on the public’s imagination is partly based on this feeling that in marriage, a couple can feel a sense of liberty coupled with security.

Declaration of Nancy F. Cott, Ph.D., In Support of Opposition to Motion for Prelimary Injunction, at ¶¶ 5-7 (Addendum 1).[19]

It is only access to the same institution of marriage on the same terms as applied to others that the plaintiffs will be understood to share the love and commitment of spouses, and all the protections, benefits and obligations that flow from that culturally unique status.

b. Tangible Protections, Benefits and Obligations

Beyond the intangible consequences of marriage are its more concrete and definable protections. The word "marriage" is controlled by the Commonwealth. Goodridge, 440 Mass. at 954 (civil marriage is created and regulated by the state). The word "marriage" is a protection in and of itself because it serves as a gateway, or the key word in a language universally understood, to respect for the couple by others. When David Wilson's partner of 13 years suddenly died while

[19] This affidavit was secured by the State of California in litigation against it by organizations claiming that recently approved and expanded domestic partnership legislation in that state contravened a state constitutional amendment restricting marriage to a male-female union. Knight v. Davis, Cal. Super. Ct., Sacramento Cty., No. 03AS05284 (Oct. 25, 2003).

raking leaves, the EMT's who arrived on the scene didn't care about their long relationship and private commitment. Complaint, at ¶ 43. Marriage is what is understood. Marriage is what conveys that a spouse has a presumptive right to be by his or her spouse's side. Civil unions will continue to leave people explaining themselves in times of need or crisis.

i. Portability

Many people who live in Massachusetts now will relocate later for work or school, to care for family or friends, to start a new life, or simply to take a vacation. Of those who relocate, among their worries is *not* that their marriage will be disrespected when they get out of their car or step off the plane in another state.

Massachusetts has largely respected marriages licensed and certified in other states for the reason most states do: "[T]he great object of marriage ... is to secure the existence and permanence of the family relation." Richardson v. Richardson, 246 Mass. 353, 355 (1923).[20] No one gains when a family does not

[20] See, e.g., Commonwealth v. Graham, 157 Mass. 73, 75 (1892) ("The general rule of law is that marriage contracted elsewhere, if valid where it is contracted, is valid here").

know if it remains a legal family from day to day or place to place. Will a person joined in civil union in Massachusetts, but a non-birth parent, still be a parent or a civil union partner if the family relocates, or even if they are simply vacationing and a car accident renders comatose the other partner/parent? When a man loses his civil union partner, will he be able to inherit automatically if they have relocated outside of Massachusetts? While one could debate the answers, and the answer may well be, "it depends," it is also fair to say that only with a legal "marriage" may a couple confidently expect that a public or private entity will respect their legal relationship as the marriage it is.

While good arguments exist as to why others should respect civil unions from Vermont or elsewhere,[21] and a few have for limited purposes,[22] the

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[21] These arguments rely largely on an analogy to marriage because civil unions are to be treated as a marriage (although marriage itself undoubtedly provides the stronger case). This includes comity. Faulkner v. Hyman, 142 Mass. 53, 54 (1886). Choice of law principles should support respect for civil unions if a civil union is regarded as like a marriage. See, e.g., Barbara Cox, Same-Sex Marriage and Choice of Law, 1994 Wis. L. Rev. 1033 (1994) (discussing theories; overwhelming tendency of states to respect marriages if valid where licensed and certified);

fifty states all have marriages, not civil unions. Despite the attempt to bestow the legal rights of marriage on those joining in civil union in Vermont, the appellate courts in Connecticut, Florida and Georgia that have considered the issue have declined to equate the two for purposes of administering particular laws.[23] There is no reason to believe that civil unions from Massachusetts would fare any better.

Barbara Cox, But Why Not Marriage, 25 Vt. L. Rev. 113, 137-38 (2000)(same). Finally, respect for a marriage or civil union also avoids questions about violations of both the state and federal constitutions. Singling out only same-sex relationships for disrespect raises equal protection concerns in addition to whatever other due process and federalism claims may exist. See, e.g., Lawrence v. Texas, 539 U.S. __, 123 S.Ct. 2472, 2482(2003) and id. at 2486-2487 (O'Connor, J., concurring); Romer v. Evans, 517 U.S. 620, 633 (1996).

[22] See Langan v. St. Vincent's Hospital of N.Y., 765 N.Y.S.2d 411 (N.Y. Sup. Ct. Apr. 10, 2003), appeal docketed (allowing man joined in civil union standing to sue for wrongful death of his partner); In the Matter of Kimberly Brown and Jennifer Perez, (Iowa Dist. Ct., Woodbury County, Nov. 14, 2003)(dissolving civil union), further proceedings discussed in Iowa judge amends lesbian divorce order, available at http://www.advocate.com/new_news.asp?ID=10868&sd=01/01/04-01/02/04; In re the Marriage of Misty Gorman and Sherry Gump, No. 02-D-292 (W.Va. Fam. Ct., Marion County, Jan. 3, 2003)(same).

[23] Rosengarten v. Downes, 71 Conn. App. 372, 802 A.2d 170 (no jurisdiction to dissolve civil union), cert. granted, 806 A.2d 1066 (2002), appeal dismissed (Dec. 31, 2002). Burns v. Burns, 253 Ga. App. 600, cert. denied, 2002 Ga. LEXIS 626 (Ga. July 15, 2002) (civil union not a basis for modifying restriction on

While some might reply that "marriage" provides no advantage to same-sex couples given that 37 states have enacted some type of marriage restriction or non-recognition statute concerning same-sex couples' marriages,[24] this does not answer the issue of Massachusetts' duty as a sovereign to provide the full measure of equality that it may to its citizens. Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 350

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parental visitation); Hall v. Beauchamp, No. 1D02-807 (Fl. Ct. App. Oct. 10, 2002)(divorced father's civil union with his partner was not a substantial change of circumstances allowing modification of visitation restrictions in divorce order). As a general matter, it has been difficult to dissolve a civil union outside of Vermont. See, e.g., Fred A. Bernstein, Gay Unions Were Only Half the Battle, New York Times (April 6, 2003) at section 9, p. 2.

[24] Section 2 of the "Defense of Marriage Act" provides in the following terms that States need not respect the marriages of same-sex couples from other states:

> No State, territory or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession, or tribe, respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 1996 U.S.C.C.A.N. (110 Stat.) 2419, (codified at 28 U.S.C. § 1738C).

(1938) ("[T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate ... It is there that the equality of legal rights must be maintained").

Moreover, this argument neglects the fact that a dozen states have not enacted such laws, and that some that have may yet repeal their measures. Instructively the California Supreme Court's decision in Perez v. Sharp, 32 Cal. 2d 711, 728 (1948) was catalytic both in its legal and political influence and this Court's opinion in Goodridge may be as well. At the time of the Perez decision, thirty states banned interracial marriage in 1948, but only sixteen statutes remained on the books of the states when the U.S. Supreme Court ruled in Loving v. Virginia, 388 U.S. 1 (1967), nineteen years later. Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity and Adoption (2003) at 258 (noting history). See also Goodridge, 440 Mass. at 327-28 (comparing Perez and Loving to Goodridge).[25]

ii. Federal Protections

[25] At one point, 42 states had enacted anti-miscegenation laws. Kennedy, Interracial Intimacies, at 219-221.

Beyond respect by states, for over 200 years, the federal government has ceded the determination of who is married to the states.[26] The federal government then respects that determination.[27] It is difficult to overestimate the amount of protection federal laws can provide to married couples. The ability to share in a spouse's social security, the ability to be designated as the beneficiary of a spouse's pension plan, and the ability to take time off from work to care for a spouse struck with sudden illness are just three of the 1,049 legal protections associated with marriage at the federal level.[28]

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[26] See, e.g., Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) ("[T]he whole subject of the domestic relations of husband and wife ... belongs to the laws of the States and not to the laws of the United States"); In Re Burrus, 136 U.S. 586 (1890) (same). Of course, the general rule of states governing eligibility to marry gives way only when states' marriage laws fail to conform with constitutional guarantees. See, e.g., Perez, 32 Cal. 2d at 728; Zablocki v. Redhail, 434 U.S. 374, 400-402 (1978).

[27] See, e.g., De Slyva v. Ballentine, 351 U.S. 570, 580 (1956) (scope of federal right concerning a legal status within a family relationship should be determined by reference to state law).

[28] The General Accounting Office report on the impact of the Defense of Marriage Act is the source for the number of protections. See GAO Report GAO1, OGC-97-16 (Jan. 31, 1997), found at http://www.gao.gov/aindexfy97/abstracts/og97016.htm.

While a 1996 federal law, the so-called "Defense of Marriage Act," upends these principles with respect to marriages of same-sex couples,[29] it is only with access to marriage that people like Hillary and Julie Goodridge can ask the government to return to its previous posture of respect for state law determinations of who is married. Acquiescing to the discrimination by naming their relationship something different would be destructive to Massachusetts' duty as a sovereign to its citizens generally and also specifically to people like the Goodridge plaintiffs.

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[29] Section 3 of the "Defense of Marriage Act" states:

> In 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, the word 'marriage' means only a legal union between 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.

Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 1996 U.S.C.C.A.N. (110 Stat.) 2419, 2419 (codified at 1 U.S.C. § 7).

While the U.S. government never enacted an anti-miscegenation law, it did at times abet state law discrimination by denying legal rights to military personnel married to someone of the "wrong" race and by attempting to discourage interracial marriages of service members. See Kennedy, Interracial Intimacies, at 88-89.

Without access to “marriage,” they will not be able to argue for unequivocal respect for their legal relationship in the Halls of Congress or elsewhere. As the U.S. Supreme Court stated in another context, “It is difficult to believe that one who had a free choice between these [two] would consider the question close.” Sweatt v. Painter, 339 U.S. 629, 634 (1950)(comparing law schools segregated by race).

iii. Private Entities

In imitation of states and the federal government, private parties also use “marriage” as the touchstone for ordering their policies, providing benefits and interacting with the public. True, under the S. 2175 proposal, civil union spouses would be protected under the anti-discrimination laws to the extent that married spouses are protected, S. 2175, § 4, and that protection may at times even extend to entities based outside of Massachusetts. But without a doubt, because marriage ties into an existing vocabulary and is already understood, it is simply common sense that a life insurer faced with a married couple -– including a same-sex married couple -– is more likely to extend the married rates to that couple than to a couple joined in civil union. The same is

true for myriad other transactions ranging from employment benefits administered by human resources managers to family discounts at stores.

For all of the above reasons, when all is said and done, civil unions are unequal to marriage and do not provide "*all* 'benefits, protections, rights and responsibilities' of marriage." S. 2176 (emphasis added).

2. Senate No. 2175 Is An Unconstitutional Segregation Proposal.

The constitutional commands of equality and liberty brook no compromise.[30] "The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens." Goodridge, 440 Mass. at 312. Although the circumstances and history are different with every type of invidious discrimination, the core issue facing the Justices here is the same as courts faced in Plessy v. Ferguson and Brown v. Board of Education and numerous other desegregation cases: can the Constitution tolerate segregation *mandated by law?* Certainly, the "separate but equal" doctrine once

[30] A measure like S. 2175 also segregates/limits the choice to marry for gay people, and therefore does nothing to answer the due process violation found in Goodridge. Goodridge, 440 Mass. at 325-328.

governed civil rights in the racial context. In Plessy v. Ferguson, 163 U.S. 537 (1896), the U.S. Supreme Court upheld a statute that segregated train passengers by race, claiming that the 14th Amendment brought about "absolute equality" between the races, but "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality." Id. at 544.

The two-tiered approach to legal recognition of couples now contemplated by Senate No. 2175 relies on this same discredited idea -– that same-sex couples can be treated differently from different-sex couples as long as the distinction enforces only "social" inequality while conferring equal rights and benefits.[31]

[31] Plessy relied for support on a decision by this Court upholding racially segregated schools. Roberts v. Boston, 59 Mass (5 Cush.) 198, 206 (1849). Chief Justice Shaw explained that blacks are "equally entitled to the ... protection of the law," but when it comes to the "actual and various conditions of persons in society," people are not necessarily "legally clothed with the same civil and political powers ... and [] subject to the same treatment." Id. This was an awkward way of saying what the state Senate contemplates saying today: equality may be compromised by prejudice.

Justice Harlan's dissent in Plessy provides the enduring response to this argument. Harlan insisted that the Constitution prohibits distinctions "implying inferiority in civil society" because "there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." Plessy, 163 U.S. at 556, 559. The commitment to a caste-free society cannot be reconciled with any law that amounts to "degradation upon a large class of our fellow-citizens, our equals before the law." Id. at 562. [32]

While Charles Sumner's arguments for the Roberts' plaintiffs were unsuccessful, they were the winning arguments for later generations.

> [The separate school] is not in fact an equivalent. ... it inflicts upon them the stigma of caste and although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially, in its spirit and character, from that public school known to law, where all classes meet together in equality.

Roberts, 59 Mass. at 203.

[32] A number of editorial boards have reacted harshly to civil union proposals for this reason. See, e.g., High court issues bold decision to allow marriage, New Bedford Standard Times, Nov. 19, 2003 at A6 ("Civil

Critically, this is true even of laws that *confer equal rights or benefits*. As Harlan explained, "The thin disguise of 'equal' accommodations ... will not

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unions are not the same as civil marriage. They are a case of separate but not equal."); Same-sex marriages about love, not gender, Springfield Republican, Nov. 19, 2003 ("Some suggest a civil union as a compromise. That only creates a separate inferior class of marriage -- and it's unacceptable."); Opening the door to gay marriage, Waltham Daily News Tribune, Nov. 19, 2003 ("A civil union alternative similar to Vermont's . . . doesn't carry the stamp of societal respect that comes with the term marriage -- and it may be precluded by the SJC's decision."); Same-sex semantics, Boston Globe, Nov. 25, 2003 at A14 ("Calling their commitment anything other than marriage creates an odious 'separate but equal' version of partnership under the law. And for Romney to say that the lesser title would be 'sufficient' is to treat a segment of the population as not quite worthy to be in the club."); The rights of marriage, Cape Codder, Nov. 26, 2003 ("Why can't I get all the benefits of civil union without the total responsibility and accountability that goes alone with 'real' marriage?"); Strengthening marriage and society, Berkshire Eagle, Nov. 30, 2003 ("[Those] who advocate a "civil-unions" compromise to dangle before the SJC -- which in any case said marriage and meant marriage -- will be representing what is now demonstrably a minority viewpoint."); Same or opposite-sex: What's the difference?, Springfield Republican, Dec. 14, 2003 ("The Massachusetts Supreme Judicial Court's ruling on gay marriage wasn't written in secret code. ... A civil-union law ... would not guarantee that they would be given what Justice John Greaney called 'our full acceptance, tolerance and respect.'"). See also John Lewis, At a crossroads on gay unions, Boston Globe, Oct. 25, 2003, at A15 ("Some say let's choose another route and give gay folks some legal rights but call it something other than marriage. We have been down that road before in this country. Separate is not equal.").

mislead any one, nor atone for the wrong this day done." Id.

Harlan's dissent was vindicated six decades later in Brown v. Board of Education, 347 U.S. 483 (1954). There, in the context of public education, the Supreme Court emphatically rejected the notion that "equality of treatment is accorded when the races are provided substantially equal facilities." Id. at 488. Rather, racial segregation "generates a feeling of inferiority as to [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494.

As this Court recognized in Goodridge, gay men and lesbians have faced a history of discrimination reminiscent of the African-American experience. The Goodridge opinion provides no refuge for "separate but equal" as this Court repeatedly lauded legal efforts to dismantle segregation in marriage or otherwise.[33]

[33] Goodridge, 440 Mass. at 320-321 (stating that segregation implicates the due process and equal protection principles vindicated in Goodridge, citing Bolling v. Sharpe and Brown v. Board of Ed.); at 328 n.16 (analogizing Goodridge to Perez v. Sharp and noting that in 1948, "the 'separate but equal' doctrine of Plessy v. Ferguson was still good law); at 328 n. 17 (citing Lawrence v. Texas to say that the state may not wield its regulatory power "in a manner

This Court's ruling in Goodridge, as well as the words of Justice Harlan in Plessy, and the unanimous Court in Brown, speak to the Senate's request today. A two-tiered "marriage/civil union" approach creates a caste system based on and reinforcing the notion that some Massachusetts residents are second-class citizens. The fact that such a system confers arguably equal *benefits* does not erase this fundamental perversion of equality under the law.[34]

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that demeans basic human dignity even though that statutory discrimination may enjoy broad support").

[34] Commentators have made the same point vis-à-vis the Vermont Civil Union law. See, e.g., Separate But Equal, The New Republic, Jan. 10, 2000 at 9 ("To grant homosexuals all the substance of marriage, while denying them the institution, is in some ways, a purer form of bigotry than denying them any rights at all. It is to devise a pseudo-institution to both erase inequality and to perpetuate it. ... There is in fact no argument for a domestic partnership compromise except that the maintenance of stigma is an important social value –- that if homosexuals are finally allowed on the marriage bus, they should still be required to sit at the back."); Eileen McNamara, Marriage Lite Won't Cut It, Boston Globe, Dec. 22, 1999, at B1 ("Domestic partnership proposals are . . . an unconscionable sop to bigots who will tolerate homosexuality only if it can be segregated in some parallel universe. But gay and lesbian people do not live in a parallel universe. They live in this one."); Andrew Sullivan, Marriage or Bust: Why Civil Unions Aren't Enough, at http://www.andrewsullivan.com/print.php?artnum=20000427 (civil unions create a two-tiered system with one clearly superior to the other and continues to deny gay people a badge of citizenship).

The "deep and scarring" effect of exclusion from marriage encompasses more than the denial of legal benefits –- it is part and parcel of the badge of inferiority and compromised citizenship that accompanies such exclusion.[35] See also Goodridge, 440 Mass. at 348 (Greaney, J., concurring) (marriage exclusion creates "caste-like system"). Senate No. 2175 cannot be constitutional because it flies in the face of the bedrock and uncompromising principles of equality for all. By ruling that the Massachusetts Constitution "forbids the creation of second-class citizens," Goodridge, 440 Mass. at 312, this Court has already chosen a path other than the Plessy/Dred Scott side of history.

3. S. 2175 Lacks A Rational Basis.

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[35] See also Martin Luther King, Jr., Letter from Birmingham Jail, in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr., James M. Washington ed. (1986) at 293 ("All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority"); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (denying "colored people" by statute the right to participate as jurors "is practically a brand upon them, affixed by the law, an assertion of their inferiority").

Senate No. 2175 prohibits same-sex couples from marrying and offers civil unions as a consolation prize in order to "*preserv[e] the traditional historic nature and meaning of the institution of civil marriage*." S. 2175, § 1(g)(emphasis added). But it is too late to relitigate the validity of the marriage ban. Albano v. Jordan Marsh, 5 Mass. App. Ct. 277, 281 (1977) (no relitigation where issue has been raised, litigated and carefully deliberated). Moreover, the time for seeking reconsideration has come and gone. M.R.App.P. 27.[36]

Even assuming, arguendo, that the issue is open, the proposed law should fail rational basis scrutiny.[37]

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[36] A number of the *amici* in support of the department articulated an *a priori* definition of marriage as the union of a man and a woman, that is, the same "traditional" definition S. 2175 seeks to incorporate into Massachusetts law. See, e.g., Amicus Curiae Brief of National Legal Fdn., Goodridge, at 14, 15; Amicus Brief of Catholic Action League of Massachusetts, Goodridge, at pp. 2, 9-11, 13-14, 18; Amici Brief of the Hon. Philip Travis et al., Goodridge, at pp. 2-3, 5-11, 14, 29-30, 32-33; Amicus Brief of Marriage Law Project, Goodridge, at pp. 2-6, 15, 17-20, 34-39, 41-42, 44.

[37] Amicus curiae respectfully refers the Justices to its briefs in Goodridge on the issue of sexual orientation heightened scrutiny since the marriage restriction in S. 2175 so pointedly singles out gay people for unequal treatment. See Pls' Br. at 61-79 and Pls' Reply Br. at 29-30. This issue was not

The state's exercise of its regulatory authority may not be arbitrary or capricious. Goodridge, 440 Mass. at 329. "Under both the equality and liberty guarantees, regulatory authority must, at very least, serve a legitimate purpose in a rational way; a statute must bear a reasonable relation to a permissible legislative objective." Id. at 329-330 (internal quotations omitted). The proper inquiry is whether governmental action exceeds constitutional limits, Goodridge, 440 Mass. at 338, not whether a practice is longstanding. See also Elrod v. Burns, 427 U.S. 347, 355 (1976).

Unlike the U.S. Supreme Court in Plessy justifying segregation on the basis of "established usages, customs and traditions of the people," Plessy, 163 U.S. at 550, this Court has forcefully refused to let traditional practices trump the Constitution when those practices are invidious and discriminatory. Goodridge, 440 Mass. at 328 (noting that "history must yield to a more fully developed understanding of the

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decided by Goodridge. Goodridge, 440 Mass. at 331, n. 21.

invidious quality of the discrimination").[38] Directly rejecting the tradition argument, this Court stated,

> [Some argue] that broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned. Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.

Id. at 337.

To the extent "tradition" is really a cover for accommodating the discomfort of others, the Court has rightly refused to accommodate private bias in the law. Id. at 342 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect")(internal citation

[38] The SJC pointed to other types of historical discrimination within marriage as support. Goodridge, 440 Mass. at 328 (anti-miscegenation laws); at 337 n. 28 (limited perspectives of men and women); at 339-340 (anti-miscegenation laws, common law disabilities for women, divorce). The whole notion of continuing discrimination in order to preserve traditional discrimination is not only circular, but disrespectful to those men and women who wish to join in marriage as equals. Although coverture is long gone, allowing the state to deny marriage to same-sex couples in order to uphold traditional meanings essentially tells heterosexual couples they they alone are permitted to join in marriage because the institution is one whose traditional and historic meaning is one of male superiority and female subordination.

omitted). If moral judgments about gay people as unworthy of marriage is masquerading as "tradition," this Court has also rejected the notion that gay people are inherently immoral. Id. at 341 (rejecting notion of community consensus that homosexual conduct is immoral). See also id. at 312 (defining court's task as defining the liberty of all, not "mandat[ing] our own moral code"). Like the courts in Perez and Loving, the SJC in Goodridge declined "to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus." Id. at 327, n.16.

When all is said and done, S. 2175 is a marriage restriction. But "the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual." Id. at 341. The Court has already rejected all of the conceivable rationales for the ban on marriage for same-sex couples under rational basis review. Id. at 331. Since there is no constitutionally adequate reason for the marriage ban as a matter of equal protection or due process, nor can there be a rational basis for civil unions as described in S. 2175 that has not already been found wanting by this Court.

CONCLUSION

For all of the foregoing reasons, amicus curiae, Gay & Lesbian Advocates & Defenders, respectfully submits that this Court should answer S. 2176 (SJC-09163), "No."

Respectfully submitted,

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