COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-09684

JOHANNA SCHULMAN,
Plaintiff-Appellant,

v.

THOMAS REILLY, in his official capacity as the Attorney General, WILLIAM F. GALVIN, in his official capacity as the Secretary of the Commonwealth,
Defendants-Appellees,

and

HON. RAYMOND FLYNN, HON. PHILIP TRAVIS, RICHARD GUERRIERO, JOSSIE OWENS, ROBERTO MIRANDA, RICHARD RICHARDSON, BRONWYN LORING, C. JOSEPH DOYLE, KRIS MINEAU, LURA MINEAU, THOMAS SHIELDS and MADELYN SHIELDS,
Defendants-Interveners.

ON A RESERVATION AND REPORT FROM A SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

AMICI CURIAE BRIEF OF FORMER ATTORNEYS GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, PROFESSORS OF LAW, AND THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION

Robert D. Carroll
BBO No. 662736
Christopher C. Nee
BBO No. 651472
Anna-Marie L. Tabor
BBO No. 662364
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
T: 617.570.1000

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INTEREST OF THE AMICI CURIAE

Scott Harshbarger served as the Attorney General of the Commonwealth of Massachusetts from 1991 to 1999. He is formerly president of Common Cause, and is currently Senior Counsel to the Boston office of Proskauer Rose LLP.

James M. Shannon served as the Attorney General of the Commonwealth of Massachusetts from 1987 to 1991. From 1979 to 1985, he was a member of the United States House of Representatives representing the Fifth District of Massachusetts.

The professors of law are specialists in the area of state constitutional law and/or are professors of law in the Commonwealth of Massachusetts.[1]

The Massachusetts Lesbian and Gay Bar Association (MLGBA) is a state-wide professional association of lawyers that promotes the administration of justice for all persons and educates the bar about issues affecting the lives of lesbians, gay men, bisexuals, and transgendered people.

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[1] The Amici Curiae professors of law are: Libby Adler, Vincent M. Bonventre, Lawrence M. Friedman, Anne B. Goldstein, Ingrid Michelsen Hillinger, Michael G. Hillinger, Michael Meltsner, Wendy E. Parmet, Katharine Silbaugh, Jane L. Scarborough, Joseph William Singer, Robert Volk, Robert F. Williams, Arthur D. Wolf, and Larry Yackle.

The names, institutional affiliations, and brief biographies for the Amici Curiae are attached as an addendum to this brief.

The former Attorneys General each served as the chief law enforcement officer of the Commonwealth. The professors of law teach, research and publish on topics relating to state constitutional law and/or Massachusetts law. The MLGBA is an organization of lawyers that promotes the administration of justice for all persons under Massachusetts law. In these roles, the Amici Curiae have an interest and expertise in the application of Amendment Article 48 of the Massachusetts Constitution (hereinafter “Article 48”) in the present case.

The Amici Curiae submit this brief to assist the Court’s deliberations by offering an analysis of how concerns expressed in the debates from the Massachusetts Constitutional Convention of 1917-18 confirm that the exclusions to Article 48 to the Massachusetts Constitution, including the judicial exclusions, reflect the people’s intent to maintain safeguards for individual and minority rights.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case and Statement of Facts in the brief of the Plaintiff.

SUMMARY OF ARGUMENT

The Amici Curiae submit that the plain text of Article 48 of the Massachusetts Constitution should control the issue of whether the Attorney General erred in certifying Petition No. 05-02. Article 48 provides that no petition to amend the Constitution that "relates to . . . the reversal of a judicial decision," Art. 48, Init., Pt. 2, § 2, may be brought through the Initiative process. Petition No. 05-02 seeks prospectively to reverse the Court's decision in Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003), and therefore falls under the exclusion. Although the intent of the drafters of Article 48 does not alter the plain meaning of the text in this context, it illuminates the reasoning behind the compromise that led to the exclusions in Article 48. The Court has recognized that the exclusions to Article 48 were drafted by the Constitutional Convention of 1917-18 in part to balance the desire to create a constitutional amendment process more

responsive to the citizenry with delegates' concerns that not every category of constitutional amendment should be turned over to a citizen initiative process. Some categories of constitutional amendments, including all manner of amendments that relate to the judicial branch, were deemed too sensitive to be submitted to a non-legislative amendment process. Two important concerns driving the exclusions were that amendments through the Initiative may (i) put individual and minority rights at risk in a way that would undermine the Commonwealth's constitutional compact, and (ii) result in an amendment process that would not accurately reflect the views of all of the people because it would be removed from the representative process. Representative government allows for more deliberate consideration of proposed constitutional amendments on the excluded matters.

The delegates' compromise was enshrined in the language of the exclusions to Article 48, including the judicial exclusions. The Court should apply those exclusions to effectuate fully that compromise as it was adopted by the people of Massachusetts in 1918, and reverse the Attorney General's certification of Petition No. 05-02 because it "relates to . . . the

reversal of a judicial decision." Art. 48, Init., Pt. 2, § 2.

ARGUMENT

I. The Plain Language of Article 48 of the Massachusetts Constitution Mandates That No Initiative Petition That Relates to the Reversal of A Judicial Decision May Be Placed on the Ballot.

The Amici Curiae submit that the question of whether Petition No. 05-02 qualifies to be placed on the ballot should begin and end with the plain language of Article 48. Petition No. 05-02 seeks to overturn this Court's decision in Goodridge. It therefore plainly "relates to . . . the reversal of a judicial decision," Art. 48, Init., Pt. 2, § 2, and should not have been certified by the Attorney General.

"[I]t is appropriate to construe the language of [Article 48] in accordance with the language's familiar and plain meaning." Yankee Atomic Electric Co. v. Sec'y of the Commonwealth, 402 Mass. 750, 756 (1988). The rule of construction that plain meaning controls applies with even greater force to constitutional amendments than it does to legislation, "because [a constitutional amendment] is proposed for public adoption and must be understood by all entitled

to vote." Cohen v. Att'y Gen., 357 Mass. 564, 571 (1970) (quoting Att'y Gen. v. City of Methuen, 236 Mass. 564, 573 (1921)); see also Opinion of the Justices to the Senate, 413 Mass. 1201, 1204 (1992) ("We must interpret the language of art. 48 in a sense most obvious to the common understanding at the time of its adoption, because it is proposed for public adoption and must be understood by all entitled to vote.") (quoting Methuen, 236 Mass. at 573 (internal citations omitted)).

II. The Debates at the Constitutional Convention of 1917-18 Confirm That the Exclusions to Article 48 Reflect the People's Intent to Maintain Safeguards of Individual and Minority Rights.

Article 48 was drafted by the delegates to the Constitutional Convention of 1917-18. The debates of the Constitutional Convention should not be read to alter the plain meaning of the text of Article 48, particularly because the operative intent for purposes of a constitutional amendment is that of the citizens who enacted it. See, e.g., Cohen, 357 Mass. at 571. This Court has held, however, that the debates of the Constitutional Convention "may be examined, not for the purpose of controlling the plain meaning of the words written into the [amendment] but of

understanding the conditions under which it came into existence and how it appears to have been received and understood by the convention." Id. at 572 (quoting Loring v. Young, 239 Mass. 349, 368 (1921)); see also Yont v. Sec'y of the Commonwealth, 275 Mass. 365, 368-70 (1931). Although the intent of the delegates does not control the meaning of Article 48 in this context, evidence regarding the concerns that drove the Constitutional Convention to exclude certain categories of amendments from the Initiative process, including those that relate to the reversal of a judicial decision, help to illuminate the scope of those exclusions in the version of Article 48 that was ultimately adopted by the voters of the Commonwealth in 1918.

The delegates' debates show that Article 48 was a compromise that sought to strike a balance between making the amendment process more responsive, and preserving individual and minority rights,[2] in part, by

[2] This brief uses the terms "minority" or "minority group" to mean a group of Commonwealth residents who constitute less than a majority of voters. The delegates' use of the term "minority" reflects this meaning. See, e.g., 2 Debates in the Constitutional Convention, 1917-1918, 144 (1918) (hereinafter "2 Debates") (Walter Creamer) ("[O]ne real argument against the initiative and referendum . . . is the possible danger to minority rights");

putting amendments affecting the judicial branch, including those that relate to the reversal of a judicial decision, outside of the scope of the Article 48 Initiative process.

In particular, the delegates to the Convention expressed concerns that a plebiscite or initiative process for amending the Constitution could (i) erode the protections that the Massachusetts Constitution provides individual and minority rights, and the role that Massachusetts' independent judiciary has traditionally played in safeguarding those rights; and (ii) result in a constitutional amendment process that would not reflect the views of all people because it would be removed from the representative process.

Article 48 was the product of exhaustive debate at the Constitutional Convention[3] and passed only narrowly after the inclusion of language that

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cf. 2 Debates at 257 (Samuel L. Powers) (founders said, "We will create a Commonwealth which shall be a representative democracy, and, more than that, we will create one which shall stand for all time, because we will put into this Constitution certain restraints upon the majority, and we will provide a method which is difficult, complex and laborious, to remove those restraints.")

[3] The majority of the debate in the Constitutional Convention was devoted to the controversial Initiative. See Cohen, 357 Mass. at 572-73. The debates over the Initiative took place between August 7 and November 28, 1917. Id. at 572.

"excluded from the Massachusetts initiative process . . . those core rights guaranteed in the Constitution, notably those that protect the minority against the will of the majority . . . ." Bates v. Director of the Office of Campaign and Political Finance, 436 Mass. 144, 159 n.23 (2002).[4] Specifically, the delegates excluded from the initiative process measures related to, inter alia: religion, the right of trial by jury, protection from unreasonable search, freedom of the press, freedom of speech, freedom of elections, the right to peaceable assembly, "the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts." Art. 48, Init., Pt. 2, § 2 (emphasis added).

As the Court has recognized, the opposition to the Initiative and the support for exclusions to Article 48 were animated by concerns about protecting those rights. See Bates, 436 Mass. at 158 n.23. As

[4] Article 48 passed the Constitutional Convention by a margin of 163 to 125 only after certain exclusions and procedural safeguards were introduced, including the exclusion of amendments that relate to the reversal of a judicial decision. See Cohen, 357 Mass. 572-73.

discussed below, concerns for protecting individual and minority rights and maintaining the judiciary's role in safeguarding those rights, as well as concerns for protecting a deliberative process of constitutional amendment in important areas concerning individual rights, drove both the original opposition of many delegates to Article 48 and the compromise that resulted in the addition of exclusionary language to the measure.

The compromise language of Article 48 reported to the public was drafted and phrased "in a carefully prescribed manner." Sears v. Treasurer & Receiver Gen., 327 Mass. 310, 320 (1951). Consequently, this Court has held that exclusions to Article 48 must be fully enforced in order to give effect to that compromise struck by the people of Massachusetts who adopted it. See Collins v. Sec'y of the Commonwealth, 407 Mass. 837, 844-45 (1990) ("The people for their own protection have provided that the initiative [and the referendum] shall not be employed with respect to certain matters. Unless the courts . . . enforce those exclusions, they would be futile, and the people [w]ould be harassed by measures [and laws] of a kind that they had solemnly declared they would not

consider.") (quoting Bowe v. Sec'y of the Commonwealth, 320 Mass. 230, 247 (1946)).

In light of the controversy surrounding Article 48, the exhaustive debate, and its narrow passage only after the addition of exclusions aimed at protecting important individual and minority rights, Article 48 should be interpreted to give full effect to those exclusions, including the exclusion of amendments "relat[ing] to . . the reversal of a judicial decision," such as Petition 05-02. It is clear from the debates that an important aim of the exclusions to Article 48 was maintaining the traditional safeguards afforded to individual and minority rights through a combination of a constitutional framework supported by a strong judiciary and a deliberative process for certain categories of constitutional amendments, including those that relate to the reversal of a judicial decision. Amendments falling within the excluded categories may be made either through the legislative amendment process or by calling a Constitutional Convention. The judicial exclusions to Article 48 should be read to effectuate fully the compromise language of Article 48 that the people of Massachusetts adopted.

A. The Judicial Exclusions to Article 48 Were Animated by Concerns for Individual and Minority Rights.

Delegates to the Constitutional Convention were wary that the Initiative would compromise the enduring nature of the Constitution by irreparably upsetting the balances struck therein. An important concern was protection of individual and minority rights in a system of increased majority power. Article 48 granted an unprecedented role to popular majorities and threatened to create new dangers for any minority group. The exclusionary provision served as a counterbalance in deference to the Constitution's function as a binding social compact.[5]

1. When Drafting Article 48, the Delegates Sought to Safeguard the Constitutional Limits That the People Had Placed on Themselves.

One theme of the Convention debates was how far the Constitution could bend without compromising its core protections of individual rights. The delegates ardently debated the tension between the experimental Initiative and the intent of the Commonwealth's

[5] "The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." Mass. Const. pmbl.

founders to create a Constitution that would govern consistently through the vicissitudes of popular sentiment.

The Initiative's opponents viewed the Constitution as a compact that could be amended only through a lengthy deliberative process. See 2 Debates at 57 (Charles F. Choate) (Constitution is a "compact between all the people and every individual;" characterizing the Initiative as an "easy way" to amend "upon the occasion of that single piece of legislation which may have for the moment aroused the antipathy or the excitement of the opposition of some who are opposed to it."); id. at 91 (George B. Churchill) ("I would rather go to the people and . . . ask them to keep the form of government deliberately adopted by a wise and self-knowing people, to the end of the common good, to the end that we may 'in the heat of conflict keep the law in calmness made, and see' for another one hundred and thirty-seven years, please God, 'what we foresaw.'"). These delegates based their position in part on deference to the wisdom of the Commonwealth's founders, but also on their belief that the current generation was bound to

honor the core protections enacted in 1780. As stated by delegate Henry Lummus:

> The doctrine that our written Constitution is a compact between all the people and every individual expresses an historical fact, a vital fact which no one can successfully deny. It is not an irrevocable compact, not a compact that the majority cannot change, but a compact that in sound morality they cannot repudiate, save after long deliberation, grave consideration, and the fullest hearing of all the individuals and minorities who are the very parties to the compact for whose benefit it primarily was intended.

Id. at 123.[6]

Notably, the delegates believed that the Massachusetts Constitution was superior to and more enduring than constitutions in other states. See, e.g., 2 Debates at 122 (Henry T. Lummus). For example, they contrasted the effective Massachusetts Constitution with those of the Western states. See id. (describing the Massachusetts Constitution as

[6] See also 2 Debates at 80 (Churchill) ("[I]t is my indictment, Mr. Chairman, of the general argument of the gentlemen who here and elsewhere favor the initiative and referendum that they have been so deeply impressed with the value of what is new that they have failed to see what is vital in the old, that they see dimly, mistily, what there is of vitality and truth in the past . . .").

"not the lengthy and restrictive miscellany common in western States, but . . . a Constitution that never has prevented this Commonwealth from being the leader, without a peer, in all labor and social legislation . . ."). The superiority and independence of Massachusetts' appointed judiciary was said to distinguish the Commonwealth and make amendments regarding the judiciary especially unwise. See, e.g., id. at 789-90 (John W. Cummings discusses the superiority of the Massachusetts judiciary); id. at 812 (Robert Luce relates Alabama governor's praise for the Massachusetts judiciary).

Even delegates who favored the Initiative acknowledged the historical significance of the social compact theory. See 2 Debates at 57 (initiative supporter Sherman L. Whipple acknowledges the dangers inherent in Constitutional amendment made "while the people are heated on the subject," but argues that the proposed Article 48 contains sufficient safeguards). While viewing the Constitution as more flexible than their opponents, these delegates nonetheless acknowledged that some rights could not be compromised

without fundamentally altering the nature of the Constitution.[7]

Ultimately, the two sides of the social compact debate compromised by passing the Initiative with exclusionary language. The Initiative itself embodied a flexible view of the social compact theory, while the exclusionary provisions preserved core rights by removing certain matters – most notably, the independent judiciary – from the Initiative's scope.

2. When Drafting Article 48, the Delegates Sought to Maintain Protective Restraints on Constitutional Change and To Protect Individual and Minority Rights.

Walter H. Creamer, a delegate from Lynn and a proponent of the citizen initiative, admitted the existence of "one real argument against the initiative and referendum, and that is the possible danger to minority rights." 2 Debates at 144. As Creamer acknowledged, the Initiative created a new avenue for majority oppression of minority rights by altering the compact created at the Commonwealth's founding. Samuel Powers expressed the view of many Initiative opponents when he declared that "[t]he real purpose of this resolution, so far as it refers to amending the

[7] See 2 Debates at 39-41 (Whipple), 443 (Albert Bushnell Hart), 1001 (Joseph Walker).

Constitution, is to provide a convenient and easy way for the majority to remove restraints which they have imposed upon themselves." Id. at 256.

Delegates considered protection of minority rights to be one of the fundamental goals of the founders when they drafted the Massachusetts Constitution. See 2 Debates at 520 (Asa P. French) ("[Massachusetts] is a democracy in which a majority of the voters of the Commonwealth do not rule, and were not intended to rule, - emphatically not with respect to those propositions of fundamental constitutional law by which rights sacred to all are safeguarded against the injustice or the fury or the momentary passion of the multitude.") (emphasis in original); id. at 257 (Powers) (founders said, "We will create a Commonwealth which shall be a representative democracy, and, more than that, we will create one which shall stand for all time, because we will put into this Constitution certain restraints upon the majority, and we will provide a method which is difficult, complex and laborious, to remove those restraints.")[8] These concerns were not unique to the

[8] See also 2 Debates at 89 (Churchill) ("[D]id [the founders] not deliberately adopt a written Constitution, with a Bill of Rights, which at least

Convention, but grew from a broader concern at that time regarding the balance "between the people's concern over their government's responsiveness, and the people's fears of being tyrannized by a process that would give free rein to the majority's whims." Bates, 436 Mass. at 157.

Because the Initiative shifted additional power to the majority, bypassing the constitutional safeguards that the founders created to protect minority interests, the debates reflected a high level of unease with the Initiative's inherent risks. See, e.g., 2 Debates at 523 (French) (Initiative and Referendum "is an attempt on behalf of the majority of the people to acquire power which they do not now possess, namely, the power to control all legislation, whether organic or statutory, and to put them in a position, which they do not now occupy, of dictating the rights which the minority shall henceforth be permitted to enjoy."); id. at 936 (John M. Merriam) (calling for additional exclusionary language for the Declaration of Rights because "otherwise, these great individual privileges, these great individual

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so long as that Constitution lasted no majority vote of either people or Legislature could overthrow?").

liberties, may be subject to the transient will of an apparent majority."); id. at 941 (Lummus) ("[W]e are to pass whatever measure in our judgment makes, not for hasty, snap, popular judgment, but for the expression of that sound and settled popular will, fair to minorities, sane as to its consequences, which in a democracy ought to govern."); id. at 256 (Powers) ("When the Constitution was adopted in 1780 the majority imposed upon themselves certain restraints. They did that voluntarily. They said they did that in the interest of minorities.").

The amendment's excluded matters addressed these concerns, in part, by removing from the Initiative the branch of government best equipped to protect minority rights. See 2 Debates at 89 (Churchill) ("Did [the founders] not say . . . that no majority of the people or of the Legislature, so long as that Constitution lasted, should have the power to determine whether a given law did invade the rights of the people, the rights that they wished to guard? Did they not declare that this power should belong to the courts, so long as that Constitution lasted?"). The final compromise reserved to the legislature or to a Constitutional Convention the role of amending the

Constitution when those amendments would impact constitutional rights as previously propounded by this Court.

The Massachusetts delegates' views of the centrality of the Constitution and the judiciary in protecting minorities, and their resulting concerns about enacting an unrestricted citizen initiative process, reflected as well the views of the framers of the U.S. Constitution. See The Federalist No. 51, at 357-58 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("It is of great importance . . . not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part . . . . If a majority be united by a common interest, the rights of the minority will be insecure."); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 Papers of James Madison at 295, 298 (Robert Rutland and Charles Hobson eds., 1977). ("[T]he invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of its Constituents.")(emphasis in original); Alexander

Hamilton, Address at the Constitutional Convention (June 18, 1787), in 5 Debates on The Adoption of the Federal Constitution at 198, 203 (Jonathan Elliot ed., 1987). ("Give all power to the many, they will oppress the few. Give all power to the few, they will oppress the many.").

B. The Exclusions to Article 48 Preserve the Representative and Moderating Functions Served by the Legislative Process.

As explained above, the delegates to the Massachusetts Constitutional Convention of 1917-18 made a deliberate choice not to allow the people to have a direct vote on all issues through the Initiative and Referendum process. The delegates recognized that allowing the vote of the people alone to determine constitutional amendments in all instances could result in "factions" or "private interests" trampling the rights of minorities or imposing their will on all of the people. Of particular concern to the delegates was that an amendment to the Massachusetts Constitution enacted through a direct initiative would allow "factions" to avoid the representative and deliberative functions ensured by the legislative process.

1. When Drafting Article 48, the Delegates Sought to Neutralize the Threat of Factions.

The concern that the devolution of constitutional amendment in the Initiative could give unintended powers to "factions" was voiced by delegates to the Convention of 1917-18 from the very start of the debates. Indeed, in their response to the report of the majority recommending the adoption of the resolution, the dissenting members of the committee on the Initiative and Referendum argued:

> Under the resolution reported, an amendment to the Constitution initiated by petition, though twice rejected, disapproved and condemned by the representatives of all the people, may nevertheless be forced upon the people by a majority vote of those who cast their ballots at the next election, though that majority may be only a minority of the whole number of voters. An organized minority may change the compact by which all have agreed to be bound, may impose new and different obligations upon all, may take away from them rights which are cherished and have been preserved to them by solemn covenant.

2 Debates at 8.

This fear of "factions" or "private interests" utilizing the initiative process to circumvent the traditional process of amending the Constitution through the legislature, where the interests of all the people would be represented, was echoed by

delegates throughout the debates. See, e.g., 2 Debates at 130 (Lummus) (expressing concern that the power of constitutional amendment would be held by "[a]ny ten men in the Commonwealth, unchosen, unsworn, self-appointed, representing no one but themselves and their own interests, provided with the aid of paid canvassers they can secure the signatures of fifty thousand men, who, we are told, need know very little about the matter"); 521 (French) (arguing that "[u]nder the initiative and referendum, a mere plebiscite, that is to say, an expression of the will of a bare and shifting majority of those actually voting, may become a fundamental law of the Commonwealth without any obstacle whatever"); 544 (Robert P. Clapp) (asserting that legislating through "the initiative and referendum is . . . a method not of government by popular opinion but of government by factions and parties").

These delegates envisioned two adverse consequences of providing a new method to amend the Constitution without the safeguards of the traditional methods of initiating an amendment through the legislature or convening a constitutional convention. First, private interests could force their will on all

citizens of Massachusetts. 2 Debates at 131 (Lummus) ("the method which is here proposed puts the amendment of the Constitution into the hands of private interests rather than into the hands of the people as a whole"). Second, the majority would wield absolute control over an unrepresented minority. Id. at 521 (French) ("The initiative and referendum would give [the majority] absolute power over the destinies of the minority, and transform Massachusetts from a democracy to a polyarchy.").

Similar concerns were voiced and considered during the drafting of the United States Constitution. James Madison, the principal architect of the U.S. Constitution, explained in Federalist Number 10 that the republican structure of representative democracy established by the U.S. Constitution was established to "break and control the violence of faction." The Federalist No. 10, at 129 (James Madison) (Benjamin Fletcher Wright ed., 1961). Madison defined a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the

community." Id. at 130. Federalist Number 10 observes that the risks of the "violence of faction" – that is, the urge of the majority to "sacrifice the weaker party" – is greatest in the non-republican forms of "pure democracy" such as government through plebiscite or initiative. See id. at 129, 133 ("[A] pure democracy, by which I mean a society . . . who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or any obnoxious individual."); see also The Federalist No. 63, at 415 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("[T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.").

2. Representative Government Better Represents the People's Will Than Does a Direct Initiative Process.

The delegates were concerned that the Initiative process was ripe for abuse by factions and private interests, problems that could be moderated by representative government. Opponents of the Initiative expressed the view that representative government better expressed the will of all of the people. See, e.g., 2 Debates at 131 (Lummus) ("[A] change coming through the elected representatives of the people, and drafted by them, either in the Legislature or in a Convention such as this, puts the power of constitutional change more fully, more securely, more justly, into the hands of the whole people than any such proposition as is contained in this majority resolution").

Delegates considered two procedural shortcomings of amendment through direct vote. First, a direct vote would allow a majority of voters on a particular amendment – rather than a majority of the people – to amend the Constitution. 2 Debates at 415

(Charles Mitchell) ("Unless all the people do act you do not get real democracy").[9]

Second, an amendment passed directly by the people would be subject to an up-or-down vote without opportunity for debate or compromise among the thousands of voters enacting the amendment. See 2 Debates at 346-47 (Augustus P. Loring) ("the referendum would not get a fair expression of opinion or as good an expression of opinion as you could get from a body of men who were elected and appointed to discuss the question and decide it"). By contrast, representative government ensures that a proposed amendment will be considered, debated, and deliberated on by representatives from across the Commonwealth who are accountable to a variety of constituencies. As a

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[9] Delegate Charles Mitchell set forth a detailed example of the risks he saw in allowing for amendment through direct initiative:

> Take an illustration: Suppose that an amendment is submitted to the people after having been rejected by the House of Representatives and by the Senate, and at the election suppose that twenty-five percent of the voters vote "Yes," that twenty percent of the voters vote "No," and that fifty-five percent of the voters, -- either because they do not understand the amendment, or, understanding the amendment, they do not understand what its consequences might be, -- do not vote at all. Then we have an amendment written into our fundamental law by twenty five percent of the electorate . . .

2 Debates at 415.

result, representative government requires a broader range of interests to be considered, and is also conducive to compromise. Id. at 199 (William S. Youngman) (stating that "[r]epresentative government is a series of compromises to work out a measure that is on the average fair to the whole community," and "[t]he fundamental weakness in the initiative and referendum is that there is no possibility of compromise").

Similar considerations caused the Founding Fathers to adopt a representative system of government under the United States Constitution. The deliberative process of a representative, republican form of government was the cure to the "violence of faction" that Madison identified in the Federalist Papers, The Federalist No. 10, at 129, 132 (James Madison) (Benjamin Fletcher Wright ed., 1961) (republican government ensures that factions do not sacrifice "the public good and private rights" to their "ruling passion or interest"), and which was incorporated in the U.S. Constitution through the Guarantee Clause. U.S. Const. art. IV, § 4 ("The

United States shall guarantee to every State in this Union a Republican form of Government . . . .").[10]

The delegates to the Massachusetts Constitutional Convention recognized, as had the Founding Fathers of the United States, the value of representative government in neutralizing the threats posed by factions. In striking a compromise with the exclusions to Article 48, the delegates ensured the judiciary would maintain its unique role in determining the scope of and protecting individual rights. The compromise guaranteed that the legislature or a Constitutional Convention, where a broad range of interests would be represented and

[10] Former Oregon Supreme Court Justice Hans Linde has argued that the direct initiative process, when used to constrain the rights of minority groups, violates the Guarantee Clause of the U.S. Constitution. See Hans A. Linde, When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality, 72 Or. L. Rev. 19, 41-43 (1993). Although the U.S. Supreme Court has held that this issue is a non-justiciable political question in federal courts, see Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 150-51 (1912), Linde and others argue that state courts may and should address the question of whether initiative lawmaking violates art. IV, section 4 of the U.S. Constitution. See, e.g., Hans A. Linde, Who Is Responsible for Republican Government?, 65 U. Colo. L. Rev. 709, 714 (1994); Erwin Chemerinsky, Cases Under the Guarantee Clause Should Be Justiciable, 65 U. Colo. L. Rev. 849, 873-74 (1994); cf. Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 70-78 (1988).

considered, would be the only avenue through which constitutional amendments relating to the reversal of a judicial decision could pass.

III. Petition No. 05-02 Falls Under the Judicial Exclusions to Article 48.

Petition 05-02 would reverse this Court's Goodridge decision and would, in the process, deny gay and lesbian citizens of the Commonwealth their currently-recognized constitutional right to marry. It is a point such as this, where the grand compromise of the 1917-1918 Convention comes into play, that the intent to protect the rights of individual citizens as guaranteed by the Constitution necessitates the operation of the "reversal of a judicial decision" exclusion. Therefore, Petition 05-02 must be found to fall under the exclusion. Any other application of the exclusion would conflict with the delegates' compromise, which was memorialized in the language of Article 48 and adopted by the voters in 1918. The Convention delegates considered the courts and individual rights too vital to trust to a new experiment in popular governance. The Attorney General's narrow reading of the "reversal of a judicial decision" exclusion undermines the balance

drawn at the Convention – the same balance reflected throughout American democracy – at the expense of both the independence of this Court and the constitutional rights guaranteed in Goodridge.

CONCLUSION

For the foregoing reasons, the Amici Curiae respectfully request that the Court declare that the Attorney General erred in certifying Petition No. 05-02.

Respectfully submitted,

FORMER ATTORNEYS GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, PROFESSORS OF LAW, AND THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION

By their attorneys,

Robert D. Carroll
BBO No. 662736
Christopher C. Nee
BBO No. 651472
Anna-Marie L. Tabor
BBO No. 662364
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
T: 617.570.1000

Dated: March 1, 2006

ADDENDUM

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Description of Amici Curiae

Former Attorneys General

Scott Harshbarger

Scott Harshbarger served as the Attorney General of the Commonwealth of Massachusetts from 1991 to 1999. He is formerly president of Common Cause, and is currently Senior Counsel to the Boston office of Proskauer Rose LLP.

James M. Shannon

James M. Shannon served as the Attorney General of the Commonwealth of Massachusetts from 1987 to 1991. From 1979 to 1985, he was a member of the United States House of Representatives representing the Fifth District of Massachusetts.

Law Professors

Libby Adler

Libby Adler is an Associate Professor of Law at Northeastern University where she has been teaching full-time since 1999. She teaches Constitutional Law, Administrative Law and Sexuality, Gender and the Law. Her principal area of research is the legal regulation of sexuality, family and children, including

constitutional and private law dimensions. Her publications in the field of constitutional law include The Future of Sodomy, 32 Fordham Urban L.J. 197 (2005); California's Holocaust Victim Insurance Relief Act and American Preemption Doctrine, 4 German L.J. 1193 (2003); and Federalism and Family, 8 Colum. J. of Gender and Law 197 (1999).

Vincent M. Bonventre

Vincent M. Bonventre is a Professor of Law at Albany Law School and teaches, lectures, studies, researches, and writes in the fields of state constitutional law (he also edits the scholarly journal, State Constitutional Commentary) and the judicial process (he is the director of a student-professional research group, the Center for Judicial Process), including independent state court protection of civil and criminal rights and liberties and the independence of the judiciary. Professor Bonventre has taught as a visiting professor at Syracuse University College of Law and the Maxwell School of Public Affairs. While completing a Ph.D. in government/public law studies at the University of Virginia, he taught courses in judicial process, civil rights and liberty, and

constitutional theory and development. Professor Bonventre has recently published articles on judicial decision making, state constitutional law, criminal and civil rights, legal ethics, and the New York Court of Appeals. He is the author of "Streams of Tendency" on the New York Court: Ideological and Jurisprudential Patterns in the Judges' Voting and Opinions (W.S. Hein).

Lawrence M. Friedman

Lawrence M. Friedman is an Assistant Professor of Law at New England School of Law, where he teaches Civil Procedure and Constitutional Law. Before joining the New England faculty in 2004, Professor Friedman was a visiting assistant professor of law at Boston College Law School, where he taught Constitutional Law and Privacy Law. Previously, he was a lecturer on law at Harvard Law School. He was selected as a First Amendment Fellow by the National Press Club in 2002 and was a recipient of the Lawyers' Committee for Civil Rights Under Law Recognition Award in 1999. Professor Friedman is co-author of the forthcoming The Massachusetts State Constitution (Greenwood Press). His other publications include: Public Opinion and

Strict Scrutiny Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework, 24 B.C. Third World L.J. 267 (2004); The Constitutional Value of Dialogue and the New Judicial Federalism, 28 Hastings Const. L. Q. 93 (2000); and On Human Rights, the United States and the People's Republic of China at Century's End, 4 J. Int'l Stud. 241 (1998).

Anne B. Goldstein

Anne Goldstein is a Professor of Law at Western New England College School of Law. Professor Goldstein's specific areas of expertise are conflict of laws, constitutional law, and law and literature. She is currently teaching criminal law, criminal procedure, evidence and scientific evidence. Her pertinent publications include History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick, 97 Yale L.J. 1073 (1988); and The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Act, 25 U.C. Davis. L. Rev. 845 (1992).

Ingrid Michelsen Hillinger

Professor Ingrid Michelsen Hillinger is a Professor of Law at Boston College Law School where she teaches a variety of commercial law/bankruptcy courses including Business Bankruptcy, Consumer Bankruptcy, and Secured Transactions. She is a co-editor of Chapter 11 Theory & Practice: A Guide to Reorganization, a multi-volume bankruptcy treatise. She is co-author of an Article 9 case book, Commercial Transactions: Secured Financing: Cases, Materials & Problems, which adopts a problem-solving approach to teaching transactional law. Professor Hillinger has taught at a variety of schools during her 20-year teaching career: William & Mary, the University of Texas at Austin, Emory University, Northeastern University School of Law and the University of Connecticut School of Law.

Michael G. Hillinger

Michael Hillinger is a Professor of Law at Southern New England School of Law. Professor Hillinger teaches Appellate Advocacy, Consumer Bankruptcy and Secured Transactions. Before joining the full-time faculty of the Law School in 1989, Professor Hillinger was the Director of Legal Writing and Appellate

Advocacy at the Marshall-Wythe School of Law, College of William & Mary. His recent publications include: Environmental Affairs in Bankruptcy: 2004, 12 Am. Bankr. Inst. L. Rev. 331 (2004) (co-author); Commercial Transactions: Secured Financing (3d. Ed., LexisNexis 2003) (co-editor); 2001: A Code Odyssey (New Dawn for the Article 9 Secured Creditor), 106 Comm. L.J. 105 (2001) (co-author); Consumer Protection in and Around the Uniform Computer Information Transactions Act (UCITA) in Understanding Electronic Contracting: UCITA, E-Signature, Federal, State & Foreign Relations 649 PLI/PAT 401 (Practicing Law Institute, 2001) (co-author); Commercial Transactions: Secured Financing (2d. Ed., Lexis Law Publishing, 1999) (co-editor).

Michael Meltsner

Michael Meltsner is the Matthews Distinguished University Professor of Law at Northeastern University. Professor Meltsner was first assistant counsel to the NAACP Legal Defense Fund in the 1960s and served as Dean of Northeastern School of Law from 1979 until 1984. His memoir, The Making of a Civil Rights Lawyer, will be published this year. Among his

other writings are four books and numerous articles, including: Confronting Unequal Protection of the Law, 24 N.Y.U. Rev. L. & Soc. Change 163 (1998) (with Harry Subin). Professor Meltsner has served as a consultant to the U.S. Department of Justice, the Ford Foundation and the Legal Action Center of the City of New York and has lectured in Canada, Egypt, Germany, India, the Netherlands and South Africa.

Wendy E. Parmet

Wendy E. Parmet is George J. and Kathleen Waters Matthews Distinguished University Professor of Law at Northeastern University School of Law, and Program Director of the law school's dual degree J.D.-M.P.H. program with Tufts University School of Medicine. She teaches Public Health Law, Health Law, Disability Law, Bioethics and Torts. Professor Parmet has recently co-authored, with Patricia Illingworth, Ethical Health Care, published by Prentice Hall. She has also published widely in medical journals and law reviews on public health law, bioethics, constitutional law, health care access and disability law. She is on the Board of Directors of Health Law Advocates and the Public Health Law Association and is a member of the

ABA's Commission on Mental and Physical Disability Law. She received her J.D. from Harvard Law School in 1982 and her B.A. from Cornell University in 1979.

Katharine Silbaugh

Katharine Silbaugh is Professor of Law and Associate Dean for Academic Affairs at Boston University School of Law, where she teaches courses on Family Law, Women and the Law, and Torts and serves as Advisor to the Law School's Public Interest Law Journal. A former Law Clerk to Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, Professor Silbaugh collaborated with Judge Posner on A Guide to America's Sex Laws, a reference guide to sexual regulation in the United States. The author of numerous journal articles including, After Goodridge: Will Civil Unions Do? (Jurist, 2004), Professor Silbaugh has produced pioneering work in the emerging legal literature on the work-family conflict. She received her J.D. with high honors and Order of the Coif from the University of Chicago Law School, and her B.A. magna cum laude from Amherst College.

Jane L. Scarborough

Jane L. Scarborough, Professor of Law, Northeastern University School of Law (retired), also served as associate dean and vice president for the school's Division of Cooperative Education. Named the School of Law's Thomas P. Campbell Distinguished Professor for 1998-1999, Professor Scarborough taught Constitutional Law, Professional Responsibility and Advanced Constitutional Law: Sexuality, Gender and the Law. Professor Scarborough has written extensively on issues of concern to the lesbian, gay, bisexual and transgender community. She holds a B.A. from Rice University, an M.A. from Purdue University, Ph.D. from Rice University, and a J.D. from Northeastern University.

Joseph William Singer

Joseph William Singer has been a Professor of Law at Harvard Law School since 1992. His primary interests are American Indian Law, Conflict of Laws and Property. His representative publications are: Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 Stan. J. Civ. Rts. & Civ. Lib. 1 (2005); Property Law: Rules, Policies & Practices

(Aspen Law & Business 3d ed. 2002)(with Teacher's Manual) (Aspen Law & Business, 2d ed. 1997)(Little, Brown & Co., 1st ed. 1993); The Edges of the Field: Lessons on the Obligations of Ownership (Beacon Press 2000); Entitlement: The Paradoxes of Property (Yale University Press 2000); Rent, 39 B.C. L.Rev. 1 (1997); No Right to Exclude: Public Accommodations and Private Property, 90 NW. U. L. Rev. 1283 (1996).

Robert Volk

Robert Volk is the director of the First-Year Writing Program at Boston University. Professor Volk received his B.A. from Lake Forest College in 1973 and his J.D., cum laude, from Boston University School of Law in 1978. He has been a member of the Boston University School of Law faculty since 1982 and has taught a seminar dealing with the legal rights of gay, lesbian, bisexual and transgendered citizens since the late 1980's. Professor Volk has spoken on GLBT issues on many occasions, is a member of the Massachusetts Lesbian and Gay Bar Association, and serves as faculty advisor to the Law School's GLBT student group. Professor Volk has taught courses in banking law, law and morality and the American legal system.

Robert F. Williams

Robert F. Williams is Distinguished Professor of Law at Rutgers University School of Law in Camden, New Jersey. He received his B.A. from Florida State University in 1967 and his J.D. from the University of Florida College of Law in 1969. Prior to attending law school, he served as legislative assistant in the Florida Legislature during the 1967 Constitutional Revision Session. He practiced law with Legal Services in Florida and represented clients before the 1978 Florida Constitution Revision Commission. Professor Williams received an LL.M. from New York University School of Law in 1971, and an LL.M. from Columbia Law School in 1980. He teaches Civil Procedure, State Constitutional Law and Statutory Interpretation at Rutgers Law School in Camden, New Jersey, in addition to writing and practicing in those areas. He is the author of State Constitutional Law: Cases and Materials (3d ed., Lexis Law Publishers 1999), and The New Jersey Constitution: A Reference Guide (Rutgers University Press, rev. ed. 1997) and numerous journal articles about state constitutional law and legislation. He is also coauthor (with Hetzel

and Libonati) of Legislative Law and Statutory Interpretation (3d. ed., Lexis Law Publishers, 2001).

Arthur D. Wolf

Arthur D. Wolf is a Professor of Law at Western New England College School of Law. Professor Wolf, who clerked for New Jersey Superior Court Judge Theodore I. Botter, served as a Trial and Appellate Attorney in the Civil Rights Division of the United States Department of Justice. Professor Wolf began his teaching career in 1978. Among his writings are a three-volume treatise, Court-Awarded Attorney Fees (published in 1983 with current updates), which he coauthored, and articles on supplemental jurisdiction in the federal courts. Professor Wolf has a special interest in international human rights. He serves as Director of the Law School's Institute for Legislative and Governmental Affairs.

Larry Yackle

Larry Yackle is a Professor of Law and the Basil Yanakakis Faculty Research Scholar at Boston University. Professor Yackle has written five books, including the recent Federal Courts (second edition, 2003) and Habeas Corpus (2003). He also has authored a

number of articles on constitutional law and the jurisdiction of the federal courts, including The Figure in the Carpet in a recent issue of the Texas Law Review and Capital Punishment, the Federal Courts, and the Writ of Habeas Corpus in Beyond Repair? America's Death Penalty. He is best known for his 1994 book, Reclaiming the Federal Courts, and for his pro bono work with the American Civil Liberties Union and the NAACP Legal Defense and Education Fund. Professor Yackle also has written more than two-dozen amicus curiae briefs in the U.S. Supreme Court on behalf of those organizations and other advocacy groups and currently teaches courses in constitutional law and federal courts.

Massachusetts Lesbian and Gay Bar Association

The Massachusetts Lesbian and Gay Bar Association (MLGBA) is a state-wide professional association of lawyers that promotes the administration of justice for all persons, educates the bar about issues affecting the lives of lesbians, gay men, bisexuals, and transgendered people and advocates for the enforcement of laws promoting equal rights for all. A key aspect of MLGBA's mission is to ensure that issues

pertaining to sexual orientation are handled fairly and respectfully in the Commonwealth’s courts.

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