

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk County

No. SJC-08860

HILARY GOODRIDGE, JULIE GOODRIDGE,
DAVID WILSON, ROBERT COMPTON,
MICHAEL HORGAN, EDWARD BALMELLI,
MAUREEN BRODOFF, ELLEN WADE,
GARY CHALMERS, RICHARD LINNELL,
HEIDI NORTON, GINA SMITH,
GLORIA BAILEY and LINDA DAVIES,

Plaintiffs-Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH and
HOWARD KOH, COMMISSIONER
OF THE DEP'T. OF PUBLIC HEALTH,

Defendants-Appellees.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO
VACATE THE COURT'S JUDGMENT FOR LACK OF SUBJECT MATTER
JURISDICTION**

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirteen members of the General Court
(hereinafter "Proposed Intervenors") make the
groundless claim that in Goodridge v. Department of
Public Health, 440 Mass. 309 (2003), this Court had no
jurisdiction to hear a constitutional challenge to our
marriage statute because the Massachusetts

Constitution "gives the political branches, not the judicial branch, authority over jurisdiction in marriage cases." See Proposed Intervenors' Brief, p. 8 (emphasis in original). This novel assertion, which if accepted would reformulate the separation of powers and our entire system of government, is plainly wrong given the type of question that this Court addressed in Goodridge and this Court's precedent interpreting pt. 2, c. 3, art. 5 of the Massachusetts Constitution. The motion to vacate must be denied because:

(1) Goodridge involved a claim that the exclusion of same-sex couples from marriage, under statutes enacted by the Legislature and enforced by the Executive Branch, violated the Massachusetts Constitution.¹ This court always has jurisdiction to review acts of the Legislature and public officials for constitutional soundness. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (characterizing such review

¹ See Goodridge, 440 Mass. at 312 ("The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits and obligations of marriage to two individuals of the same sex who wish to marry."); Id. at 312-313 (identifying the issue as "[w]hether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage").

as "the very essence of judicial duty"), and cases cited in Argument I, infra. This court had the unquestionable authority to decide plaintiffs' constitutional claims in Goodridge, and it squarely stated as much.²

(2) The Proposed Intervenors' sole argument is based on an incorrect view of pt. 2, c. 3, art. 5 of the Massachusetts Constitution, which provides that "[a]ll causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provisions." Plaintiffs' claims here, however, are not a "cause" of marriage as that term has been construed by this Court. See Sparhawk v. Sparhawk, 116 Mass. 315, 317 (1874). Moreover, this Court has interpreted this constitutional provision to reflect the framers'

² See Goodridge at 339 ("it is the traditional and settled role of courts to decide constitutional issues"); Id. at 338 ("The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded."). Proposed Intervenors' incorrectly state at page 13 of their Brief that this Court "simply assumed such jurisdiction without examination.").

intent to place such "causes" within the judiciary.

Id. See Argument II, infra.³

ARGUMENT

I. THIS COURT PROPERLY EXERCISED JURISDICTION IN THIS CASE BASED ON THE JUDICIARY'S WELL-ESTABLISHED AUTHORITY TO DECIDE CLAIMS THAT A LAW, AND PUBLIC OFFICIALS' ACTIONS UNDER THAT LAW, VIOLATE THE REQUIREMENTS OF THE CONSTITUTION.

The jurisdiction of this Court to rule on the constitutionality of legislative enactments and the acts of public officials is a principle that was settled early on in the history of our legal system and is not subject to any reasonable question. As this Court has recognized:

It is elementary in constitutional law under the Constitution of this commonwealth that a duty is cast upon the judicial department of government, when the question is properly raised between litigants, to determine whether a public officer is overstepping constitutional bounds and whether statutes duly enacted conform to the fundamental law as expressed in the Constitution. It is a delicate duty, always approached with

³ It is worth noting that the claim pressed by Proposed Intervenors now -- that the Massachusetts Constitution, pt. 2, c. 3, art. 5, precludes judicial review in this case -- was asserted in amici curiae briefs filed in the trial court proceedings in this case, and in this Court in Goodridge and In re Opinion of the Justices to the Senate, 440 Mass. 1201. See Plaintiffs' Opposition to Motion For Leave to Intervene As Defendants As a Matter of Right, pp. 2-3, separately filed with the Court.

caution and undertaken with reluctance, but an imperative duty which cannot be escaped.

Horton v. Att'y Gen., 269 Mass. 503, 507 (1930). This Court has repeatedly articulated this vital principle as essential to the proper functioning of the three branches of government. See, e.g., Bowe v. Secretary of the Comm., 320 Mass. 230, 243-44 (1946) ("The nature of the power of the courts to enforce the provisions of the Constitution of Massachusetts as against a conflicting statute ... is a necessary function, if constitutional provisions are to be the supreme law, and not mere declarations of policy to be disregarded by the Legislature at will."); Moe v. Secretary of Administration & Fin., 382 Mass. 629, 642 (1981) ("without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have the duty, certainly since Marbury v. Madison to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution.") (quoting Colo v. Treasurer & Receiv. Gen., 378 Mass. 550, 553 (1979) (citations omitted)).⁴ The Court's

⁴ See also Moore v. Election Commissioners of Cambridge, 309 Mass. 303, 312 (1941) ("power of deciding on the constitutionality of legal enactments,

authority to decide the constitutional question in Goodridge comes from this established role of judicial review.

Disagreement about the merits of plaintiffs' constitutional challenge is an entirely separate matter from the Proposed Intervenors' attack on the Court's authority to even hear such a challenge. The import of Proposed Intervenors' argument is that this Court has never had jurisdiction to decide challenges to any statute or executive action related to the subject of marriage, including laws that "prohibited miscegenation; required court approval for marriage of persons with child support obligations; [or] compelled a pregnant unmarried minor to obtain the consent of both parents before undergoing an abortion."

Goodridge, 440 Mass. at n.31. Moreover, the Proposed Intervenors would place the power of such judicial

is one clearly vested in the judicial department"); Sperry & Hutchinson v. McBride, 307 Mass. 408, 416 (1940) ("the question whether a statute is in conflict with the provisions of the Constitution of this Commonwealth is a question on which the decision of our Supreme Judicial Court is final"); The Inhabitants of Norwich v. The County Commissioners of Hampshire, 30 Mass. 60, 61 (1832) ("If an act, purporting to be a statute passed by the legislature, is not warranted by the powers vested in the legislature, it is clear that such act cannot have the force of law; and that it is the duty of the Court so to declare it ...").

review in the Executive Branch (Brief at pp. 8-9), an assertion that cannot withstand any understanding of the constitutional separation of powers.⁵

II. PART 2, CHAPTER III, ARTICLE V OF THE MASSACHUSETTS CONSTITUTION IS INAPPLICABLE TO THIS CASE.

The Proposed Intervenors claim that the Court in Goodridge improperly asserted subject matter jurisdiction in violation of pt. 2, c. 3, art. 5 of the Massachusetts Constitution, which provides:

All causes of marriage, divorce, and alimony, and all appeals from the judges of Probate shall be heard and determined by the governor and council, until the Legislature shall, by law, make other provision.

⁵ The Proposed Intervenors' Brief at p. 13 incorrectly asserts that the declaratory judgment statute, G.L. c. 231A, § 1, cannot provide a basis for jurisdiction. The declaratory judgment statute can "itself provide a basis of jurisdiction when the appropriate bases for such an action exist and the court is otherwise authorized to grant the relief sought." See Villages Dev. Co., Inc. v. Sec'y of Exec. Office of Env'tl. Affairs, 410 Mass. 100, 109-110 & n.6 (1991). See also Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 268 n.4 (1992) (declaratory judgment appropriate to resolve challenge to constitutionality of statute). Moreover, a complainant may seek declaratory relief regarding an enactment's constitutionality under the Court's equity power under G.L. c. 214, § 1. See, e.g., Winch v. Registrar of Motor Vehicles, 334 Mass. 271 (1956). This Court may rely on any basis for jurisdiction, whether or not cited by plaintiffs. See Twomey v. Bd. of Appeals of Medford, 7 Mass. App. Ct. 770, 773 (1979).

See Proposed Intervenor's Brief at pp. 3, 5, 8. The Proposed Intervenor's posit that the Legislature has not specifically transferred jurisdiction over the "issues presented in Goodridge" from the Governor and Council to this Court. Id. at 5, 6. This assertion is plainly wrong for two reasons.

First, plaintiffs' claims in Goodridge are not a "cause" of marriage. This Court has explained that "[t]he word 'causes' is evidently here used as equivalent to 'controversies' or 'cases'." See Sparhawk, 116 Mass. at 317. Plaintiffs here, however, are not asking that this Court, or any court, marry them, adjudicate that they are married, or annul a marriage. Tellingly, the Proposed Intervenor's acknowledge that Goodridge did not address "whether a particular marriage license was valid." See Proposed Intervenor's Brief at 6. Rather, plaintiffs challenge the constitutionality of a legislative enactment and its enforcement by officials of the Executive Branch. Whether a statutory marriage licensing scheme is unconstitutional because it excludes a class of citizens may concern the subject matter of marriage, but it is not a "cause" of marriage, as that term has

been construed for one hundred and thirty years. See Sparhawk 116 Mass. at 317. (1874).

Second, even if this case did involve a "case" or "controversy" about a particular marriage, the Proposed Intervenors fail to distinguish between the proper legislative and judicial roles as articulated by this Court in Sparhawk. In Sparhawk, this Court ruled that a divorce statute was unconstitutional. Id. at 320. In reaching its result, the Court began by noting that the declaration of divorce is "an investigation of a judicial nature." Id. at 316. The Court went on to examine pt. 2, c. 3, art. 5, together with art. 30 of the Massachusetts Constitution, to conclude that the people intended all "causes" of marriage and divorce to be the exclusive province of the judiciary. Id. at 317. The Court reasoned:

The 30th article of the Declaration of Rights prefixed to the Constitution declares that in the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers or either of them. The third chapter of the Constitution, entitled "Judiciary Power," contains this article: "All causes of marriage, divorce and alimony, and all appeals from the judges of probate, shall be heard and determined by the Governor and Council, until the Legislature shall by law make other provision." The word "causes" is evidently here used as equivalent to "controversies" or "cases;" and the terms,

as well as the position of this article in [the judiciary powers section of] the Constitution, manifest the intention of the people, in establishing a frame of government, to commit the hearing and determination of all cases of divorce and probate appeals to the judiciary only. The reason for temporarily entrusting the jurisdiction of these matters to the Governor and Council doubtless was that it had been vested in them under the Province Charter.

Id. (emphasis added). As such, under the Constitution, the judicial branch was to have the role of hearing causes of marriage and divorce, and “[t]he Legislature undoubtedly has the power by general laws to specify the grounds and regulate the forms of divorce [and marriage].” Id. at 318.⁶

⁶ Shortly after the enactment of the Massachusetts Constitution, the Legislature passed comprehensive legislation regarding marriage and divorce, and providing for the Supreme Judicial Court to hear and determine marital disputes. See Charles P. Kindregan and Monroe L. Inker Family Law & Practice in 1 Mass. Prac. § 1:6, n. 10 (3d ed. 2002) (discussing St. 1785, c. 69, § 7). See also White v. White, 105 Mass. 325, 327 (1870) (Examining constitutional provision and determining that “[n]o jurisdiction in cases of marriage, any more than in cases of divorce, alimony or appeals from the judges of probate, had been conferred by any law upon the legislature ... They had exercised their power to take away the jurisdiction of the governor and council, and confer it upon another tribunal.”). Kindregan and Inker explain that these enactments “set the stage for development of family law by the judiciary within the framework of legislative enactments, a process which has continued in Massachusetts to this day.” 1 Mass. Prac. § 1:6 (p. 16).

As such, under our constitutional system: (1) The courts have the power to hear cases or controversies related to specific marriages and divorces. See Sparhawk, supra at 317; (2) The Legislature retains the power to specify the "grounds" for marriage and divorce. Id.; see also Massachusetts Constitution, pt. 2, c. 1, § 1, art. 4 (Legislative authority to make "reasonable orders, laws, statutes, and ordinances."); and (3) The courts determine whether the Legislature's ongoing activity in the realm of marriage and divorce conforms to the requirements of the Massachusetts Constitution. See Argument I, supra. See also Sparhawk, supra; White, supra at n. 6; Bucknam v. Bucknam, 176 Mass. 229 (1900); and Bigelow v. Bigelow, 108 Mass. 78 (1871) (cases of the court exercising its power of judicial review of acts of the Legislature).

CONCLUSION


For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Motion Of Members Of The General Court Of Massachusetts To Vacate The Court's Judgment For Lack Of Subject Matter Jurisdiction Or, In The Alternative, To Extend The

Court's Stay Pending Resolution of The Jurisdictional
Issue.

Respectfully submitted,

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Dated: May 3, 2004

CERTIFICATE OF SERVICE

I, Mary L. Bonauto, certify that on this 3rd day of May 2004, I caused the above Opposition to be served by regular mail upon counsel for the Proposed Intervenors,

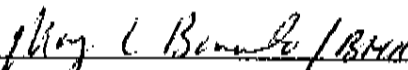
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