

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal No. _____

ROBERT P. LARGEISS, *et al.*

Plaintiffs-Appellants,

vs.

SUPREME JUDICIAL COURT FOR THE STATE
OF MASSACHUSETTS, *et al.*,

Defendants-Appellees.

**APPELLANTS' MEMORANDUM IN SUPPORT OF EMERGENCY
MOTION FOR INJUNCTION PENDING APPEAL, EXPEDITED APPEAL,
EXPEDITED BRIEFING SCHEDULE, AND FOR IMMEDIATE HEARING**

Robert J. Muise
Thomas More Law Center
3475 Plymouth Rd, Ste 100
Ann Arbor, MI 48105

Stephen M. Crampton
Brian Fahling
Afa Ctr for Law and Policy
100 Parkgate Drive
Tupelo, MS 38803

Chester Darling
Citizens for the Preservation of
Constitutional Rights
306 Dartmouth Street
Boston, MA 02116
Telephone: (617) 536-1776
Facsimile: (978) 470-2219

Mathew D. Staver
(Lead Counsel)
Erik W. Stanley
Anita L. Staver
Joel L. Oster
Rena M. Lindevaldsen
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
Telephone: (407) 875-2100
Facsimile: (407) 875-0770
Attorneys for Appellants

Appellants file this Memorandum of Law in support of their Emergency Motion for Injunction Pending Appeal, Expedited Appeal, Expedited Briefing Schedule, and for Immediate Hearing, and, state as follows:

STATEMENT OF FACTS AND INTRODUCTION

The facts in the Amended Complaint and affidavits are incorporated herein. Plaintiffs request an injunction pending appeal, enjoining the enforcement of the decision of the Supreme Judicial Court (“SJC”) in *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003), because the court in redefining “marriage”, and even hearing the cause, violated the separation of powers in the Massachusetts Constitution and, therefore, violated Article 4, §4, of the United States Constitution.¹

STANDARD FOR INJUNCTIVE RELIEF

The standards for an injunction pending appeal are the same as a preliminary injunction, namely “consideration of movant’s likelihood of success on the merits, potential for irreparable harm, balancing of relevant equities, and effect on public interest.” *Campbell Soup Co. v. Giles*, 47 F.3d 467 (1st Cir. 1995); *see, e.g., Kawalski v. Chicago Tribune Co.*, 854 F.2d 168, 170 (7th Cir.1988) (stating that a request for a preliminary injunction is evaluated in accordance with a “sliding scale” approach: the more the balance of irrevocable harms inclines in the plaintiff’s favor, the smaller the

¹ This Court is only required to determine whether *Goodridge* violated the Guarantee Clause, not the wisdom of the decision.

likelihood of prevailing on the merits he need show in order to get the injunction.)

I. PLAINTIFFS FACE IRREPARABLE HARM.

Due to the compelling national importance of this case, this Court should grant an injunction pending appeal because of the enormous irreparable harm that will ensue in its absence. *The decision of the SJC will go into effect Monday, May 17, 2004*, at which time marriage as universally understood for millenia of human history will be forever changed. Chaos will ensue. Marriage has always been between opposite-sex couples, and for good reason. The incredible upheaval in Massachusetts is inevitable. The SJC recognized one aspect of the breadth of its decision by noting, “The benefits accessible only by way of a marriage license are *enormous*, touching nearly every aspect of life and death.” *Goodridge*, 440 Mass. at 323 (emphasis added). “[H]undreds of statutes are related to marriage and marital benefits.” *Id.* (internal marks omitted). The legal uncertainty, not to mention the social and policy disruption, is enough reason to stay the *Goodridge* decision in order to carefully consider the Plaintiffs’ claims. *See Kawalski*, 854 F.2d at 170 (applying a “sliding scale” analysis in granting injunctive relief so that the higher the harm, the less the party has to show a likelihood of prevailing on the merits).

Should this Court find in favor of the Plaintiffs after May 17, the result would be sheer mayhem. Same-sex marriages performed in the intervening period would be

in limbo. After changing hundreds of statutes, they will have to be restored, and the legal effect of licenses issued to same-sex couples will have to be adjudicated. The range of impact runs from property, to insurance coverage (in the midst of ongoing treatment), to employment, to custody, alimony and support, just to name a few. No one has the slightest clue what kind of an earthquake we will experience, but one thing is for sure – once we cross that bridge of May 17, the damage done will be virtually impossible to restore. The Vermont Supreme Court recognized this very concern:

[W]hile the State’s prediction of “destabilization” cannot be a ground for denying relief [on the merits], it is not altogether irrelevant. *A sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences.* Absent legislative guidelines defining the status and rights of same-sex couples, consistent with constitutional requirements, uncertainty and confusion could result.

Baker v. State, 744 A.2d 864, 887 (Vt. 1999) (emphasis added).

Outside Massachusetts, the chaos will be even greater. Some Clerks are in a dispute with the Governor, saying they will marry nonresidents.² No state allows same-sex marriage. It is certain that same-sex couples will flock to Massachusetts to marry. San Francisco illustrates this point. We will see an explosion of litigation in the other 49 states and territories, including suits against the United States. This cataclysmic train

²See The Boston Globe, *Defiance, Rebuke on Gay Marriage*, available at http://www.boston.com/news/local/massachusetts/articles/2004/05/12/defiance_rebuke_on_gay_marriage_boston_globe/.

wreck must be enjoined pending this appeal to allow for a reasoned deliberation.

The “deadline” of May 17, 2004, is an artificial deadline created by the SJC, designed to undermine representative government and thwart the will of the people, the Legislative and the Executive branches. If same-sex marriage begins on May 17, Pandora’s box will be opened. The legal and cultural ramifications and the seriousness of violating the Guarantee Clause necessitate an injunction, because the numerous and untold consequences cannot be undone.

From the day the first European settler set foot on our soil, and for millenia of universal human history, marriage has only been between a man and a woman. On May 17, 2004, that will change. Male-female marriage is of vital interest to society. It is a bedrock of society.

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political involvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

Plaintiffs have a constitutional guarantee that the definition of marriage will not be altered except by those expressly granted such authority under the Massachusetts Constitution. Article 4, § 4 of the United States Constitution is one of the most

fundamental rights guaranteed by the Constitution. Alexander Hamilton explained that the healthy balance of power reduces the “risk of tyranny and abuse” *Gregory v. Ashcroft*, 501 U.S. 452, 459 (quoting THE FEDERALIST No. 28, pp. 180-81). This constitutional guarantee is even more important than free speech because it goes to the very heart of our system of law and government. *See Gordon v. Griffith*, 88 F. Supp.2d 38, 42-52 (E.D. NY 2000). Denial of free speech for a minimal time “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also New York Times Co. v. United States*, 403 U.S. 713 (1971). The loss of a republican form of government is even more egregious. If “our political system rests” upon free speech, then surely the political system itself is even more valuable. The irreparable harm is clear and immediate, and an injunction should prevent this harm.

II. PLAINTIFFS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs have a likelihood of success on two grounds. The SJC violated the separation of powers in (i) redefining marriage, and (ii) hearing the matter. When one branch usurps another, it violates the Guarantee Clause. That guarantee inures to the citizens like Largess and to legislators whose power has been usurped.³

³ *See Adams v. Clinton*, 90 F. Supp.2d 27 (D.D.C. 2000) (residents have standing to maintain Guarantee Clause claim, finding that “deprivation of their right to republican form of local government” is a concrete injury); *LaGrant v. Boston Housing Auth.*, 403 Mass. 328, 330 (1988) (branch of government has standing when

A. The Constitution Guarantees A Republican Form Of Government.

Article IV, section 4 of the U.S. Constitution provides that the “United States shall guarantee to every State in the Union a Republican Form of Government.” Although claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O’Connor noted in the 1992 decision in *New York v. United States* “that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.” 505 U.S. 144, 183 (1992). *See also Reynolds v. Sims*, 377 U.S. 533 (1964) (“some questions raised under the Guaranty Clause are nonjusticiable, where ‘political’ in nature and where there is a clear absence of judicially manageable standards”). “Contemporary commentators,” Justice O’Connor noted, “have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *Id.* at 185 (citing L. Tribe, AMERICAN CONSTITUTIONAL LAW 398 (2d ed. 1988); J. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118 and n. 122-123 (1980); W. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 287-289, 300 (1972); D. Merritt, 88 COLUM. L. REV. 1, 70-78 (Jan. 1988); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in*

authority has been usurped by another for if it “cannot seek judicial relief, then the . . . branch might be foreclosed from protecting its separate powers”).

Constitutional Desuetude, 46 MINN. L. REV. 513, 560-65 (1962)). The Court has reaffirmed the importance of the Guarantee Clause. See *Printz v. United States*, 521 U.S. 898 (1997).

Following the *New York* decision, several articles were published discussing the history and purpose of the Guarantee Clause. The 1849 Supreme Court decision in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), began a bifurcation of the Guarantee Clause between substantive (exercised by Congress) and structural/procedural review (exercised by courts).

In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 , 176 (1874), the Court noted that state governments in place when the Constitution was adopted were “presumed” to be consistent with the Guarantee Clause. In *In re Duncan*, 139 U.S. 449 (1891), the Court ruled that matter before it was a nonjusticiable political question. See *Pacific States Telephone & Telegraph Co. v. Oregon*, 233 U.S. 118 (1912).

The Court in *Baker v. Carr*, 369 U.S. 186 (1962), provided guidelines regarding political questions.⁴ In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court pointed to

⁴ (1) whether the case involved a question textually committed to a coordinate political department; (2) whether there is a lack of judicially discoverable and manageable standards for resolving it; (3) whether it is impossible to decide the matter without an initial policy determination of a kind clearly for nonjudicial discretion; (4) whether the court’s decision of the matter would demonstrate a lack of respect for coordinate branches of government; (5) whether there is an unusual need for unquestioning adherence to a political decision already made; or (vi) whether there is

Baker, noting that “*some* questions raised under the Guaranty Clause are nonjusticiable” *Id.* at 582 (emphasis added).

In 1992, the Court in *New York* stated that not all Guarantee Clause claims are nonjusticiable. This was reaffirmed in 1997 by *Printz*. There are circumstances in which the Guarantee Clause can, and should, be used to protect the people.⁵

The Guarantee Clause is a “protector of basic individual rights and should not be treated as being solely about the structure of government.” Chemerinsky, 65 U. COLO. L. REV. at 851. “[T]he Guarantee Clause should be regarded as assuring basic political rights, and therefore it is very much the judicial role to interpret and apply this constitutional provision.” *Id.* at 852. To categorize Guarantee Clause issues as political and nonjusticiable, leads to the “only instance in which nonjusticiability has the effect of rendering a constitutional provision a nullity.” *Id.* at 851. Professor Chemerinsky clarifies which cases should be considered political questions, and which should not. “Matters should be deemed to be a political question only if there is reason to believe

potential for embarrassment of multifarious pronouncements by various departments on one question. *Id.* at 217.

⁵ See generally, Ewrin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849 (1994); Debra F. Salz, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100 (1993); see also Jonathon K. Waldrop, JOURNAL OF LAW & POLITICS Spring, 1999 NOTE: *Rousing the Sleeping Giant? Federalism and The Guarantee Clause*, 15 J.L. & Pol. 267.

that the judicial is ill-suited to enforce a particular constitutional provision . . .” 65 U. COLO. L. REV. at 853. This case falls squarely within the court’s power to “defin[e] and safeguard[] fundamental rights - “rights that are truly at the heart of the republican government.” *Id.* at 869.

In *Vansickle v. Shanahan*, 511 P.2d 223 (Kan. 1973), the Supreme Court of Kansas discussed the history and purpose of the Guarantee Clause, concluding that “modern analysis of the guaranty clause leads to the conclusion that neither *Luther* nor *Pacific* are authority for the proposition that all questions arising under the guaranty clause are nonjusticiable” *Id.* at 235. “As Chief Justice John Marshall said in *Wayman v. Southard*, 23 U.S. 1, 46 . . . The difference between the departments undoubtedly is, that the legislature makes, the executive executes and the judiciary construes the law.” *Id.* at 235. Here, even assuming the court had the authority to exercise jurisdiction over the *Goodridge* case (which it did not), it exceeded the separation of powers in making new law - it expressly redefined and “reformulated” marriage to be the “voluntary union of two persons as spouses.” The SJC’s actions violated the Guarantee Clause when it exceeded its authority under the state’s division of powers. “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.” *Id.* at 239.

The essence of a republican guarantee is the right of a State's citizens to "structure their government as they see fit." *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995); *see also New York*, 505 U.S. at 181. If the rights of the people "are invaded by either [federal or state government branches], they can make use of the other as the instrument of redress." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (quoting THE FEDERALIST No. 28, pp. 180-181 (C. Rossiter ed. 1961)) (emphasis added).

"In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments....Hence a double security arises **to the rights of the people**. The different governments will control each other, at the same time that each will be controlled by itself."

Id. (quoting James Madison, THE FEDERALIST No. 51, p.323) (emphasis added).

The SJC altered the allocation of power expressly provided for in the Massachusetts constitution between the Judiciary and Legislature. *See, e.g., Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999) (noting that the federal courts are supposed to protect the structural preferences of a State's citizens, serving as a sort of "structural referee"), *aff'd sub nom United States v. Morrison*, 529 U.S. 598 (2000).

B. The Division of Powers in the Massachusetts Constitution.

The Massachusetts Constitution establishes three co-equal and independent

branches of government. The legislative power is reposed in the General Court, MASS. CONST. Part 2, ch. I, § I, arts. I, IV; the supreme executive power is reposed in the Governor, MASS. CONST. Part 2, ch. II, § 1; and the judicial power is reposed in the judiciary, MASS. CONST. Part. 2, ch. III. Under the Massachusetts Constitution, no branch shall exercise the powers of either of the other two branches. MASS. CONST. Part 1, art. XXX. This separation is essential for preserving the rule of law and preventing tyranny. *See* THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

The state constitution provides that the “judicial shall never exercise the legislative and executive powers.” MASS. CONST. Part 1, art. XXX. Each branch performs its established functions within limited jurisdiction. Part I, Art. XVIII of the constitution provides that “The people . . . have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.” The SJC acknowledged this limitation applies to the courts. “[B]oundaries set by the Constitution on our duty to furnish opinions are jurisdictional in nature and ‘must be strictly observed in order to preserve the fundamental principle of the separation of the

judicial from the executive and the legislative branches of government.” See *Opinion of the Justices to the Senate*, 383 Mass. 895, 916 (1981)(quoting *Answer of the Justices to the Council*, 362 Mass. 914, 917 (1973)).

The SJC made clear that no branch of government (and most especially the Legislature) may abandon or transfer any of the powers entrusted to it by the Constitution to any other person or group of persons.

Article 30 of the Declaration of Rights provides for the permanent separation of the executive, legislative, and judicial powers in the government of the Commonwealth, and the Constitution, by the various provisions of c. 1, § 1, particularly those contained in art. 4, designates the General Court as the repository of the legislative power. It is fundamental that no one of the three great departments of government can abandon any of the powers entrusted to it by the Constitution or transfer those powers to any other person or group of persons. If this could be done the plan of government laid down by the Constitution could be destroyed.”

Opinion of the Justices to the House of Representatives, 328 Mass. 674, 675 (Mass. 1952)(emphasis added). See also *Town of Brookline v. The Governor*, 407 Mass. 377, 384 n.10 (1990)(stating, “We would be reluctant to tolerate a situation in which allegedly unconstitutional conduct would be free from judicial scrutiny even on the request of an entity most directly affected by the alleged unlawful conduct.”).

The SJC usurped the legislature when it redefined marriage and when it heard this cause. Without even delving into the separation of powers concerning what “causes” of marriage the SJC may hear, this Court can enjoin enforcement of the

decision because the *Goodridge* decision exceeded its powers in redefining marriage, thereby violating the Guarantee Clause.

1. The *Goodridge* court performed a purely legislative function when it redefined marriage to include same-sex marriage.

Assuming, *arguendo*, that the SJC had subject matter jurisdiction to even consider this unique question, it did not have the power to redefine the marriage. The SJC acknowledged that the “everyday meaning of ‘marriage’ is ‘the legal union of a man and woman as husband and wife,’ . . . and the plaintiffs do not argue that the term ‘marriage’ has ever had a different meaning under the Massachusetts law”, and this “longstanding understanding” dates back to common law.” *Goodridge*, 440 Mass. at 319, 320. The Legislature did not “intend that same-sex couples be licensed to marry.” *Id.* at 319. Although the Massachusetts Constitution limits the SJC’s authority over marriage (with its undisputed meaning of one man and one woman), *Goodridge* nevertheless redefined marriage. *Id.* at 343. The SJC then legislated a remedy fashioned after the Court of Appeal for Ontario, Canada, when it “refined the common-law meaning of marriage” to permit same-sex marriage. *Id.* The SJC held: “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” *Id.* What the SJC should have done is turn to U.S. precedent for guidance, including the decision of the Supreme Court in Vermont. The Supreme Court of

Vermont, in *Baker v. State*, faced the exact same question of how to fashion a remedy after it declared that refusal to grant marital benefits to same-sex couples was a violation of plaintiffs' state constitutional rights. There, the court stated:

We hold only that plaintiffs are entitled ... to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions... [I]t cannot be doubted that judicial authority is not ultimate authority. It is certainly not the only repository of wisdom. When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation.

744 A.2d 864, 886-88 (Vt. 1999).

Similarly, in *Colegrove v. Green*, 328 U.S. 549 (1949), the Court considered Illinois districts, stating “[o]f course no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing system invalid.” *Id.* at 553. Although not decided under the Guarantee Clause, the following is instructive.

When a statute is challenged under the constitutional doctrine of separation of powers, the court must search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented. . . . It seems to us that to have a usurpation of powers there must be a significant interference by one department with the operations of another department.”

Parcell v. State, 620 P.2d 834, 836 (Kan. 1980).

The SJC under the Massachusetts Constitution has no more authority to redefine marriage as “two persons” than Utah courts have authority to redefine marriage under that state’s constitution to “three or more persons.” When the people expressly limit authority under their state constitution on one branch of government, that branch must operate within that limitation.

2. The State Constitution grants the Legislature the exclusive authority over transferring subject matter jurisdiction in all cases involving marriage.

A separate basis to enjoin the decision is that the court lacked subject matter jurisdiction to even hear the case. A unique aspect of Massachusetts’ Constitution is that it grants to the Legislature exclusive authority over marriage.

All causes of marriage, divorce, and alimony, and all appeals from the Judges of probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision.

Mass. Const. Part 2, ch. III, art. V. Unless the Legislature makes an express transfer of jurisdiction concerning marriage, jurisdiction to determine all causes of marriage, divorce, and alimony resides with the Governor and Council under art. V. **Article V, which creates the judiciary, places only one limitation on its power – the limitation over marriage.**

The Legislature has transferred only four elements of jurisdiction under Article

V to the courts (divorce, alimony, annulment and affirmation), which do not encompass the right to “reformulate” marriage itself. The exclusive original jurisdiction over marriage was placed in the Governor and Council, until the Legislature made other provision. MASS. CONST. Part 2, ch. III, art. V. *See also* MASS. CONST. Part 2, ch. II, § 1, art. IV, and ch. II, § III, art. 1 (creating Council and establishing its powers). The Legislature, however, has “made other provision” only in cases involving divorce, alimony, affirmation, and annulment, and nothing else.

In 1785 the Legislature passed “An Act for regulating Marriage and Divorce,” which extended jurisdiction to the courts on matters of divorce and alimony. The second to last provision of that act provides, “Be it therefore enacted by the authority aforesaid, that all questions of divorce and alimony shall be heard and tried by the Supreme Judicial Court holden for the county where the parties live, and that the decree of the same Court shall be final.” 1785 Mass. Acts 69. In 1836 the Legislature extended the court’s jurisdiction to questions of affirmation or annulment of marriage. The Revised Statutes of 1836 contain, in the statute pertaining to divorce, a provision providing that if the validity of a marriage was doubted, a libel for annulment was to be filed as for divorce. Mass. Rev. Stat. 76, §§ 3-4 (1836).

Since 1836 there has been no expansion of the subject matter jurisdiction of the court. *Specifically, there has been no statute or provision by the Legislature granting*

jurisdiction to the court to hear a case which concerns the definition of marriage in the Commonwealth.

The SJC has recognized this constitutional restriction on its jurisdiction, except in *Goodridge*. See *Loring v. Young*, 239 Mass. 349, 366 (1921) (Massachusetts courts do not have general jurisdiction to decide cases relating to marriage without specific grant of jurisdiction from the Legislature); *Kelley v. Kelley*, 161 Mass. 111, 111 (1894) (“In this Commonwealth, no power exists in any court to pass an order for the payment of alimony pendente lite, or of permanent alimony, in a matrimonial cause of any description, except under provisions of statute conferring such power.”); *White v. White*, 105 Mass. 325, 327 (1870) (asserting jurisdiction over a case involving divorce and affirmation of marriage only after recognizing the constitutional provision and the necessary statutory transfer of jurisdiction by the Legislature); see also *Bernatavicius v. Bernatavicius*, 259 Mass. 486, 488 (1927); *Adams v. Holt*, 214 Mass. 77, 78 (1913); *Robbins v. Robbins*, 140 Mass. 528, 529-30 (1886). During the last rearrangement of the Massachusetts Constitution in 1916, the delegates were explicit in continuing to include Part 2, ch. III, art. V, for “***the words constituted an operative article, still in force, which should remain in the Constitution.***” *Loring*, 239 Mass. at 366 (citing Volume 4 of Debates, pp. 74 to 80)(emphasis added).

Thus, the Massachusetts Constitution and the decisions of the SJC are clear: a

specific grant of jurisdiction from the Legislature is necessary in order for any court to hear “causes” involving marriage, divorce, or alimony. The SJC has interpreted the word “causes” in the marriage provision as being equivalent to “controversies” or “cases.” *Sparhawk v. Sparhawk*, 116 Mass 315, 317 (1874). Any court must have a specific grant of jurisdiction from the Legislature before it can hear any cases or controversies concerning marriage. *Goodridge* is clearly a controversy concerning marriage. It does not, however, fall under any of the categories of controversies over which the courts have jurisdiction. *Goodridge* is neither a controversy concerning divorce and alimony, nor a controversy concerning affirmation or annulment of marriage. *Goodridge* presented a question entirely separate from those over which the court has jurisdiction. *Goodridge* called for a redefinition of marriage. *See* 440 Mass. at 337 (“***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.***”)(emphasis added). Such a case does not fall within the current jurisdiction of the SJC. In the absence of legislation conferring jurisdiction upon the courts to hear such controversies, the case, or any future similar case challenging the definition of marriage, must be brought before the Governor and Council acting as a court under a constitutional grant of authority. Under Part 2, ch. III, art. V, the Governor and Council have exclusive authority over matters pertaining to marriage,

“until the Legislature shall, by law, make other provisions.”

The SJC exceeded the powers granted to it under the Massachusetts Constitution - whether by exercising jurisdiction over the case, or by redefining marriage. The SJC usurped the power of the people through the representatives as established in their constitution and thereby violated the Guarantee Clause. Plaintiffs are likely to succeed on the merits.

III. THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF GRANTING THE INJUNCTION AND IT IS IN THE PUBLIC INTEREST.

Defendants will not be harmed by the granting of this injunction. Defendants have no right to enforce laws that were created in excess of their jurisdiction. The *Goodridge* decision was issued in direct violation of the separation of powers established by the people of Massachusetts in their Constitution. If relief is not granted, marriage in the state and throughout the nation will be in a state of flux and uncertainty. The process is underway to amend the Massachusetts Constitution to preserve marriage as one man and one woman. If passed, then there will be great uncertainty as to the validity of the same-sex marriages that were issued due to the SJC’s unconstitutional actions in redefining “marriage.” This nationwide marital mayhem would be the result of the SJC violating the republican form of government, and radically changing the state’s marriage laws. This Court should find that the balance of harm weighs in favor of granting Plaintiffs’ request for an injunction

pending appeal. Marriage as one man and one woman is universally understood. Granting an injunction to allow for a reasoned deliberation of this case will cause no harm to Defendants, in that from the founding of the Commonwealth until now, male-female marriage has been the established norm. As such, it is certainly within the public interest to protect such a longstanding relationship.

As already noted, the irreparable harm is so great if this Court does not enjoin the *Goodridge* decision from going into effect on May 17, that the overwhelming harm should tip the scales on any of the other injunctive prongs where there might be debate or doubt. *See Kawalski*, 854 F.2d at 170 (applying a “sliding scale” analysis in granting injunctive relief so that the higher the harm, the less the party has to show a likelihood of prevailing on the merits). Once May 17 happens, it will be virtually impossible to put the toothpaste back in the tube. The irreparable harm to Plaintiffs and the lack of harm to Defendants tip the scales in favor of granting an injunction. Good cause exists to expedite this appeal and to grant Appellants an immediate hearing.

CONCLUSION

Appellants request an injunction pending appeal enjoining the enforcement of the *Goodridge* decision, and enjoining appellees from issuing or recording marriage licenses issued to same-sex couples, and from violating Plaintiffs’ constitutional rights pursuant to Article IV, §4. Appellants also request an expedited hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile and U.S. Mail delivery this _____ day of May, 2004, to the following:

Mr. Charles Lyons
Assistant Corporate Counsel
City of Boston Law Department
One City Hall Plaza
Room 615
Boston MA 02201
(617) 635-2012 - Fax
Attorney for Judy McCarthy

Mr. Peter Sacks
Office of the Attorney General
1 Ashburton Place
Room 2019
Boston MA 02108
(617) 727-5785 - Fax
Attorney for Supreme Judicial Court for
the State of Massachusetts, Chief Justice
Margaret H. Marshall, Justice Robert J.
Cordy, Justice Judith A. Cowin, Justice
John M. Greaney, Justice Roderick L.
Ireland, Justice Martha B. Sosman,
Justice Francis X. Spina, Massachusetts
Department of Public Health, and
Christine Ferguson

Ms. Judy McCarthy
City Registrar
City of Boston
One City Hall Plaza, Rm 213
Boston MA 02201
(617) 635-3775 - Fax
To be served for City and Town Clerks
1-350

Mary L. Bonauto
Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108
(617) 426-3594
Attorney for Hillary 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

Mathew D. Staver
Attorney for Appellants