

United States Court of Appeals For the First Circuit

No. 04-1621

ROBERT P. LARGESE, ET

AL., Plaintiffs,

Appellants,

v.

SUPREME JUDICIAL COURT FOR THE STATE OF MASSACHUSETTS, ET AL.,

Defendants, Appellees.

Before

Boudin, Chief Judge, Lipez and
Howard, Circuit Judges.

ORDER OF COURT

Entered: May 14, 2004

Before us is a motion by appellants for interim relief pending appeal and for expedited consideration of the appeal. The relief requested is an injunction enjoining the implementation of the decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), and the issuance or recording of marriage licenses to same-sex couples. We deny the request for an injunction pending appeal but will hear the case on an expedited basis as set forth below.

On May 13, 2004, the district court denied preliminary injunctive relief and an appeal may be taken from such an order under 28 U.S.C. § 1292 (2000). A federal court may preserve the status quo pending appeal or grant other forms of interim relief, but this ordinarily requires a showing of likelihood of success as well as a balance of equities and public interest considerations tipping in favor of such relief. *Coalition for Basic Human Needs v. King*, 654 F.2d 838, 842-43 (1st Cir. 1981) (per curiam). In this instance, the showing so far made as to likelihood of success is not sufficient to justify interim relief.

The central claim made by appellants is that the *Goodridge* decision erroneously interprets the Massachusetts Constitution and

state law by appropriating to the court authority reserved to the legislature and, in consequence, violates article IV, § 4, of the United States Constitution guaranteeing to the states a republican form of government. For much of its history the Supreme Court has treated almost all claims under article IV, § 4, as non-justiciable political questions, see *New York v. United States*, 505 U.S. 144, 183-85 (1992) (collecting cases); *Baker v. Carr*, 369 U.S. 186, 223-24 (1962), and while in recent years a few decisions suggest that the Court might alter its approach, e.g.. *New York*, 505 U.S. at 185, one might expect that to occur only in an extreme case.¹

Further, appellants would also have to show not only that the state's highest court had in this instance misconstrued state law but, in addition, that a federal court should disregard the long-standing practice of federal courts to treat the decisions of the highest state courts as controlling interpretations of state law. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *Forrysyth v. City of Hammond*, 166 U.S. 506, 518-20 (1897) ("settled decisions" of the state's highest courts "regarded as authoritative by the courts of the United States") (citations omitted).

Finally, assuming that this barrier too were overcome, *Goodridge* does not establish permanent martial law or declare the Commonwealth a monarchy; and it cannot plausibly be argued that every disagreement about allocation of power within a state government—even a very important disagreement — raises a question under article IV, § 4 . That this disagreement is important is obvious; but, at least so far, it is not obvious why its resolution one way rather than another threatens a republican form of government.

Other legal objections have been made by opponents of appellants' request for an injunction, but what has been said above is sufficient for present purposes. The request for injunctive relief pending appeal is denied but the appeal will be expedited. The appellants' opening brief must be filed and received by May 21, 2004; the appellees' brief must be filed and received by May 28, 2004; and the case will be assigned for argument during the court's sitting week which begins on June 7, 2004.

It is so ordered.

¹ A closely related question is who would have standing to bring such a suit and whether the appellants in this case satisfy such a requirement.

By the Court:

Richard Gushing Donovan, Clerk

LYNNE ALIX MORRISON

By: _____
Appeals Attorney.

[cc: Chester Darling, Esq., Erik W. Stanley, Esq., Joel L. Oster,
Esq., Rena M. Lindevaldsen, Esq., Mathew D. Staver, Esq., Robert
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