

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal No.04-1621

ROBERT P. LARGESS, *et al.*

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

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JURISDICTIONAL STATEMENT

The District Court's jurisdiction was pursuant to 28 U.S.C. §1331 and 28 U.S.C. §§ 2201-02 based on a federal question under Article 4, §4 of the United States Constitution and under 42 U.S.C. §1983. This case also involves a request for a Declaratory Judgment under Article 4, §4, and under 42 U.S.C. §1983.

This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

STATEMENT OF THE ISSUES FOR REVIEW

Whether the District Court erred in refusing to grant Injunctive and Declaratory relief against the Massachusetts Supreme Judicial Court (“SJC”) because the court exceeded its power when it improperly amended the Massachusetts Constitution by redefining marriage from its undisputed meaning as “a union between one man and one woman” to “a union of two persons” in *Goodridge v. Department of Public Health*, and by hearing a case involving the *definition* of marriage, thereby upsetting the separation of powers contained within the Massachusetts Constitution (which *uniquely* gives jurisdiction over all causes of marriage to the executive branch¹ and gives power over the definition of marriage only to the people through an amendment to the Massachusetts Constitution), and, consequently, violating Appellants’ rights under Article 4, §4 of the United States Constitution.

¹ In the chapter of the Massachusetts Constitution establishing the judicial branch, only one limitation is placed on the power of the judiciary - the power over marriage. The Constitution states, “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.

STATEMENT OF THE CASE

Robert Largess filed a Complaint and Motion on May 10, 2004, seeking a Temporary Restraining Order, Preliminary and Permanent Injunctive Relief and a Declaratory Judgment. (A.2-3). An Amended Complaint and a Renewed Motion was filed on May 11, 2004, adding eleven Massachusetts Legislators as Plaintiffs. (A.5-6).² The Defendant Massachusetts Supreme Judicial Court filed a Motion to Dismiss and an Opposition. (A.9, Dk. #47).³ Defendant Judy McCarthy also filed an Opposition to Plaintiffs' Motion.(Dk. #27).

Several same-sex couples filed a Motion to Intervene on May 11, 2004 (A. 10), and Plaintiffs filed an Opposition. (Dk. #48).

A hearing was conducted on May 12, 2004, where the District Court denied the Motion to Dismiss, and allowed limited intervention for the proposed intervenors.⁴ (A.11, p.8; A.14). On May 13, 2004, the District Court entered an Order denying Plaintiffs' Motion. (A. 12, 13).

² Plaintiffs will be referred to throughout this Brief as Plaintiffs or Appellants.

³ Although represented by the same Attorney General, Defendants Department of Public Health and its Commissioner (of the Executive Branch) took no position concerning Plaintiffs' Motion.

⁴ The District Court later memorialized the oral orders entered at the hearing in a written order dated May 17, 2004.

Plaintiffs filed a Notice of Appeal on May 13, 2004, with a Motion seeking a stay of *Goodridge* pending the outcome of the appeal. (Dk. #53). On May 14, this Court denied the Motion for Stay, but granted an expedited appeal. (A. 15).

On May 14, Plaintiffs petitioned the United States Supreme Court to enter an emergency stay of *Goodridge*. By order that same day, the United States Supreme Court declined the requested emergency stay. (A. 16).

STATEMENT OF THE FACTS

On November 18, 2003, the SJC issued *Goodridge v. Department of Health*, 440 Mass. 309 (2003). In *Goodridge*, the SJC addressed the question “whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.” *Id.* at 312. Declaring that the SJC “interpret[s] statutes to carry out the Legislature’s intent ... according to ‘the ordinary and approved usages of the language’” the court stated 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 it has ever had a different meaning under Massachusetts law.” *Id.* at 319 (citations omitted). The licensing statute could not be construed to permit same-sex marriage. *Id.* at 319-20. The SJC “recognized the long-standing statutory understanding, derived from the common law, that ‘marriage’ means the lawful union of a woman and a man.” *Id.* at 320. The SJC then “construe[d] civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.” *Id.* at 343. The SJC characterized its decision as a “reformulation” of marriage. *Id.* at 344. The court did not invalidate the marriage laws, but instead, stated that its decision would become effective 180 days after the date of the court’s order “to permit the Legislature to take such action as it may deem appropriate in light of

this opinion.” *Id.*

On December 11, 2003, the Senate presented to the SJC Senate Bill 2175, entitled “An Act relative to civil unions.” (A. 5, at 6). On February 3, 2004, the SJC rejected the Senate’s proposed statutory changes. (A. 5, at 6); *see also Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004). On January 4, 2004, the Legislature met in constitutional session to change the Commonwealth’s Constitution. (A. 5, at 6). On March 29, 2004, a “Proposal for a Legislative Amendment to the Constitution relative to the affirmation of marriage” was adopted. (A.5, at 6). The Article of Amendment states, in relevant part, “It being the public policy of this commonwealth to protect the unique relationship of marriage, only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth of Massachusetts.” (A.5, at 6). The citizens of Massachusetts, including Plaintiffs, will have an opportunity to vote for the amendment in 2006 if the Legislature passes the amendment again during the 2005 session. (A.5, at 6). On May 17, 2004, the *Goodridge* decision became effective. (A.5, at 6).

Defendants McCarthy and Town and City Clerks 1-350 will be required to issue marriage licenses to same-sex couples on and after May 17, 2004. (A.5, at 6). Defendant Ferguson will be required to record these marriage licenses. (A.5, at 6).

Plaintiffs are a Massachusetts citizen and voter and eleven Massachusetts

Legislators. Plaintiffs have a right to have their State government abide by the State Constitution's mandated separation of powers. (A.5, at 8).

SUMMARY OF THE ARGUMENT

The District Court erred in denying Plaintiffs' Motion for Injunctive and Declaratory Relief.⁵ Irreparable harm will ensue, both inside and outside the State of Massachusetts, unless this Court issues an injunction blocking the implementation of the SJC ruling. The SJC exceeded its delegated authority when it amended the constitutional definition of "marriage" and it was without power to hear the *Goodridge* case when the definition of "marriage" was at issue. Because the SJC violated the separation of powers uniquely contained in the Massachusetts Constitution, the Plaintiffs' rights under the Guarantee Clause of the United States Constitution, Article 4, §4, have been violated. The balance of harms weighs in favor of the Plaintiffs and issuing an injunction is in the public interest.

⁵ "We review the grant or denial of a preliminary injunction for abuse of discretion; legal issues are reviewed de novo, and findings of fact are reviewed for clear error." *S.E.C. v. Fife*, 311 F.3d 1, 7 (1st Cir. 2002)(citing *Lanier Prof'l Servs. v. Ricci*, 192 F.3d 1, 3 (1st Cir.1999)). If abstention is an issue in this appeal, this Court's review of the abstention issue is *de novo*. See *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 636-37 (1st Cir. 1996).

ARGUMENT

I.

THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF BECAUSE THE SJC VIOLATED THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION.

The SJC violated the Guarantee Clause of the United States Constitution when it exceeded its delegated authority and upset the separation of powers in the Massachusetts Constitution in (i) amending the constitutional definition of marriage, and, (ii) hearing a case where the *definition* of marriage was at issue.

A. The Constitution Guarantees A Republican Form Of Government.

1. The Guarantee Clause is Justiciable.

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 there is a line of cases premised on the Guarantee Clause which have viewed matters arising under the Clause as nonjusticiable political questions, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O’Connor noted 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”) (emphasis added). O’Connor also noted that, “Contemporary commentators 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 Constitutional Desuetude*, 46 MINN. L. REV. 513, 560-65 (1962)). The Court, since *New York*, 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. *Luther* 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.⁶ In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court pointed to *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.⁷

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.

⁶ (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 potential for embarrassment of multifarious pronouncements by various departments on one question. *Id.* at 217.

⁷ 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.

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 that the judicial is ill-suited to enforce a particular constitutional provision” *Id.* 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 amending the constitution - 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)); *see also James Madison*, THE FEDERALIST No. 51, p.323; *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)).

2. The Guarantee Clause protects against more

***than just the establishment of a monarchy or
a permanent dictatorship.***

A primary purpose of the Guarantee Clause is to ensure that *each* branch of state government respects the separation of powers as provided *by the people* in their state constitution. In recent years, the highest courts of several states have explained that respect for the separation of powers lies at the core of our republican form of government. *See, e.g., State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 233 (Missouri 1997) (invalidating committee actions, “This is the sort of impermissible interference a co-equal branch’s performance of its constitutional duties against which the separation of powers doctrine is designed to guard and precisely the complicated and indirect legislative ‘encroachment’ against which Madison warned. ‘In republican government, the legislative authority necessarily predominates.’”); *State v. King*, 973 S.W.2d 586, 588 (Tenn. 1998) (“The separation of powers doctrine arises from the precept that ‘it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct.’”); *Prater v. Kentucky*, 82 S.W.3d 898, 901, n.7 (Ky 2002) (invalidating legislation that conferred executive powers upon the judiciary; describing sections 27 and 28 of state constitution that “were designed to separate the powers of government and prevent concentrations of power

. . . as embodying the ‘cardinal principle of our republican form of government.’” “The observance of this division is essential to the maintenance of a republican form of government.”); *The Board of County Comm’rs v. County Road Users Assoc.*, 11 P.3d 432, 439 (Colo. 2000) (en banc) (“Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government.”); *see also Vigo County Republican Central Committee v. Vigo County Comm’rs*, 834 F. Supp. 1080, 1082 (S.D. Ind. 1993) (explaining that “the principles of federalism and the separation of powers” are the tenets upon “which our republican form of government is founded”).

The state supreme courts have also expressly recognized the Guarantee Clause serves as a check on the power of the judiciary. *See, e.g., Ex Parte T.B.*, 698 So.2d 127, 130 (Ala. 1997) (“[T]he judiciary cannot and should not, in a republican form of government, usurp the legislative function.”); *Washington State Bar Assoc. v. Washington*, 890 P.2d 1047 (Wash. 1995) (en banc) (“it is also the law that ‘American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power’”); *Vansickle*, 511 P.2d at 239 (“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.”).

The case of *Washington State Bar Association v. Washington*, 890 P.2d 1047 (Wash. 1995) (en banc) highlights the purpose and importance of the Guarantee Clause. This case invalidated a law that encroached upon the court's exclusive authority to regulate the practice of law.

The importance of the case before us is that it deals directly with one of the cardinal and fundamental principles of the American constitutional system, both state and federal: the separation of powers doctrine. "It has been declared that the division of governmental powers into the executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people, and preventing the exercise of autocratic power, and that it is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government."

890 P.2d at 1050. Protecting the delicate balance of powers is at the core of the Guarantee Clause and each branch is bound to prevent such encroachments.

The vital right under the Guarantee Clause means nothing if courts will not act until the state imposes permanent martial law or declares Massachusetts a monarchy. Justice Harlan, in his dissent in *Plessy v. Ferguson*, viewed the Guarantee Clause as a protector of individual rights that can and should be used by the courts to invalidate actions that fall far short of permanent martial law or declaration of a monarchy. He characterized Louisiana's laws that interfered with basic rights based on race, as

inconsistent with the guaranty given by the constitution to each state of republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn

duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.

163 U.S. 537, 563-64 (1896). James Madison similarly indicated that the federal courts can and should invalidate state actions that violate the separation of powers as established by the people in their state constitutions: “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.” *Kelley*, 69 F.3d at 1511 (quoting James Madison, THE FEDERALIST No. 51, p.323) (emphasis added).

It elevates form over substance to confine the Guarantee Clause to those instances of the worst sorts of abuse of the republican form of government. Separation of powers is essential to the prevention of tyranny and is at the core of the republican form of government. If this vital principle is not protected by the Guarantee Clause, then the people are just as prone to subjection under a tyrannical system of government as they would be if Massachusetts declared permanent martial law.

B. The Division of Powers in the Massachusetts Constitution.

It is important to understand the balance of powers as expressly defined in the Massachusetts Constitution in order to understand how the SJC exceeded its powers. The Massachusetts Constitution, like most other states, 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. No branch may exercise the powers of either of the other two branches. MASS. CONST. Part 1, art. XXX. The “judicial shall never exercise the legislative and executive powers.” 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 SJC has repeatedly acknowledged that, “[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 exceeded its delegated power when it redefined marriage and when it heard the *Goodridge* case where the issue was the constitutional definition of

marriage. This Court can either enjoin the *Goodridge* decision as a whole under the theory that it was not a “cause” of marriage the SJC may hear, or can enjoin enforcement of the remedy entered in *Goodridge* because the remedy - redefining marriage - exceeded the SJC’s powers, thereby violating the Guarantee Clause.

C. The *Goodridge* Court Exceeded Its Powers In Hearing The Case Because The State Constitution Specifically Limits The Power Of Massachusetts Courts To Hear Cases Involving Marriage.

The SJC had no power to hear the *Goodridge* case. The Massachusetts’ Constitution uniquely grants to the Executive exclusive authority over marriage, with the proviso that the Legislature may make other provision.

All causes of marriage,⁸ 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. This section of the Constitution is a direct limitation on the power of the judiciary. It appears under Chapter III of Part 2 of the Massachusetts Constitution which establishes the judicial branch of the government. *Article V, quoted above, is the only express limitation on the power of the judiciary contained within the Constitution.* Unless the Legislature makes an express transfer

⁸ The SJC has interpreted the word “causes” in this provision as being equivalent to “controversies” or “cases.” *Sparhawk v. Sparhawk*, 116 Mass 315, 317 (1874).

of jurisdiction concerning marriage, jurisdiction to hear all causes of marriage, divorce, and alimony resides with the Governor and Council under Article V.

The Legislature has transferred only four elements of jurisdiction under Article V to the courts (divorce, alimony, annulment and affirmation), none of which encompass the right to “reformulate” marriage itself or amend the definition contained in the state constitution. The Legislature has not transferred jurisdiction to the Massachusetts courts to hear causes of marriage related to the definition or reformulation of marriage.⁹ In 1785 the Legislature passed “An Act for regulating Marriage and Divorce,” which extended jurisdiction to the courts on matters of divorce and alimony. *See* 1785 Mass. Acts 69. In 1836 the Legislature extended the court’s jurisdiction to questions of affirmation or annulment of marriage. *See* 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.*

⁹ Nor could the Legislature make such a transfer. The definition of the word marriage, as described below, was enshrined in the Massachusetts Constitution when it was adopted. That definition - marriage is the “union of one man and one woman” - can only be changed by an amendment to the Constitution. While the Legislature is empowered to propose constitutional amendments, it is the people who have the ultimate authority to amend the constitution. The Legislature cannot delegate power to the Courts with which it has not been entrusted.

When the Legislature delegated jurisdiction over divorce, alimony, annulment, and affirmation to the SJC, it did not grant any power, express or implied, to alter the definition of marriage. In *Mangue v. Mangue*, 1 Mass. 240 (1804), a man and a woman went before a justice of the peace, with witnesses present, and voluntarily took each other as husband and wife, and the justice of the peace entered a record of the proceedings. When the parties came before the SJC seeking a divorce, the SJC refused to hear the case because the parties did not marry in strict conformance with Massachusetts law, and it did not have the power to redefine marriage or to change the standards by which people can marry.

I do not undertake to say that this was not a marriage as to *civil* purposes, nor how it might operate as to civil contracts; but as to the case before the Court [for divorce], there must have been such a marriage as is pointed out by the acts of the legislature, for *such only* are we authorized to dissolve.

Id. at 242.

As of 1804, the Legislature had not given the SJC inherent power to define marriage when it gave it the power to grant divorces. Nor did the Legislature grant the SJC any power to define marriage when it delegated its authority to grant annulments and affirmations in 1836. Annulment of marriage contracts is the practice of determining whether one party was lured into the marriage through fraud. *See Batty v. Greene*, 206 Mass. 561 (1910)(the intentional concealment that previous marriage

was still in force was a fraud, providing the basis for an annulment); *Sasserno v. Sasserno*, 240 Mass. 583 (1922)(a wife’s utter denial of sexual intercourse does not go to the validity of the marriage and affords no ground for annulment).

[A] marriage could be annulled if a court found that there had been “fraud in the essentials,” a doctrine that has generally been applied to matters involving sex or religion. Concealed impotence, for example, was a ground for annulment, as were misrepresentations concerning pregnancy and representations by a spouse that he or she would go through with a religious ceremony following a civil ceremony or that he or she would practice a certain religion.... [A]nnulments are much less common than they were in earlier times. Still, the doctrine of fraud in the essentials continues to be useful in shedding light on the meaning of the phrase, “the essentials of marriage.”

Twila Perry, *The “Essentials of Marriage”*: *Reconsidering the Duty of Support and Services*, 15 YALE J. L.& FEMINISM 1, 8 (2003). Annulment does not involve changing the definition of marriage, but rather the determination that fraud was used by one of the parties.

The SJC has historically recognized the 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 (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, because, “***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).

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 any cases or controversies concerning marriage. *Goodridge* is clearly a controversy concerning marriage. It does not, however, fall under any of the four 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. Therefore, the SJC exceeded its powers when it heard the *Goodridge* case.

D. The *Goodridge* Court Had No Power To Redefine Marriage To Include Same-Sex Marriage.

Assuming, *arguendo*, that the SJC had jurisdiction (which it did not), it did not have the power to *redefine* marriage as a remedy. 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 (emphasis added). *It was and is undisputed by all of the parties to Goodridge that marriage is between one man and one woman.* 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 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.*(emphasis added). Instead of redefining marriage, the Court should have looked to other precedent for guidance. In *Baker v. State*, the Vermont Supreme Court faced a similar question of how to fashion a remedy after it declared that refusal to grant marital benefits to same-sex couples violated the state constitution. 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).¹⁰ Similarly, in *Colegrove v. Green*, 328 U.S. 549

¹⁰ The Vermont Constitution is different than the Massachusetts Constitution in that the latter does not allow the Legislature to redefine marriage. Only the people, through a constitutional amendment, may redefine marriage in Massachusetts. The question, as framed by *Goodridge*, is “whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.” 440 Mass. at 312. Answering that question in the negative does not permit the SJC to redefine marriage to mean the “union of two persons.” Even if the SJC had

(1949), the Court in a redistricting case, stated “[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.

The SJC has no more authority to redefine marriage as “two persons” than the courts in Utah, Arizona, New Mexico and Oklahoma have authority to redefine marriage under their state constitutions to mean “three or more persons.”¹¹ When the people, through their state constitution, expressly place a limit of authority on one branch of government, that branch must operate within that limitation.¹²

jurisdiction to hear this case or controversy (which it did not), the SJC would have been bound by the constitution to turn the matter over to the Legislature to fashion a remedy. The Legislature could have chosen to (1) propose a new constitutional definition of marriage to include the “union of two persons”, or (2) award marital benefits to same-sex couples. However, no branch of government is empowered by the constitution to redefine marriage from its undisputed meaning contained in the constitution.

¹¹ *See* Arizona Enabling Act, 36 Stat. 569; New Mexico Enabling Act, 36 Stat. 558; Oklahoma Enabling Act, 34 Stat. 269; Utah Enabling Act, 28 Stat. 108. *See* ARIZ. CONST. art. XX, 2; IDAHO CONST. art. I, § 4; N.M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; UTAH CONST. art. III, § 1.

¹² The United States Supreme Court’s decision involving interracial marriage is inapposite. The Supreme Court does not operate under the same jurisdictional limitations as does the SJC in Massachusetts. If the Supreme Court states that a ban on interracial marriage is unconstitutional, then the SJC is bound to uphold that as a matter of the supremacy of federal law. However, the SJC cannot redefine marriage for the State of Massachusetts using the state Constitution because it lacks the power

After concluding, in the present case, that it had jurisdiction to hear the claim, the District Court rejected Plaintiffs' claim that the SJC exceeded its powers. On that point, the District Court incorrectly concluded:

There can be no question that, if the judicial branch has jurisdiction over all questions involving divorce, alimony, affirmation, and annulment, it has the authority to determine whether there has been a valid marriage. And, in order to determine whether there has been a valid marriage, the judicial branch must have the authority to interpret, and if necessary, *reinterpret*, the term marriage.

(District Court decision, at 9) (emphasis added). The District Court is incorrect. Even if the SJC had authority to hear limited causes of marriage, what the SJC did in *Goodridge* is *amend* the word "marriage," not interpret it. None of the parties dispute the meaning "marriage" to be the "union of one man and one woman." The SJC, however, amended the word to mean the "union of two persons."

The word "marriage" in the Massachusetts Constitution is contained in the only section that places a limitation on the courts' jurisdiction.¹³ The definition of that

to do so under that very Constitution. At any rate, marriage is the "union of one man and one woman," not the "union of one man and one woman of the same race." The interracial decisions were race discrimination decisions carried over into the institution of marriage. The fundamental core of marriage ("union of one man and one woman") remained intact and was not at issue.

¹³ Massachusetts is unique in its grant of jurisdiction over marriage cases completely to the Governor and the Council. The only other state in the Union that comes close is Hawaii which gives the Legislature "the power to reserve marriage to opposite-sex couples." HAW. CONST. Art. 1, §23.

word contained the everyday common meaning of that term, which the *Goodridge* court and the parties recognized, as a union of one man and one woman. This definition was enshrined in the Constitution at the time it was adopted. An amendment to the definition of marriage can only be accomplished by a vote of the citizens of the Commonwealth. *See, e.g., Anderson v. Secretary of Com.*, 255 Mass. 366, 368 (1926) (“The Constitution as amended is the direct and fundamental expression of the sovereign will of the citizens of the commonwealth. . . . It controls as it is written until changed by the authority by which it was established”). In *Loring v. Young*, the SJC explained that when the will of the people, as expressed in the Constitution, “has been ascertained, it must prevail.” 239 Mass. 349, 373 (1921).

A particularly instructive application of this principle is found in *Opinion of the Justices to the Senate*, 324 Mass. 746, 85 N.E.2d 761 (1949). In that case a proposed bill in the Senate sought to expand the definition of “public highways or bridges” as those words are contained in Article LXXVIII of the Amendments to the Constitution. *Id.* at 747. The proposed expanded definition that the Senate sought to implement would have demanded that the constitution’s terms “public highways and bridges” be understood to include “subways, tunnels, viaducts, elevated structures and rapid transit extensions.” *Id.* at 748. The SJC condemned this act of “legislative fiat,” *id.*, which sought to amend the people’s Constitution:

The function of a written constitution adopted by the people is to establish by their votes an objective standard of conduct by which all departments of the government, executive, legislative and judicial alike, shall be bound, until the constitution is changed by another vote of the people. In order that this function may be performed, and that the will of the people may prevail, ***it is necessary that the words inserted into the constitution by their votes be interpreted as they meant them to be interpreted at the time and in the circumstances of their adoption.*** Accordingly, this court said in *Attorney General v. Methuen*, 236 Mass. 564, at page 573, “An amendment to the Constitution is one of the most solemn and important of instruments. . . . ***Its words should be interpreted 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.”

Id. at 748-49 (emphasis added).

The Legislature’s redefinition would not give to those words “their natural and obvious sense according to common and approved usage,” *id.* at 750, and the “voters of the Commonwealth could not have had any such meaning in mind when they adopted” that provision of the constitution. *Id.* “The Legislature is bound by that article as adopted and cannot now by enacting a declaratory statute change the meaning of the article so as to permit such diversion.” *Id.* at 752.

“[The Constitution’s] words should be interpreted 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.” *Cohen v. Attorney Gen.*, 357 Mass. 564, 571, 259 N.E.2d 539 (1970) (citing *Attorney Gen. ex rel. Mann*

v. Methuen, 236 Mass. 564, 573, 129 N.E. 662 (1921); *see also Opinion of the Justices to the Senate*, 413 Mass. 1201, 1204, 595 N.E.2d 292 (1992) (same); *Opinion of the Justices*, 308 Mass. 619, 626, 33 N.E.2d 275 (1941) (same); *Loring*, 239 Mass. at 372 (same).

The SJC's precedent (prior to *Goodridge*) is clear that the word marriage, because it is in the Massachusetts Constitution, *must* be interpreted as it was understood at the time adopted into the constitution. Any amendment to that word *must* be made by the citizens – not the legislature, executive or judicial branches.

What the SJC did cannot be deemed a “reformulation.” Instead, it is a radical redefinition of the term and an amendment of the Constitution by judicial fiat. As an example, a reformulation of the three pronged Lemon test could occur in order to better achieve the goal of determining whether particular governmental action violates the Establishment Clause. Even though the test could look drastically different after the reformulation, the Establishment Clause itself, and the definition of the words in the clause, remain unaltered. This is also consistent with the contract principle of reformation. When a court reforms a written document, the ultimate goal is to change the document so as to reflect the true intentions of the parties. *See* BLACK'S LAW DICTIONARY 1281 (6th ed. 1990).

A “reformulation” cannot alter the institution of marriage itself as the people

intended when they approved the Constitution – that it is a union of one man and one woman. The SJC explained that the meaning of marriage has always been, including at the time it was written into the state constitution, a union between one man and one woman. Changing the meaning of marriage to include “two persons” is not a reformulation, but is instead an improper amendment of the Constitution.

Similarly, the SJC’s change in meaning cannot be considered a reinterpretation of marriage, which is how the District Court characterized the SJC’s decision. Interpretation of a word or document is the “process of discovering and ascertaining the meaning of a statute or other written contract.” *See* BLACK’S LAW DICTIONARY 817 (6th ed. 1990).

In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), Justice Scalia cautioned:

This conclusion of unconstitutionality is of course no ground for going back to reinterpret the statute, making it say something that it does not say, but that is constitutional. Not every construction, but only “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” **Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute or judicially rewriting it.** Otherwise, there would be no such thing as an unconstitutional statute.

Id. at 87 (Scalia, J. dissenting) (citations omitted) (emphasis added). *See also* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986) (same);

Aptheker v. Secretary of State, 378 U.S. 500, 515-16 (1964) (same); *American Federation of Labor and Congress of Industrial Org. v. Marshall*, 494 F. Supp. 971, 973 (D.D.C. 1980)(“The statute, however, appears clear and unambiguous and does not provide for, nor does it require, interpretation. . . . *Reinterpretation of the phrase in question is therefore a departure from the plain language of the Act. If the Act is to be amended, Congress, not the Secretary, must do the amending.*” (emphasis added)).

The SJC perverted the meaning of marriage when it judicially amended the Constitution and statutes to mean the “union of two persons.” If changing marriage from a “union of one man and one woman” to include a “union of two persons” is not an amendment, what would constitute an amendment?

The SJC concedes that at the time marriage was written into the state Constitution, it meant one man and one woman. No constitutional amendment can occur without a vote of the people. In order to circumvent what it apparently perceives as the “technicality” of requiring a vote of the people, the SJC characterized its redefinition or amendment as a reformulation. There can be no question that what the SJC did was to improperly amend the word marriage in the Constitution. That is something it clearly lacks the power to do. The SJC has stripped from the citizens their exclusive power to amend their Constitution. The very essence of the guarantee

of a republican form of government has been violated when the SJC exceeded its powers and divested the people of their inherent rights under their Constitution.

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 exceeded its authority and usurped the power of the people and thereby violated the Guarantee Clause.

II.

THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF BECAUSE PLAINTIFFS FACE IRREPARABLE HARM IF AN INJUNCTION IS NOT ENTERED.

Due to the compelling national importance of this case, the District Court should have granted injunctive relief because of the enormous irreparable harm that will ensue in its absence.¹⁴ The decision of the SJC went into effect Monday, May 17, 2004, at which time marriage as universally understood for millennia of human history was forever changed. Chaos will ensue. Marriage has always been between opposite-sex couples, and for good reason. The SJC recognized one aspect of the breadth of marriage by noting, “The benefits accessible only by way of a marriage license are *enormous*, touching nearly every aspect of life and death.” *Goodridge v.*

¹⁴ The District Court did not address the issue of irreparable harm in its denial of the Preliminary Injunction. However, Plaintiffs have demonstrated irreparable harm sufficient to justify the issuance of an injunction.

Dept. of Public Health, 440 Mass. 309, 323 (2003) (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 *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 170 (7th Cir. 1988) (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 Plaintiffs ultimately succeed in their claim, same-sex marriages performed in the intervening period would be in limbo. Hundreds of statutes that have been changed 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. The Vermont Supreme Court recognized this 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. No other state allows same-sex marriage. Same-sex couples have already traveled to Massachusetts to marry, stating that they intend to go back to their home state and challenge the marriage laws there. *See Boston Globe, R.I., Conn. may grant recognition, available at http://www.boston.com/news/specials/gay_marriage/articles/2004/05/18/ri_conn_may_grant_recognition/*. We will see an explosion of litigation in the other 49 states and territories, including suits against the United States. This cataclysmic train wreck must be enjoined to allow for a reasoned deliberation.

The “deadline” of May 17, 2004, is an artificial deadline created by the SJC, (which was the anniversary of the desegregation decision) designed to undermine representative government and thwart the will of the people. What the Massachusetts Constitution establishes as a two year process to amend its provisions, the SJC did in six months. Thus, the people of Massachusetts have had the right to craft their own republican form of government undercut by the SJC. The legal and cultural ramifications and the seriousness of violating the Guarantee Clause necessitate an injunction, because of the numerous and untold consequences. If there is any doubt, those doubts should be decided in favor of the people to direct their own version of a republican form of government. To respond to the impermissible amendment to their state Constitution, the Legislature has voted to bring to the people for vote an

amendment to respond to the SJC's actions. However, in the meantime, the SJC's decision will continue to undermine the state constitutional guarantees of a republican form of government. From colonial times to the present, marriage in Massachusetts has only been the "union of one man and one woman." The status quo should be maintained to allow the people the right to vote and to structure their own government.

From the day the first European settler set foot on our soil, and for millennia of universal human history, marriage has only been between a man and a woman. On May 17, 2004, that changed. 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. 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.N.Y. 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.

III.

THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF GRANTING INJUNCTIVE RELIEF AND IS IN THE PUBLIC INTEREST.

Defendants will not be harmed by the granting of this injunction. The SJC has no right to enforce laws that were created in excess of its jurisdiction.¹⁵ The

¹⁵ It is noteworthy that the Attorney General’s opposition papers filed in the District Court stated that the SJC was opposed to Plaintiffs’ Motion, but the Department of Public Health and its Commissioner (the Executive branch defendants) took no position against Plaintiffs’ Motion. (Dk. # 47 at p.1, n.1). Taking no position against a plaintiff requesting injunctive relief means no opposition to the relief. Moreover, Governor Mitt Romney has publically opposed the SJC decision and has requested the Attorney General to represent the Executive branch in filing suit to oppose the implementation thereof. The Attorney General has refused to represent the Executive branch. *See Press Release of April 15, 2004, Romney Files Emergency Bill*

Goodridge decision was issued in 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 further 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 injunctive relief. Granting an injunction to allow for a reasoned deliberation of this case will cause no harm to Defendants, in that from the

*to Seek Goodridge Decision Stay, available at, http://www.mass.gov/portal/govPR.jsp?gov_pr=gov_pr_040415_emergency_bill.xml. Governor Romney recognized the harm that would result from refusing to stay the *Goodridge* decision. He stated, "If we begin providing for same-sex marriages on May 17, as ordered by the Court, and then our citizens choose to limit marriage to a man and woman by their vote in November 2006, we will have created a good deal of confusion during the period in between – for the couples involved, for our state, for other states where couples may have moved and for the children of these families." *Statement of Governor Mitt Romney on Constitutional Convention, available at, http://www.mass.gov/portal/govPR.jsp?gov_pr=gov_pr_040329_Gay_marriage_statement.xml. The majority of the Plaintiffs are legislators, who are also opposed to the implementation of the SJC decision. In light of the above, there can be no harm to the SJC by holding off implementation of its decision until the people have the opportunity to vote.**

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. The irreparable harm to Plaintiffs and the lack of harm to Defendants tip the scales in favor of granting an injunction.

IV.

THIS CASE IS NOT BARRED BY ROOKER-FELDMAN.

Even though the District Court denied Defendants' claims that the Rooker-Feldman doctrine bars this case, Appellants address this issue because the Defendants will raise it again. The Rooker-Feldman doctrine is inapplicable because Plaintiffs were not parties to the state court action in *Goodridge*. See Mathew D. Staver, *The Abstention Doctrines: Balancing Comity With Federal Court Intervention*, 28 SETON HALL L. REV. 1102, 1125-26 (1998) ("The Rooker-Feldman Abstention Doctrine is inapplicable, however, in cases where the federal plaintiff was not a party to the state court proceeding."). Also, the issues in the State Court proceeding were never raised or decided by the State Court. Finally, Rooker-Feldman is inapplicable in Guarantee Clause cases.

A. Rooker-Feldman Does Not Apply Because The Parties To This Action Were Not Parties To The State Court Action.

In order for the Rooker-Feldman doctrine to apply, the parties to the state court

action must be the same parties seeking to overturn the state court judgment in federal court. “The Rooker-Feldman doctrine ... precludes a lower federal court from entertaining a proceeding to reverse or modify a state judgment or decree **to which the assailant was a party.**” *Mandel v. Town of Orleans*, 326 F.3d 267, 271 (1st Cir. 2003)(emphasis added). The Supreme Court has refused to apply Rooker-Feldman to bar a federal claim by a plaintiff who was not a party to the state court action in question. *See Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994). The Third Circuit has “found no authority which would extend the Rooker-Feldman doctrine to persons not parties to the proceedings before the state ... court.” *Valenti v. Mitchell*, 962 F.2d 288, 297 (3d Cir.1992); *see also Marks v. Stinson*, 19 F.3d 873, 885 n. 11 (3d Cir.1994) (holding that, “Rooker-Feldman [does] not bar the district court from hearing the claims of the [] plaintiffs because they were not parties to any of the state court proceedings on the matter.”); *National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission*, 342 F.3d 242, 257 (3d Cir.2003) (noting that, “[a] state court order to which [the plaintiff] was not a party cannot be the basis to deny [the plaintiff] its statutory right to a federal forum.”); *ITT Corp. v. Intelnet Int’l.*, ___ F.3d ___, 2004 WL 877571 at n.19 (3d Cir. Apr. 26, 2004) (collecting cases). Other Circuits have similarly held, “[t]he Rooker-Feldman doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the

preceding action in state court.” *U.S. v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995); *see also Gross v. Weingarten*, 217 F.3d 208, 218 n. 6 (4th Cir.2000) (holding that “Rooker- Feldman does not apply, however, when the person asserting the claim in the federal suit was not a party to the state proceeding”); *Bennett v. Yoshina*, 140 F.3d 1218, 1224 (9th Cir.1998) (holding that “since the new plaintiffs were not parties to the state suit, their suit is not barred by the Rooker/Feldman doctrine”); *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1351 (7th Cir.1996) (holding that “[w]e, too, have held that the Rooker-Feldman doctrine does not affect suits by or against persons who were not parties to the initial case”); *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir.1995) (holding that the Rooker-Feldman doctrine did not bar the action because “the plaintiffs in this case [were] not, by the admission of all parties, parties to [the state action]. The Rooker-Feldman doctrine does not apply to such circumstances”); *E.B. v. Verniero*, 119 F.3d 1077, 1092 (3d Cir.1997) (“Rooker-Feldman does not bar individual constitutional claims by persons not parties to the earlier state court litigation.”); *Johnson v. Rodriguez*, 226 F.3d 1103, 1109 (10th Cir. 2000) (citing *Johnson v. DeGrandy* and stating, “As *Johnson* teaches, the Rooker-Feldman doctrine should not be applied against non-parties.”).

Rooker-Feldman does not bar non-parties from bringing a federal claim because the Plaintiffs did not have the opportunity to raise the federal claims in the

state court action. Rooker-Feldman applies to prevent parties in a state court action from appealing an adverse judgment to a federal court. Plaintiffs are not attempting to appeal anything. They seek to raise federal constitutional rights independent from the issues raised in the state court judgment.¹⁶

B. Rooker-Feldman Does Not Apply Because Plaintiffs Raise Issues With This Court That Were Never Raised Nor Decided In The State Court.

The Rooker-Feldman doctrine does not apply when a plaintiff is not seeking to overturn the exact holding of the state court. If the issues raised in the federal litigation were never raised in the state court action, then Rooker-Feldman does not apply even if the litigation of those issues results in an invalidation of an underlying state court judgment. A direct attack on a state court judgment is barred by Rooker-Feldman only when the federal court ruling would require the federal court to overturn the *specific holding* of the state court.¹⁷ This is true even if the federal court

¹⁶ The case of *Angle v. Legislature of the State of Nevada*, 274 F. Supp. 2d 1152 (D. Nev. 2003), is inapposite. *Angel* stated, “As established by these authorities, a plaintiff in a United States District Court **who was a party to the proceedings in state court** confronts an unequivocal jurisdictional bar.” *Id.* at 1155 (emphasis added). The District Court then dismissed the case against the Legislator Plaintiffs because, “they were parties to the state court action and are precluded from proceeding in this court under the Rooker-Feldman doctrine.” *Id.*

¹⁷ Here, there is no judgment with respect to these Plaintiffs that they are seeking this Court to review. This is the rationale behind the unequivocal precedent mentioned earlier that Rooker-Feldman does not bar a federal claim when the

judgment would in effect invalidate the state court's ruling on another point of law. The Guarantee Clause issue raised by the Plaintiffs was *never raised in the state court* and was never decided by the state court. Rooker-Feldman does not apply.

In *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (3d Cir. 1996), the Third Circuit held that when a federal court is asked to directly enjoin a state court judgment, Rooker-Feldman does not act as a bar to the relief requested if the state court did not rule on the issue raised in the federal court proceeding. In *FOCUS*, several individuals and groups who were not parties to a state court proceeding, sued in federal court challenging the constitutionality of a gag order entered by the state court. *See FOCUS*, 75 F.3d at 836. The plaintiffs had attempted to intervene in the state court action to challenge the constitutionality of the state court gag order, but their motion to intervene was denied. *Id.* at 836-37. The plaintiffs attempted to appeal the denial of intervention, but were denied by the intermediate appellate court and the State Supreme Court. *Id.* The plaintiffs filed a federal court action seeking to overturn the gag order entered by the federal court on the grounds that it violated their First Amendment rights. *Id.* at 837. The federal court held the matter was not barred by Rooker-Feldman because the federal plaintiffs, who were

Plaintiffs in the federal suit were not parties to the state court action. This is because there is no state court judgment as to those Plaintiffs for the federal court to review.

not parties to the state court action, were not seeking to overturn the state court judgment.

[T]o determine whether Rooker-Feldman bars [plaintiff's] federal suit requires determining exactly what the state court held.... If the relief requested in the federal action requires determining that the state court decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the district court has no subject matter jurisdiction to hear the suit.

Id. at 840 (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir.1995)).

If the federal court is asked to invalidate the specific holding of the state court's judgment, then the suit is barred by Rooker-Feldman. "The [state court] judge did not decide FOCUS' constitutional challenge to the gag orders or any other issue that is a predicate to the claim in the federal proceeding. In short, we have no reason to believe that in order for FOCUS to prevail in federal court, the court must decide 'that the state court decision [on intervention] is wrong.'" *FOCUS*, 75 F.3d at 841. The plaintiffs were not seeking a direct federal court review of the state courts' judgment in denying their motion to intervene, but were seeking to have the federal court determine the constitutionality of a gag order - *an issue the state courts had not determined in any of their holdings*. Rooker-Feldman does not bar litigation in a federal forum of issues that were never raised in the state court even if litigation of those issues in the federal court would cause an invalidation of an underlying state

court judgment.

The Third Circuit stated that the *FOCUS* case was indistinguishable from the one we faced in *Marks v. Stinson*, 19 F.3d 873 (3d Cir.1994). In that case, some of the plaintiffs had filed petitions with the Philadelphia Court of Common Pleas asking relief on the basis of fraud and alleged constitutional violations in connection with an election. The court refused to entertain their claims asserting that it lacked jurisdiction to do so. We held that a subsequent proceeding in the district court was not barred by the Rooker-Feldman doctrine:

“[T]he court was not barred under Rooker-Feldman from hearing the constitutional and fraud claims of Marks and the Republican State Committee (“RSC”) because these claims had not been determined by the state court, nor were they inextricably intertwined with a prior state court decision. Specifically, the court of common pleas dismissed Marks’ and the RSC’s claims without reaching the merits. Therefore, the district court was not faced with a situation where it was asked to review a determination of the state court.... Here, the district court could (and did) find that Marks’ and the RSC’s fraud and constitutional claims had merit without also finding that the court of common pleas erred when it dismissed their proceedings. *Marks v. Stinson*, 19 F.3d at 886 n. 11.

FOCUS, 75 F.3d at 841.

The Guarantee Clause was never raised in the state court proceeding, could not have been raised because the Plaintiffs were not parties, and was never decided by the state court.¹⁸ This Court has jurisdiction to decide the Guarantee Clause issue even

¹⁸ The only issue that was raised before the state court by some of the legislators was whether they should be allowed to intervene to argue that the SJC did not have subject matter jurisdiction. The SJC denied intervention and the legislators are not asking this Court whether the SJC’s decision on intervention was proper. Indeed, the legislators, as in the *FOCUS* case, are not asking this Court at all to

if the decision results in the invalidation of the underlying judgment in *Goodridge*. The reasoning is analogous to the fact that the Rooker-Feldman doctrine does not apply to bar a constitutional challenge to a state statute when the plaintiff does not seek to overturn his conviction under that statute. The Fourth Circuit has stated:

A distinction must be made between actions seeking review of the state court decisions themselves and those cases challenging the constitutionality of the process by which the state court decisions resulted. For example, in *Feldman*, the Court recognized that the plaintiff was allowed to challenge the constitutionality of a rule under which he had been denied admission to the bar, but the Court prohibited the plaintiff from challenging in federal court, the denial itself. *Feldman*, 460 U.S. at 487-88, 103 S.Ct. at 1317-18; *see also Van Harken v. City of Chicago*, 103 F.3d 1346, 1349 (7th Cir.1997) (court held that federal plaintiffs' action merely seeking a declaration that the process under which parking charges were imposed were constitutionally inadequate, and not challenging the judgment in any parking case, was not barred by Rooker-Feldman.).

Jordahl v. Democratic Party of Va., 122 F.3d 192, 202 (4th Cir. 1997); *accord Hood v. Keller*, 341 F.3d 593 (6th Cir. 2003) (holding that constitutional challenge to trespass statute was not barred by Rooker-Feldman because the plaintiff was not seeking to overturn the state court judgment finding him in violation of the statute).

A constitutional challenge to a statute that does not seek to invalidate a previous state court judgment is not barred by Rooker-Feldman. The same is applicable here. Plaintiffs are not seeking federal court review of *Goodridge* that same-sex couples

review the decision of the SJC denying their Motion to Intervene.

should be allowed granted marital benefits. The District Court properly concluded that it had jurisdiction over Plaintiffs' claims.¹⁹

C. Rooker-Feldman Should Not Apply To Guarantee Clause Challenges.

The Rooker-Feldman doctrine should not apply to Guarantee Clause challenges because to do so would render the Clause ineffective against a state judiciary. If Defendants were correct, then a plaintiff could never raise a Guarantee Clause violation by a state judiciary. It is important to note that if Plaintiffs were challenging the action of the Governor or the Legislature, the Rooker-Feldman doctrine would not even be at issue. However, because Plaintiffs are challenging the actions of the state judiciary in violating the Guarantee Clause, suddenly the Rooker-Feldman doctrine becomes applicable. It is an absurdity to think that this Court could invalidate the actions of an executive and legislative branch of a state, but could not do the same for a judicial branch of a state. Such a holding would render the Guarantee Clause meaningless against the judiciary while applying it against the other two branches of

¹⁹ This is even more the case on Plaintiffs' limited challenge that the SJC was without power to order the remedy it did in *Goodridge*. This Court, as an alternative form of relief, could invalidate the remedy of the *Goodridge* court while still leaving intact the *Goodridge* judgment itself. This clearly would not result in the invalidation of the SJC's specific holding in *Goodridge* on the state constitutional issue and would place the issue of a proper remedy back in the hands of the Legislature where it belongs under the separation of powers clearly outlined in the Massachusetts Constitution.

a state government.

V.

THE ELEVENTH AMENDMENT DOES NOT BAR THIS SUIT.

Even though the District Court expressly denied the Eleventh Amendment arguments of the Defendants, Appellants address them here anyway. The Eleventh Amendment does not bar suit in federal court against state officials for prospective injunctive relief when the relief being sought is premised on a federal right. *See Ex parte Young*, 209 U.S. 123 (1908). While the Eleventh Amendment does not permit a federal court to exercise jurisdiction against a non-consenting state, an exception applies when a suit is brought against a state official for injunctive relief. *See Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 100 (1994). This exception is “based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity.” *Papasan v. Allain* 478 U.S. 265, 276 (1986). The *Young* Court explained that an unconstitutional enactment is “void” and therefore does not “impart to [the officer] any immunity from responsibility to the supreme authority of the United States.” *Id.*

Young provides the federal government with a way to ensure that states

recognize federal rights for its citizens. “The *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). The Eleventh Amendment does not bar this Court from ensuring that the United States Constitutional guarantee of a republican form of government is afforded to all Massachusetts residents.

When “making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, . . . such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state and thereby attempting to make the state a party.” *Young*, 209 U.S. at 157-158. “*Young* unequivocally concedes that a state officer’s connection with the enforcement of the challenged act can ‘arise’ out of the general law... so long as it exists.” *Allied Artists Pictures Corp. v. Rhodes*, 473 F.Supp. 560, 566 (S.D. Ohio 1979). If the general laws of the state establish a connection between an official to the enforcement of the law whose constitutionality is in question, Eleventh Amendment immunity does not apply. As the Defendants have a connection to the enforcement of the law whose constitutionality is in question, Eleventh Amendment immunity does not apply.

Defendants suggestion that the State Defendants are immune is inconsistent

with the holding of *Pennhurst*, is directly contrary to the rationale behind *Young*, and even if correct, would not deny relief to Plaintiffs. According to *Pennhurst*, a federal court can provide prospective, injunctive relief against State officials when federal rights are at stake. *See id.* at 106. “Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.” *Id.* at 105. While the Court did state that States cannot be sued in federal court based on violations of state law, this did not mean that States cannot be sued in federal court when state law operates to deny citizens a federal right. The Eleventh Amendment does not bar suit against the State as Plaintiffs are seeking prospective injunctive relief based on the denial of a federal right.

Even if Defendants were correct in their Eleventh Amendment argument, this would not bar this action as Plaintiffs also have a claim against the Boston City Registrar and the Massachusetts City and Town Clerks 1-350, who are not protected by the Eleventh Amendment. *See Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 280 (1977) (stating that Eleventh Amendment immunity does not extend to counties and similar municipal corporations). This Court can give Plaintiffs relief from the acts that deprived them a republican government by enjoining the issuance of marriage licenses by city and town clerks.

VI.

PLAINTIFFS HAVE STANDING TO MAINTAIN THIS SUIT.

This case does *not* ask this Court to second-guess the wisdom of the SJC’s ruling that it is unconstitutional to deny same-sex couples marital benefits. Nor are Plaintiffs asking this Court to take any position on the highly politicized and personally charged issue of same-sex marriage. Plaintiffs are asking this Court to determine whether the SJC exceeded its powers in expressly redefining marriage.

Plaintiffs must demonstrate that they have a concrete injury that is fairly traceable to defendant’s actions, and is likely to be redressed by the requested relief. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). In *Baker v. Carr*, the Court characterized standing as whether the plaintiffs have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?” 369 U.S. 186, 206 (1962). Plaintiffs satisfy that standard. The concrete injury alleged by Plaintiffs is the deprivation of the right to a republican form of government. Their injury is directly traceable to the actions of the SJC in hearing and deciding *Goodridge*. That injury can be redressed by enjoining enforcement of *Goodridge*.

Adams v. Clinton, 90 F. Supp.2d 27 (D.D.C. 2000) demonstrates that individual citizens have standing to seek judicial relief for a violation of the Guarantee Clause. In *Adams*, residents of the District of Columbia brought two separate suits arguing that the existence of the Financial Responsibility and Management Assistance Authority (“Control Board”) deprived them of their constitutional right to a republican form of government. Plaintiffs argued that because Congress had power of “exclusive legislation” over the District of Columbia, Congress could not delegate some of those powers to a body it created and maintained control. The court found that resident plaintiffs had standing.

[T]he *Adams* plaintiffs have clearly alleged a concrete injury (deprivation of their right to a republican form of local government) that is traceable to the existence of the Control Board, and that would be redressed, at least in part, by its elimination.

90 F. Supp.2d at 34. *See also Baker*, 369 U.S. at 206 (citing line of cases where “citizens,” “electors” and “voters” had standing based on facts showing disadvantage to themselves as voters).²⁰ Massachusetts law also clearly establishes that legislators, as lawmakers, have standing to seek judicial relief for the SJC’s having usurped the

²⁰ *But see Schulz v. Jennings*, 198 F.3d 234 (2d Cir. 1999) (rejecting that the Guarantee Clause confers standing on citizens to challenge state actions that violate their right to a republican form of government). Plaintiffs maintain that the Second Circuit Guarantee Clause case law is wrong. Despite the Supreme Court cases plainly stating that certain Guarantee Clause cases are justiciable, the Second Circuit has continued to summarily dismiss those claims as nonjusticiable.

power of the Legislature by delegating to itself power it did not have to delegate. *LaGrant v. Boston Housing Auth.*, 403 Mass. 328, 530 N.E.2d 149 (Mass. 1988) (one branch of government has standing to seek judicial relief for encroachment of that power by another branch).

The power of government resides in the people. Each branch of government must respect that separation of powers and as such is ultimately responsible for protecting the federal guarantee of a republican form of government. The guarantee of a republican form of government would have little meaning if it could not be enforced by the individuals. Justice Harlan, in his dissent in *Plessy v. Ferguson*, viewed the Guarantee Clause as a protector of individual rights that can and should be enforced by the courts. 163 U.S. 537, 563-64 (1896). Justice Harlan characterized Louisiana's laws that interfered with basic rights based on race, as

inconsistent with the guaranty given by the constitution to each state of republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.

Id. at 563-64. Chief Justice Marshall in *Marbury v. Madison* similarly explained that controversies concerning individual rights are justiciable: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to

resort to the laws of his country for a remedy.” 5 U.S. (1 Cranch) 137, 165-66 (1803). Individual citizens and legislators may seek redress for a violation of the republican form of government.²¹ If this Court does not act, the assault on plaintiffs fundamental liberty interests will not be vindicated.²²

This case is about the individual rights of Massachusetts citizens and legislators to have the separation of powers, as established in their Constitution, respected and enforced. The citizens are guaranteed the right to vote for legislators who, in turn, are granted the power to represent them in making laws. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1 (1964). “The right to vote ... is constitutionally protected.” *Ex parte*

²¹ See Waldrop, *Note: Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J.L. & Pol. 267, 287-299 (1999) (citing cases recognizing that Guarantee Clause claims are justiciable and should be given serious consideration).

²² Defendants point out that the SJC expressly rejected, in its May 7, 2004 per curiam order, the argument that it lacked subject matter jurisdiction to hear *Goodridge*. That has no bearing on this Court’s determination of whether the SJC exceeded its powers in either hearing the case, or in the more limited issue, of whether it performed a legislative function in redefining marriage. Indeed, it comes as no surprise that the SJC would reject a challenge to its authority to have issued *Goodridge*. What is telling, however, is that the Executive branch does not oppose Plaintiffs’ Motion for injunctive relief.

Yarbrough, 110 U.S. 651, 663-665 (1884); *Smith v. Allwright*, 321 U.S. 649, 664 (1944). “It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *See also Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). “This right to vote is a personal right that is vested in qualified individuals by virtue of their citizenship. It is not a privilege to be granted or denied at the whim or caprice of state officers or state governments.” *U. S. v. Penton*, 212 F. Supp. 193, 202 (M.D. Ala. 1962). The “political franchise of voting” is a “fundamental political right, because it is preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

The SJC, in redefining marriage, deprived Plaintiffs the right to amend their Constitution according to the procedure outlined in their charter. The people have never consented to an amendment by judicial fiat. Plaintiffs were deprived of any opportunity for representation by their elected legislators and denied the right to craft their own government on the important policy decision regarding the definition of marriage. *See, e.g., Wayman v. Southard*, 23 U.S. 1, 46 (1825) (C.J., Marshall) (the “difference between the departments undoubtedly is, that the legislature makes, the executive executes and the judiciary construes the law”).

The SJC also deprived Plaintiffs of their state constitutional right to reverse *Goodridge* through a constitutional amendment. *See Mass. Const. Amend. Art. 48; see also Mazzone v. Attorney Gen.*, 432 Mass. 515, 528 (2000) (acknowledging that

citizens could overrule a decision of the SJC by constitutional amendment). This right, which is both an individual and a public right, confers standing in this matter. The SJC has long recognized that the right of a citizen to participate in the political process, which includes the process to amend the Commonwealth's Constitution to reverse a decision of the SJC, is fundamental. *See, e.g., Attorney General v. Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 601 (1916) ("The right to vote is a fundamental personal and political right"). The SJC has recognized the right of a private citizen to maintain an action before the SJC on the ground that the question at issue was "one of public right," and that the object of the action was "to procure the enforcement of a public duty," with the people as a whole being "regarded as the real party in interest." *Brewster v. Sherman*, 195 Mass. 222, 224 (1907) (permitting a single petitioner to maintain an action for a writ of mandamus to correct an error of the registrars of voters in counting a ballot); *Brooks v. Secretary of the Commonwealth*, 257 Mass. 91 (1926) (petitioner had standing to seek the enforcement of a public duty by an officer with respect to a public right in which the voters at large have an interest); *Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310 (1951) (citizens had standing by virtue of their interest in the execution of the laws to compel respondents to refrain from paying out any money or taking any action under a purported law proposed by initiative).

In cases involving challenges related to the processes prescribed by the Commonwealth's Constitution, the SJC has conferred standing to persons who were citizens and qualified voters. *See, e.g., Cohen v. Attorney Gen.*, 354 Mass. 384 (1968)

(holding that qualified voters had standing to challenge proposed initiative amendment); *Massachusetts Teachers Ass'n v. Secretary of the Commonwealth*, 384 Mass. 209 (1981); *Tax Equity Alliance for Mass, Inc. v. Commissioner of Revenue*, 401 Mass. 310, 313-14 (1987). Qualified voters have a real, concrete and cognizable interest in the constitutional processes in which they have a right to participate. *See Vansickle v. Shanahan*, 511 P.2d 223, 239 (Kan. 1973) (“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 be the legislator.”). The SJC in hearing the *Goodridge* case and in redefining marriage violated the most basic individual liberty – that of the republican form of government. Plaintiff have suffered a concrete injury (deprivation of their republican form of government) that is directly traceable to the SJC decision that is redressable by this Court.

CONCLUSION

Petitioners request that this Court reverse the District Court and enter an injunction enjoining the enforcement of the *Goodridge* decision, and enjoining Defendants from issuing or recording marriage licenses issued to same-sex couples, and from violating Plaintiffs’ constitutional rights pursuant to Article IV, §4.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the Brief contains 13,983 words.
2. The Brief has been prepared in proportionately spaced typeface using Word Perfect version 9 in Times New Roman 14 point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, in both paper and electronic format, by Federal Express, overnight delivery this 20th day of May, 2004, to the following:

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LOCAL RULE 28(a) ADDENDUM