

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. 08860

**HILLARY GOODRIDGE ET AL.,
Plaintiff - Appellant**

v.

**DEPARTMENT OF PUBLIC HEALTH ET AL.,
Defendant - Appellees**

On Appeal from a Judgment from the
Superior Court, Suffolk County

**BRIEF OF THE AMICUS CURIAE
MASSACHUSETTS BAR ASSOCIATION**

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INTEREST OF THE AMICUS CURIAE

The Massachusetts Bar Association ("MBA") respectfully submits this brief as Amicus Curiae pursuant to Rule 17 of the Massachusetts Rules of Appellate Procedure and the invitation of this Court dated October 4, 2002.

The MBA, *amicus curiae*, is a voluntary, non-profit, statewide professional association of attorneys in the Commonwealth of Massachusetts. It presently has more than 18,000 members, including lawyers and judges. The purpose of the MBA is to promote the administration of justice and reform in the law, to uphold the honor of the profession of law; to seek advancements in the field of jurisprudence in this commonwealth; to promote the public good; and to insure that all citizens of the Commonwealth who seek justice are afforded an opportunity to obtain it.

STATEMENT OF THE ISSUES

Amicus adopts the Statement of the Issues as set forth by the Plaintiffs-Appellants.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amicus adopts the Statement of the Case and the Statement of Facts as set forth by Plaintiffs-Appellants.

INTRODUCTION

Although the MBA House of Delegates has not yet discussed participation in Goodridge et al. v. Department of Public Health et al., per se, it has considered the core issues germane to Goodridge et al.¹ While sometimes lengthy, the procedure for considering Resolutions submitted to the MBA House of Delegates provides for full and open debate. This Court should not construe the MBA House of Delegates' lack of specific action regarding Goodridge et al. as disinterest or opposition to the claims Plaintiffs have set forth therein. Rather, the MBA maintains the issues Goodridge et al. presents are of paramount importance in addressing individual rights and responsibilities, as well as in the administration of justice.

¹ The MBA notes that it directs study of matters of such importance to its Section Councils which, in turn, direct Resolutions to the MBA House of Delegates. While sometimes lengthy, the procedure for considering Resolutions submitted to the MBA House of Delegates provides for full and open debate.

The MBA House of Delegates has considered and twice voted on issues which are core to those the parties present herein. (see addendum) In this regard, the MBA House of Delegates has voiced its strong opposition to defining the term "marriage" as a legal contract between a man and a woman, as well as to prohibiting recognition of any other relationship as marriage or its legal equivalent. In particular, the MBA House of Delegates voted to oppose H472 and H3375 at its July 15, 1999 and June 20, 2001 Meetings, respectively.

H472, filed in 1999, provided as follows:

Chapter 207 of the General Laws is hereby amended by inserting after section 4 the following section:

Section 4A. A purported marriage contracted between persons of the same sex shall be neither valid nor recognized in the Commonwealth of Massachusetts.

H472.

H3375, filed in 2001 provided, in pertinent part, as follows:

Chapter 207 of the General Laws is hereby amended by inserting after section 4 the following section:

Section 4A. A marriage is a civil contract and shall be defined as a legal relationship between one man and one woman, who consent to take each other exclusively as husband and wife, provided that each person has attained the age of 18 years, is of sound mind, and is not related by consanguinity whether by half of whole blood, not closer than the fourth degree.

Section 4B. Any other relationship shall not be recognized as a marriage or its legal equivalent, or receive the benefits exclusive to marriage in the Commonwealth of Massachusetts as a matter of public policy.

H3375.

While some of the policies relating to H472 and H3375 fall outside the purview of issues presented herein², many of the fundamental concerns articulated in opposition to H472 and H3375 merit this Court's attention.

The MBA House of Delegates based its opposition to H472 and H3375 upon materials the MBA Family Law Section Council submitted for the MBA House of Delegates' consideration. In particular, the MBA House of Delegates opposed H472 and H3375 whereas the proposed legislation:

1. violated equal protection of the law;
2. constituted discrimination based on gender;
3. may have constituted discrimination based upon sexual orientation;
4. disregarded the understanding that marriage has come to be regarded as a basic human right; and
5. failed to promote the legal security a marriage lends to a family.

Importantly, H3375, if enacted, would have established a prohibitive ban on recognition of same sex marriage.

² Issues pertaining to the Full Faith and Credit Clause and other federalist clauses of the U.S. Constitution, while pertinent to H472 and H3375, are not addressed herein.

While the MBA understands that marriage has existed traditionally between one man and one woman, this Court must not ignore contemporary constitutional protection relating to the family and the institution of marriage. ³

SUMMARY OF THE ARGUMENT

The Massachusetts Constitution embodies the core principle of equality among all people and guarantees that no individual or group of individuals receive advantage or privileges over others. Excluding same sex couples from recognition of marriage defies the Constitutional mandate of self-determination in pursuing our individual rights to marriage. ((pp. 6-13))

Excluding same sex couples from recognition of marriage establishes unlawful discrimination based upon a gender-based classification of marriage laws, which is banned by both the Federal and Massachusetts Constitutions. Discrimination based upon sexual orientation should be considered either a suspect or quasi-suspect classification requiring the Court's strict scrutiny. ((pp. 13-15))

³ Amendment Article CVI (the Equal Rights Amendment) substituted the word a "people" for "men" in the first sentence and added the second sentence.)

The civil institution of marriage is a fundamental human right which sets out the protections and responsibilities granted families. To prohibit same sex couples from enjoying such a basic human right constitutes unlawful discrimination. ((pp. 15-19))

ARGUMENT

I. Excluding Same Sex Couples from Recognition of Marriage Violates Equal Protection Under the Massachusetts Constitution.

Excluding same sex couples from recognition of marriage violates the Massachusetts Constitution Part I Preamble, Articles I, VI, VII, and X. Read together, the Preamble, Articles I, VI, VII and X establish the guaranty of equality set forth in the Mass. Constitution. Lavelle v. MCAD, 426 Mass. 332 (1997). Whether or not independently enforceable, such provisions provide a forceful guaranty of equality. Indeed, this Court has taken pride in interpreting the Federal and State Constitutions to respond to "radical changes in social, economic, and industrial conditions." Cohen v. Attorney Gen.,

357 Mass. 564, 570 (1970). See Tax Comm'r v. Putnam, 227 Mass. 522, 523-24 (1917).

(Interpreting the Massachusetts Constitution to effect such social progress is consistent with the genesis and history of interpretation of our State Constitution.)

A. Massachusetts Constitution Article I Mandates Equality in the Recognition of Marriage.

Massachusetts Constitution Article I embodies our core principle of equality among all people. Article I provides as follows: All people are born free and equal and have certain natural, essential, and unalienable rights; among which may be recognized the right of enjoying and defending their lives and liberties; that of acquiring, possessing, or protecting property; in fine that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or natural origin, Mass. Decl. Of Rts. Article I.

The breadth of equality the first clause of Article I provides must not be diminished. To so

restrict the plain reading of Article I ignores our fundamental constitutional guarantee of equality. Excluding same sex couples from recognition of marriage constitutes a violation of the principles Article I establishes. This Court's history demonstrates an emboldened interpretation of Article I. See Inhabitants of Winchendon v. Inhabitants of Hatfield, 4 Mass. 123, 128 (1808) (Abolition of slavery in Massachusetts by virtue of Article I of the Declaration of Rights); Roberts v. City of Boston, 59 Mass.198, 206 (1849) ("All persons without distinction of age or sex, birth or color, origin or condition, are equal before the law.") Article I grants unalienable rights, including the "right of enjoying and defending their lives and liberties" as well as "that of seeking and obtaining their safety and happiness." Article I Decl. of Rts. Consistent with its approach to Article I interpretation, this Court should find that Article I mandates equality in the definition of marriage.

B. Massachusetts Constitution Article VI Mandates Equality in the Recognition of Marriage.

Massachusetts Constitution Article VI ensures that no individual or group of individuals receive advantages or privileges. Article VI provides as follows:

No man, no corporation, or association of men have any other title to obtain advantages, or particular and exclusive privilege distinct from those of the community, than what arises from the consideration of services to the public; in this title being in nature neither hereditary, nor transmissible to children or descendents or his relations by blood, the idea of a man born a magistrate, law giver, or judge, is absurd and unnatural. Mass. Declaration of Rights Article VI.

Excluding same sex couples from recognition of marriage ignores Article VI's prohibition on granting advantages and privileges to a specific group of individuals. Those advantages and privileges are set forth in the Amici Curiae Brief the Boston Bar Association and the Massachusetts Lesbian and Gay Bar Association et

al. have filed. See Opinion of the Justices, 175 Mass. 599, 601 (1900).

C. Massachusetts Constitution Article VII Mandates Equality in the Recognition of Marriage.

The Constitutional mandate that no one class of people be treated favorably is echoed in Article VII, which provides, in pertinent part, as follows:

Government is instituted for the common good; for the protection, safety, prosperity and happiness of people; not for the profit, honor, or private interest of any one man, family, or class of men.

Massachusetts Declaration of Rights Article VII.

Article VII embodies the Constitutional principle that government exists for the "common good". See Brown v. Russell, 166 Mass. 14, 21 (1896); Corning Glassworks v. Ann & Hope, Inc., 363 Mass. 409, 416-17 (1973).

A principle of law which excludes same sex couples from recognition of marriage does not bear "a real and substantial relation to the public health, safety, morals, or some phase of the general welfare" which Article VII requires. See Corning Glassworks v. Ann & Hope, Inc., 363 Mass. 409, 416-17 (1973).

D. Massachusetts Constitution Article X Mandates Equality in the Recognition of Marriage.

Massachusetts Constitution Article X provides, in pertinent part, as follows:

Each individual of this society has the right to be protected in the enjoyment of his life, liberty and property, according to standing laws.

Massachusetts Decl. of Rights Article X.

See Holden v. James, 11 Mass. 396, 401 (1814)

(Article X guarantees individuals the "first principles" of liberty and equality). Opinion of the Justices, 211 Mass. 618, 619 (1912) ("Any free government" must secure the rights of safety, liberty and property to the people).

Article X's constitutional guarantee of individual enjoyment of "life, liberty and property" as well as the right to be "protected" in the enjoyment of those rights militate in favor of an expansive definition of the term "marriage." Importantly, Article X underscores our fundamental right to self-determination in matters pertaining to our person and property. Tarin v. Comm'r of the Div. of Med. Assistance, 424 Mass. 743, 756 (1997) ("the right of an

individual to marry, establish a home, and bring up children"); A.Z. v. B.Z., 431 Mass. 150, 162 (2000) ("[R]espect for liberty and privacy requires that individuals be accorded the freedom to decide to enter into a family relationship"); Sec'y of the Commonwealth v. Clerk of Lowell, 373 Mass. 178, 185 (1977) ("[T]here is a private realm of family life which the State cannot enter.")

E. The Massachusetts Constitution Preamble Mandates Equality in the Recognition of Marriage.

The Massachusetts Declaration of Rights Preamble provides a contextual backdrop to consider Articles I, VI, VII and X. The Preamble provides, in pertinent part, as follows:

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights.

Massachusetts Decl. of Rts. Preamble. This Court has stated that the Preamble sets forth the principal purpose of government as "[T]he preservation of rights and liberties." McDuffy

v. Secretary of the Exec. Office of Education,
415 Mass. 545, 565 (1993).

Excluding same sex couples from recognition of marriage defies the Constitutional mandate of self-determination in pursuing our individual rights relating to marriage. In this regard, the determination to marry is a fundamental individual right under the Massachusetts Constitution. For the reasons articulated above, the exclusion of same sex couples from marriage also violates the letter and spirit of the Preamble.

II. Excluding Same Sex Couples from Recognition of Marriage Constitutes Unlawful Discrimination.

As set forth in the MBA Family Law Section Council's submission to the MBA House Delegates, excluding same sex couples from recognition of marriage is discrimination based on gender barred by both the Federal and Massachusetts Constitutions. Indeed, the substantive prohibition of marriage between same sex couples constitutes unlawful discrimination based on sex as well as sexual orientation. See e.g. Baehr v. Lewin, 74 Haw. 530

(1993): Brause v. Bur. Vital Statistics, Slip Op. 3 AN-95-6562CI (Alaska Super. Ct. February 27, 1998).

A. Excluding Same Sex Couples from Recognition of Marriage is Discrimination Based Upon Sex.

Excluding same sex couples from recognition of marriage constitutes a gender-based classification of the marriage laws. Such classification is contravened by the Massachusetts Constitution which states, "equality under law shall not be denied or abridged because of sex. . . ." Mass Constitution, Article I as amended by Article CVI. See Attorney Gen. v. Desilets, 418 Mass. 316 (1994). In the matter before this Court, there would be no controversy were Plaintiffs' partners members of the opposite sex. Statutes pertaining to marriage discriminate based upon sex to the extent that they are not gender-neutral. To argue that the prohibition on same sex marriage flows from the definition of marriage, itself, is circular and unpersuasive. Baehr v. Lewin, 74 Haw. 530 (1993) see also Loving v. Virginia, 388 U.S. 1,3 (1967) (rejecting the argument that Virginia's miscegenation law was constitutional because a marriage between a white person and a person of color was not a true marriage).

B. Excluding Same Sex Couples from Recognition of Marriage is Discrimination Based Upon Sexual Orientation.

Excluding same sex couples from recognition of marriage constitutes discrimination based upon sexual orientation which should be considered either a suspect or quasi-suspect classification requiring this Court's strict scrutiny. See Rowland v. Mad River Local Sch. Dist., 471 U.S. 1009, 1014 (1985).

(Brennan, J., dissenting from denial of Writ of Certiorari; joined by Marshall, J., concluding that sexual orientation classifications merit at least heightened scrutiny). Discrimination based upon sexual orientation is, per force, related to sex discrimination. Macauley v. Mass. Comm'n Against Discrimination, 379 Mass. 279, 281 (1979)

("homosexuality is . . . sex-linked"; "[a]s a matter of literal meaning, discrimination against homosexuals can be treated as a species of discrimination based on sex."). Indeed, the Supreme Court of Hawaii relied upon such flaw in the state's restriction on marriage for same-sex couples. See Baehr at 67-68. Regardless of its relation to sex discrimination, the MBA maintains discrimination based on sexual orientation is invidious and subject to this Court's strict

review. See Rowland at 1014. Although this Court has not resolved whether discrimination based upon sexual orientation is subject to strict scrutiny, the MBA notes that the Declaration of Rights prohibits putting the private interests of any one class of individuals or "family" above another. Mass. Constitution Article VII.

III. Excluding Same Sex Couples from Recognition of Marriage is Unlawful Because Marriage is a Fundamental Human Right.

The civil institution of marriage is a fundamental human right. Civil marriage is the institution for which the state sets out the protections and responsibilities granted families. Historical bans on interracial and interfaith marriages have either been legally challenged or fallen away. See e.g. Loving v. Virginia, 388 U.S. 1, 12 (1967) (Striking down law on miscegenation and recognizing that the freedom to marry is a vital personal right to the orderly pursuit of happiness by free men); Zablocki v. Redhail, 434 US 374, 384 (1978) (striking law interfering with right of individuals to marry if they were delinquent in child support payments); Turner v. Safley, 107 S.

Ct. 2254 (1987) (Incarcerated felons enjoy a fundamental right to marry).

The institution of marriage confers a status and not just a contractual relationship. Indeed, this Court has stated that, "marriage is not merely a contract between the parties. . . . [I]t is a social institution of the highest importance the moment the marriage relation comes into existence, certain rights and duties necessarily incident to that relation spring into being." French v. McAnarney, 290 Mass. 544, 546 (1935); DeMatteo v. DeMatteo, 436 Mass. 18 (2002).

This Court recognizes the fundamental importance society places in rights and responsibilities created by marriage. Similar personal decisions have received state constitutional protection. Moe v. Sec'y of the Commonwealth, 382 Mass. 629 (1981). See also Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (plurality) (Core "liberty" interests warrant constitutional protections for "personal decisions relating to marriage, procreating, contraception, family relationships, child-

rearing, and education" because they "[i]nvolve the most intimate and personal choices a person may make in a lifetime, choices essential to personal dignity and autonomy"). To prohibit our citizens from enjoying such a basic human right constitutes unlawful discrimination. As such, the right to marriage should not exclude same sex couples.

IV. Excluding Same Sex Couples from Recognition of Marriage Fails to Promote the Legal Security a Marriage Lends to a Family.

Marriage brings legal security and peace of mind to a family. The Amici Curiae Brief of the Boston Bar Association, and the Massachusetts Lesbian and Gay Bar Association sets forth an illustrative list of such legal protections. See also Attorney Gen. v. Desilets, 418 Mass. 316 (1994) (wherein this Court cataloged some of the rights that go along with assuming the responsibilities of marriage.) In rejecting the principles set forth in H472 and H3375, the MBA considered the legal security and peace of mind marriage brings to a family, e.g., to be automatic next of kin in the event of hospitalization, disability, or death; the

ability to inherit from one's partner without a will; the ability to share in a partner's pension and retirement benefits; the ability to sue for wrongful death; and the ability to form a complete legal family with one's children. Excluding same sex couples from recognition of marriage denies a significant portion of our state's citizenry the enjoyment of legal rights which flow from marriage. Indeed, same sex couples committed to creating a family under a union of love are deserving of the same privileges which marriage grants their legally married neighbors.

CONCLUSION

The MBA's position is grounded in constitutional protections set forth in the Massachusetts Constitution Part I Preamble, Articles I, VI, VII and X as well as the cases construing such provisions. Moreover, the MBA maintains the exclusion of same sex couples from the institution of marriage constitutes discrimination based upon sex as well as sexual orientation in violation of the Massachusetts Constitution. Lastly, such exclusion deprives a

significant portion of our citizenry of a fundamental human right as well as the legal security which a marriage lends to a family. In these various regards, the MBA requests this Court find that the exclusion of same sex couples from the institution of marriage is unlawful.

Respectfully submitted,

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BRIEF OF THE AMICUS CURIAE
MASSACHUSETTS BAR ASSOCIATION

CERTIFICATE OF SERVICE

I, Martin W. Healy, hereby certify that on December 6, 2002, a copy of the above document was served by hand upon:

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ADDENDUM