

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT  
NO. 01-1647-A

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HILLARY GOODRIDGE, et al.,

Plaintiffs,

-VS-

DEPARTMENT OF PUBLIC HEALTH, et al.,

Defendants.

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**MOTION TO INTERVENE OF AMBASSADOR  
RAY FLYNN AND THOMAS A. SHIELDS**

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Now come Proposed Intervenor-Defendants Ambassador Ray Flynn and Thomas A. Shields (“Proposed Intervenors”) and, pursuant to Rule 24 of the Massachusetts Rules of Civil Procedure, move this Court to intervene in this matter for the sole purpose of challenging the Court’s subject matter jurisdiction to entertain this case. Proposed Intervenors seek to intervene as of right pursuant to Mass.R.Civ.P. 24(a) or, in the alternative, with permission pursuant to Mass.R.Civ.P. 24(b).

A Memorandum in support of this Motion follows. Pursuant to Rule 24(c), Proposed Intervenors responsive pleading accompanies this Motion.

## MEMORANDUM

### I. Introduction

Proposed Intervenors seek herein to challenge this Court's subject matter jurisdiction to enter a final judgment that redefines "marriage," as only the people of the Commonwealth may redefine marriage by an amendment to the Constitution.<sup>1</sup> The "people" are represented herein by Ambassador Ray Flynn, the former Mayor of Boston and former Ambassador to the Vatican, and Thomas A. Shields, a North Shore businessman who is active in charitable organizations. Ambassador Flynn and Mr. Shields, as citizens and voters of the Commonwealth of Massachusetts, seek to protect the sovereign will of the people as expressed in their Constitution, and to defend their exclusive jurisdiction to amend that Constitution. As such, they stand in the place of the whole people in bringing this Motion.

### II. Procedural History

This case originated in 2001, with the filing of a Complaint by the Plaintiffs seeking a declaratory judgment that excluding same-sex couples from being married in Massachusetts, and obtaining the benefits that obtain from marriage, violates the Massachusetts Constitution.<sup>2</sup> Rejecting those claims, this Court granted summary judgment in favor of the Department of

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<sup>1</sup> Part II, c.3, art. 5 of the Constitution provides: "All causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision." The people thereby delegated jurisdiction over marriage to the branches of government in a limited manner. The people determined that the realm of marriage was worthy of isolated treatment separate from the general category of matters otherwise left to more summary or general treatment by the government. In so granting that limited authority to the various branches of their government, "marriage" was given specific constitutional identification. So enshrined, marriage is therefore not amenable to redefinition by the branches of government which were by this provision granted measured authority to regulate it. Such a change in the fundamental order of the Commonwealth is only available through an amendment by the people.

<sup>2</sup> Plaintiffs' prayer for relief asked the Court to "[e]nter a declaratory judgment that the exclusion of the Plaintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law." (Complaint, at 31.)

Public Health, ruling that a prohibition on same-sex marriage does not violate the Massachusetts Constitution.

On direct appeal, the Supreme Judicial Court (“SJC”) by a narrow 4-3 vote reversed this Court’s well-reasoned opinion, declaring that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.” To reach this conclusion, the SJC was required to “reformulat[e]” “marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.” *Goodridge v. Department of Public Health*, 440 Mass. 309, 344, 798 N.E.2d 941 (2003). The SJC then vacated this Court’s entry granting summary judgment to the Department, and remanded “for entry of judgment consistent with [the SJC’s] opinion,” although it stayed entry of final judgment for 180 days, until May 17, 2004.

Proposed Intervenors, however, seek herein to challenge the Court’s subject matter jurisdiction to enter a final judgment in accordance with the Supreme Judicial Court’s opinion, as only the people of the Commonwealth may redefine “marriage” by an amendment to the Constitution.

### **III. ARGUMENT**

#### **A. Intervention as of Right Is Proper.**

Under Massachusetts Rule of Civil Procedure 24(a)(2), intervention as of right is proper when the motion is timely and when:

[T]he applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

As explained below, Proposed Intervenors meet the standard established by Rule 24(a)(2). Moreover, “courts frequently view applications to intervene as of right leniently

because denial may entail serious harm.” *Bd. of Selectmen of Stockbridge v. Monument Inn, Inc.*, 8 Mass.App.Ct. 158, 162, 391 N.E.2d 1265 (1979). As discussed above and elaborated further in Proposed Intervenor’s Motion to Dismiss (submitted herewith), the Supreme Judicial Court has usurped the sovereign will of the people of the Commonwealth as expressed in their Constitution. Unless this court allows the people of Massachusetts, by and through their relators herein, to intervene and defend their rightful claim (of sole authority to amend the Constitution), serious harm will undoubtedly entail.

**1. Proposed Intervenor’s application for intervention is timely.**

The sole issue that Proposed Intervenor’s seek to raise in this case—that the Court lacks subject matter jurisdiction to redefine marriage—transcends the standard timeliness requirement because subject matter jurisdiction may be raised at any point in the proceeding, and time limitations do not apply. See *ROPT Ltd. Pshp. v. Katin*, 431 Mass. 601, 605, 729 N.E.2d 282 (2000) (“Where a court lacks subject matter jurisdiction, the judgment is void and time limitations for raising the issue are inapplicable.”); see, also, *Litton Bus. Sys. v. Commissioner of Revenue*, 383 Mass. 619, 622, 420 N.E.2d 339 (1981) (It is the Court’s duty to note and decide a jurisdictional question “regardless of the point at which it is first raised.”) Accordingly, Proposed Intervenor’s motion is timely.<sup>3</sup>

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<sup>3</sup> Intervention *after* a final judgment must meet a heightened standard. *Cruz Management Co., Inc. v. Thomas*, 417 Mass. 782, 785-86, 633 N.E.2d 390 (1994) (“[A]lthough motions to intervene after judgment are seldom ‘timely,’ they may be allowed if the proposed intervener demonstrates a strong justification for intervention after judgment”) (citations omitted). Here, there is no final judgment because the Supreme Judicial Court vacated this Court’s summary judgment order. See *Bagley v. Illyrian Gardens, Inc.*, 28 Mass.App.Ct. 127, 130-31, 546 N.E.2d 883 (1989) (entry of judgment not final if appealed; litigation not terminated until entry of judgment after rescript). Therefore, the heightened justification standard does not apply. Nonetheless, even if Proposed Intervenor’s were required to meet the post-judgment standard, this standard is met, as challenges to subject matter jurisdiction may be raised at any time.

Moreover, the question of jurisdiction has not yet been raised by the Defendant Department of Public Health and is not likely to be raised by the Department at this stage of the litigation.<sup>4</sup> And although the Supreme Judicial Court has already issued a rescript to this Court, the Court has the power to take such further action as may be necessary “to the end that justice might be done.” *Paper Trucking Co. v. Russo*, 281 Mass. 209, 210, 183 N.E. 149 (1932), citing *West v. Platt*, 124 Mass. 353 (1878); see, also, *Carilli v. Hersey*, 303 Mass. 82, 86, 20 N.E.2d 492 (1939) (trial court has power to engage in further proceedings on remand after rescript); *Long v. George*, 296 Mass. 574, 577, 7 N.E.2d 149 (1937) (same; Massachusetts has never followed federal practice of prohibiting further proceedings absent express permission from appellate court); *Day v. Mills*, 213 Mass. 585, 587, 100 N.E. 1113 (1913) (further proceedings appropriate to “see that justice is done”); *Crossman v. Griggs*, 188 Mass. 156, 160, 74 N.E. 358 (1905) (rescript “not a final decree which precluded further action”); *Bagley v. Illyrian Gardens, Inc.*, 28 Mass.App.Ct. 127, 130, 546 N.E.2d 883 (1989) (“the rescript disposes of the appeal but does not necessarily end the proceedings”). In this case, justice would indeed be furthered if this Court were to consider arguments as to the Court’s subject matter jurisdiction, resolution of which is crucial to the integrity of any final judgment. *Old Colony Trust Co. v. Porter*, 324 Mass. 581, 586, 88 N.E.2d 135 (1949) (a judgment entered in the absence of jurisdiction is “wholly void and of no effect”).

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<sup>4</sup> *Amici Curiae* Massachusetts Citizens for Marriage, *et al.*, suggested in its Brief to this Court and in a Brief to the Supreme Judicial Court that the judiciary is without subject matter jurisdiction to hear the case pursuant to Part II, c.3, art. 5 of the Massachusetts Constitution, as that provision delegates jurisdiction over “all causes of marriage” to the Governor, unless the legislature provides otherwise. In other words, according to those *amici*, the Legislature, not the judiciary, has jurisdiction to redefine marriage. Proposed Intervenors, however, contend that only the *people* have jurisdiction to redefine “marriage” by an amendment to the Constitution. That particular argument has not heretofore been presented to this Court or to the Supreme Judicial Court for consideration.

**2. Proposed Intervenors have a significant interest in the litigation.**

Intervention is proper where the intervenors have a “significantly protectable” interest in the litigation. *Bolden v. O’Connor Cafè of Worcester, Inc.*, 50 Mass.App.Ct. 56, 62, 734 N.E.2d 726 (2000), quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Moreover, the interest “must be sufficiently direct and immediate to justify the intervention.” *Id.*, citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 154 (1967). A flexible, rather than a rigid, approach should be taken by the Court in considering whether the Proposed Intervenors have an interest in the subject of the action. *Cosby v. Dep’t of Soc. Serv.*, 32 Mass.App.Ct. 392, 395, 589 N.E.2d 349 (1992). And where the litigation “implicate[s] questions of public interest,” the interest requirement is viewed even more leniently. *Johnson Turf & Golf Mgmt., Inc. v. City of Beverly*, 60 Mass.App.Ct. 386, 390, 802 N.E.2d 597 (2003).

In this case, intervention is proper because Proposed Intervenors have a significantly protectable, and, indeed, compelling, interest in the litigation. As citizens of the Commonwealth of Massachusetts, Proposed Intervenors seek to protect the integrity of the Constitution and defend the people’s exclusive jurisdiction to amend their Constitution as provided therein. Just as the individual branches of government have a duty to jealously guard against encroachment of the powers delegated to them by the people, the people all the more have a duty to guard against the usurpation by the branches of government of their exclusive jurisdiction to alter the Constitution as they see fit. For, “[s]overeignty in this commonwealth resides in the people.” *Loving v. Young*, 239 Mass. 349, 373, 132 N.E. 65 (1921). The will of the people is expressed in the Constitution, and “[w]hen their will in this regard ... has been ascertained, it must prevail.” *Id.* The people expressed their will by choosing to place the term “marriage” in the Constitution and, at the same time, delegating limited authority over controversies of marriage to the various

branches of government. Mass. Const. Part II, c.3, art. 5. Marriage is therefore not amenable to redefinition by the branches of government which were by this provision granted measured authority to regulate it. By seeking to redefine marriage, the government usurps the people's sovereignty guaranteed by Article VII of the Declaration of Rights.<sup>5</sup> It is the people, and the people alone, that control the content of the Constitution. Therefore, a change in the fundamental order of the Commonwealth is only available through an amendment by the people.

Proposed Intervenors stand in the place of the people, so intervention in this instance is analogous to an individual asserting a "public right" claim. See *Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310, 315, 98 N.E.2d 621 (1951) (petitioner may "maintain the petition on the ground that the question was 'one of public right'"); *Bancroft v. Bldg. Comm'r of City of Boston*, 257 Mass. 82, 84, 153 N.E. 319 (1926) (citizen may petition where "question is one of public right" and "he is interested in the due execution of the laws"). Proposed Intervenors must be permitted to intervene to safeguard the public's interest in defending the people's exclusive authority to amend the Constitution.

**3. Proposed Intervenors' interest will not be protected unless the Court allows intervention.**

Although "[a]dequate representation is presumed," Proposed Intervenors may overcome this presumption by showing that the Attorney General's interest is adverse or that he has failed to fulfill his duty of representation. *Massachusetts Federation of teachers, AFT, AFL-CIO v. School Com. of Chelsea*, 409 Mass. 203, 207, 564 N.E.2d 1027 (1991). The Attorney General's failure to call into question the Court's subject matter jurisdiction to redefine marriage demonstrates that the Proposed Intervenors' interest will not be protected unless they are permitted to intervene.

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<sup>5</sup> Article VII of the Declaration of Rights states that "the people alone have an incontestable, unalienable, and indefeasible right to institute government."

As discussed above, Proposed Intervenors have a compelling interest in this lawsuit, *i.e.*, to protect their Constitution from amendment by judicial fiat. Although it is arguably the duty of the Attorney General to represent the *people* in a lawsuit of this nature, the Attorney General has not fulfilled that duty in this litigation, despite every opportunity to do so. While the Attorney General has defended the merits of the Plaintiffs' allegations adequately, he has failed at every juncture to raise, on the people's behalf, the issues now sought to be raised by Proposed Intervenors herein. Moreover, it is evident from the Attorney General's continued silence on this crucial jurisdictional issue during the lengthy period of time which has elapsed since the Supreme Judicial Court issued the rescript in this case that he does not ever intend to raise this argument prior to this Court's issuance of a final judgment at the expiration of the 180-day stay.

This case will very soon reach its final conclusion. The people's interest in constitutional government is at stake, and it will not be protected unless this Court allows the petitioned intervention.

**B. Permissive Intervention Is Also Proper.**

In the alternative, permissive intervention is proper in this case because Proposed Intervenors' motion is timely, and there is a common question of law. Permissive intervention is governed by Massachusetts Rule of Civil Procedure 24(b), which provides, in applicable part:

Upon timely application anyone may be permitted to intervene in an action ... when an applicant's claim or defense and the main action have a question of law or fact in common. ... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

*Mass. Fed'n of Teachers*, 409 Mass. at 209.

Proposed Intervenors' motion is timely, as discussed above, because subject matter jurisdiction may be raised at any point in the proceedings. *Litton Bus. Sys. v. Comm'r of Rev.*,

383 Mass. 619, 622, 420 N.E.2d 339 (1981). Also, the motion is timely because courts have an obligation to address the issue of subject matter jurisdiction whenever the issue becomes apparent. See *The Nature Church*, 384 Mass. at 812.

Moreover, Proposed Intervenors' defense has a question of law in common with the main action: the question of subject matter jurisdiction. This is true because implicit in any request for relief is the assertion that the court has subject matter jurisdiction. Thus, subject matter jurisdiction is a common question of law for Proposed Intervenors and the main action. Finally, intervention for the limited purpose of challenging the Court's subject matter jurisdiction to enter a judgment that redefines marriage will not unduly delay or prejudice the adjudication of Plaintiffs' rights, as any order issued by the Court without subject matter jurisdiction is void. *Old Colony Trust Co.*, 324 Mass. at 586. Indeed, if this Court does not address the issue of subject matter jurisdiction, any same-sex "marriage" that results will be subject to collateral attack on that ground.

## **V. CONCLUSION**

For the foregoing reasons, Proposed Intervenors respectfully request that the Court sustain their Motion to Intervene and proceed to consider whether the Court has jurisdiction to redefine marriage.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing Motion to Intervene was delivered by hand this 4th day of May, 2004, upon the following counsel:

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