

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH  
NO. SJC-\_\_\_\_\_

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 HILLARY GOODRIDGE, et al., \*  
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 Plaintiffs-Appellees, \*  
 \*  
 -vs- \*  
 \*  
 DEPARTMENT OF PUBLIC HEALTH, et al., \*  
 \*  
 Defendants; \*  
 \*  
 and \*  
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 AMBASSADOR RAY FLYNN and \*  
 THOMAS A. SHIELDS, \*  
 \*  
 Proposed Defendants-Intervenors \*  
 Petitioners. \*  
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**PROPOSED DEFENDANT-INTERVENORS' EMERGENCY PETITION  
 FOR REVIEW, PURSUANT TO M.G.L. 211, § 3, OF DENIAL OF  
 MOTION TO INTERVENE FOR PURPOSE OF MOVING TO DISMISS**

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Proposed Defendant-Intervenors Ambassador Ray  
 Flynn and Tom Shields ("Petitioners") respectfully  
 request that this Court exercise its discretionary  
 power to superintend the lower courts by reviewing on

an emergency basis the Superior Court's denial of Proposed Defendant-Intervenors' Motions to intervene and dismiss. Petitioners are seeking review pursuant to M.G.L. 211, § 3 because following the ordinary course of appeal pursuant to Mass. R. App. P. 11 would result in the loss of an invaluable constitutional right.

#### PROCEDURAL AND FACTUAL BACKGROUND

On May 4, 2004, Petitioners filed a motion to intervene in this action in the Superior Court<sup>1</sup> for purposes of moving to dismiss. The basis for the motion to dismiss was that going beyond granting the benefits and privileges of marriage to the Plaintiffs by redefining marriage itself would be an amendment of the Constitution in violation of the Charter or Rights. "Marriage" is an institution that was enshrined in the Constitution of 1780 by the founding fathers,<sup>2</sup> and this Court has more than 120 years of

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<sup>1</sup> Proposed Defendant-Intervenors moved to intervene in the Superior Court because rescript had already issued from this Court.

<sup>2</sup> The consensus of human civilization that would have informed the understanding of those ratifying the Constitution is adequately presented in the now well-known case of *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48 (1810). "Marriage is unquestionably a civil contract, founded in the social nature of man, and intended to regulate, chasten, and

consistent precedent ruling that the words and phrases of the Constitution may not be expanded by the branches of the government, but only by the people pursuant to the amendment procedures. Under that precedent, the courts do not have subject matter jurisdiction to redefine the words of the Constitution to mean something the original voters did not understand them to mean. After reviewing Petitioners' pleadings, Judge Troy, the Motions Judge in the Superior Court, scheduled an emergency hearing for May 12, 2004.

On May 7, 2004, this Court issued an order denying the request of several Legislators to intervene and vacate this Court's opinion issued on November 18, 2003. The Order rejected the Legislators' argument that this Court did not have subject matter jurisdiction for its decision because the Legislature had not granted such jurisdiction. It further noted that this action is not a "cause[] of marriage" within the meaning of p. 2, c. 3, art. 5, and that the Court has jurisdiction to hold "'that

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refine, the intercourse *between the sexes*; and to multiply, preserve, and improve the species. It is an engagement, by which a *single man and a single woman*,

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.'" Order at 3, quoting *Goodridge v. Department of Pub. Health*, 440 mass. 309, 344 (2003).

On May 10, 2004, Judge Troy canceled the emergency hearing on the basis of this Court's May 7, 2004, Order, before Petitioners were able to file a supplemental brief explaining why their motion to dismiss is not inconsistent with this Courts' Order. The Court denied Petitioners' motions on May 12, 2004. If this Court does not grant Petitioners' emergency appeal, the Constitution of the Commonwealth will be amended by entry of judgment on May 17, 2004.<sup>3</sup>

#### **ARGUMENT**

##### **I. THIS COURT SHOULD GRANT THE EMERGENCY APPEAL**

###### **A. Petitioners Have No Other Effective Remedy Available**

This Court may grant relief under M.G.L. c. 211, § 3 when petitioners can "demonstrate both a

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of sufficient discretion, *take each other for husband and wife.*" *Id.* at 52 (emphasis added).

<sup>3</sup> The Superior Court's denial of the motion to intervene functions as a final order subject to appeal. *Massachusetts Federation of Teachers, AFT,*

substantial claim of violation of the party's substantive rights and error that cannot be remedied under the ordinary review process." *Com v. Clerk-Magistrate of West Roxbury*, 439 Mass. 352, 354 (2003). This Court has noted that the exercise of its supervisory power under c. 211, § 3 is especially appropriate to safeguard rights that will not be adequately protected due to the delay of the appellate process:

[C]ertain substantive rights may not survive the delays inherent in the normal appellate process. In certain circumstances, the practical effect may be that these rights are lost during the process of appeal and review to which a party ordinarily must turn for protection. The dilemma posed by such a situation presents an appropriate case for c. 211, § 3, review."

*Planned Parenthood v. Operation Rescue*, 406 Mass. 701, 708 (1990); see also *Doe v. Doe*, 399 Mass. 1006, 1007 (1987) (same). In essence, if the appellate process might not put the petitioner in the statu quo, c. 211, § 3 review should be allowed. *Id.*

In this case, Petitioner's substantive right to vote on amendments to the constitution is in jeopardy. As detailed below, because the term "marriage" is

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*AFL-CIO v. School Committee of Chelsea*, 409 Mass 202, 205, 564 N.E.2d 1027 (1991).

contained in the constitution, its meaning was fixed by the understanding of those who ratified the Constitution, and may not be changed absent an amendment approved by the voters. 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"). The voters of Massachusetts have not approved a wholesale redefinition of the term "marriage" and are therefore being deprived the right to vote on an amendment to the Constitution.

If Petitioner's are required to proceed through the appellate process, there stands little likelihood that they will be placed in statu quo. The statu quo is that marriage retains the meaning it had when it was embedded in the Constitution. A final judgment entered before petitioners are able to obtain relief will effectively eviscerate Petitioner's rights because the amendment of p. 2, c. 3, art. 5 of the Constitution will be complete. Attempting to undo that amendment after thousands of same-sex couples have obtained marriage licenses may well prove

impossible, absent another constitutional amendment by the voters to restore the meaning of "marriage" in the Constitution. The voters have a right to decide whether to amend the Constitution, not whether to undo an amendment by a branch of the government.

**B. The May 7, 2004, Order Did not Foreclose Petitioners' Motion to Dismiss**

The sole basis for Judge Troy's denial of Petitioners' motions was this Court's May 7, 2004, Order. However, the Order denying the Legislators' motions to intervene and vacate has no bearing on Petitioners' motion to dismiss. The Legislators' motions in this Court were untimely because rescript had already been issued to the Superior Court, and the asserted grounds for challenging subject matter jurisdiction had previously been raised by *amici* below and in this Court. The Legislators' substantive motion depended entirely upon whether this lawsuit constitutes a "cause[] of marriage" within the meaning of p. 2, c. 3, art. 5 of the Massachusetts Constitution, an assertion this Court squarely rejected. It is noteworthy that this Court considered the subject matter jurisdiction issue that was raised

even though it denied intervention, and the issue had been raised before.

In contrast to the Legislators' motion, the basis for challenging subject matter jurisdiction in Petitioners' motion has not previously been raised, and it is not dependent upon the type of action before the Court. Although it involves the same constitutional provision, Petitioners' motion focuses on the meaning of the term "marriage" itself in the Constitution. Is the term "marriage" to be defined as it was understood by those who ratified the Constitution (and as the canons of constitutional construction dictate), or is it subject to redefinition by the judicial branch? This question goes to the very foundation of this Court's subject matter jurisdiction to grant Plaintiffs' requested remedy. It is a question that has not heretofore been asked or answered by the Court, and which must now be decided. See *Litton Business Sys., Inc. v. Commissioner of Revenue*, 383 Mass 619, 622, 420 N.E.2d 339 (1981) ("jurisdictional issue must be decided").

**1. Petitioners' Grounds for Challenging Subject Matter Jurisdiction Are Distinct**

Stated simply, Petitioners' ground for challenging Subject Matter Jurisdiction is that no branch of the Government may amend the Constitution absent a vote of the people. Rather, as discussed more thoroughly in Section III below, only the voters of this Commonwealth may redefine or expand the definition of terms in the Constitution, and then only through an amendment. See *Loring v. Young*, 239 Mass. 349, 373, 376-77, 132 N.E. 65 (1921) (rearrangement of Constitution approved by voters did not replace Constitution of 1780 because voters were not informed that the rearrangement had substantive changes); *Opinion of the Justices to the Senate*, 324 Mass. 746, 747-49, 85 N.E.2d 761 (1949) (rejecting legislative attempt to expand meaning of "public highways or bridges" in Article LXXVIII); *Opinion of the Justices to the House of Representatives*, 247 Mass. 583, 587, 143 N.E. 142 (1924) (Legislature may provide for voter registration, but "cannot change in any particular the qualifications required to enable one to vote"); *Opinion of the Justices in re House Bill No. 1477*, 237 Mass. 591, 593-94, 130 N.E. 685 (1921) (prior to

adoption of the 19<sup>th</sup> Amendment to the U.S. Constitution, Legislature had no authority to allow women to serve as jurors (only qualified voters could be jurors) because to do so would have been inconsistent with the understanding of the right to vote when Constitution adopted); *Opinion of the Justices to the Senate*, 226 Mass. 607, 612, 115 N.E. 921 (1917) (Legislature had no power to expand meaning of "qualified voters" to include women); *Opinion of the Justices*, 107 Mass. 604, 604 (1871) (Governor and Council could not expand understanding of who could hold a judicial office to include women because inconsistent with understanding when Constitution adopted); see also *Opinion of the Justices to the Senate*, 413 Mass. 1201, 1204, 595 N.E.2d 292 (1992) (proposed initiative not inconsistent with Constitution "in a sense most obvious to the common understanding at the time of its adoption") (citation omitted); *Cohen v. Attorney General*, 357 Mass. 564, 571, 578, 259 N.E.2d 539 (1970) (citizen initiative to enact law calling for constitutional convention invalid because inconsistent with common understanding of Article 48 when enacted); *Opinion of the Justices*, 308 Mass. 619, 626, 33 N.E.2d 275 (1941) (impeachment

provisions interpreted in the sense most obvious to common understanding of voters who approved Constitution). The Constitution "controls as it is written until changed by the authority by which it was established." *Anderson v. Secretary of Commonwealth*, 255 Mass. 366, 368, 151 N.E. 378 (1926).

The position of the Legislators before this Court was that the Legislature has the authority to grant or withhold jurisdiction to redefine marriage. As shown by the cases cited above and as further discussed below, only the qualified voters of the Commonwealth have the authority to redefine the meaning of marriage under Massachusetts law. It is impossible to redefine the term "marriage" under Massachusetts law without changing the meaning of the term in p. 2, c. 3, art. 5 of the Constitution.

Moreover, the Legislators' argument was dependent upon whether this lawsuit involves "'a cause[] of marriage, divorce, or alimony,' within the meaning of the Massachusetts Constitution." SJC 5/7/04 Order at 2. In contrast, Petitioners' claim is that "marriage" in p. 2, c. 3, art. 5 has a fixed meaning, and only the voters of the Commonwealth have the authority to change it. That position is consistent with more than

120 years of case law cited above, and is not dependent upon whether this action is a "cause" of marriage.

**2. Petitioners' Motion Does not Challenge Jurisdiction to Determine Whether Same-sex Couples Have a Right to the Protections, Benefits and Obligations Extended to Married Couples**

Petitioners are challenging solely the jurisdiction of the Court to redefine the term "marriage," not its jurisdiction to grant Plaintiffs the same benefits, protections and obligations of married individuals. However, Plaintiffs' requested relief would require redefining marriage because they demanded "access to marriage licenses, and the legal and social benefits of civil marriage . . . ." Complaint, at 31. Regardless of the judicial branch's authority to adjudicate whether the benefits, protections and obligations extended to married individuals must also be extended to individuals in same-sex relationships, it does not have jurisdiction to redefine terms that are embedded in the Constitution. Plaintiffs are excluded from marriage not by the statutes enacted by the Legislature and enforced by the Executive Branch, but by the Constitution itself. The definition of "marriage"

that this Court changed in *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 337, 798 N.E.2d 941 (2003), existed at the time the Constitution was adopted. *Id.* (referring to meaning of marriage "for centuries"). Same-sex couples may not obtain the legal status of "marriage" without amending the Constitution.

Plaintiffs did not include a claim solely for "the protections, benefits and obligations of marriage." They have expressly denied before this Court and elsewhere that a declaratory judgment granting "the protections, benefits and obligations of marriage," without marriage itself, would satisfy their Complaint. Accordingly, the issue of whether the Court may enter a declaratory judgment "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," without redefining marriage itself, is not before the Court. *Cf.* 5/7/04 Order at 3, quoting *Goodridge*, 440 Mass. at 344. Therefore, this Court's only proper recourse is to dismiss for lack of subject matter jurisdiction.

## II. THE SUPERIOR COURT SHOULD HAVE PERMITTED INTERVENTION

Petitioners sought to challenge the Superior 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>4</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

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<sup>4</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

jurisdiction to amend that Constitution. As such, they stand in the place of the whole people in bringing this Motion.

**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 Section III, entering a judgment that redefines marriage would usurp the sovereign will of the people of the Commonwealth as expressed in their Constitution. Unless this court allows the people of

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change in the fundamental order of the Commonwealth is

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 Intervenors' application for intervention is timely.**

The sole issue that Proposed Intervenors 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, Petitioners’ motion was timely.<sup>5</sup>

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only available through an amendment by the people.

<sup>5</sup> Intervention *after* a final judgment must meet a heightened standard. *Cruz Management Co., Inc. v.*

Moreover, the Department of Public Health not only failed to raise the matter of subject matter jurisdiction, the Attorney General actually opposed the Legislators' challenge to it. And after rescript to the Superior 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

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*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 this Court vacated the Superior 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 Petitioners were required to meet the post-judgment standard, that standard is met, as challenges to subject matter jurisdiction may be raised at any time.

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 the Superior Court or 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").

**2. Petitioners 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 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 Petitioners have a significantly protectable, and, indeed, compelling, interest in the litigation. As citizens of the Commonwealth of Massachusetts, Petitioners seek to protect the integrity of the Constitution and defend the people's exclusive jurisdiction to amend their Constitution as provided therein. "The right of voting, in such a government as ours, is a valuable right; it is secured by the constitution; it cannot be infringed without producing

an injury to the party . . . ." *Lincoln v. Hapgood*,  
11 Mass. 350, 355 (1814).

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." *Loring 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. p. 2, 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>6</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.

Petitioners 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"). Petitioners must be permitted to intervene to safeguard the public's interest in defending the people's exclusive authority to amend the Constitution. Moreover, the Declaratory Judgment Act under which Plaintiffs have proceeded in this action provides that all persons should be made parties who have or claim any interest, which would be

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<sup>6</sup> Article VII of the Declaration of Rights states that "the people alone have an incontestable, unalienable,

affected by a judgment. M.G. L. c. 231A, § 8. Petitioners' right to vote on any amendment to the Constitution would surely be affected if a judgment is entered that redefines marriage.

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

Although "[a]dequate representation is presumed," Petitioners 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, and his defense of the Court's jurisdiction in opposition to the Legislators, demonstrates that the Petitioners' interest will not be protected unless they are permitted to intervene.

As discussed above, Petitioners have a compelling interest in this lawsuit, *i.e.*, to protect their Constitution from amendment by a judicial act. Although it is arguably the duty of the Attorney

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and infeasible right to institute government."

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, he has failed at every juncture to raise, on the people's behalf, the issues Petitioners now seek to raise.

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 would be proper in this case because Petitioners' motion was 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.

Petitioners' motion was 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 was 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, Petitioners' 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 Petitioners 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 this issue of subject matter jurisdiction, any

same-sex "marriage" that results will be subject to collateral attack on that ground.

### III. THE COURTS MAY NOT AMEND THE CONSTITUTION

A. Operative terms of the Constitution may not be redefined by government, but rather only by the people through constitutional amendment.

1. Sovereignty resides in the people, who control the content of the Constitution.

Article VII of the Declaration of Rights states that "the people alone have an incontestable, unalienable, and indefeasible right to institute government." Article IV thereof states that the "people of this commonwealth have the sole and exclusive right of governing themselves." Quite consistently, then, Article XVIII exhorts that "[t]he people ... have a right to require of their lawgivers and magistrates, an exact and constant observance of [the fundamental principles of the Constitution], in the formation and execution of the laws necessary for the good administration of the commonwealth." The branches of government in Massachusetts derive their authority exclusively from the Constitution, itself containing the directives of the people. "Sovereignty in this commonwealth resides in the people." *Loring*

*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.*

A written constitution is the fundamental law for the government of a sovereign State. It is the final statement of the rights, privileges and obligations of the citizens and the ultimate grant of the powers and the conclusive definition of the limitations of the departments of State and of public officers. In its grants of powers, the bounds set for their exercise, the duties enforced and the guarantees established are found the constitutional liberty of the individual and the foundation for the regulated order and general welfare of the community. *To its provisions the conduct of all governmental affairs must conform. From its terms there is no appeal. Such a great charter cannot itself in the nature of things be made subject in its “meaning or effect” to another instrument.* In that event it is not final and that other instrument becomes paramount.

*Id.* at 376-77; see, also, *Opinion of the Justices to the Governor and Council*, 233 Mass. 603, 611, 125 N.E. 849 (1920) (emphasis added).

It is a necessary consequence of these principles that only the people may amend the content of the Constitution. For a branch of government to redefine the terms found in the constitution serves as a revolt from the discipline of that document; it is an inversion of the relationship. The government, having

its powers delegated to it by the Constitution and being subject to the provisions thereof, is in no position to alter the Constitution to which it is subservient. As a servant does not instruct his master, so the Government may not manipulate the meaning of the terms of the Constitution so as to change its content from that which the people approved. See *Loring, supra*.

**2. "Marriage" was placed in the Constitution by the people.**

Part 2, c. 3, art. 5 of the Constitution of this Commonwealth, reads as follows: "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. See *Loring v. Young*, 239 Mass. 349, 373, 132 N.E. 65 (1921), citing Mass. Const., p. 1, art. 7.

**3. Plaintiffs' requested relief requires redefining marriage.**

The primary remedy requested by the Plaintiffs is that the Court:

Enter 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. This requested remedy cannot be granted without redefining the term "marriage," as it was understood by the voters who adopted the Massachusetts Constitution. Indeed, this Court expressly recognized that it must redefine "marriage" in order to grant the requested relief:

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.

*Goodridge v. Department of Public Health*, 440 Mass. 309, 337, 798 N.E.2d 941 (2003) (emphasis added).

Not only did the Court's redefinition serve as a departure from the common law and historic societal consensus, more significantly (for present and constitutional purposes), it served as a departure from that understanding of marriage which was ratified as a component of the people's Constitution. While the Court was silent as to this aspect of its decision, the trespass was nonetheless accomplished. The active participation of the judiciary in the development of the common law does not and can not authorize the constitutional reordering that the Plaintiffs here request, and that the Court purported to accomplish. The courts of Massachusetts are themselves given their life and authority by the Constitution; that document is not subject to change by the courts it governs.

**B. The branches of government are without authority to redefine terms contained in the Constitution.**

In *Opinion of the Justices to the House of Representatives*, 247 Mass. 583, 143 N.E. 142 (1924),

this Court was faced with the question of whether the General Court had the power under the Constitution to enumerate and classify those who are "legal voters," as that term is found in the Constitution. The Court allowed the Legislature the ability to engage in the enactment of a requirement that those whom the Constitution intended to be "legal voters" must register with the state, so that their qualifications as constitutionally permitted "legal voters" could be determined and recorded for administrative purposes, before these persons would be allowed their voting status. The Court made clear that these administrative requirements are indeed acceptable, for the reason that they "would not change in any respect, the meaning of the words as found in articles 21 and 22 of the Amendments to the Constitution" relating to voters. *Id.* at 588. On this consideration was hinged the Court's conclusion. That is, because no redefinition of a constitutional term was being effectuated, the action was proper. The Legislature could not "change in any particular the qualifications required to enable one to vote." *Id.* at 587.

In *Opinion of the Justices*, 107 Mass. 604, 604 (1871), the Governor and his Council attempted to

appoint a woman to the office of justice of the peace. The Court ruled that they could not appoint a woman to that office because the term "judicial officer" referred only to men when the Constitution was adopted, and the Executive could not expand the meaning to include women. *Id.*

In *Opinion of the Justices to the Senate*, 226 Mass. 607, 115 N.E. 921 (1917), the SJC applied this same principle in instructing against the intended action of the General Court in the circumstance where it sought to expand the category of voters. In that case, the Legislature sought to expand the category of those within the term "people" whom the Constitution established to be eligible to vote to amend the Constitution. The Court explained:

It seems indisputable that there is no power under the Constitution, except the sovereign people acting in accordance with their self-imposed, limiting methods of procedure, to enlarge the electorate so as to include as voters persons not eligible to vote upon amendments to the existing Constitution. This is necessarily so, whatever may be the power of the Legislature to define words for the purpose of its own legitimate enactments. The Legislature can proceed only under the Constitution. It would be contrary to its duty to that Constitution to provide for its revision or alteration by a body of electors, whose qualifications were different from those ascertained by the terms of that Constitution.

*Id.* at 612; see also *Opinion of the Justices in re House bill No. 1477*, 237 Mass. 591, 593-94, 130 N.E. 685 (1921) (Legislature could not give women right to be jurors prior to Nineteenth Amendment to the U.S. Constitution).

A particularly instructive and relevant application of this principle is likewise found in the discussion in *Opinion of the Justices to the Senate*, 324 Mass. 746, 85 N.E.2d 761 (1949). The matter in controversy discussed in that Opinion was a proposed bill in the Senate which 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 Court condemned this act of "legislative fiat," *id.*, which sought to so 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." And in *Yont v. Secretary of the Commonwealth*, 275 Mass. 365, at pages 366-367, this court said that an amendment to the Constitution 'was written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence. Its phrases are to be read and construed according to the familiar and approved usage of the language.

*Id.* at 748-49 (emphasis added).

Applying these considerations, the Court stated that 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 that the "[t]he voters of the Commonwealth could not have had any such meaning in mind when they adopted" that provision of the Constitution. *Id.* The court

stated: “[t]he 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.

Making application to the case *sub judice*, there is no doubt whatsoever that the definition of “marriage” as understood by those who approved the Constitution did not include the notion of a union of individuals of the same sex.<sup>7</sup> Indeed, this Court’s decision quoted above forthrightly calls its construction of marriage a “reformulation.” *Goodridge*, 440 Mass. at 343; see, also, *id.* at 337 (noting that the Court’s decision accomplishes “a significant change in the definition of marriage”). This “reformulation” gave the term “marriage” a “meaning which would never [have] occur[red] to a voter in the polling booth [in 1780].” *Opinion of the Justices*, 324 Mass. at 750. Stated plainly, this expansion of the meaning of “marriage” effectively amended the Constitution, and specifically p. 2, c. 3, art. 5, by redefining what the people there gave to

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<sup>7</sup> See *supra*, at 2, n.1.

the government to regulate.<sup>8</sup> This is just that form of proceeding which is condemned elsewhere by this Court, and indeed also by the very principles of constitutionalism.

"[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) (emphasis removed), 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). As it is indisputable that those adopting the Constitution did not understand marriage to comprise the configuration Plaintiffs now petition, there is no jurisdiction in this Court to honor their request. The absence of authority to pursue the enterprise the Plaintiffs here commend to the Court demands the case be dismissed. See *Nissan*

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<sup>8</sup> There is no necessity for the Court to have made direct reference to p. 2, c. 3, art. 5 to nonetheless

*Motor Corp. in U.S.A. v. Commissioner of Revenue*, 407 Mass. 153, 157, 552 N.E.2d 84 (1990) (case must be dismissed for lack of jurisdiction where remedy is unavailable).

**C. A decision issued absent subject matter jurisdiction is void.**

A judgment is void if the court from which it issues lacked jurisdiction over the subject matter. *Bassett v. Blanchard*, 406 Mass. 88, 90, 546 N.E.2d 155 (1989). The judicial branch, no less than the executive and legislative branches, is without authority to amend the Constitution. Because the Plaintiffs' requested remedy entails an amendment to the Constitution, there is no subject matter jurisdiction in the courts at any level to grant the requested relief.

The issue of subject matter jurisdiction must be decided, regardless of the point at which it is first raised, *Litton Business Systems, Inc. v. Commissioner of Revenue*, 383 Mass. 619, 622, 420 N.E.2d 339 (1981), and even when the delay in reaching the issues may pose a number of practical problems. *Jensen v. Daniels*, 57 Mass. App. Ct. 811, 820, 786

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amend it.

N.E.2d 1225 (2003). "Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative." *Opinion of Justices to the House of Representatives*, 262 Mass. 603, 606, 160 N.E. 439 (1928). A court "cannot convert into a law something in itself ineffectual." *Id.*

At no point in this litigation has any party raised the constitutional subject matter jurisdiction deficiency herein discussed, nor has this Court or the Superior Court given attention to this aspect of its undertaking. It is appropriate even at this late hour for this Court to now examine this issue. At no point during the progress of litigation is it too late to consider whether there is absence of authority to proceed.

#### **CONCLUSION**

If the Governor issued an Executive Order redefining "marriage" to include same-sex couples, this Court would be obligated to declare it invalid for violating p. 2, c. 3, art. 5 of the Constitution; if the Legislature enacted a statute redefining marriage to include same-sex couples, this Court would be obligated to find it in violation of p. 2, c. 3, art. 5. Because "marriage" was enshrined in the

Constitution by the people, the courts of this Commonwealth have no more power than the Governor and the Legislature to redefine it.

For the foregoing reasons, the Superior Court's denial of Petitioners' motions should be reversed, and Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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