

IN THE SUPREME COURT OF THE UNITED STATES

Appeal No.

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ROBERT P. LARGESS, *et al.*

Petitioners,

vs.

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

Respondents.

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**PETITIONERS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL,  
EXPEDITED APPEAL, EXPEDITED BRIEFING SCHEDULE, AND FOR IMMEDIATE  
HEARING**

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Petitioners<sup>1</sup> file this Memorandum of Law in support of their Emergency Motion for Injunction Pending Appeal, Expedited Appeal, Expedited Briefing Schedule, and for Immediate Hearing, and, state as follows:

### **STATEMENT OF FACTS AND INTRODUCTION**

The facts in the Amended Complaint and affidavits are incorporated herein. Plaintiffs request an injunction pending appeal, enjoining the enforcement of the decision of the Supreme Judicial Court (“SJC”) in *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003), because the court in redefining “marriage,” and even hearing the cause, violated the separation of powers in the Massachusetts Constitution and, therefore, violated Article 4, §4, of the United States Constitution.<sup>2</sup>

### **STANDARD FOR INJUNCTIVE RELIEF**

The standards for an injunction pending appeal are the same as a preliminary injunction, namely the Court should apply a balancing test with “consideration of movant’s likelihood of success on the merits, potential for irreparable harm, balancing of relevant equities, and effect on public interest.” *Campbell Soup Co. v. Giles*, 47 F.3d 467 (1st Cir. 1995); *see, e.g., Kawalski v. Chicago Tribune Co.*, 854 F.2d 168, 170 (7th Cir.1988) (stating that a request for a preliminary injunction is evaluated in accordance with a “sliding scale” approach: the more the balance of irrevocable harms inclines in the plaintiff’s favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction.)

### **I. PLAINTIFFS FACE IRREPARABLE HARM.**

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<sup>1</sup>Petitioners will be referred to as “Plaintiffs.” Respondents will be referred to as “Defendants.”

<sup>2</sup> This Court is only required to determine whether *Goodridge* violated the Guarantee Clause, not the wisdom of the decision.

Due to the compelling national importance of this case, this Court should grant an injunction pending appeal because of the enormous irreparable harm that will ensue in its absence. ***The decision of the SJC will go into effect Monday, May 17, 2004***, at which time marriage as universally understood for millenia of human history will be forever changed. Chaos will ensue. Marriage has always been between opposite-sex couples, and for good reason. The incredible upheaval in Massachusetts is inevitable. The SJC recognized one aspect of the breadth of its decision by noting, “The benefits accessible only by way of a marriage license are *enormous*, touching nearly every aspect of life and death.” *Goodridge*, 440 Mass. at 323 (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 Kawalski*, 854 F.2d at 170 (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 this Court find in favor of the Plaintiffs after May 17, the result would be sheer mayhem. Same-sex marriages performed in the intervening period would be in limbo. After changing hundreds of statutes, they 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. No one has the slightest clue what kind of an earthquake we will experience, but one thing is for sure – once we cross that bridge of May 17, the damage done will be virtually impossible to restore. The Vermont Supreme Court recognized this very 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. Some Clerks are in a dispute with the Governor, saying they will marry nonresidents.<sup>3</sup> No state allows same-sex marriage. It is certain that same-sex couples will flock to Massachusetts to marry. San Francisco illustrates this point. 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 pending this appeal to allow for a reasoned deliberation.

The “deadline” of May 17, 2004, is an artificial deadline created by the SJC, designed to undermine representative government and thwart the will of the people, the Legislative and the Executive branches. If same-sex marriage begins on May 17, Pandora’s box will be opened. The legal and cultural ramifications and the seriousness of violating the Guarantee Clause necessitate an injunction, because the numerous and untold consequences cannot be undone.

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

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<sup>3</sup>See The Boston Globe, *Defiance, Rebuke on Gay Marriage*, available at [http://www.boston.com/news/local/massachusetts/articles/2004/05/12/defiance\\_rebuke\\_on\\_gay\\_marriage\\_boston\\_globe/](http://www.boston.com/news/local/massachusetts/articles/2004/05/12/defiance_rebuke_on_gay_marriage_boston_globe/).

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. Alexander Hamilton explained that the healthy balance of power reduces the “risk of tyranny and abuse . . . .” *Gregory v. Ashcroft*, 501 U.S. 452, 459 (quoting THE FEDERALIST No. 28, pp. 180-81). 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. NY 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.

## **II. PLAINTIFFS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS.**

Plaintiffs have a likelihood of success on two grounds. The SJC violated the separation of powers in (i) redefining marriage, and (ii) hearing the matter. When one branch usurps another, it violates the Guarantee Clause. That guarantee inures to the citizens like Largess and to legislators

whose power has been usurped.<sup>4</sup>

### **A. The Constitution Guarantees A Republican Form Of Government.**

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 claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O’Connor noted in the 1992 decision 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”). “Contemporary commentators,” Justice O’Connor noted, “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 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

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<sup>4</sup> *See Adams v. Clinton*, 90 F. Supp.2d 27 (D.D.C. 2000) (residents have standing to maintain Guarantee Clause claim, finding that “deprivation of their right to republican form of local government” is a concrete injury); *LaGrant v. Boston Housing Auth.*, 403 Mass. 328, 330 (1988) (branch of government has standing when authority has been usurped by another for if it “cannot seek judicial relief, then the . . . branch might be foreclosed from protecting its separate powers”).

purpose of the Guarantee Clause. The 1849 Supreme Court decision in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), 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.<sup>5</sup> 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.<sup>6</sup>

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<sup>5</sup> (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.

<sup>6</sup> 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.

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. 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 . . . .” 65 U. COLO. L. REV. 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 making new law - 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)) (emphasis added).

“In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments....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.”

*Id.* (quoting James Madison, THE FEDERALIST No. 51, p.323) (emphasis added).

The SJC altered the allocation of power expressly provided for in the Massachusetts constitution between the Judiciary and Legislature. *See, e.g., 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).

#### **B. The Division of Powers in the Massachusetts Constitution.**

The Massachusetts Constitution 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. Under the

Massachusetts Constitution, no branch shall exercise the powers of either of the other two branches. 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 state constitution provides that the “judicial shall never exercise the legislative and executive powers.” MASS. CONST. Part 1, art. XXX. Each branch performs its established functions within limited jurisdiction. Part I, Art. XVIII of the constitution provides that “The people . . . have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.” The SJC acknowledged this limitation applies to the courts. “[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 made clear that no branch of government (and most especially the Legislature) may abandon or transfer any of the powers entrusted to it by the Constitution to any other person or group of persons.

Article 30 of the Declaration of Rights provides for the permanent separation of the executive, legislative, and judicial powers in the government of the Commonwealth, and the Constitution, by the various provisions of c. 1, § 1, particularly those

contained in art. 4, designates the General Court as the repository of the legislative power. It is fundamental that no one of the three great departments of government can abandon any of the powers entrusted to it by the Constitution or transfer those powers to any other person or group of persons. If this could be done the plan of government laid down by the Constitution could be destroyed.”

*Opinion of the Justices to the House of Representatives*, 328 Mass. 674, 675 (Mass. 1952)(emphasis added). *See also Town of Brookline v. The Governor*, 407 Mass. 377, 384 n.10 (1990)(stating, “We would be reluctant to tolerate a situation in which allegedly unconstitutional conduct would be free from judicial scrutiny even on the request of an entity most directly affected by the alleged unlawful conduct.”).

The SJC usurped the legislature when it redefined marriage and when it heard this cause. Without even delving into the separation of powers concerning what “causes” of marriage the SJC may hear, this Court can enjoin enforcement of the decision because the *Goodridge* decision exceeded its powers in redefining marriage, thereby violating the Guarantee Clause.

**1. The *Goodridge* court performed a purely legislative function when it redefined marriage to include same-sex marriage.**

Assuming, *arguendo*, that the SJC had subject matter jurisdiction to even consider this unique question, it did not have the power to redefine the marriage. 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. 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 then legislated a remedy fashioned after the Court of Appeal for Ontario, Canada, when it “refined the common-law meaning of marriage” to permit same-sex marriage. *Id.* 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.* What the SJC should have done is turn to U.S. precedent for guidance, including the decision of the Supreme Court in Vermont. The Supreme Court of Vermont, in *Baker v. State*, faced the exact same question of how to fashion a remedy after it declared that refusal to grant marital benefits to same-sex couples was a violation of plaintiffs’ state constitutional rights. 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).

Similarly, in *Colegrove v. Green*, 328 U.S. 549 (1949), the Court considered Illinois districts, stating “[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. Although not decided under the Guarantee Clause, the following is instructive.

When a statute is challenged under the constitutional doctrine of separation of powers, the court must search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented. . . . It seems

to us that to have a usurpation of powers there must be a significant interference by one department with the operations of another department.”

*Parcell v. State*, 620 P.2d 834, 836 (Kan. 1980).

The SJC under the Massachusetts Constitution has no more authority to redefine marriage as “two persons” than Utah courts have authority to redefine marriage under that state’s constitution to “three or more persons.” When the people expressly limit authority under their state constitution on one branch of government, that branch must operate within that limitation.

On Thursday, May 13, 2004, the District Court issued its opinion on Plaintiffs’ request for a temporary restraining order and preliminary injunction based on a violation of the Guarantee Clause of Article 4, §4 of the United States Constitution. Plaintiffs’ argued that the SJC (a) usurped the authority of the legislature when it amended the word “marriage”, which is contained in the Massachusetts Constitution, to mean the “voluntary union of two persons, as spouses”, or (b) exceeded its powers in finding that it had jurisdiction to decide the *Goodridge* case, since the cause did not include its delegated authority over divorce, alimony, annulment or affirmation.

After concluding 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 concluded

[t]here 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). A brief analysis of the *Goodridge* decision demonstrates the error in the District Court’s decision. Plaintiffs maintain that even if the SJC had authority to hear 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.” Plaintiffs also contend that the SJC lacked the authority to even decide the *Goodridge* case because it does not have authority over “causes” of marriage. It only has authority of divorce, alimony, annulment and affirmation.

The word “marriage” is contained in the Massachusetts Constitution in the only section that places a limitation on the courts’ jurisdiction. 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 and relevant 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 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 366-67, 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).

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 and any amendment to that word *must* be made by the citizens – not the legislature, executive or judicial branches. The *Goodridge* decision itself highlights that the SJC improperly amended the meaning of the word marriage, even though it was characterized in that decision as a “reformulation” and later characterized by the District Court as a “reinterpretation.”

The SJC’s *Goodridge* decision expressly stated 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.” *Id.* at 318. The SJC explained that it did not want to find the marriage laws unconstitutional, as that would “dismantle a vital organizing principle of our society.” *Id.* at 342-43. The SJC, therefore, “reformulated” marriage “to mean the voluntary union of two persons as spouses, to the exclusion

of all others.” *Id.* at 343.

What the SJC did cannot be deemed a “reformulation.” This Court’s use of the term reformulation demonstrates that the underlying goal in those circumstances is to achieve the true intent of the statute, parties or document in question. For 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 remains unaltered. That 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. BLACK’S LAW DICTIONARY 1281 (6<sup>th</sup> ed. 1990).

A “reformulation” cannot alter the institution of marriage itself – i.e., 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 a man and a woman. Changing the meaning of marriage to include two people of the same-sex is not a reformulation.

Similarly, that 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 (6<sup>th</sup> ed. 1990). This Court’s precedent makes clear that the SJC’s changed meaning of marriage is not a reinterpretation, but an impermissible amendment.

In *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986), this Court explained that:

[S]tatutes are to be so construed as to avoid serious doubt of their constitutionality.

Where such “serious doubts” arise, a court should determine whether a construction of the statute is “fairly possible” by which the constitutional question can be avoided. It is equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication;” *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.*”

*Id.* at 841 (citations omitted) (emphasis added). *See also Aptheker v. Secretary of State*, 378 U.S. 500, 515-16 (1964) (same) Citing *Schor*, Justice Scalia in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), similarly 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). *See also 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 very meaning of marriage when it judicially rewrote the meaning to be the voluntary union of two people. Yet, the District Court concluded that the SJC’s actions did not constitute an amendment to the word marriage. If changing marriage from a union of one man and one woman to include a union of two people of the same sex is not an amendment, what would

constitute an amendment?<sup>7</sup>

The SJC concedes that at the time marriage was written into the constitution, it meant one man and one woman. The SJC's own precedent demonstrates that no constitutional amendment can occur without a vote of the people. In order to get around what it apparently perceives as the "technicality" of requiring a vote of the people, the SJC characterized its redefinition as a reformulation. Call it what you will, but there can be no question that what the SJC did was to amend the word marriage. That is something it 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.

**2. The State Constitution grants the Legislature the exclusive authority over transferring subject matter jurisdiction in all cases involving marriage.**

A separate basis to enjoin the decision is that the court lacked subject matter jurisdiction to even hear the case. A unique aspect of Massachusetts' Constitution is that it grants to the Legislature exclusive authority over marriage.

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. Unless the Legislature makes an express transfer of jurisdiction concerning marriage, jurisdiction to determine all causes of marriage, divorce, and alimony resides with the Governor and Council under art. V. **Article V, which creates the judiciary, places only one limitation on its power – the limitation over marriage.**

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<sup>7</sup> A Utah court would have no more authority under Utah's Constitution (which bans polygamy) to interpret marriage to be the "union or two or more persons" than a Massachusetts court would have to redefine "marriage" in its state constitution to mean the "union of two persons."

The Legislature has transferred only four elements of jurisdiction under Article V to the courts (divorce, alimony, annulment and affirmation), which do not encompass the right to “reformulate” marriage itself. The exclusive original jurisdiction over marriage was placed in the Governor and Council, until the Legislature made other provision. MASS. CONST. Part 2, ch. III, art. V. *See also* MASS. CONST. Part 2, ch. II, § 1, art. IV, and ch. II, § III, art. 1 (creating Council and establishing its powers). The Legislature, however, has “made other provision” only in cases involving divorce, alimony, affirmation, and annulment, and nothing else.

In 1785 the Legislature passed “An Act for regulating Marriage and Divorce,” which extended jurisdiction to the courts on matters of divorce and alimony. The second to last provision of that act provides, “Be it therefore enacted by the authority aforesaid, that all questions of divorce and alimony shall be heard and tried by the Supreme Judicial Court holden for the county where the parties live, and that the decree of the same Court shall be final.” 1785 Mass. Acts 69. In 1836 the Legislature extended the court’s jurisdiction to questions of affirmation or annulment of marriage. The Revised Statutes of 1836 contain, in the statute pertaining to divorce, a provision providing that if the validity of a marriage was doubted, a libel for annulment was to be filed as for divorce. 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.*

The SJC has recognized this 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, 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, for “*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).

Thus, 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 “causes” involving marriage, divorce, or alimony. The SJC has interpreted the word “causes” in the marriage provision as being equivalent to “controversies” or “cases.” *Sparhawk v. Sparhawk*, 116 Mass 315, 317 (1874). Any court must have a specific grant of jurisdiction from the Legislature before it can hear any cases or controversies concerning marriage. *Goodridge* is clearly a controversy concerning marriage. It does not, however, fall under any of the 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. In the absence of legislation conferring jurisdiction upon the courts to hear such controversies, the case, or any future similar case challenging the definition of marriage, must be brought before the Governor and Council acting as a court under a constitutional grant of authority. Under Part 2, ch. III, art. V, the Governor and Council have exclusive authority over matters pertaining to marriage, “until the Legislature shall, by law, make other provisions.”

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 usurped the power of the people through the representatives as established in their constitution and thereby violated the Guarantee Clause. Plaintiffs are likely to succeed on the merits.

### **III. THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF GRANTING THE INJUNCTION AND IS IN THE PUBLIC INTEREST.**

Defendants will not be harmed by the granting of this injunction. Defendants have no right to enforce laws that were created in excess of their jurisdiction. The *Goodridge* decision was issued in direct 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 great 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 an injunction pending appeal. Marriage as one man and one woman is universally understood. Granting an injunction to allow for a reasoned deliberation of this case will cause no harm to Defendants, in that from the 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.

As already noted, the irreparable harm is so great if this Court does not enjoin the *Goodridge* decision from going into effect on May 17, that the overwhelming harm should tip the scales on any of the other injunctive prongs where there might be debate or doubt. *See Kawalski*, 854 F.2d at 170 (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). Once May 17 happens, it will be virtually impossible to put the toothpaste back in the tube. The irreparable harm to Plaintiffs and the lack of harm to Defendants tip the scales in favor of granting an injunction. Good cause exists to expedite this appeal and to grant Appellants an immediate hearing.

#### **IV. THIS CASE IS NOT BARRED BY ROOKER-FELDMAN.**

The Rooker-Feldman doctrine is inapplicable in this case because Plaintiffs were not parties to the state court action in *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003). *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."). Additionally, 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). The Third Circuit has held in numerous cases that the Rooker-Feldman doctrine does not apply to a federal plaintiff who was not a party to the state court proceeding.

On several occasions, to be sure, we have declined to apply Rooker-Feldman to bar a federal claim by a non-party to a state action. For example, in *Marks v. Stinson*, 19 F.3d 873, 885 n. 11 (3d Cir.1994), we held 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.” Similarly, in *National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission*, 342 F.3d 242, 257 (3d Cir.2003), we noted 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.” *Id.*

*ITT Corp. v. Intelnet Int'l*, \_\_\_ F.3d \_\_\_, 2004 WL 877571 at n.19 (3d Cir. Apr. 26, 2004). 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.”).

The Plaintiffs were not parties to the state court action in *Goodridge v. Department of Health*. It is impossible for the Rooker-Feldman doctrine to apply to bar non-parties from bringing a federal claim in this case. This is because the Plaintiffs did not have the opportunity to raise the federal claims in the state court action *because they were not parties*. Rooker-Feldman applies to prevent parties in a state court action from appealing an adverse judgment to a federal court. In this case, there is absolutely no basis for the application of Rooker-Feldman because the Plaintiffs in this action are not attempting to appeal anything because they were not parties to the state court action. The federal court is not concerned in this instance with comity and federalism in respecting the state court judgment because the Plaintiffs were not parties to the state court action. They seek to raise

federal constitutional rights independent from the issues raised in the state court judgment.

Because the Plaintiffs in this case were not parties to the *Goodridge* decision, the Rooker-Feldman doctrine does not bar them from bringing their claims in this Court.<sup>8</sup>

**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 bar litigation of those issues in federal court 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.<sup>9</sup> This is true even if the federal court judgment would in effect invalidate the state court's ruling on another point of law. In this case, the Guarantee Clause issue raised by the Plaintiffs was *never raised in the state court* and was never decided by the state court. In addition, as stated previously, the Plaintiffs in the federal action were not parties to the state court action. Therefore, Rooker-Feldman does not apply.

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<sup>8</sup> The case of *Angle v. Legislature of the State of Nevada*, 274 F. Supp. 2d 1152 (D. Nev. 2003), cited by the Defendants 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.*

<sup>9</sup> 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 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.

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 in the federal court action 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 in the federal court action even attempted to appeal the denial of the intervention, but were denied by the intermediate appellate court in Pennsylvania as well as the State Supreme Court. *Id.* After they were denied at the state court, 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 Third Circuit held that the federal court challenge was not barred by the Rooker-Feldman doctrine because the federal court Plaintiffs, who were not parties to the state court action, were not seeking to overturn the state court judgment.

The Third Circuit stated, “[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)). Therefore, 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 Third Circuit stated, “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. In essence, the state court judgment that would be barred by Rooker-Feldman would be requesting the federal court to review the state court’s judgment on denying the Motion to Intervene. Instead, 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*. Put another way, 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.

In explaining its holding the Third Circuit stated that the *FOCUS* case was indistinguishable from

[T]he 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.

In this case, the Guarantee Clause issue raised by the Plaintiffs was never raised in the state court proceeding, could not have been raised in the state court proceeding because the Plaintiffs were not parties to the state court proceeding, and was never decided by the state court.<sup>10</sup> The Guarantee Clause issue has never been raised or adjudicated by the Massachusetts state courts. This Court has jurisdiction to decide the Guarantee Clause issue even if the decision results in the invalidation of the underlying judgment in *Goodridge*. The Third Circuit was aware in *FOCUS* that its decision allowing the First Amendment challenge to the gag order could have resulted in the invalidation of the gag order. However, the Third Circuit still ruled that the case could progress and was not barred by Rooker-Feldman. 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

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<sup>10</sup> 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 review the decision of the SJC denying their Motion to Intervene.

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 because the plaintiff in such an action is not seeking direct review of the state court judgment finding him in violation of the statute. The same is applicable in this case. Plaintiffs are not seeking federal court review of the *Goodridge* court's holding that same-sex couples should be allowed to marry in Massachusetts. The District Court properly concluded that it determined Plaintiff's claims.<sup>11</sup> Rooker-Feldman does not apply to prohibit Plaintiffs' federal court Guarantee Clause action.

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

The Rooker-Feldman doctrine should not apply to Guarantee Clause challenges because applying Rooker-Feldman would render the Guarantee Clause completely ineffective against a state judiciary. If Defendants are successful in its Rooker-Feldman challenge, then a plaintiff could never raise in federal court 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. The very basis of Plaintiffs' Guarantee Clause challenge is that the federal court should

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<sup>11</sup> 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.

step in to this case as a “referee” to ensure that the SJC abides by the republican form of government guaranteed to all citizens under the federal constitution. 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 a state. Rooker-Feldman should not even be applicable in this instance and this Court should decide, as a matter of federal constitutional law, that the SJC violated the Guarantee Clause. This action is not barred by Rooker-Feldman.

#### **V. THE ELEVENTH AMENDMENT DOES NOT BAR THIS SUIT.**

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 was “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.

The fact that the state officer by virtue of his office, has *some* connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.”

*Young*, 209 U.S. at 157; *see also Allied Artists Pictures Corp. v. Rhodes*, 473 F.Supp. 560, 566 (S.D. Ohio 1979). “All that *Young* requires, as Plaintiffs point out, is that the official have some connection with enforcement of the act. *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.” *Rhodes*, 473 F. Supp. at 566. 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 suggested that the State Defendants are immune from suit in federal court as the federal court cannot enforce state law against state officials. Such an interpretation of the Eleventh Amendment 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. The Court said, “[o]ur 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. In the present case, the Eleventh Amendment does not bar suit against the State as Plaintiffs are seeking prospective injunctive relief that is based on the denial of a federal right.

The circumstances of this case are rare, and will not lead to a multiplicity of lawsuits. Massachusetts law is abundantly clear that the Legislature has the exclusive authority over transferring subject matter jurisdiction in all cases involving marriage, divorce and alimony:

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. The Massachusetts Constitution explicitly gives the political branches, not the judicial branch, jurisdiction in marriage cases. When one branch violates a clear provision of law, thus denying the citizens a republican form of government, the federal courts must step in to protect the citizens’ federal rights. Defendants’ argument provides the perfect example why this court must ensure that Massachusetts citizens have a republican form of government. Defendants said, “The essence of plaintiff’s claims - the central and indispensable premise of his Guarantee Clause argument - is that the SJC exceeded its powers under the Constitution of the Commonwealth. Under the Eleventh Amendment, that is quintessentially a matter for the SJC alone to adjudicate.” *See State Defendants’ Opposition to Motion for TRO*, 5. State Defendants suggests

that when the SJC violates the law, and rules in matters that it should not, then it should just police itself. This scenario illustrates the need for the Guarantee Clause - when a state denies citizens the right to a republican form of government, the federal government can step in to protect federal rights.

Even if Defendants were correct, this would not deny relief to Plaintiffs as Plaintiffs 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 the opportunity to marry. Nor does a decision in Plaintiffs’ favor require 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. *Significantly, none of the parties dispute that the SJC redefined marriage.* The *Goodridge* decision expressly states that marriage has always been defined as a union of a man and a woman and that its decision was “reformulating” the definition of marriage to be the voluntary union of two persons as spouses. Thus, the only question that this Court need address is whether the SJC performed a legislative function (creating law) when it redefined law.<sup>12</sup> If so, Plaintiffs would be entitled to the relief sought.

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<sup>12</sup> Although Plaintiffs assert a second claim that the SJC exceeded its powers in even hearing *Goodridge*, this Court need not even reach that issue if it determines that the SJC violated the separation of powers in performing the legislative function of making new law.

Defendants have argued that Plaintiffs lack standing to maintain this suit. To establish Article III standing, 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*, this 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 this Court through issuance of an order 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 specifically 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).<sup>13</sup> Massachusetts law also clearly establishes that legislators, as lawmakers, have standing to seek judicial relief for the SJC’s having usurped the power of the Legislature. *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 history and purpose of the Guarantee Clause demonstrate that Plaintiffs have standing. The power of government resides in the people. In Massachusetts, the people established in their constitution a separation of powers that delegates to different branches different responsibilities. 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. In a statement to Virginia’s ratifying convention, Patrick Henry stated, ““republicanism” was government by elected representatives who remained accountable to the public through the “unimpeded reversion [of power] back to the people.”” Debra F. Salz, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 Geo. Wash. L. Rev. 100, 103 (1993). Thomas Jefferson also believed that ““a republic was a government by its citizens *en masse*.”” *Id.* at 104.

The guarantee of a republican form of government would have little meaning if it could not be enforced by the individuals to which it is granted. Indeed, Justice Harlan, in his dissent in *Plessy v. Ferguson* plainly 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

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<sup>13</sup> *But see Schulz v. Jennings*, 198 F.3d 234 (2<sup>nd</sup> 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.

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 seek redress for a violation of the republican form of government.<sup>14</sup> With implementation of *Goodridge* only days away, if this Court does not act, the assault on plaintiffs' fundamental liberty interests will not be vindicated.<sup>15</sup>

This case is about the individual rights of Massachusetts citizens and legislators to have the separation of powers, as established in the Massachusetts Constitution, respected and enforced. The citizens of the Commonwealth 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,

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<sup>14</sup> 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).

<sup>15</sup> 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 of Massachusetts does not oppose Plaintiffs' Motion for a Temporary Restraining Order.

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 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 Supreme Court has stated that 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 the Massachusetts’ citizens the right to have their duly elected legislators create laws concerning marriage. It is the Legislature, not the courts, that is charged, under the Massachusetts Constitution, with creating and making laws. The SJC, in creating new law through a “reformulation” of marriage to mean the voluntary union of two people as spouses, stripped the Legislature of the power to define marriage.<sup>16</sup> As a result, Massachusetts citizens were deprived of any opportunity for representation by their elected legislators on the important policy decision of what is 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 *Goodridge* decision deprived Massachusetts citizens of their state constitutional right

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<sup>16</sup> The Vermont Supreme Court in *Baker v. State* recognized that it was without the power to fashion new law to remedy what it determined was unconstitutional marriage laws. 744 A.2d 864, 886-88 (Vt. 1999) (“We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate . . .”).

to reverse the *Goodridge* decision 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. In this case, however, the SJC ruling requiring implementation of its case on May 17 did not grant the voters sufficient time to reverse the decision, even though the amendment process has already begun.

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"). Similarly, 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) (holding that citizens of the Commonwealth 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). Citizens, who are 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) (stating, “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. That Plaintiffs have standing to seek redress for that injury cannot be questioned: they 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 an injunction pending appeal enjoining the enforcement of the *Goodridge* decision, and enjoining Respondents from issuing or recording marriage licenses issued to same-sex couples, and from violating Plaintiffs’ constitutional rights pursuant to Article IV, §4. Petitioners also request an expedited hearing.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile and U.S. Mail delivery this 14th day of May, 2004, to the following:

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