COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SJC No. 09163

REQUEST FOR AN ADVISORY OPINION (A-107)

BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND LAW PROFESSORS

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BRIEF OF AMICI CURIAE
"INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS
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STATEMENT OF INTEREST OF AMICI CURIAE

This brief is submitted in response to this Court's announcement of December 15, 2003, inviting "interested individuals and organizations to submit briefs addressing the request for an advisory opinion that was transmitted by the Senate to the Justices on December 12, 2003, relative to Senate, No. 2175, entitled 'An Act Relative to Civil Unions.'"

The Amici Curiae are the 15 international human rights organizations and 21 law professors (in the U.S. sense, except as otherwise indicated) listed in Appendix I.[1] These human rights organizations and law professors are interested in the elimination of all forms of discrimination, including discrimination based on sex or sexual orientation, and are either based outside the United States or are familiar with legal developments outside the United States. They respectfully submit this Brief, which supplements and refers to the Brief of Amici Curiae International Human Rights Organization, et al., filed November 8, 2002 in Goodridge v. Department of Public Health, SJC No. 08860 (the "Goodridge Brief"), to ensure that this Court is fully aware of developments since

[1] In submitting this brief, Amici assume that a solemn occasion exists for this Court to answer the question from the Senate.

November 8, 2002, in international human rights law and national law outside the United States (hereinafter "human rights law"), with regard to the opening up of civil marriage to same-sex couples, as opposed to the creation of a "separate but equal" institution for same-sex couples only, with a name other than civil marriage.[2]

SUMMARY OF ARGUMENT

The Senate has asked this Court: "Does Senate Bill No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12, and 16 of the Declaration of Rights?" Amici suggest that the answer to this interrogatory ought to be: No. There is no language or reasoning in this Court's opinion of November 18, 2003 suggesting that a separate institution would satisfy this Court's mandate. Nor do principles of constitutional equality support any other answer than a negative one.

In constitutional systems recognizing a power of judicial review, separate is presumptively not equal.

[2] By using the phrase "separate but equal," Amici do not concede that a parallel structure, such as civil unions, is in fact equal.

Recall the American experience with racial segregation, culminating in Loving v. Virginia, 387 U.S. 1 (1967). After Loving, it was unconstitutional for states to deny different-race couples the same marital benefits and obligations they afforded same-race couples. If a southern state had petitioned the Court for an allowance to reserve marriage to same-race couples (as it had always been in states of the South), while creating a new institution of civil unions for different-race couples, is there any doubt that the Supreme Court would have responded in the negative? This Court should do the same.

Amici recognize that no American court, until this Court's decision in Goodridge, has interpreted the constitutional equality principle to require state recognition of marriage for same-sex couples. A dearth of precedent is not dispositive in applying the equality principle, however. Courts did not apply the equality principle to anti-miscegenation laws until after World War II, see Perez v. Sharp, 198 P.2d 17 (1948). It was only then that American culture started to embrace the norm that people of color are equal citizens and to understand the social fact that different-race couples can benefit from state support of their unions in the ways that same-race couples can.

Similarly, it was not until the last generation that Western culture has started to embrace the norm that gays and lesbians are equal citizens and to understand the social fact that same-sex couples can benefit from state support of their unions in the same ways that different-sex couples can. Once judges embrace that norm and understand that social fact, they see that equality requires non-discrimination. This Commonwealth has embraced the norm that lesbians, gay men, and bisexuals are equal citizens. See Goodridge v. Department of Public Health, 440 Mass. 309, 341 (2003)(citing various Massachusetts statutes and cases evidencing the Commonwealth's "strong affirmative policy of preventing discrimination on the basis of sexual orientation"). In Goodridge, this Court understood the fact that same-sex couples can benefit from state support of their unions and ruled that civil marriage cannot discriminate against lesbian and gay couples.

Experience in other Western countries provides support for the important step this Court took in Goodridge, including this Court's apparent rejection of a separate-but-equal regime such as civil unions for same-sex couples. The most relevant international parallel is Canada, whose equality jurisprudence provides strong confirmation of this Court's holding that the Massachusetts Constitution does

not permit discrimination against lesbian and gay couples and its apparent rejection of a separate-but-equal regime. Canada has operated under a constitutional Charter of Rights since 1981. From the beginning, the Supreme Court of Canada has read the equality guarantee of its Charter to require equal citizenship for lesbian, gay, and bisexual Canadians. After study and deliberation, the Court has also recognized that lesbian and gay couples derive the same kind of benefits from their relationships that straight couples do. Applying the Supreme Court's equality jurisprudence, provincial courts in Ontario, Quebec, and British Columbia have recently interpreted the Charter's equality principle to require state recognition of marriage for same-sex couples. Each court specifically rejected the government's contention that a separate-but-equal regime would satisfy the equality principle. Although two of the three lower courts provided a transition period before their judgments would become effective, the purpose of the delay was to enable the legislature to implement full equality for lesbians, gay men, and bisexuals—not to dilute full equality through the process of political compromise.

In the interest of providing the Court with a complete factual account, Amici also report on developments elsewhere in the world. Countries with judicially-

enforceable constitutional regimes containing strong equality principles, such as South Africa, are moving toward same-sex marriage, we think inexorably. Countries without such constitutional regimes are creating intermediate institutions, many of which are analogous to the civil unions propounded by the Senate. These new institutions, however, are the product of legislative compromises, not judicial application of constitutional principle.

Additionally, Amici believe that many of these new institutions, once heralded as advances, are unacceptable compromises now that same-sex marriage has been recognized in various countries. So The Netherlands created a new institution of registered partnerships in 1997, but lesbians, gay men, and bisexuals argued that they were not accorded equal citizenship until all discriminations, including that entailed in civil marriage, were abolished. In 2001, The Netherlands adopted further legislation recognizing marriage for same-sex couples. Belgium followed almost immediately, but without adopting the intermediate institution. The actions of Belgium and The Netherlands surely affected the willingness of Canadian courts to insist on marriage recognition. Once gays and

lesbians realized that full equality is possible, separate-but-equal has become unacceptable.

Finally, most of the new institutions do follow the non-discrimination principle. Lesbians, gay men, and bisexuals all over the world are respectfully requesting equal rights as to state recognition of their committed unions. When legislatures, for political reasons, create a new institution as an alternative to marriage, lesbian and gay activists generally favor non-discrimination as to the new institution. Typically, legislatures accede to this request, and so different-sex as well as same-sex couples can enjoy the benefits and duties of the new institutions in most countries.

ARGUMENT

I. THIS COURT'S GOODRIDGE DECISION, REFORMULATING THE DEFINITION OF MARRIAGE AS THE EXCLUSIVE VOLUNTARY UNION OF TWO PERSONS, IS CONSISTENT WITH CONSTITUTIONAL DECISIONS FROM CANADIAN COURTS, HOLDING THAT A "SEPARATE BUT EQUAL" INSTITUTION FOR SAME-SEX COUPLES IS AN INADEQUATE REMEDY FOR DISCRIMINATION.

Amici interpret this Court's November 18, 2003 Goodridge decision to hold that the Massachusetts Constitution requires equal access for same-sex couples to civil marriage, "[a public] institution of fundamental legal, personal, and social significance." Goodridge, 440 Mass. at 359. A logical corollary of this holding is that a separate-but-equal regime of civil unions is inconsistent with the constitutional equality principle. Amici believe

that the Court was right to assure lesbian and gay couples access to marriage. In light of traditional state and cultural denigration of lesbians, gay men, and bisexuals, a separate-but-equal regime would be a state signal that lesbian and gay relationships are second-class.

Experience in other countries confirms the Court's earlier judgment and undercuts arguments that the equality principle is consistent with a separate-but-equal regime such as civil unions. "Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. * * * While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here."[3]

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[3] Justice Sandra Day O'Connor, "Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law," 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002); As Chief Justice Rehnquist has put it, "now that constitutional law is solidly grounded in so many foreign countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." The Hon. William H. Rehnquist, "Constitutional Courts—Comparative Remarks," in Germany and Its Basic Law: Past, Present, and Future—A German-American Symposium 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

Following this suggestion, Amici submit that this interpretation is strongly reinforced by the experience of courts interpreting similar equality principle in Canada's Charter of Rights and Freedoms.

A. Canada's Charter Ensures an Equality Principle Very Much Like That of the United States and Massachusetts Constitutions, and the Supreme Court of Canada Has Applied that Principle to Ensure Equality for Same-Sex Couples.

Section 15(1) of the Canadian Charter of Rights and Freedoms provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The equality guarantee found in Section 15(1) is similar to that found in analogous provisions of the United States and Massachusetts Constitutions. Like courts in this Commonwealth, Canadian courts have been ready to invalidate state laws discriminating on the basis of race, religion, and sex. Indeed, Canadian and American equality jurisprudence have evolved along very similar lines, and are now facing similar new challenges.[4] Like courts in this Commonwealth, Canadian courts have had to decide whether

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[4] See generally, Robert Wintemute (ed.) & Mads Andenæs (hon. co-ed.), Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law (Oxford, Hart Publishing, 2001).

laws discriminating on the basis of sexual orientation (including marriage-based discriminations) are invalid and, if invalid, what remedy is appropriate.

In Egan and Nesbit v. Canada, (1995) 2 S.C.R. 513, the Supreme Court of Canada unanimously ruled that sexual orientation was "analogous" to those classifications enumerated in Section 15(1) as presumptively suspicious grounds for state lawmaking. This was a judicial recognition of the equal citizenship lesbians, gay men, and bisexuals ought to enjoy under a constitutional equality guarantee. Five Justices, however, upheld a social security benefit that did not apply to same-sex couples. They reasoned that the state had special leeway to encourage and regulate different-sex marriage. Four Justices dissented, arguing that this was an invidious discrimination. See also, Canada v. Mossop, (1993) 1 S.C.R. 554, 630-31 (L'Heureux-Dubé, J., dissenting).

In Vriend v. Alberta,(1998) 1 S.C.R. 493, the Supreme Court explained why discriminations against gay people were presumptively invidious: One's sexual orientation has no correlation with one's ability to be a productive citizen, yet the state had long discriminated against gay people and had fueled private anti-gay prejudices. The Court extended this reasoning to same-sex couples in M. v. H., (1999) 2 S.C.R. 3. M. and H. were lesbian partners whose economic lives were completely intertwined. When M. left their common home in 1992, she sought an order of support as a

"spouse" under Ontario's Family Law Act (the "FLA"), which provides for such support upon the break-up of married couples or different-sex couples who have cohabited for at least three years. Eight Justices of the Canadian Supreme Court agreed with the lower court that the FLA violated Section 15(1). Six Justices joined the opinion of Justice Cory, which explained why the exclusion of same-sex couples was an unconstitutional discrimination. First, the statute contributed to historic disadvantages suffered by lesbians, gay men, and bisexuals and reinforced anti-gay stereotypes and prejudices. Second, the excluded claimant had the same human needs as the persons included in the family law, and so the statutory distinction lacked a non-discriminatory policy basis. Third, "the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society." Justice Cory concluded that "[t]he human dignity of individuals in same-sex relationships is violated by the impugned legislation," for it denies a traditionally disadvantaged group access to a fundamental social institution.

To give the legislature an opportunity to remedy the discrimination, the Court postponed the effect of its ruling for a period of six months. But there was no doubt that the legislature was required, by the Charter, to acknowledge the political norm of equal citizenship and dignity for lesbians, gay men, and bisexuals and to

understand the social fact that lesbian and gay couples have the same human needs as different-sex couples. The legislature remedied the discrimination. More importantly, the decision in M. v. H. paved the way for same-sex couples to petition the courts to achieve non-discrimination as to marriage itself.

B. Canadian Courts Have Found That a Separate Institution for Same-Sex Couples Does Not Satisfy the Equality Principle.

Since M. v. H., six appellate judges and one trial judge in Canada have considered (in judgments that have not been superseded by the judgment of a higher court) the question of whether a "separate but equal" institution for same-sex couples only, with a name other than civil marriage, would comply with the equality rights provision (Section 15(1)) of the Charter. All seven judges have clearly rejected this possibility as discriminatory.

On May 1, 2003, subsequent to the Goodridge oral argument, a three-judge panel of the British Columbia Court of Appeal (the highest court of the province of British Columbia), unanimously held, in EGALE Canada Inc. v. Canada (Attorney General),[5] that equal access to civil marriage for same-sex couples is the only remedy consistent with the equality principle of Section 15(1). The government had

[5] Indexed by Court as Barbeau v. British Columbia (Attorney General) (1 May 2003), 225 Dominion Law Reports (4th Series) 472, http://www.courts.gov.bc.ca/../../../../jdb-txt/ca/03/02/2003BCCA0251.htm, Westlaw (2003 CarswellBC 1006).

argued that a separate-but-equal registered partnership law would satisfy Section 15(1). Writing for the Court, Madam Justice Prowse rejected that argument. She reasoned (emphasis added):

> 154. * * * The [Law] Commission [of Canada] ... stated that registration schemes should not be viewed as a policy alternative to same-sex marriage since to do so would maintain the stigma of same-sex couples as second-class citizens. * * * "... If governments are to continue to maintain an institution called marriage, they cannot do so in a discriminatory fashion." * * *[6]
>
> 156. * * * If the prohibition of same-sex marriage is recognized as being a contravention of the equality rights of same-sex couples * * * the obvious remedy is * * * the redefinition of marriage to include same-sex couples. In my view, this is the only road to true equality for same-sex couples. Any other form of recognition of same-sex relationships, including the parallel institution of RDP's [registered domestic partnerships], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or to leave it to governments to choose amongst less-than-equal solutions.
>
> 157. If [the federal] Parliament concludes that this result is unacceptable, it continues to have options available to it. It could, for example, abolish marriage altogether. * * * In the alternative, it is open to the government to use its override power under s. 33 of the Charter.[7]

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[6] See Law Commission of Canada, "Beyond Conjugality: Recognizing and supporting close personal adult relationships" (Dec. 21, 2001), http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp, Chapter 4, "The Case for Same-Sex Marriage", and Recommendation 33.

[7] Section 33 permits a Canadian legislature to exempt legislation from much of the Charter for five years

The British Columbia Court therefore granted a declaration that "the common law bar against same-sex marriage is of no force or effect because it violates [the Charter]," and, as this Court did in Goodridge, reformulated the common law definition of marriage to mean "the lawful union of two persons to the exclusion of all others." The British Columbia Court suspended this remedy until July 12, 2004,[8] not to give the federal Parliament time to consider alternative remedies, such as "civil unions" for same-sex couples only, but (emphasis added):

> 161. * * * solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision. This period of suspension * * * is necessary, in my view, to avoid confusion and uncertainty in the application of the law to same-sex marriages. The appellants acknowledge that there will be consequential amendments required to both federal and provincial legislation to give effect to this decision.

This Court's remedy in Goodridge is identical to that of the British Columbia Court (apart from the length of the period of stay). Both remedies contemplate minor, consequential adjustments to legislation (e.g., ensuring that women may not marry their mothers, sisters, etc., that

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at a time, after which the exemption expires but may be renewed. Since the Charter came into force in 1982, the federal Parliament has never invoked Section 33.

[8] This was an existing deadline set on July 12, 2002 by the Ontario trial court in the Halpern case, to be discussed below.

men may not marry their fathers, brothers, etc., and that statutory references to "wives" or "husbands" are changed to "spouses") or to administrative forms and procedures (e.g., marriage license application forms with "Name of Bride", "Name of Bridegroom"). Neither decision contemplates the creation of a "separate but equal" institution.

On May 6, 2003, the Canadian Human Rights Commission expressed the same view as the British Columbia Court (emphasis added):[9]

> Under Canadian human rights law, "separate but equal" institutions like domestic partnerships are not true equality. * * * [T]he only answer consistent with the equality rights [the federal] Parliament has already recognized is one which eliminates the distinctions between same sex and heterosexual partners and includes the issuance of civil marriage licences to same-sex couples.[10]

On June 10, 2003, in Halpern v. Canada (Attorney-General), a three-judge panel of the Ontario Court of Appeal (the highest court of the province of Ontario) unanimously reached the same conclusion as the British Columbia Court.[11] The Ontario Court found that federal and

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[9] "Submission of the CHRC to the Standing Committee on Justice and Human Rights study on marriage and the legal recognition of same-sex unions" (May 6, 2003), http://www.chrc-ccdp.ca/Legis&Poli/SameSex_MemeSexe.asp?l=e,"Domestic Partnership and Other Options."

[10] Ibid., "Conclusion."

[11] (June 10, 2003), 65 Ontario Reports (3rd series) 161, http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm, Westlaw (2003 CarswellOnt 2159).

provincial legislation enacted since 1999, to extend the numerous rights and obligations of unmarried different-sex couples in Canada to unmarried same-sex couples, was not sufficient (emphasis added):

> 104. * * * In many instances, benefits and obligations do not attach until the same-sex couple has been cohabiting for a specified period of time. Conversely, married couples have instant access to all benefits and obligations. * * *
>
> 106. * * * [Section] 15(1) guarantees more than equal access to economic benefits. One must also consider whether persons and groups have been excluded from fundamental societal institutions. * * *
>
> 107. In this case, same-sex couples are excluded from a fundamental societal institution – marriage. * * * [A]ll parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

The Ontario Court agreed with the British Columbia Court that only equal access to civil marriage would respect the requirements of the Charter. In Halpern, the Court stated that "same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts." The government argued that same-sex couples had achieved virtually all of the federal benefits that flow from marriage with the passing of

the Modernization of Benefits and Obligations Act in 2000. The Court rejected this argument, in part because the Act did not assure completely equal access to governmental benefits. But more important for the Court was this further point:

> 136. Importantly, the benefits of marriage cannot be viewed in purely economic terms. The societal significance surrounding the institution of marriage cannot be overemphasized. * * *
>
> 137. * * * This is not a case of the government balancing the interests of competing groups. Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples.
>
> 138. Nor is this a case of balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. Freedom of religion under s. 2(a) of the Charter ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views.
>
> 139. In our view, the opposite-sex requirement in the definition of marriage does not minimally impair the rights of the claimants. Same-sex couples have been completely excluded from a fundamental societal institution. Complete exclusion cannot constitute minimal impairment.

The Ontario Court went beyond the British Columbia Court with regard to the remedy, because it saw no need for a suspension to allow time for adjustments to legislation:

> 152. * * * [T]he [federal government] argues for a suspension in order to permit Parliament an

opportunity to respond to the legal gap that such a declaration would create. * * * [T]emporarily suspending a declaration of invalidity is warranted only in limited circumstances, such as where striking down the law poses a potential danger to the public, threatens the rule of law, or would have the effect of denying deserving persons of benefits under the impugned law. * * *

153. There is no evidence before this court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage * * * [or] that the reformulated definition of marriage will require the volume of legislative reform that followed the release of the Supreme Court of Canada's decision in M. v. H. In our view, an immediate declaration will simply ensure that opposite-sex couples and same-sex couples immediately receive equal treatment in law in accordance with s. 15(1) of the Charter.

The Ontario Court therefore made the following order:

156. To remedy the infringement of these constitutional rights, we:

(1) declare the existing common law definition of marriage to be invalid to the extent that it refers to "one man and one woman";

(2) reformulate the common law definition of marriage as "the voluntary union for life of two persons to the exclusion of all others";

(3) order the declaration of invalidity in (1) and the reformulated definition in (2) to have immediate effect;

(4) order the Clerk of the City of Toronto to issue marriage licenses to the [applicant same-sex] Couples; and

(5) order the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour [who were married in a religious ceremony at the Metropolitan Community Church in Toronto on January 14, 2001].

Relying on the June 10, 2003 judgment's immediate effect, one of the applicant same-sex couples, Michael Leshner and Michael Stark, obtained a marriage license from the City of Toronto and were married the same day.[12] On June 17, 2003, the Prime Minister, Jean Chrétien, made the following announcement:

> We will not be appealing the recent decision on the definition of marriage. Rather, we will be proposing legislation that will protect the right of churches and religious organizations to sanctify marriage as they define it. At the same time, we will ensure that our legislation includes and legally recognises the union of same sex couples. As soon as the legislation is drafted, it will be referred to the Supreme Court. After that, it will be put to a free vote in the House [of Commons of the federal Parliament].[13]

On July 8, 2003, the British Columbia Court lifted the suspension of its May 1, 2003 decision. After hearing applications by the appellant same-sex couples with the consent of the federal Government, the Court ruled:[14]

> It is reasonable to assume * * * that any consequential amendments to the law which may be required as a result of this Court's decision do

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[12] See http://www.cbc.ca/stories/2003/06/10/ont_samesex030610.

[13] Formerly available at http://www.pm.gc.ca but removed after change of Prime Minister on Dec. 12, 2003.

[14] Barbeau v. British Columbia (Attorney General),(8 July 2003), 228 Dominion Law Reports (4th series) 416, http://www.courts.gov.bc.ca/Jdb-txt/CA/03/04/2003BCCA0406.htm, Westlaw (2003 CarswellBC 1659).

> not require the suspension of remedy which this Court originally imposed. It is also apparent that any further delay in implementing the remedies will result in an unequal application of [federal] law [on the definition of civil marriage] as between Ontario and British Columbia. * * * In these circumstances, the Court is satisfied that it is appropriate to amend the order in these appeals to lift the suspension of remedies, with the result that the declaratory relief and the reformulation of the common law definition of marriage as "the lawful union of two persons to the exclusion of all others" will take immediate effect.

Antony Porcino and Tom Graff were married in Vancouver within minutes of the decision.[15]

On July 17, 2003, the federal Government referred to the Supreme Court of Canada the following draft bill:

> 1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
> 2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

The government also submitted three constitutional questions about the bill:

> 1. Is the annexed Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada [ie, are dissenting provincial governments, such as that of Alberta, bound to comply with federal legislation on this question]? If not, in what particular or particulars, and to what extent?

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[15] See Collin Nickerson, British Columbia Approves Gay, Lesbian Marriages, Boston Globe, July 8, 2003).

> 2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars, and to what extent?
>
> 3. Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

The Supreme Court of Canada is scheduled to hear oral arguments in this case, In the Matter of a Reference by the Governor in Council concerning the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes (No. 29866), on April 16, 2004. In view of the express reference to "Marriage and Divorce" in the list of federal powers in the Constitution of Canada,[16] and the Court's case law on the constitutional equality rights of lesbian, gay and bisexual individuals and same-sex couples,[17] it is very likely that the Court will agree with the British Columbia and Ontario Courts of Appeal and answer "Yes" to all three questions. Once passed by the federal Parliament, perhaps in late 2004 or early 2005, the bill will formally extend the British Columbia and Ontario decisions to the other eight provinces and three territories of Canada.[18]

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[16] See Goodridge Brief, p. 55.

[17] See Goodridge Brief, pp. 8-10, 16, 23-25.

[18] Unlike in the United States (where individual states are free to reach their own conclusions), capacity

The seventh Canadian judge to consider the question of civil marriage versus a "separate but equal" institution was Madam Justice Lemelin of the Superior Court of Québec, District of Montréal (a trial court). On September 6, 2002, in Hendricks v. Québec (Procureur Général) (Attorney General),[19] she rejected the argument that existing Québec and federal legislation provided sufficient protections, benefits and obligations to same-sex couples.

Unlike in British Columbia and Ontario before EGALE Canada and Halpern (where same-sex couples were still denied some of the protections, benefits and obligations of married different-sex couples, or could not acquire them immediately through an alternative registration system), the June 2002 amendments to Québec's Civil Code permitted unmarried same-sex (and different-sex) couples to contract "civil unions" which are identical to civil marriages for all purposes of Québec law.[20] Moreover, under federal law, after one year of cohabitation, unmarried same-sex (and

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to marry in Canada is a federal question that must be resolved one way or the other for the entire country at the same time.

[19] No. 500-05-059656-007, [2002] Recueil de Jurisprudence du Québec 2506, http://www.jugements.qc.ca, Westlaw (2002 CarswellQue 1890).

[20] See An Act instituting civil unions and establishing new rules of filiation, Statutes of Québec 2002, chapter 6, 2nd session, 36th legislature, Bill 84; Goodridge Brief, pp. 55.

different-sex) couples in Québec are generally treated in the same way as married different-sex couples.[21]

Despite the existing "separate but equal" regime in Québec law (and substantial but not full equality in federal law), in Hendricks, Madam Justice Lemelin concluded that the availability of “civil unions” did not cure discrimination against same-sex couples[22] (unofficial translation from French original, emphasis added):

> 133. These laws correct certain inequities and confirm social acceptance of a new reality. It remains the case that Mr. Hendricks and Mr. LeBoeuf do not have the right to marry each other. * * * They are thus deprived of the choice of the type of union in which they wish to live their relationship. [They] may pursue a de facto union with the economic benefits recently granted by legislatures. In Québec, since July 2002, they can officialise their relationship by contracting a civil union which grants the same rights and obligations to all couples. But they are still denied access to marriage, an important institution in our society.

As Madam Justice Lemelin noted, under Québec law, same-sex couples have only two options: they may choose to

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[21] See Modernization of Benefits and Obligations Act, Statutes of Canada 2000, chapter 12.

[22] On January 26, 2004, the Québec Court of Appeal (the highest court of the province of Québec) is scheduled to hear an appeal from the judgment of Madam Justice Lemelin (finding discrimination violating the Charter), not by the federal Government (which withdrew its appeal after deciding not to appeal EGALE Canada and Halpern) but by two amici curiae (the Francophone Alliance of Evangelical Protestants of Québec and the Catholic League for Human Rights).

be "de facto spouses" or "civil union spouses", but cannot be "married spouses."[23] Different-sex couples in Québec enjoy all three options. Madam Justice Lemelin then quoted a 1993 statement by Mr. Justice Linden of the Federal Court of Appeal (original text in English, Madam Justice Lemelin's emphasis):

> 134. One cannot avoid the conclusion that offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine. That appalling doctrine must not be resuscitated in Canada four decades after its much heralded death in the United States.[24]

These Canadian courts, unanimously, have ruled, as this Court did in Goodridge, that the discriminatory exclusion of same-sex couples from marriage cannot be remedied by the establishment of a separate, different classification or status for those relationships. Because equality can only be achieved by including same-sex couples within the institution of marriage, this Court should answer the question from the Senate by ruling that Senate No. 2175 does not comply with the equal protection and due process requirements of the Constitution of the Commonwealth.

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[23] See, e.g., Civil Code of Québec, article 15 ("consent [to medical care] is given by his or her married, civil union or de facto spouse or ... by a close relative").

[24] Quoting from Egan v. Canada, [1993] 3 Federal Court 401 (Federal Court of Appeal of Canada) (dissenting opinion).

C. The Canadian Experience Strongly Supports This Court's Refusal to Accept a Separate-But-Equal Regime for Same-Sex Couples.

The issue presented by the Senate to this Court has been thoroughly litigated under the Canadian Charter, and every judge to address that issue has responded the same way: It is inconsistent with the constitutional equality principle for a court to accept a separate-but-equal regime for same-sex couples. Separate treatment is presumptively not equal treatment. As to marriage, an institution rich in social meaning as well as legal rights and duties, separate treatment signals continuing state disrespect for lesbian, gay, and bisexual citizens. From gays and lesbians' point of view, it perpetuates their second-class citizenship.

The Canadian experience is relevant in another respect. Critics in Canada as well as the United States maintain that judicial "imposition" of same-sex marriage upon the polity would not only be illegitimate but would bring ruin to the judiciary as well as to representative democracy. Marriage licenses have been issued to same-sex couples in Ontario since June 2003, the first in North America. There were critics of the Halpern decision in Canada, but there is no evidence that the judiciary has lost any degree of legitimacy as a result of that decision. As noted above, the elected government has acquiesced in it. The Canadian people have accepted the mandate of the constitutional equality principle. As American courts

learned in the desegregation cases, scrupulous judicial application of the constitutional equality principle enhances rather than undermines the legitimacy of the judiciary.

II. THE TREND OF INTERNATIONAL JUDICIAL DECISIONS HAS BEEN TO ELIMINATE BARRIERS TO EQUALITY FOR SAME-SEX COUPLES.

Outside of the United States and Canada, no appellate court has yet delivered a decision equivalent to the Goodridge decision. However, as the Goodridge Brief of these Amici Curiae demonstrated, the international trend is clearly in the direction of equivalent judicial decisions (in countries where they are constitutionally possible), and of voluntary legislative action to end the discriminatory exclusion of same-sex couples from civil marriage. Since these Amici filed the Goodridge Brief, there have been some important developments that reinforce our conclusion that separate-but-equal institutions for gays and lesbians are suffering the same fate that apartheid did for people of color.

On July 31, 2003, South Africa's Constitutional Court held that the country's first challenge to the common-law rule excluding same-sex couples from civil marriage, Fourie v. Minister of Home Affairs,[25] must be heard initially by the Supreme Court of Appeal, which has primary jurisdiction

[25] Case CCT 25/03, http://www.concourt.gov.za. See also, Goodridge Brief, pp. 43-44.

over common-law rules. In view of the most recent case law on equal rights for same-sex couples of both the Constitutional Court[26] and the Supreme Court of Appeal,[27] it is very likely that either Court or both will hold, at the appropriate time, that the existing common-law rule is discriminatory, violates the Constitution of South Africa, and must be reformulated.

On July 24, 2003, in Karner v. Austria,[28] the European Court of Human Rights took an important step in the direction of a decision like Goodridge. Cf. Lawrence v. Texas, 123 S. Ct. 2472, 2481, 2483 (2003) (considering decisions by the European Court of Human Rights as highly relevant to the constitutionality of American sodomy laws). A seven-judge chamber of the Court held unanimously that Austria must provide the same housing succession rights to the unmarried same-sex partners of deceased tenants as to their unmarried different-sex partners (emphasis added):

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[26] See Goodridge Brief, pp. 11-12, 26-29; J. & B. v. Director General, Department of Home Affairs (March 28, 2003), Case CCT46/02, http://www.concourt.gov.za (registration of mother's female partner as a parent after a birth resulting from donor insemination must be allowed, as in the case of the mother's husband).

[27] Du Plessis v. Road Accident Fund (Sept. 19, 2003), http://wwwserver.law.wits.ac.za/sca/index.php (common-law dependant's action extended to cover surviving partner in a same-sex permanent life relationship similar in other respects to a marriage).

[28] See http://www.echr.coe.int/hudoc.htm (Access HUDOC, Title = Karner, Search).

> 37. * * * [V]ery weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. * * * Just like differences [in treatment] based on sex, differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification. * * *
>
> 40. The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment. * * *
>
> 41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to member States is narrow, as [is] the position where there is a difference in treatment based on sex or sexual orientation, * * * [i]t must * * * be shown that it was necessary to exclude persons living in a homosexual relationship * * * in order to achieve that aim. The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion.

The Court therefore found a violation of Articles 14 (non-discrimination) and 8 (respect for home) of the European Convention on Human Rights. Note the parallels between Karner and M. v. H.: Both Courts ruled that the equality principle renders suspicious broad discriminations against gay and lesbian couples, and both understood the social fact that committed lesbian and gay couples are similarly situated to married different-sex couples. At some point in the future, the Court's reasoning in Karner (it is not necessary to discriminate against the families of same-sex couples in order to protect the "traditional" families of married different-sex couples) and in Christine

Goodwin v. United Kingdom (a couple need not be able to procreate without assistance in order to enjoy the Convention's Article 12 right to marry)[29] could be applied to the exclusion of "persons living in a homosexual relationship" from access to civil marriage.

On August 6, 2003, in Edward Young v. Australia,[30] the United Nations Human Rights Committee reached the same conclusion as the European Court of Human Rights with regard to equal treatment of unmarried different-sex and same-sex couples. The case concerned a federal veteran's dependant pension that was expressly limited to a veteran's surviving different-sex spouse or unmarried different-sex partner:

> 10.4 The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 [of the International Covenant on Civil and Political Rights] comprises also discrimination based on sexual orientation.[31] * * * [Australia] provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective. * * * In this context, the Committee finds that [Australia] has violated article 26 of the Covenant by denying the author

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[29] See Goodridge Brief, pp. 47-48.

[30] See Communication No. 941/2000, http://www.unhchr.ch (Treaty Bodies Database Search, Edward Young). The Committee's 2002 decision in Joslin v. New Zealand (discussed in Goodridge Brief, pp. 48-50) must now be read with Young.

[31] See Goodridge Brief, pp. 7-8.

> a pension on the basis of his sex or sexual orientation.

Like Australia, the United States ratified the International Covenant on Civil and Political Rights, which the Committee interprets, on June 8, 1992.

Like M. v. H., none of the foregoing decisions requires state recognition of marriage for same-sex couples. And none directly addresses the separate-but-equal issue presented by Senate Bill No. 2175. Hence, they are not as relevant as the Canadian decisions discussed in Part I of this Brief. But they directly support (1) the norm that lesbians, gay men, and bisexuals ought to be considered equal citizens; (2) the social fact that lesbian and gay couples derive the same kinds of satisfaction from their committed unions as different-sex couples do and provide some support for the corollary, namely that (3) equal citizenship for gay people entails state recognition of same-sex unions on the same terms as the state recognizes different-sex unions.

III. MOST LEGISLATURES OUTSIDE THE UNITED STATES THAT HAVE CREATED NEW INSTITUTIONS FOR RECOGNIZING COMMITTED UNIONS HAVE DONE SO ON A NON-DISCRIMINATORY BASIS (UNLIKE THE PROPOSAL IN SENATE BILL NO. 2175).

There are two reasons why a legislature might choose to create a new legal institution that is substantially similar to civil marriage, but has a different name, such as "civil union" or "registered partnership." The first, non-discriminatory reason is to expand the choices of all couples, different-sex and same-sex, who seek legal recognition of their relationships. This reason is consistent with the Massachusetts Constitution, most other constitutions (national, federal or state), and international human rights treaties. Most jurisdictions that have created new institutions, therefore, have made them available to different-sex as well as same-sex couples.[32]

The second, discriminatory reason is to create a "separate but equal," (or more aptly described "separate and not even equal,") substitute for civil marriage for same-sex couples, providing all or most of the protections, benefits, and obligations of civil marriage but not the

[32] This Brief will support the generalization in text as it applies to jurisdictions outside the United States. Most American jurisdictions in the United States creating registered “domestic partnerships,” for example, have followed this principle. Lists of domestic partner registries can be found on the following websites: <lambdalegal.org> and <buddybuddy.com>. The Human Rights Campaign Foundation website, <hrc.org>, has the most extensive report of state and local governments that offer domestic partner health benefits to their employees.

name. This reason is contrary to the Massachusetts Constitution as well as the Canadian Charter of Rights and Freedoms, and will eventually be recognised as contrary to other constitutions and to international human rights treaties.

A. The Majority of Legislatures Outside the United States Have Rejected "Separate But Equal" Institutions For Same-Sex Couples.

Whatever their position to date on ending the exclusion of same-sex couples from civil marriage, the majority of legislatures outside the United States that have created new institutions (requiring a formal registration or other public act) have made access non-discriminatory, in that the new institutions are open to all unmarried couples, different-sex or same-sex. The following legislatures have created new institutions of this kind:[33]

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[33] Citations for all the legislation referred to in the following tables can be found in Appendix III of the Goodridge Brief, with the following exceptions, which we now supply: Argentina, Buenos Aires (Autonomous City of), Ley de Unión Civil, No. 1004, 12 Dec. 2002; Australia, Australian Capital Territory, Legislation (Gay, Lesbian and Transgender) Amendment Act 2003, Discrimination Amendment Act 2003; Australia, Queensland, Discrimination Law Amendment Act 2002; Australia, Tasmania, Relationships Act 2003, Relationships (Consequential Amendments) Act 2003; Spain, Andalucía, Ley de parejas de hecho, (5 Dec. 2002) 422 Boletín Oficial del Parlamento de Andalucía 23987; Spain, Basque Country, Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho, (9 May 2002) 92 Boletín Oficial del Parlamento Vasco 9760; Spain, Canary Islands, Ley 5/2003, de 6 de marzo, para la regulación de las parejas de hecho, (13 March 2003, V Legislatura) 150 Boletín Oficial del Parlamento de Canarias 2; Spain, Extremadura, Ley de

Table 1
Non-Discriminatory Access to New Institutions

Country	*Legislature*	*Name of Institution*
Argentina	Buenos Aires (city)	Civil union
Australia	Tasmania (state)	Registered deed of relationship
Belgium	Federal	Statutory cohabitation
Canada	Manitoba (province) Nova Scotia (province) Québec (province)	Registered common-law partnership Registered domestic partnership Civil union
France	National	Civil solidarity pact
Netherlands	National	Registered partnership
Spain	(autonomous communities) Andalucía Aragón Asturias Balearic Islands Basque Country Canary Islands Catalonia Extremadura Madrid Navarra Valencia	(Registration or a public deed required or possible) De facto couples Unmarried stable couples Stable couples Stable couples De facto couples De facto couples Stable unions of couples De facto couples De facto unions Stable couples De facto unions
Switzerland	Geneva (canton)	Partnership

B. The Minority of Initiatives Creating Separate Institutions for Same-Sex Couples Will Eventually Fall to the Growing Insistence on the Equality Principle in National and International Human Rights Law.

As Table 2, below, reports, a minority of legislatures outside the United States have created new institutions for

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Parejas de Hecho, (26 March 2003) 377 Boletín Oficial de la Asamblea de Extremadura 13.

same-sex couples only, as a matter of political compromise rather than constitutional principle. These institutions are in fact "separate and not even equal," because they do not grant the same rights and duties as civil marriage:[34]

Table 2
Discriminatory Access to New Institutions

Country	*Legislature*	*Name of Institution*
Denmark	National	Registered partnership (same-sex only)
Finland	National	Registered partnership (same-sex only)
Germany	National	Registered life partnership (same-sex only)
Iceland	National	Confirmed cohabitation (same-sex only)
Norway	National	Registered partnership (same-sex only)
Sweden	National	Registered partnership (same-sex only)
Switzerland	Zürich (canton)	Partnership (same-sex only)

These new institutions with unequal access run counter to the broad trend of human rights law, which is the elimination of sexual orientation discrimination with

[34] There may be more countries on the horizon. On Dec. 3, 2003, the National Council (one house) of the Swiss Parliament passed a proposed Federal Law on Registered Partnership Between Persons of the Same Sex, which is now before the Council of States (the other house). On November 26, 2003, the United Kingdom Government announced that it plans to introduce in the U.K. Parliament a bill that would create a new institution of "civil partnership" for same-sex couples only. See Department of Trade and Industry, Women and Equality Unit, "Civil Partnership: A framework for the legal recognition of same-sex couples" (June 30, 2003).

regard to a couple's choice of whether or not to seek legal recognition for their relationship, and what form that legal recognition will take. This trend is most advanced with regard to legal recognition of de facto, informal, or unregistered cohabitation (i.e., living together in a "common-law marriage"), where legal consequences follow from the fact of cohabitation for a specified period and no formal registration or other public act is required. The following legislatures have attached significant protections, benefits and obligations to cohabitation, which apply to all unmarried couples, different-sex or same-sex.[35]

Table 3
Non-Discriminatory Recognition of Cohabitation

Country	*Legislature*
Australia	Australian Capital Territory New South Wales (province) Queensland (province) Tasmania (province) Victoria (province) Western Australia (province)
Canada	Federal Alberta (province) British Columbia (province) Manitoba (province) Nova Scotia (province) Québec (province) Saskatchewan (province)
France	National
Hungary	National

[35] The Ontario legislation provides the same protections, benefits and obligations but uses the separate terms "spouse" (which includes an unmarried different-sex partner) and "same-sex partner".

Country	*Legislature*
Netherlands	National
New Zealand	National
Portugal	National
South Africa	National
Sweden	National

The Karner v. Austria judgment of the European Court of Human Rights essentially requires that all 45 member states of the Council of Europe follow the approach of the countries in Table 3. Absent a strong justification, legislatures and courts in these countries must extend any existing or new recognition of cohabitation by unmarried different-sex couples to unmarried same-sex couples. In Edward Young v. Australia, the United Nations Human Rights Committee gave a similar interpretation to the International Covenant on Civil and Political Rights, which 151 countries (including the United States) have ratified.[36]

The Netherlands exemplifies the end result of this international trend. All choices with regard to legal recognition of relationships are equal for all couples,

[36] As of Nov. 3, 2003. Unlike judgments of the European Court of Human Rights, which are binding in international law, "views" of the United Nations Human Rights Committee about an individual complaint are technically not binding on the respondent government, but are highly persuasive.

different-sex or same-sex. The following are the choices in the Netherlands:[37]

Table 4
Choices for All Couples in The Netherlands

Choice	*Different-Sex Couples*	*Same-Sex Couples*
Civil Marriage	Yes	Yes
Registered Partnership	Yes	Yes
De Facto, Informal, Unregistered Cohabitation	Yes	Yes

It is generally for the legislature to decide the number of choices (in particular whether civil marriage should be the only choice or whether any new choices should be created) and the specific protections, benefits, and obligations attached to each choice. But the non-discrimination principles of human rights law require that the choices must be equal for different-sex and same-sex couples.

Applying this analysis to Massachusetts, the following choices will be available to couples if Senate Bill No. 2175 is passed:

[37] See Kees Waaldijk, "Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands," in Robert Wintemute (ed.) & Mads Andenæs (hon. co-ed.), Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law (Oxford, Hart Publishing, 2001), pp. 437-64.

Table 5
Choices for All Couples in Massachusetts
(Under Senate Bill 2175)

Choice	*Different-Sex Couples*	*Same-Sex Couples*
Civil Marriage (Goodridge)	Yes	No[38]
Civil Union (Senate Bill 2175)	No	Yes
Cohabitation	No	No

Table 5 reflects a regime that is doubly discriminatory, and greatly at odds with the equality principle as it is being articulated in international law as well as the law of Western countries.

Given the international trend towards equal choices for all couples, what will become of the new "separate and not even equal" institutions that a minority of legislatures have created for same-sex couples only? Outside the United States, constitutions and international human rights treaties are increasingly likely to be interpreted as requiring equal access to civil marriage for same-sex couples (as in Canada and probably soon in South Africa), and legislatures are increasingly likely to

[38] This will be the result under Senate Bill 2175 despite the fact that Goodridge unequivocally grants the right of civil marriage to same-sex couples. Senate Bill 2175 is contrary to the holding of the Goodridge decision because it explicitly bars same-sex couples from the institution of marriage.

conclude voluntarily that the non-discrimination principles of human rights law require equal access (as in The Netherlands and Belgium).

Once a country that has created a new "separate and not even equal" institution opens up civil marriage to same-sex couples, whether because of a judicial decision or legislative action, it will have two choices with regard to the alternate institution: extend it to different-sex couples, or abolish it (e.g., by changing its name to civil marriage). The non-discrimination principles of human rights law would not permit same-sex couples to have two choices of registration system (civil marriage and civil union or registered partnership) while different-sex couples had only one choice (civil marriage).

This process of transition is now occurring in Scandinavia. The first step towards the extension or abolition of "separate and not even equal" same-sex registered partnership in the five Nordic countries (Iceland, Norway, Denmark, Sweden, Finland) was the equalization of adoption rights for different-sex married spouses and same-sex registered partners in Sweden in 2002.[39] Apart from a general concern that "the sky would fall" (now refuted by the examples of The Netherlands, Belgium, Ontario, and British Columbia), the Nordic countries' main reason for creating new institutions of

[39] See Goodridge Brief, pp. 54-55.

same-sex registered partnership, rather than granting same-sex couples equal access to civil marriage, was to exclude same-sex couples from the right of married different-sex couples to seek second-parent or joint adoption of children, or donor insemination. These forms of discrimination against same-sex couples do not exist in Massachusetts.

The Swedish Government is now studying a proposal to equalize access to donor insemination and other reproductive technology for different-sex married spouses and same-sex registered partners.[40] Once this second major difference between different-sex civil marriage and same-sex registered partnership has been removed, it is likely that same-sex couples in Sweden will be granted equal access to civil marriage,[41] and that same-sex registered partnership will be extended to different-sex couples or abolished. It is also likely that the other four Nordic countries will eventually follow Sweden's example.

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[40] See *Barn i homosexuella familjer* (Children in Gay and Lesbian Families), SOU 2001:10, http://www.regeringen.se/propositioner/sou/index.htm (January 2001).

[41] On Nov. 26, 2003, the Ombudsman against Discrimination because of Sexual Orientation delivered to the Attorney General (Minister for Justice) a formal request that the Swedish Government begin the legislative proceedings necessary to introduce a sex-neutral marriage law. See http://www.homo.se/o.o.i.s/1022 (03-11-26 Införande av en könsneutral äktenskapsbalk).

The Amici Curiae respectfully urge this Court not to hold that the Massachusetts Constitution permits the legislature to go down the road of "separate but equal", by creating a new institution of "civil union" for same-sex couples (and the lesbian and gay minority of the Commonwealth's citizens), instead of granting them equal access to the existing institution of civil marriage enjoyed by different-sex couples (and the heterosexual majority of the Commonwealth's citizens). To do so would be to allow temporary political expedience to override the lasting values of the Massachusetts Constitution.

A civil union is not the same as a civil marriage, just as the United Kingdom's granting the vote to women in 1918, but only at the age of 30, was not the same as the existing right of men to vote at the age of 21.[42] As the Amici Curiae argued in their Goodridge Brief, the fact that civil marriage has been opened up to same-sex couples by the courts of Ontario and British Columbia, and by the legislatures of The Netherlands and Belgium,[43] means that an end to the discriminatory exclusion of same-sex couples from civil marriage is far from being "unthinkable."

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[42] Representation of the People Act 1918, s. 4 (vote for women at 30 vs. 21 for men); Representation of the People Act 1928, s. 1 (equal voting age of 21).

[43] See Goodridge Brief, pp. 51-53; Law of 13 Feb. 2003 opening up marriage to persons of the same sex and modifying certain provisions of the Civil Code, Moniteur belge, Feb. 28, 2003, Edition 3, p. 9880, in force on June 1, 2003.

On the contrary, equal access to civil marriage represents the only just outcome. Therefore, Amici respectfully conclude that the only correct response to the Senate's question is a resounding "No." Whatever short-term criticism this Court might face, its courage will ultimately be honored by governments, legislatures and courts throughout the world. And the decision will be one of which this Court will be very proud.

CONCLUSION

For the foregoing reasons, the Amici Curiae respectfully request that this Court answer the question from the Senate by ruling that Senate No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with identical benefits, protections, rights, and responsibilities, does not comply with the equal protection and due process requirements of the Constitution of the Commonwealth.

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CERTIFICATE OF SERVICE

I, Darcy W. Shearer, certify that on this 12th day of January, 2004, I caused this Brief of Amici Curiae "International Human Rights Organizations and Law Professors" to be served upon Legal Counsel to the Senate of Massachusetts.

/s/ Darcy W. Shearer
Darcy W. Shearer

APPENDIX I

AMICI CURIAE: INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND LAW PROFESSORS

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Coalition gaie et lesbienne du Québec (Gay and Lesbian Coalition of Québec), Québec City, Québec, Canada

Comunidad Homosexual Argentina (Homosexual Community of Argentina), Buenos Aires, Argentina

EGALE Canada Inc., Ottawa, Ontario, Canada

Fédération internationale des ligues des Droits de l'Homme(FIDH)(International Federation for Human Rights), Paris, France

Human Rights Watch, New York, New York, USA

ILGA (International Lesbian and Gay Association), Brussels, Belgium

ILGA-Europe (the European Region of the ILGA), Brussels, Belgium

ILGA-North America (the North American Region of the ILGA), Québec City, Québec, Canada and New York, New York, USA

Interights, London, United Kingdom

International Lesbian and Gay Law Association (ILGLaw), Toronto, Ontario, Canada

Lesbian and Gay Equality Project, Johannesburg, South Africa

Lesbian and Gay Legal Equality, Wellington, New Zealand

ProGay Philippines, Caloocan City, Philippines

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