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Mathew Staver

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## An Overview of the Massachusetts Federal Court Rulings and the Next Legal and Political Steps

Following the federal court rulings regarding same-sex marriage in Massachusetts, many are wondering what the next step is in the battle over marriage. Before answering that question, let me explain the rulings and the status of the litigation.

### The Federal Court Ruling

The lawsuit we filed on May 10, 2004, in federal court is based on the Guarantee Clause contained in Article IV of the United States Constitution. Its placement in the Constitution is significant because the Founders designed the Clause to be enforced by all three branches of government (Executive, Legislative and Judiciary). The Guarantee Clause is designed to ensure that the United States, and each individual state, have a republican form of government. Simply put, a republican form of government means, at a minimum, that the people be allowed to elect representatives and that the people retain authority for self-government. The United States Constitution, as well as individual state constitutions, accomplish representative government by distributing authority among three separate branches, the Legislative (which makes the law), the Executive (which enforces the law), and the Judiciary (which applies the law).

The most powerful branch of government is the Legislative. It is through this branch that the people, via their representatives, make law and create social policy. Whenever one branch usurps the authority delegated to another branch, the republican form of government is upset. The Founders believed misuse of delegated authority could lead to tyranny.

Historically the Guarantee Clause was used by the federal Legislature to require that new states establish a republican form of government as a condition of their admission to the Union. However, in the mid-1800s the United States Supreme Court interpreted the Guarantee Clause in such a way as to limit its effect. In 1912, the Supreme Court issued another opinion stating that claims arising under the Guarantee Clause were nonjusticiable, meaning that such cases could not be decided by the courts. However, in 1992, the Supreme Court issued another

ruling in which it stated that some cases may be appropriate to bring in federal court under the Guarantee Clause.

Premised on the federal Guarantee Clause, our lawsuit argues that the republican form of government in Massachusetts was upset when the Massachusetts Supreme Judicial Court usurped the power of the Legislature by redefining marriage as the "union of two persons." Unlike other state constitutions, the Massachusetts Constitution is quite unique in reference to marriage. In the section of the state constitution that sets up the judiciary, there is one, and only one, limitation on the power of the courts – the limitation on judicial authority over marriage. As one of the original 13 colonies, Massachusetts' experience with marriage bears some explanation. Originally, The Governor and the Governor's Council handled all matters pertaining to marriage. To get married or divorced, the parties went before the Governor or the Council, not the Courts. The judiciary was a fledgling branch, a ninety-pound weakling if you will. When the state constitution was adopted, it left marriage where it had always been – with the Executive branch. Thus, the state constitution gives absolute authority over marriage to the Governor and the Governor's Council. The constitution then states that the Legislature may delegate some authority over marriage to the other branches, namely to itself or to the courts. The Legislature has only twice delegated authority to the Judiciary. In 1785, the Legislature gave authority to the courts over divorce and alimony. In 1836, the Legislature gave the courts authority over annulment and affirmation. Outside of these four limited areas, the courts have no other authority over marriage.

In its decision on November 18, 2003, when the Massachusetts Supreme Judicial Court issued its ruling regarding same-sex marriage, the court acknowledged that marriage has always been understood as the "union of one man and one woman", but the court then redefined marriage to mean the "union of two persons." In doing so, the court usurped the power of the Executive and Legislative branches of government and therefore violated the Guarantee Clause.

The Massachusetts Supreme Judicial Court has no more authority to redefine marriage than a Utah court has to authorize polygamy. Utah is one of several states whose constitution expressly bans polygamy. Thus, a Utah court would have no authority to redefine marriage to be the "union of two or more persons." The constitution of Massachusetts limits the power of the courts over marriage. Moreover, as used in the constitution, marriage is indisputably the "union of one man and one woman." Thus, the state court upset the republican form of government when it redefined marriage.

On May 13, 2004, the federal court in our lawsuit ruled that it had jurisdiction to hear the case under the federal Guarantee Clause, and our clients (a Massachusetts citizen and 11 legislators) had standing to bring the suit against all seven justices of the Massachusetts Supreme Judicial Court and other state defendants. This was the most difficult part of the case, and our case marks the first time in American history where a federal court has used the Guarantee Clause against a state court. This means that the Guarantee Clause can be used to reign in state (and federal) courts that usurp the power of another branch of

government.

After the federal district court favorably decided the most difficult legal question in our favor, it then stumbled on the easy question – “Did the Massachusetts Supreme Judicial Court usurp the authority of the Legislature when it redefined marriage?” The federal court said “No!” The federal court reasoned that if the state courts have authority over divorce, annulment or affirmation, then they must have authority to define what marriage is, and if they can define what marriage is, they can redefine marriage. However, declaring that a marriage is ended is far different than redefining marriage itself and thereby creating an entirely new and different institution. To annul or affirm a marriage, the court merely considers specific questions, such as consent, competency, family relationship, fraud, or whether one of the parties was married at the time to another person. Deciding these questions does not require courts to define marriage. Marriage has been defined as the “union of one man and one woman.” Most certainly, exercising limited authority over divorce, alimony, annulment or affirmation does not give authority to redefine marriage to mean the “union of two persons.”

### **The Next Legal Step**

When I received the federal court decision On May 13, 2004, at 4:00 pm EDT, I immediately filed an appeal with the First Circuit Court of Appeals in Boston. I also filed a motion and a 20-page memorandum of law asking the appeals court to issue an injunction pending the appeal to stop the Supreme Judicial Court’s ruling from going into effect on May 17.

Our appeal asked for (1) an injunction pending appeal and (2) an expedited hearing. The appeals court denied the injunction pending appeal but granted an expedited hearing. The Supreme Court declined to get involved at this stage. However, the case will be argued this month before the court of appeals, and after this court issues its ruling, the case will once again be headed for the United States Supreme Court.

### **The Next Political Steps in Massachusetts**

In the meantime, there are several political steps that can be taken in Massachusetts. First, since the Executive branch has absolute authority over marriage with the proviso that the Legislature may delegate certain duties over marriage to other branches, what the Legislature gave to the Judicial branch, the Legislature may take away. While I disagree with the federal court’s reasoning that having authority over divorce, alimony, annulment and affirmation means the courts have authority to define marriage, the Legislature could pass a law expressly stating that marriage is defined as the “union of one man and one woman” and that courts have no authority to redefine or reformulate marriage in any other manner. This unique authority is likely unavailable in most other states because most other states do not expressly mention marriage in their constitutions, and even those that do, do not expressly grant complete authority over marriage to the Executive and Legislative branches. The Legislature can, and should, take this action. A sample legislative enactment could read as follows:

The definition of marriage in the state constitution, as inherited from common law, is, and always has been, the union of one man and one woman. Notwithstanding the Legislature's limited grant of authority to the Judiciary to preside over matters of divorce, alimony, annulment and affirmation, no court has the authority to define, redefine, reformulate or amend marriage to mean or be anything other than the union of one man and one woman; and any attempt by the Judiciary is null and void ab initio.

Second, Governor Mitt Romney could refuse to enforce the Supreme Judicial Court's ruling. As noted, the state constitution vests the Executive branch with authority over "causes" of marriage. While neither the Governor nor the Executive can redefine marriage from its undisputed meaning in the state constitution absent a constitutional amendment, the Executive retains authority over causes of marriage other than divorce, alimony, annulment and affirmation. Thus, the Executive has the authority to preserve the definition of marriage, and thus the authority to issue an Executive Order prohibiting the issuance, solemnization and recordation of same-sex marriage licenses. Moreover, since the Executive branch enforces the law, it does not have to implement or enforce the decision of the Massachusetts Supreme Judicial Court. Without the Executive branch enforcing the court decision, the court's ruling is meaningless. The Department of Public Health, the Registrar and the City and Town Clerks all come under the Executive branch.

Third, the Legislature will meet in 2005 to vote a second time to place a referendum on the ballot to amend the state constitution to ban same-sex marriage. If a favorable vote ensues, the amendment will go to the voters in the Fall of 2006. However, the current version of the amendment that passed this year bans same-sex marriage but authorizes same-sex civil unions. This presents three possible scenarios. First, next year the Legislature could modify the proposed amendment to ban same-sex marriage and eliminate the provision to authorize civil unions. If that happens, instead of going on the ballot in November 2006, the Legislature would have to vote again on the same wording in 2006. Then the same-sex marriage ban will be placed on the ballot in November 2008. Second, the "no to same-sex marriage - yes to civil unions" amendment could be passed a second time in the Legislature next year and be placed on the ballot in November 2006. Neither side wants this amendment, so it is possible it could fail to win enough votes. Third, the Legislature could fail to pass on any amendment next year, and thus the amendment process would be stalled.

It is worth pointing out that a few years ago, more than enough voter signatures were obtained to place an amendment on the ballot banning same-sex marriage. However, the then-Senate President refused to call up the signatures for verification, and thus the time expired on these signatures. Perhaps another citizen referendum is worth trying again.

## **The Next Legal and Political Steps for the Nation**

### ***Legal***

Following the issuance of marriage licenses to same-sex couples, in Massachusetts, we will see increased litigation throughout the other 49 states and territories, including suits against the United States. Since February 12, 2004, there have been 17 legal cases involving same-sex marriage. Liberty Counsel is involved in 15 of those cases. We filed the first suit to stop San Francisco Mayor Gavin Newsom from issuing same-sex marriage licenses. The California Supreme Court eventually stopped the mayor. Our suit stopped New Paltz, New York, Mayor Jason West from solemnizing same-sex marriages. In other cases where homosexual advocates have filed suit against state marriage laws, Liberty Counsel has moved to intervene to defend these laws. So the litigation will continue and will exponentially increase. We will continue to aggressively defend marriage between one man and one woman.

### ***Political – The Federal Marriage Amendment***

What we can and must do is amend the United States Constitution to preserve marriage between one man and one woman. The courts have no business setting social policy on our most basic and fundamental social compact of male-female marriage. To pass an amendment to the United States Constitution, we must have two-thirds of the House and Senate vote in favor of such an amendment. Then we need three-fourths of the states (38) to ratify the amendment. Since 1996, more than the required number of states have either passed legislation or amended their state constitutions to expressly ban same-sex marriage. Once a constitutional amendment goes to the states for ratification, I believe we will clearly win.

The real battle now is getting our U.S. Senators and Representatives to pass a marriage amendment so the state legislatures can ratify the amendment. The Senate is currently holding hearings on such an amendment. President George W. Bush has publicly supported a constitutional amendment. However, President Bush needs to do more than make a public statement. He should appoint a pro-marriage advocate to his staff whose sole job is to push forward a constitutional amendment. Every day this advocate should be contacting politicians to educate, motivate and direct the strategy. The House must also become aggressive in pushing a marriage amendment forward.

Marriage between one man and one woman is fundamental to our society. A mother and a father are critically important for the proper development of children. Gender is not optional when it comes to kids. God didn't make a mistake when He created man and woman. Our children will suffer, and our society will become less safe and nurturing, if we create policy that sanctions and promotes single-gender families. We will all pay a steep price, and most importantly, we have no business experimenting with the future of our children.

Despite what happens in Massachusetts, we must not get discouraged. This is just one battle in a larger cultural war over marriage. I believe that the homosexual agenda has advanced too fast, and the accelerated pace we are seeing is not sitting well with the general public. As this battle begins to spread across America, I see a sleeping giant awakening – the majority of Americans who believe in

marriage between one man and one woman, who have historically remained silent in this cultural war, but who are beginning to draw a line in the sand and who are ready to preserve marriage. The pulpits around the country must ring with truth. Pastors must get over their moral laryngitis.

We have a choice. Surrender now, or increase the intensity and win. We can, we must, do the latter. For me this is not a choice. The decision is easy. We will prevail.

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### **Law School Poised to Change History One Degree at a Time**

Years of dreaming and almost two years of intensive planning and hard work will become a reality on August 18, 2004, when Liberty University School of Law officially welcomes the entering first year class. Although class officially begins the following week, all students are required to attend a four-day Barristers orientation program the week prior to class. This program is unlike any other in the nation. During these four days students will be taught foundational principles upon which they will build for the rest of their law school career. This orientation program will focus on biblical worldview, the integration of law and the Christian faith, what to expect and how to successfully excel in law school and the practice of law.

In 1971, when Dr. Jerry Falwell founded Liberty University, he dreamed of the day when the University would launch a law school as its first professional school. Now the largest Christian University in the world with global impact will further advance its mission with the opening of the School of Law. The timing on the law school could not be any more critical. We have entered an era where the judicial branch of government has become actively engaged in forging new social policy. The situation in Massachusetts is just one such example.

It is not surprising why some judges act like legislators. There is virtually no law school in the country that requires students to read the actual text of the Constitution as part of their constitutional law course. When I was in law school, I took every constitutional law course available. Not once was I ever required to read the Constitution. If you ask any attorney, you will be surprised to learn that my experience is typical. Can you imagine someone completing seminary and never having to read the Bible? Its no wonder why the constitutional text means nothing to many judges. It remains a foreign document, and more particularly, the principles underlying the Western Legal Tradition are even more alien to most judges.

The School of Law will present a rigorous program, teaching the best of the Western Legal Tradition. Students will be trained in a biblical worldview, drawing upon the rich history. Students will be able to integrate their Christian faith with law.

Unlike any other law school, Liberty University will have a mandatory research and writing requirement every semester. I have personally hired and supervised