

QUESTIONS PRESENTED

1. Where the state Constitution was defied by both the Legislature and the Governor -- even after this Court clearly outlined on Dec. 20 their mandatory duties under art. 48 -- is there nothing the citizens can do?

2. Is the remedy that the plaintiffs have suggested to the Court unusual or drastic? If it is, what are the citizens able to do to get relief?

STATEMENT OF THE CASE

Prior Proceedings

The Plaintiff noted, in oral argument before the full Court on Dec. 3, 2002, in a previous case involving this scandal (Pawlick v. Birmingham and Secretary, No. SJC-08879), that the plaintiffs would not be able to quietly disappear if the citizens were not granted some effective relief in this Constitutional crisis. Although this Court subsequently dismissed our case, it did not do so before it had granted all the relief we had requested in our Complaint, which was that the Court inform the parties about their duties and responsibilities under art. 48. The Court did this when it issued its Dec. 20 advisory to Gov. Swift.

Nevertheless, both the Legislature and the Governor ignored your advice and we filed this suit on Jan. 2, 2003. Single Justice Greaney granted a Motion to Dismiss, without comment, on February 28, thus continuing the mantra that these plaintiffs have no right to sue.

Statement of Facts

Plaintiffs are 1) a corporation and 2) an individual, both of which have been working assiduously to move forward an art. 48 initiative, known as the Protection of Marriage amendment, to the citizens for their vote at the November election in 2004.

(There is some question whether an organization may be formally included in this suit. While it is necessary that this Court understands the significance of the parties involved, whether or not they are a legal party to the suit is insignificant.)

The corporation was established in 2001. The Commonwealth required that it be created especially for the purpose of pursuing the art. 48 initiative. Prior to it, another corporation, Massachusetts Citizens Alliance, had been formed in 2000 for the same purpose. Those two corporations have spent

\$1,761,086.54 to date, and 2) the President of those corporations since their inception, Sarah McVay Pawlick, has personally contributed \$1,560,398.22 to date to those corporations.

The plaintiffs followed all the intricate requirements of art. 48, obtaining over 130,000 raw signatures and 76,607 certified signatures (which was almost 20,000 more than the 57,100 necessary for approval). The Secretary of State certified the amendment in January 2002.

Although the duties of the Legislature and the Governor were clear, both failed to perform those duties and the plaintiffs were forced to bring an action in this Court on August 16, 2002, which merely requested a clarification of the legal responsibility of the various officers and legislators of the Commonwealth. Because of the plaintiffs' action against her, the Governor also requested on Dec. 3, 2002, that the Supreme Judicial Court advise her of her responsibilities under the law. The state Senate made a similar request two days later. As a result, the plaintiffs' lawsuit was rendered moot because that was exactly what the plaintiffs had requested from the Court, i.e., a clarification of the duties of the parties.

On Dec. 20, the Supreme Judicial Court answered the Governor's request and advised her that the Legislature had not followed art. 48 as required and a vote was necessary before Dec. 31 in order to obey the requirements of art. 48. Despite the clear message from the Court, the Governor and the Legislature still failed to perform their duties.

As a result, the Secretary has not forwarded the art. 48 initiative to the new Legislature.

Because of the relief which is requested of this Court at this time, it is important that 1) the new Legislature be notified as quickly as possible what further action is required of it and 2) that the many thousands of citizens who are carefully following this suit see a final closure to this matter.

SHORT SUMMARY OF THE ARGUMENT

If there is no remedy under state law for this scandal, then we no longer have a republican form of government as guaranteed by the U.S. Constitution and the only remedy is to seek relief in the federal courts.

One suggested remedy is that the Court take judicial notice that the Legislature purposefully failed to exercise its right and its duty to vote on the Amendment in its desire to kill the amendment by

any means. Therefore, the Court could send it on to the new Legislature for its action if the Court is unable to devise any other remedy.

The First Amendment rights of those Legislators who were not allowed to debate the issue were also damaged by the violation of the law.

ARGUMENT

I.

FACTUAL AND LEGAL BACKGROUND

There are two major differences in this suit, which was filed on Jan. 2, 2003, from last year's case.

1) One is that the major perpetrator of this scandal, Senate President Thomas Birmingham, is no longer a defendant. The only defendant at this time is a neutral person, the Secretary of the Commonwealth, whose apparent desire is only to obey the law, whatever it may be.

The attorney who opposes the suit continues to be the Attorney General, whose duty it is to defend the person who has been sued, regardless of the attorney's personal beliefs. We will never know, and do not wish to know the personal feelings of the Attorney General, because it is his duty to protect his client. When we disparage the arguments of the Assistant Attorney

General, we do not mean anything personal.

The scandal resulted because the people on Beacon Hill were, and are, under tremendous pressure from their political allies to kill the Protection of Marriage amendment even though the majority of the citizens favor it. Therefore, the Legislature and Governor Jane Swift resorted to violating the Constitution in order to prevent a vote on the measure, because they knew they would lose if it came to a vote.

2) The other major difference from last year is that no one can claim any longer that they are confused by Limits v. President of the Senate, 414 Mass. 31 (1992). Whether the person making that claim is Thomas Birmingham, Jane Swift or any of the 143 Legislators who voted to adjourn the Constitutional Convention on July 17 or any of the other politicians who seek to impose their will upon the citizens, it no longer has any aura of truth.

That is true because this Court made it clear in its advisory of Dec. 20 that the Legislature's Joint Rule 12A changed the law when it was enacted in 1995. Unlike 1992, this meant that the 2002 Legislature violated the Constitution in July when it adjourned the Constitutional Convention on July 17 and then

adjourned the Legislature on July 31 so that it was unable to recall the Constitutional Convention on its own without the help of the Governor.

The advisory of Dec. 20 accomplished everything that Pawlick had requested in her suit last fall. The only relief she had sought was a clear statement of the legal responsibilities of the parties in the art. 48 process. When this was accomplished in the Dec. 20 opinion, it essentially made her suit moot.

However, in her final brief, she also had requested the relief which is the subject of this suit. She could see that this Court has always hesitated to order the Legislature to do anything. It has always had respect for the other two branches of our government, as it should. But it has not hesitated to tell others, such as the Secretary, to do things which affect the actions of the Legislature if this is necessary.

The latest example of this is last year's Clean Elections case, Bates v. Director of the Office of Campaign and Political Finance, 436 Mass. 144, where the Court did not back down in its confrontation with the Legislature.

Therefore, in last year's argument before the full Court, Pawlick requested that the Secretary be

instructed to send the Amendment to the new Legislature for its consideration, just as though the old Legislature had approved it. But the attorney for the Commonwealth argued that that issue had not been raised before and should be "properly briefed." It has now been briefed in this lawsuit and is properly before the Court.

Although the previous lawsuit became moot after the Court gave Pawlick the desired relief in its response to the Governor on Dec. 20, the Court then had the dilemma of how to remove Pawlick's suit from its calendar. Although Pawlick had gotten everything she had asked for in her Complaint, she had also requested in her brief that the Court send the Amendment to the new Legislature for its consideration. Therefore, the Court undoubtedly felt it could not render the case moot and the best way to get the case off its calendar was to merely affirm the opinion of the Single Justice that Pawlick had no right to sue the President of the Senate any more than any other citizen.

II.

IS THERE ANYONE WITH A RIGHT TO BE HEARD?

What citizen has a right to be heard in this

scandal? If not the plaintiff, then who?

It is difficult to believe that the citizens have nowhere to go for relief. If that is true, there will be much unhappiness in the Commonwealth. Over 60% of the citizens favor the amendment and about 90% want the Constitution to be obeyed. It was to correct this type of abuse by the powerful that the liberals and progressives enacted art. 48 in 1918, to return our republican form of government to the people.

At the very least, the citizens have the right to be heard and to present their grievances. If they are to be cut off without anyone even listening to their issues, this would be a terrible indictment of our democracy. And yet, that is what the attorney for the Commonwealth is urging.

This is particularly true when everyone else is able to sue the Secretary without problem. The plaintiff has been told by many, probably most people, that she is wasting her time appealing to anyone in this state, including the courts. But she keeps assuring them that the courts are still fair, although some judges are not, as is true with people everywhere. There is little question that every Justice on this Court would describe himself as "liberal." It was a disappointment last fall to see

even Justice Greaney reveal his liberal bent when he told the Superior Court judges on Nov. 1, 2002:

Unfortunately for us, this cynicism has seeped into the judicial system. We are now part of the crisis in public trust and confidence in governmental institutions. A considerable number of citizens now think that judges are nothing more than politicians in black robes; that the court system utterly fails to protect the rights of the poor and minorities; and that the law is a mass of unpredictable outrageous decisions. The average citizen, if called upon to give an example to justify the latter point, would probably refer to three cases: the O.J. Simpson trial; the McDonald's coffee cup spill case; and Bush v. Gore.

Most citizens would respectfully disagree that the 2000 Presidential election was in any way unfair, particularly with the hindsight that was available in the fall of 2002. But they would not be surprised that even our most respected judges in Massachusetts have a strong liberal bent. And those citizens are quick to point out the plaintiff's naiveté for believing she will find justice anywhere in Massachusetts.

Many citizens, together with others on the national scene, point to the Goodrich case which seeks to impose homosexual marriage in our state. Many have already decided what the Court will hold. They know that the Protection of Marriage amendment would not permit homosexual marriage and they counsel us that

that is why we will never win in this Court.

But the plaintiff points out to them and to those on the national scene that she has not seen unfairness in the legal actions she has observed in the last few years, despite the political beliefs of the judges, the Attorney General and the Secretary of State. She is still optimistic about the integrity of most of our people.

There is no question, however, that she has her head on the chopping block, ready to be ridiculed and laughed at if she is proven wrong.

Her greatest concern is that she will be turned away without any answer as to who can sue.

In particular, she is unable to understand why everyone appears to be able to sue the Secretary of the Commonwealth except her. Whether she is right or wrong about the merits of her suit, why would she be estopped from raising the issues?

If she is not allowed to sue, who can?

Many persons have been allowed to sue the Secretary without any problem.

Buckley v. Secretary of the Commonwealth, 371 Mass. 195 (1976)

This case was brought by ten original signers and other citizens against the Secretary. They claimed

that a legislative substitute which he was planning to put on the ballot as a substitute for a gun law was an entirely different law and not a substitute measure. The Court wrote in detail about the standing of the plaintiffs. Note the last two sentences of this quote.

We consider first the standing of the plaintiffs to bring their complaint. Although some question has been raised in this regard, we see no problem with the position of these plaintiffs. Traditionally we have considered the first ten signers of an initiative or referendum petition to be proper parties in moving through the courts to protect their petition. See Cohen v. Attorney Gen., 354 Mass. 384 (1968); Compton v. State Ballot Law Comm'n., 311 Mass. 643 (1942); Yont v. Secretary of the Commonwealth, 275 Mass. 365 (1931). In fact, only through the recognition of this right could the ultimate objectives of art. 48 be attained. It is therein provided: "Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection" Were the plaintiffs unable to protect their right by judicial review prior to an election, the very heart and spirit of this language might be abrogated. There can be no doubt that they have a right to bring this action for timely declaratory and injunctive relief.

Citizens for a Competitive Massachusetts v. Secretary of the Commonwealth, 413 Mass. 25 (1992)

Ten voters were allowed to sue the Secretary even though they were not connected with the initiative in any manner. The Court wrote: "In his answer, the Secretary also challenged the standing of the

organizational plaintiff, Citizens for a Competitive Massachusetts. We need not decide that issue because the individual plaintiffs [10 ordinary voters] have standing." But Pawlick wonders, "Why did Justice Greaney allow those ten ordinary citizens to sue the Secretary in 1992 when they had no involvement whatsoever with the issue?"

League of Women Voters v. Secretary of the Commonwealth, 425 Mass. 424 (1997).

This suit allowed the League of Women Voters and 9 registered voters, of which 3 were state Legislators, to sue the Secretary and seek a declaration that the term limits statute was unconstitutional.

Bates v. Director of the Office of Campaign and Political Finance, 436 Mass. 144 (2002).

Twenty-seven voters, including seven candidates for electoral office and various organizations, were allowed to sue the Secretary and seek to order the Commonwealth to distribute money to certified candidates under the Clean Election Law.

III.

WHAT REMEDY IS AVAILABLE WHEN CITIZENS HAVE SPENT OVER \$1.7 MILLION ON AN ART. 48 INITIATIVE AND HAVE SCRUPULOUSLY DOTTED EVERY "I" AND CROSSED EVERY "T", AND YET THE LEGISLATURE AND GOVERNOR REFUSE TO OBEY THE CONSTITUTIONAL REQUIREMENT THAT THE LEGISLATORS VOTE ON THE AMENDMENT?

The Single Justice was clearly wrong when he agreed with the attorneys for the Commonwealth that the citizens have no relief available, even though they have spent three years of their lives and over \$1.7 million in furtherance of their belief that we still have a representative government in Massachusetts.

He agreed with the Attorney General that it is okay to violate our state Constitution and other laws with impunity because there is nothing anyone can do to demand that our laws be obeyed. According to him, not even the Supreme Judicial Court can provide a remedy.

The citizens do not believe that. They are aware that the United States Constitution, as it was enacted in 1788, guarantees to every state a republican form of government. It says in Article IV, Section 4, "The United States shall guarantee to every State in this Union a Republican Form of Government ..."

Webster's defines a republican form of government, "as characteristic of, or having the nature of a republic." It defines a "republic" as, "a state or nation in which the supreme power rests in all the citizens entitled to vote and is expressed by representatives elected, directly or indirectly, by them and responsible to them."

It was the liberals and the progressives of

Massachusetts who enacted art. 48 in 1918 to be sure that the "supreme power" in this Commonwealth did indeed "rest in all the citizens." But the powerful forces on Beacon Hill, which were the reason for the passage of art. 48 in the first place, thumbed their noses in 2002 at the Constitution and at the Court.

It is worse today than it was in 1918. Then, everyone was cynical since they knew there was little hope, whereas now the citizens move with great enthusiasm because they believe art. 48 gives them a chance against the powerful interests.

The attorney for the Commonwealth argues in footnote 2 of his brief to the Single Justice¹ that the plaintiffs should just try again. "Of course," he said, "plaintiffs remain free to pursue their proposed amendment by beginning the art. 48 process again this year." He opined that they are allowed to spend another three years of their lives and \$1.7 million -- only to be laughed at once more in 2005!

Can anyone deny that if what the attorney for the Commonwealth argues is true, we have lost our republican form of government in Massachusetts?

¹ Because we must be the first party to file our brief, we will use portions of the defendant's brief to the Single Justice to anticipate some of his arguments.

IV.

IS IT AN UNUSUAL REMEDY THAT THE PLAINTIFFS SUGGEST?

Issuing an order that would send the amendment to the 2003 Legislature is not drastic. The Legislators at the last session were able to read and understand the Constitution as well as anyone. They knew what they were doing and what was required of them, but they pretended that they didn't. Even after the Dec. 20 advisory from this Court, they still did not comply.

This order would only be a slap on the wrist. It would merely send the amendment back to virtually the same people who violated the law, the vast majority of whom are still in the Legislature. If this is done, they will have two years to obey the law and study the amendment. If they still do not like it, they will have the opportunity to kill it, **but** only if they sincerely believe that the amendment does not have "at least a reasonable amount of public support." This time they would be on notice that they are to obey the law.

If the amendment is killed now and she must start again, Pawlick will be looking to recover her \$1.7 million from someone. That will be a long and intractable process that will cost the Commonwealth a

lot of money, including the possibility of attorney fees and treble damages. Pawlick is informed that the Attorney General would be defending Sen. Birmingham, Gov. Swift and the 143 legislators who voted to adjourn. However, Pawlick is advised by counsel that all of those parties will need two attorneys because they were not doing the business of the Commonwealth when they were knowingly violating the Constitution. Therefore, the Attorney General could not defend them, nor could the Commonwealth pay any damages awarded against them. The damages would be the responsibility of each of those who broke the law, just the same as in the case of Jane Swift last year when she was sued by a former member of the Turnpike Authority.

For many reasons, including the respect of the citizens, the Court needs to be decisive.

V.

DEFENDANT'S ARGUMENTS ANSWERED SERIATIM

Pawlick is concerned, because of the importance of this matter to our freedoms, that some unforeseen argument in the defendant's brief may be "appealing" to the Court. She has tried to anticipate those arguments by answering all the issues raised in his brief to the Single Justice. Her attorney has found it difficult to perceive what judges want to know when

they do not challenge or converse with the attorneys at oral argument. Therefore, she has attempted to answer every question in the defendant's memorandum.

p. 1 and 2 - **No Constructive Approval.** - The opposing memorandum was correct when it said that there has not been a "constructive approval" of the amendment. To the contrary, the Legislature and Governor made it clear that they do not approve the amendment in any way and will even violate the law in order to defeat it.

p. 1 and 2 - **No 'Duty' to Transmit from One Legislature to the Next.** - The memorandum is correct that the Secretary has no duty to transmit the amendment from the first Legislature to the second when the Constitution has been followed. When the Constitution is ignored and violated, it is a different story. The framers could not conceive of every trick or artifice that an unscrupulous person could devise. That is why the Secretary of State and this Court have a supervisory role which would include transmitting the amendment to the second Legislature when the Constitution has been violated.

p. 1 and 2 - **No 'Role' in Transmitting from One Legislature to the Next.** - The name, Secretary of State, is used 20 times in art. 48, but there is

nothing anywhere that says the Secretary shall be the one to determine what is legal during the process or what is not legal. It is a given that it is the duty of the courts to flesh out Constitutions, statutes, administrative regulations and to help the Secretary in so doing. For example, when the Court mandated in Citizens for a Competitive Massachusetts that the Secretary must act as a judge and decide whether the Legislature acted properly in the case, they could not point to any specific language in art. 48 that gave the Secretary that power. It would be impossible to write any Constitution or other rule of law that covered every area of the law.

p. 3 to 5 - History of the initiative.

p. 5 - **Governor Was Uncertain What to Do**. Pawlick takes issue with the following statement in the memorandum: "On December 3, 2002, the Acting Governor, uncertain whether she was obligated to call a further joint session under art. 48, Init., pt. 4, §2, requested the Justices' opinion regarding whether the joint session's adjournment constituted 'final action' on three proposed amendments within the meaning of art. 48."

The Court itself wondered (see footnote 5 in its opinion of Dec. 20) why the Governor took over four

months to take any action in this matter and so does Pawlick. It would appear that she was not "uncertain" at all and waited until the last moment with the hope that her inquiry would not be answered in time by the Court.

p. 5 and 6 - History of this initiative.

p. 7 - **Secretary Has No Role in Transmitting**

Initiative Petitions from One Legislature to the Next

- The memorandum argued that after the transmission of an initiative amendment to a Legislature, the Secretary "has no further duty with regard to that proposed amendment, unless and until the clerk of the joint session certified to the Secretary" that the initiative has been approved. But that is a very narrow view of the Secretary's duties. In this case, the Supreme Judicial Court has already stated that the requirements of art. 48 have not been followed by the Legislature. The Secretary should, at the very least, know and understand that. He is not supposed to close his eyes and ears and fall asleep.

The memorandum continues, "... the Secretary has no role whatsoever in transmitting any petition to the second Legislature or informing the second Legislature of any duty to act." Again, that is a very narrow view of the duties of the Secretary, particularly when the

Constitution has been violated.

The memorandum continues with a narrow view of the Secretary's duties: "...art. 48 imposes two and only two duties on the Secretary vis-à-vis the Legislature -- the first occurring before the petition receives legislative consideration, and the second occurring after, and only if, the petition receives the requisite approval in two successive Legislatures."

But we have seen that many challenges can and do occur to these initiatives which do require the attention of the Secretary.

p. 7 and 8 - More overly broad statements.

p. 8 and 9 - **Secretary Not Used in Latest Amendment Initiative**. The opposing memorandum uses as an example the latest initiative amendment (a graduated income tax), but since the law was followed there, the Secretary was not required to act. However, one would assume that he was watchful and knew what was happening to the Amendment he had transmitted. If he does not watch, who shall? The same applies to amendments proposed by legislators.

p. 10 - **A "Repeated Legislative Practice" Is One Method of Interpretation**. This is cited in the opposing memorandum as one accepted method of interpreting the Constitution. But that would not be

true if the Court has just found that the "legislative practice" in question violates the Constitution.

p. 11 - **Goal of Plaintiffs Is to Move the Amendment**

Forward. The memorandum argues, "Plaintiffs' real goal here, of course, is not to obtain relief against the Secretary, but instead to obtain a declaration that the 2003-2004 Legislature [sic] has the Protection of Marriage amendment pending before it for action, and that the approval of one-fourth of its members would suffice to send the amendment to the ballot."

Of course! It is the goal of everyone who sues the Secretary to obtain the relief they desire; it is not because they dislike the Secretary.

p. 11 - **Declaratory Relief Not Available.** The memorandum tried to get us back to declaratory relief again. However, the Court determined in its Dec. 20 advisory to the Governor that the Legislature violated the Constitution if it did not vote by Dec. 31. The only question now is what we can do about it.

As for the Limits case, the Court held on Dec. 20 that because of Joint Rule 12A, the law is entirely different now than it was in 1992.

p. 12 - **Trying to Fixate Us on Comparison with Law**

Initiative. The memorandum is trying to fixate us on a comparison with an initiative petition for a law. But

these facts stand on their own. They do not need to be compared to a law initiative. If they are compared to a law initiative, it gives them more credence, but they are sufficient on their own, even if there were no such thing as a law initiative.

p. 13 - **Limits Is Still Controlling**. The argument that is quoted by the memorandum from Limits would deny the Court its historic role in interpreting the Constitution. The Limits Court opined in dicta: "[A]rt. 48 gives the Governor a role in seeing that a joint session carries out its constitutional obligations, but gives to the courts no enforcement role."

Does Limits, which is now archaic because of Rule 12A, also mandate that we deny the Supreme Judicial Court the power to review an Attorney General's opinion about whether an initiative is suitable under art. 48? This Court held in 1926 in Anderson v. Secretary of the Commonwealth, 255 Mass. 366 that the decision of the Attorney General is "final." The Court continued, "It cannot be set aside by this court which can interpret, but cannot override the organic law." Would this Court in 2003 abide by the ruling that it cannot review the opinions of the Attorney General? It might, if other judges in 1930 had not overruled

Anderson in the case of Horton v. Attorney General, 269 Mass. 503. The Horton court was careful not to hurt anyone's feelings but they were clear about what they meant when they wrote that the courts are not "shorn of their ordinary powers" to interpret the Constitution despite what the Anderson court had held. "Nothing contrary to these principles was decided in Anderson," the Court opined.

p. 14 - **No Affirmative Vote for Amendment.** The memorandum is correct that, "[T]here was no affirmative vote [on the Marriage Amendment]," but only because no vote was allowed. How could there be an "affirmative vote" when there was **no** vote? This was not happenstance. It occurred because the opponents openly worried that the amendment would gather the necessary 25%. They also openly said that many legislators would vote against the amendment if it were not conveyed to their constituents as a vote against the amendment. The fact that many legislators voted against the amendment by adjourning was because they believed the process would allow them to get away with it. Others thought it was hopeless and there was no benefit to them in fighting the Senate President.

p. 15 - **Constructive or "Deemed Approval" Procedure Included in Early Draft but Rejected by Convention.**

The memorandum says that a "deemed approval" procedure was included in an early draft of art. 48 but was rejected. That is misleading. What was proposed and rejected in 1918 was not what Pawlick is requesting here. One would assume from reading the memorandum that the proposal at the Constitutional Convention in 1918 would have allowed an Amendment to be moved on if the Legislature failed to act. But that is not what was proposed. What was proposed was that instead of obtaining 25% of the Legislators, they use the same requirements as those of the law initiatives.

p. 16 - **Where Constitution Deems that Inaction**

Constitutes Approval, It Does So Clearly. The memorandum argues that where the Constitution deems that inaction by an official constitutes approval of or acquiescence in a particular course of action, the Constitution says so clearly and specifically. This means that Pawlick could not urge the Court to send the amendment to the new Legislature unless the Constitution specifically gives it the power to do so.

This argument indicates why we use judges and not computers to decide our questions of law. If it were this simple, anyone could be a judge. There are rules that can be used to justify almost any hypothetical point. That is why only a human being can, and must,

decide which rules to apply in order to achieve justice.

The opinion which was cited, Powers v. Secretary of Administration, is not much help. It merely says that where some citizens of Chelsea sued because the Legislature appointed a receiver for the city and the Constitution did not explicitly require a roll call vote by the yeas and nays, it is not required. The Court cited three instances where the Constitution does specifically require a vote by yeas and nays. The Court said at p. 124: "It is a fundamental principle of constitutional construction that every word and phrase in the Constitution was intended and has meaning." That is an excellent fundamental construction but the instances in the Constitution that are cited in the brief are inapposite because they involve obvious items, such as where the Governor must exercise her line item veto over appropriation bills within ten days or else she loses her right to do so. Obviously, that is not like the present case.

In fact, we know that the framers in 1918 stated the reason they would not include such a contingency was because they were unable to conceive of the scandal we face in 2003. Mr. Quincy said at p. 685 of the debates,

I do not believe we need to consider seriously that contingency [that the two Houses would fail to agree upon a time to meet or would fail to continue until final action had been taken upon all amendments pending] or a defiance of the provisions of the amendment by either of these two branches of the General Court. There are a great many provisions in the Constitution where the same question can be asked: 'What is going to happen if the mandate of the Constitution is disregarded and somebody declines to carry it out?' It does not seem to me that such a question suggests any very valid objection, particularly in the case of this amendment.

In other words, the framers did not anticipate this scandal or any similar one and therefore did not explicitly prepare for it because it would be impossible to consider every devious scheme that enters the minds of men. That is why we have the Supreme Judicial Court.

p. 17 and 18 - **What Occurs When the Constitution is Obeyed?** The memorandum spends a lot of time outlining what occurs when the Constitution is obeyed. No one can disagree with what is supposed to occur. Our problem is what occurs when the Constitution is not obeyed.

The memorandum argues that the framers could have explicitly stated what should happen in the case of a scandal. However, the framers stated clearly that they were unable to envision such a happening.

It is frightening that when such a terrible thing

happens in 2002, many of us do not even recognize it.

VI.

IS IT TOO MUCH TO EXPECT A FAIR VOTE IN MASSACHUSETTS IN 2003?

Why are the opponents so afraid of an honest debate that they will violate the law to avoid it? It is necessary that we mention this subject because Pawlick and the other supporters of the amendment are constantly smeared, even in the courts of the state.

Two briefs were filed in this Court during Dec. 2002 that illustrate this. The briefs were a response to the requests from Gov. Swift and the Senate for advisory opinions. One brief came from the erudite GLAD, which always walks the high road and has scholarly people writing their material with an estimated budget of \$1 million a year.

The other was from MassEquality.org., a coalition formed by GLAD and others for the sole purpose of defeating the amendment. It is an integral part of GLAD's team with a different name and agenda. It credits the Human Rights Campaign for its funding. Its brief, written by a member of the City of Boston Law Department, David J. Breen, attacked the amendment and those involved with it. On page one he began, "We are

familiar with the substance of H.4840 [the amendment] as well as the signature gathering and lobbying undertaken in connection with H4840." It then devoted more than 5 pages of an 18-page brief to "possible fraud in the signature gathering process." This brief which is now on file in the Supreme Judicial Court for eternity has many pages in the Exhibit section about the "fraud."

Pawlick has no idea who in this Court has read about her "fraud," but it has to bother her. Who has been exposed to this smear of her?

The truth is that there was no fraud except on the part of the opponents of the amendment, who are also responsible for the brief that resides in the files somewhere in this Court. This type of unfair tactics has influenced even the Court. Although the members of the Court undoubtedly do not realize it, the citizens are greatly upset as they begin to understand what is happening. They know that the Chief of the Superior Court, Suzanne DelVecchio, went to an annual meeting of the political organization, the Massachusetts Lesbian and Gay Bar Association, and told them they should be working harder for homosexual marriage, even though such a case would be decided in her court. What has she been told to cause her to act in this manner?

When Brian Camenker and Scott Whiteman blew the whistle about the Fistgate scandal, where public schools and state employees taught teenagers how to play with the sexual organs of other students, Judge Allan van Gestel of the Superior Court didn't punish the perpetrators for contributing to the delinquency of minors. He punished the whistleblowers! Those men are now in their third year of protecting themselves from a lawsuit from the five lawyers at GLAD. Judge van Gestel was so solicitous of GLAD that he embarrassed himself and our courts nationwide by putting a gag order on the press. This blatant violation of the First Amendment aroused the national media and others (not the Globe), especially Fox News and Nat Hentoff. They became upset, along with civil libertarians like Alan Dershowitz and Laurence Tribe. Why did Judge van Gestel act in this manner?

Why are the citizens upset and becoming more so? A poll of 600 voters in 2000 asked if they approved encouraging teenagers to be sexually active. A surprising 92% did not approve. Of the 47% of the sample who were liberal, 91% did not approve. The vast majority of citizens do not approve of encouraging teenagers to titillate the sexual organs of other teenagers, whether it be "heterosexual" or

"homosexual" titillation.

But, if a citizen is so bold as to question this in public, he is termed a "hater," "bigot" or worse.

The homosexual newspaper, Bay Windows, revealed a portion of the truth in an editorial in its Aug. 22, 2002 paper, which was probably written about Aug. 19. Our suit was filed on Aug. 16. Their Aug. 29 edition had a much more balanced story.

The celebratory Editorial on Aug. 22 was ecstatic about the "victory" over the amendment. But when the editors heard about our lawsuit, they pulled the editorial from their website. (Of course, it remained in the print edition). They finally realized about a month later that this did not make them look good either, and the Editorial was restored to the site.

Why were they concerned about their Aug. 22 Editorial? What could it say that would cause this behavior? It reported that the average homosexual was not interested in the marriage matter. It was like pulling teeth to get them to contribute to the effort, one activist reported.

It stated that those who were the real opponents of the amendment were powerful, national forces, particularly the feminists, including NOW, ACLU, AFL-CIO (they do not publicize this among the union

members) and the Anti-Defamation League. Although not specifically mentioned, the New York Times Company and its Boston Globe were an important player and the foremost enemy of the amendment.

Pawlick told the press at the time, "This [editorial] confirms what we have been saying. This is not primarily about homosexuality. It's about a powerful, extreme liberal agenda to change our sexual morality. These liberals are seeking a socialist state similar to Sweden or Cuba, with a free-love society in which children are the responsibility of the state, not their parents.

"That's why the national, liberal organizations are so interested in what is happening in Massachusetts. They are hiding behind homosexuals and others to achieve their political objective.

"They wish to diminish the institution of marriage which has been the bedrock of our country since its founding. When the state was first founded, everyone knew what 'marriage' meant, so it was never written down. But now it's obvious to everybody that we must do so."

There is nothing wrong with the extremists pushing their agenda as long as it is not sneaky or libelous. It's well known that the extreme feminists, such as

those at NOW, believe that the institution of marriage is deleterious to women and should be weakened or abandoned.

The "horse" trick was broadcast far and wide by the Boston Globe. The national edition of the New York Times was nasty, even libelous (although Pawlick is definitely a "public figure"). No one has reported that the paid signature gatherers became necessary only because the ACLU was training blockers, who would harass the voters and violate their Constitutional right to vote, at every major mall throughout the state. When the decision was made to hire professionals because of concerns for the safety of the volunteers, they hired a reputable organization, which was already in the state working for the horse people and Carla Howell. After all the expense, publicity and the lawsuit, the opponents have reported the names of only 13 people who say they were tricked out of a total of 76,607 people who were certified, despite the fact the opponents have spent a lot of money with mailings, etc. ever since Nov. 2001.

No citizen should ever be treated as Pawlick and the other supporters of this initiative have been. It goes beyond the pale to be libeled in a brief in this Court without an opportunity to respond. We cannot

begin to recount this sad commentary on our society in one tiny memorandum. The "horse" trick by itself would cover hours of explanation.

It's been very difficult and very expensive for MCM to compete with the power of the Globe in informing the citizens about the truth. The opponents thought it couldn't be done. That's why they were so bold as to keep violating the law and challenging the Supreme Judicial Court, even in December. The Globe reported the Dec. 20 advisory opinion to the Governor with this headline, "SJC declines to weigh in on gay marriage ballot debate." The message that everyone in New England has received is that this Court **vindicated** Sen. Birmingham!

The large law firms are all frightened of the combination of the MCAD and the Globe. If any homosexual employee becomes upset for any reason and files a complaint with the MCAD and the Globe reports that firm as a "hater," it would never again be able to regain its reputation, even if it is vindicated two years later in a trial.

But more and more people are understanding the truth. The opponents are increasingly nervous that in two more years of debate, the truth will assuredly come out as the framers intended. That's why the

opponents don't want a debate.

We, as a society, have three choices. 1) Punish those who practice homosexuality, 2) tolerate it, or 3) extol it. The vast majority of Massachusetts citizens would choose to tolerate it. It will not be the end of this type of demand if it is extolled. There is a professor of ethics at Princeton (Prof. Peter Singer, the Ira W. DeCamp professor at Princeton's "Center for Human Values"), who argues that sex with animals is normal and should be allowed and encouraged for those who desire it. Bigamy and group sex have over 250 websites and are already knocking on the door for acceptance. Even those at the North American Man/Boy Love Association, and others in intellectual circles who argue that sex with children is positive, are very much alive. Should the citizens be excluded from this debate by the rich and powerful at the New York Times Company?

Pawlick agrees with the opponents in one respect. The citizens do want a debate and they will approve the amendment when given the opportunity to vote on it.

Is a vote too much to ask for in Massachusetts in 2003?

VII.

CONCLUSION

This was summed up nicely in 1937 in Buckley.

Were the plaintiffs unable to protect their right by judicial review prior to an election, the very heart and spirit of this language might be abrogated. There can be no doubt that they have a right to bring this action for timely declaratory and injunctive relief.

Those words do not apply only to those who bring law initiatives. The plaintiffs in this case cannot be told they are second-class citizens.

For the foregoing reasons, the Court should grant relief to the citizens for this blatant violation of the Massachusetts Constitution and of the U.S. Constitution.

Respectfully submitted,

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