

REC-111-1-1004

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Superior Court
Civil Action No. 94 - 2655-G

DOUGLAS JOHNSTONE, Clerk of the Town of Provincetown,
JOHN J. LONG, Clerk of the City of Somerville,
DAVID RUSHFORD, Clerk of the City of Worcester,
EDWARD ELLIS, Clerk of the Town of Acton,
JANE CHEW, Clerk of the Town of Burlington
MARGARET DRURY, Clerk of the City of Cambridge,
THOMAS MCNULTY, Clerk of the Town of Marblehead,
CATHERINE STOVER, Clerk of the Town of Nantucket,
WENDY MAZZA, Clerk of the City of Northampton,
LAURENCE PIZER, Clerk of the Town of Plymouth,
CAROLE MARPLE, Clerk of the Town of Sherborn,
KAARI MAI TARI, Clerk of the Town of Westford,
SUSAN WOOD, Clerk of the Town of Rowe,
all in their official capacities as municipal clerks,
Plaintiffs,

v.

THOMAS REILLY, in his official capacity as ATTORNEY
GENERAL OF THE COMMONWEALTH OF
MASSACHUSETTS, CHRISTINE C. FERGUSON, in her official
capacity as COMMISSIONER OF THE DEPARTMENT OF
PUBLIC HEALTH, and STANLEY E. NYBERG, in his official
capacity as the REGISTRAR OF VITAL RECORDS AND
STATISTICS,
Defendants.

**COMPLAINT SEEKING DECLARATORY
AND INJUNCTIVE RELIEF**

Introduction

On November 18, 2003, the Supreme Judicial Court issued its decision in
Goodridge v. Department of Public Health, 440 Mass. 309 (2003), declaring

unconstitutional under the Massachusetts Constitution the exclusion of same-sex couples from civil marriage and authorizing the issuance of marriage licenses to same-sex couples as of May 17, 2004. The Department of Health waited until early May before even beginning to take any action to implement the *Goodridge* decision. It then summoned municipal clerks from across the Commonwealth to training sessions and directed them to deny marriage licenses to non-resident same-sex couples who intend to reside outside of Massachusetts. The municipal clerks were instructed to enforce an archaic, heretofore unenforced 1913 statute to prohibit the issuance of marriage licenses to out-of-state same-sex couples, based on purported impediments to such marriage in other states and United States territorial jurisdictions. The Department of Public Health sought to conscript each of the plaintiff municipal clerks in its campaign to impermissibly discriminate against out-of-state same-sex couples in violation of *Goodridge* and anti-discrimination statutes, exposing each clerk and his or her municipality to liability for engaging in discriminatory state action. Some of the plaintiff clerks in the week of May 17, 2004 exercised the discretion that had always been their prerogative to nonetheless issue marriage licenses to out-of-state couples, only to receive a cease and desist order from the defendant Attorney General shortly thereafter. This action by municipal clerks seeks declaratory and injunctive relief that the unlawful directives of the Department of Health and its bureau, the Registry of Vital Records and Statistics, are unenforceable as contrary to the Massachusetts Constitution and M.G.L. Chapter 207.

Parties

1. Plaintiff Douglas Johnstone is the duly appointed Clerk of the Town of Provincetown, Massachusetts.

2. Plaintiff John J. Long is the duly appointed Clerk of the City of Somerville, Massachusetts.
3. Plaintiff David Rushford is the duly appointed Clerk of the City of Worcester, Massachusetts.
4. Plaintiff Edward Ellis is the duly appointed Clerk of the Town of Acton, Massachusetts.
5. Plaintiff Jane Chew is the duly appointed Clerk of the Town of Burlington, Massachusetts.
6. Plaintiff Margaret Drury is the duly appointed Clerk of the City of Cambridge, Massachusetts.
7. Plaintiff Thomas McNulty is the duly elected Clerk of the Town of Marblehead, Massachusetts.
8. Plaintiff Catherine Stover is the duly elected Clerk of the Town of Nantucket, Massachusetts.
9. Plaintiff Wendy Mazza is the duly elected Clerk of the City of Northampton, Massachusetts.
10. Plaintiff Laurence Pizer is the duly appointed Clerk of the Town of Plymouth, Massachusetts.
11. Plaintiff Carole Marple is the duly elected Clerk of the Town of Sherborn, Massachusetts.

12. Plaintiff Kaari Mai Tari is the duly appointed Clerk of the Town of Westford, Massachusetts.

13. Plaintiff Susan Wood is the duly elected Clerk of the Town of Rowe, Massachusetts.

14. The duties of the Plaintiff municipal Clerks include accepting Notices of Intention of Marriage from couples who wish to marry in Massachusetts, issuing marriage licenses and recording all marriages, once they have been solemnized.

15. Defendant Thomas Reilly is the duly-elected Attorney General of the Commonwealth of Massachusetts.

16. Defendant Christine C. Ferguson is the Commissioner of the Department of Public Health of Massachusetts, the state agency authorized by statute to perform certain duties with respect to marriage licensing within the Commonwealth of Massachusetts.

17. Defendant Stanley E. Nyberg is the Registrar of Vital Records and Statistics, a bureau of the Department of Public Health, charged by statute with recording all marriages solemnized within the Commonwealth of Massachusetts and enforcing laws relative to the registry of marriages.

Marriage Licensing Rules Imposed by the Defendants in May, 2004

18. On May 17, 2004, the Supreme Judicial Court's decision in *Goodridge*, recognizing the right of same-sex couples to marry under the Massachusetts Constitution, took effect. On that day Plaintiff Clerks began accepting Notices of Intention of Marriage from same-sex couples.

19. In early May, 2004, some of the Plaintiff Clerks attended a training for City and Town Clerks conducted by the Registrar of Vital Records and Statistics and the Department of Public Health. At this training, Defendants, led by Daniel Winslow, Chief Legal Counsel to the Governor, presented information and distributed written materials purporting to update rules and policies concerning the acceptance of Notices of Intention of Marriage in light of the *Goodridge* decision.

20. According to these new rules and policies, all same-sex couples who reside outside of Massachusetts and do not intend to reside in Massachusetts are prohibited from marrying in Massachusetts. In addition, no resident of Massachusetts may marry a person of the same sex who resides outside of Massachusetts if that person does not intend to live in Massachusetts.

21. By letter dated May 11, 2004 from Defendant Nyberg, the Department of Public Health issued a guide to legal impediments to marriage. For the first time, this guidance included lists of purported impediments for the other 49 states and United States territorial jurisdictions.

22. According to the new "list of impediments" provided by the Defendant Department of Public Health, same-sex marriage is either "void and prohibited" or "not permitted" in each of the 49 states and territories. Based on the new "list of impediments," the Department of Public Health and the Registrar of Vital Records and Statistics instructed City and Town Clerks not to accept Notices of Intention of Marriage from any same-sex couple who reside outside of Massachusetts and who state that they

do not intend to reside in Massachusetts, or from any same-sex couple when one member of the couple resides in Massachusetts and the other resides in a different state.

Marriage Licensing Procedures Prior to May 17, 2004

23. Prior to May 17, 2004, consistent with written guidance of the Department of Public Health and the Registrar of Vital Records and Statistics and in light of the absence of a residency requirement for couples who wish to marry in Massachusetts, Plaintiff

Clerks accepted Notices of Intention of Marriage and issued marriage licenses to opposite-sex couples who resided in Massachusetts, as well as opposite-sex couples who resided outside of Massachusetts, without distinction or discrimination between the couples based on residency.

24. For at least several previous decades, Defendant Nyberg and his predecessor registrars prior to May, 2004, had provided a single-page list of impediments to marriage under Massachusetts law, such list required by statute to be posted in a prominent place in the Clerk's office. The last such list had been issued in February 2003 by Defendant Nyberg, unchanged in substance from previous lists.

25. Prior to May 17, 2004, Plaintiff Clerks had never before been required by Defendants to consult the law of any other state or territory prior to accepting a Notice of Intention of Marriage from a couple who did not reside in Massachusetts.

26. Prior to May 17, 2004, Plaintiff Clerks had been explicitly instructed by Defendant Department of Public Health not to inquire into the residency of any couple applying for a Notice of Intention of Marriage in Massachusetts.

27. Prior to May 17, 2004, Plaintiff Clerks had been explicitly instructed by Defendant Department of Public Health not to question the oaths or affirmations made by any out-of-state couple filing a Notice of Intention of Marriage in Massachusetts.

28. Prior to May 17, 2004, Plaintiff Clerks had been instructed by the Defendant Department of Public Health that they could exercise their lawful discretion under M.G.L. c. 207, § 12 and § 35 in accepting the oath and affirmation of the couple completing the Notice of Intention of Marriage concerning possible impediments to their marriage.

Issuance of Marriage Licenses on and after May 17, 2004

29. The Department of Public Health instructed Plaintiff Clerks that after May 17, 2004, they could no longer exercise their lawful discretion in accepting the oath and affirmation of an out-of-state same-sex couple completing the Notice of Intention of Marriage concerning possible impediments to their marriage.

30. During the week of May 17, 2004, Plaintiff Clerks of Somerville, Provincetown and Worcester accepted Notices of Intention of Marriage and issued marriage licenses to same-sex couples from Massachusetts, as well as those from other states, without distinction or discrimination based on the residency of the couples.

31. In preparation for the implementation of the *Goodridge* decision, the Town of Provincetown reviewed its past practices and policies and adopted as official Town policy the full implementation of the *Goodridge* decision. Pursuant to Town policy, the Town Clerk was advised to continue to accept Notices of Intention of Marriage from, and issue marriage licenses to, couples from Massachusetts and from outside Massachusetts,

whether opposite-sex or same-sex, without distinction or discrimination based on residency.

32. On May 17 and May 18, 2004, Mr. Johnstone, Clerk of Provincetown, accepted Notices of Intention of Marriage from 16 couples who resided outside of Massachusetts and stated that they did not intend to reside in Massachusetts.

33. Between May 17 and May 21, 2004, Mr. Long, Clerk of Somerville, accepted Notices of Intention of Marriage from 17 couples who resided outside of Massachusetts and stated that they did not intend to reside in Massachusetts.

34. Between May 17 and May 21, 2004, Mr. Rushford, Clerk of Worcester, accepted Notices of Intention of Marriage from some 30 couples who resided outside of Massachusetts and stated that they did not intend to reside in Massachusetts.

35. On or about May 18, 2004, Judith Goldberg, Deputy Chief Legal Counsel to Governor Romney, directed that the clerks of Somerville, Provincetown and Worcester send to her or the Registry of Vital Records and Statistics ("Registry") copies of all of the Notices accepted and licenses issued pursuant to such Notices during the week of May 17th and thereafter. The Clerks complied with this request. On information and belief, the Registry forwarded certain of the Notices to the Attorney General. No Registry official, nor anyone in the Attorney General's office, had ever before asked Plaintiff clerks for copies of Notices of Intention of Marriage of opposite-sex couples who resided outside Massachusetts.

36. On May 21, 2004, David Kerrigan of the Office of the Attorney General wrote to counsel for Somerville, Provincetown and Worcester, directing the clerks of those municipalities to cease and desist from accepting Notices from out-of-state same-sex couples who did not intend to reside in Massachusetts. In this letter, Mr. Kerrigan stated his view that the Registrar of Vital Records and Statistics acted within his authority in issuing the so-called revised “list of impediments” and further, that M.G.L. c. 207, §§ 11 and 12, requires that Plaintiff Clerks refuse to accept any Notices of Intention of Marriage from any couple who reside outside Massachusetts and do not intend to reside in Massachusetts. Mr. Kerrigan, on behalf of the Defendant Attorney General, threatened to take “enforcement action” against the Clerks of Somerville, Provincetown and Worcester if they failed to “cease and desist” from accepting Notices from out-of-state same-sex couples.

37. The unspecified enforcement action threatened by Defendant Office of the Attorney General could range from civil injunctive relief to criminal prosecution.

38. Based on the May 21, 2004 cease and desist letter from the Office of the Attorney General, the Clerks of Provincetown, Somerville and Worcester decided to comply with the Defendant Attorney General’s order and temporarily suspended accepting Notices of Intention of Marriage from out-of-state same-sex couples who do not reside and intend to reside in Massachusetts.

39. Since receiving the letter on May 21, 2004 from the Attorney General’s office, Plaintiff Clerks have turned away numerous same-sex couples from other states who wished to marry in Massachusetts. Throughout their tenure, none of the municipal clerks

had ever before turned away an out-of-state couple who wished to marry in Massachusetts, prior to receiving the May 2004 instructions from the Department of Public Health and/or the cease and desist letter from the Office of the Attorney General.

The Views of Other Neighboring States

40. On March 3, 2004, Elliott Spitzer, the Attorney General of the State of New York, issued a formal opinion that New York law does not explicitly prohibit marriage by

same-sex couples, that he was uncertain how courts would rule with respect to whether New York law permits or prohibits same-sex marriage and that New York law “presumptively requires” that same-sex couples married in another jurisdiction be treated as spouses under New York law.

41. On or about May 17, 2004, Patrick C. Lynch, the Attorney General of the State of Rhode Island, issued a press release stating that “[T]his Office’s review of Rhode Island law suggests that Rhode Island would recognize any marriage validly performed in another state unless doing so would run contrary to the strong public policy of this State.” He further stated that, “To date, the only marriages in Rhode Island deemed void involve bigamy, incest or mental incompetence, or marriages in which one or both parties never intended to be married.”

42. On or about May 17, 2004, Deborah L. Markowitz, the Secretary of State for the State of Vermont, issued her opinion that a couple from Vermont who had obtained a civil union in that state were not prevented from marrying in Massachusetts.

43. On or about May 17, 2004, Richard Blumenthal, the Attorney General of the State of Connecticut, issued his opinion that while Connecticut law does not permit the

issuance of a marriage license to a same-sex couple, “No reliable prediction can be made [concerning] how our own state courts will rule on a particular constitutional challenge.”

**The Defendants Have Engaged In Selective Enforcement Of A Statute
Based On An Impermissible Discriminatory Purpose
and Motivated Solely By Animus Towards Same-Sex Couples**

44. Despite the existence, since 1913, of other state’s legal impediments to certain opposite-sex marriages that were not recognized as impediments to marriage in Massachusetts, such as interracial marriage and marriage between first cousins, it was not the policy or practice of the Department of Public Health, or any other state agency formerly charged with administration of the marriage licensing laws, to provide a list of such other state’s impediments to Clerks, nor was it the policy or practice of the Department of Public Health to require the Clerks to consult another state’s marriage laws before accepting a Notice of Intention of Marriage from a couple residing in that state.

45. Despite the existence, since 1913, of M. G. L. c. 207, §§ 11-12, it has been the policy and practice of the Department of Public Health, from at least the year 1977 to May 16, 2004, that Clerks were *not* to inquire beyond the oath and affirmation of out-of-state couples concerning possible impediments to their marriages.

46. Despite the existence, since 1913, of G. L. c. 207, §§ 11-12, the Registrar of Vital Records and Statistics, upon information and belief, has recorded all marriages duly solemnized in Massachusetts, even if the laws of the home state of the nonresident couple might prohibit or consider their marriage void.

47. Despite the existence, since 1913, of G. L. c. 207, §§ 11-12, the Department of Public Health, the Registrar of Vital Records and Statistics, and the Attorney General have never sought to challenge the Notices of Intention of Marriage from any nonresident couple until same-sex couples began to file such Notices on May 17, 2004.

48. The *Goodridge* decision recognizes the right of same-sex couples to marry in Massachusetts. Rights secured by the Massachusetts Constitution have never been limited solely to residents of the Commonwealth.

49. Defendants' instructions to Plaintiff Clerks not to accept Notices of Intention of Marriage from out-of-state residents or from a Massachusetts resident who wishes to marry someone of the same sex who resides in another state, when there is no such prohibition concerning similarly-situated opposite-sex couples, exposes Plaintiff Clerks and the Town and Cities they represent to potential liability for discrimination and civil rights violations.

Injuries to Plaintiff Clerks

50. Massachusetts law, as well as the long-time policy and practice of the Department of Public Health, permits Clerks to exercise their discretion in determining whether to accept Notices of Intention of Marriage from couples seeking to marry in Massachusetts. The post-May 17, 2004 policies of the Department of Public Health and Registrar of Vital Records and Statistics, as well as the cease and desist letter from the Office of the Attorney General, limit that discretion in violation of state law.

51. By threatening to institute an enforcement action against municipal clerks who have issued licenses to out-of-state same-sex couples, the Attorney General is forcing

municipal Clerks to discriminate against certain same-sex couples in violation of *Goodridge* and the Constitution and statutes of the Commonwealth of Massachusetts.

52. The actions of the Attorney General, the Commissioner of Public Health and the Registrar of Vital Records and Statistics expose municipal Clerks individually and their respective Cities and Towns to potential liability as state actors for depriving certain same-sex couples of rights guaranteed by the Massachusetts Constitution, as well as the right to be free from discrimination on the basis of sex and sexual orientation under Massachusetts law.

53. These directives also require Clerks to take discriminatory actions offensive to their own convictions of fairness in the administration of marriage licensing and may subject them to public condemnation.

Actual Controversy

54. An actual controversy exists between each of the Plaintiffs and each of the Defendants.

WHEREFORE, the Plaintiffs demand judgment:

1. That this Honorable Court preliminarily enjoin the Defendants from initiating prosecution or from taking any enforcement action against the Plaintiffs under G. L. c. 207, § 50 or otherwise requiring the Plaintiffs to enforce the provisions of G. L. c. 207, §§ 11-12, pending final determination of this suit.

2. That this Court declare Chapter 207, §§ 11-12 unconstitutional and invalid as applied to same-sex couples, following the decision in *Goodridge v. Department of Public Health*.

3. That this Court permanently enjoin the Defendants from initiating prosecution or other action against the Plaintiffs to enforce the provisions of Chapter 207, §§ 11-12, as applied to same-sex couples.

4. That this Court grant such other and further relief as it may deem just and proper.


John J. Long, Clerk of the City of Somerville,
David Rushford, Clerk of the City of Worcester,
Edward Ellis, Clerk of the Town of Acton,
Jane Chew, Clerk of the Town of Burlington,
Margaret Drury, Clerk of the City of Cambridge,
Thomas McNulty, Clerk of the Town of

Marblehead,

Catherine Stover, Clerk of the Town of Nantucket,

Wendy Mazza, Clerk of the City of Northampton,
Laurence R. Pizer, Clerk of the Town of Plymouth,
Carole Marple, Clerk of the Town of Sherborn,
Kaari Mai Tari, Clerk of the Town of Westford,
Susan Wood, Clerk of the Town of Rowe,
all in their official capacities as municipal clerks,

By their attorneys,



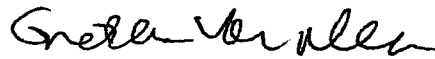
Scott P. Lewis, BBO #298740
Kevin Batt, BBO #634852
Anne Robbins, BBO #561968
Kara A. Krolikowski, BBO #658160
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
(617) 239-0100



Sarah Wunsch, BBO #548767
ACLU OF MASSACHUSETTS
99 Chauncy Street, Suite 310
Boston, MA 02111
(617) 482-3170

Douglas Johnstone,
Clerk of the Town of Provincetown,

By his attorney,



Gretchen Van Ness, BBO #553632
44 School Street, Suite 510
Boston, MA 02108
(617) 723-5060