

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT

<p>DOUGLAS JOHNSTONE, CLERK OF THE TOWN OF PROVINCETOWN, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>THOMAS REILLY, ATTORNEY GENERAL, et al.,</p> <p>Defendants.</p>	<p>CIVIL ACTION NO. 04-2655-G</p>
<p>SANDRA AND ROBERTA COTE- WHITACRE, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>DEPARTMENT OF PUBLIC HEALTH, et al.,</p> <p>Defendants.</p>	<p>CIVIL ACTION NO. 04-2656-G</p>

BRIEF OF *AMICI* RAYMOND FLYNN AND THOMAS SHIELDS IN SUPPORT OF  
DEFENDANTS' OPPOSITION TO CLERKS' AND COUPLE'S MOTIONS FOR  
PRELIMINARY INJUNCTIONS

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... i

INTRODUCTION .....1

I. THE PLAINTIFFS CANNOT PREVAIL ON THE MERITS .....2

    A. The Couples Have No Right to Export Massachusetts Domestic Relations Law to Their Home States .....2

    B. Same-Sex “Marriage” Is not a Privilege under the U.S. Constitution .....6

        1. Federal Law Defines Marriage as the Union of a Man and a Woman .....6

        2. The U.S. Supreme Court Has Ruled that There Is No Fundamental Right to Same-Sex “Marriage” .....7

II. THE PLAINTIFFS HAVE NO IRREPARABLE HARM .....10

CONCLUSION.....12

**TABLE OF AUTHORITIES**

**State Cases**

*Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980).....10

*Anderson v. State, Dep’t of Rev.*, 26 P.3d 1106, 1110 (Alaska 2001) .....5

*Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) .....7, 8

*Commonwealth v. Aves*, 35 Mass. 193, 217 (1936) .....3, 4

*Commonwealth v. Graham*, 157 Mass. 73, 75 (1892) .....11

*Commonwealth v. Lane*, 113 Mass. 458, 463 (1873).....11

*Goodridge v. Department of Pub. Health*, 440 Mass. 309, 321 (2003).....2, 12

*In re Cooper*, 187 A.D.2d 128, 134 (N.Y. 1993).....10

*Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 202).....11

*Milliken v. Pratt*, 125 Mass. 374, 380 (1878) .....11

*State, Dep’t of Rev. v. Hale*, 978 P.2d 1276, 1277-78 (Alaska 1999) .....6

**Federal Cases**

*Baker v. Nelson*, 409 U.S. 810 (1972) .....8, 9, 10

*Boddie v. Connecticut*, 401 U.S. 371 (1971) .....9

*Edgar v. Mite Corp.*, 457 U.S. 624, 644 (1982) .....5, 12

*Gaines v. Poindexter*, 155 F. Supp. 638, 643 (W.D. La. 1957).....11

*Griswold v. Connecticut*, 381 U.S. 479 (1965).....9

*Hicks v. Miranda*, 422 U.S. 332, 344 (1975).....8, 9, 11

*Loving v. Virginia*, 388 U.S. 1 (1967).....9

*Mandel v. Bradley*, 432 U.S. 173, 176 (1977) .....8, 9

*McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976).....10

<i>Meyer v. Nebraska</i> , 262 U.S. 535 (1923) .....	9
<i>Murphy v. Ramsey</i> , 114 U.S. 15, 45 (1885).....	7, 10
<i>Ohio ex rel. Eaton v. Price</i> , 360 U.S. 246, 247 (1959).....	9
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985) .....	4, 5, 12
<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942).....	9
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1975) .....	2
<i>Williams v. North Carolina</i> , 325 U.S. 226, 229 (1945).....	3
<i>Wilson v. Ake</i> , Case No. 8:04-CV-1680-T-30TBM (M.D. Fla., July 23, 2004).....	11

**Other Authorities**

<i>Federal Practice and Procedure</i> § 4014 (2003) .....	8
<i>Law of Federal Courts</i> 495 (2d ed. 1970).....	9

## INTRODUCTION<sup>1</sup>

The Plaintiff Couples have obtained or seek to obtain Massachusetts marriage licenses for the express purpose of obtaining legal and other rights in other states, not in Massachusetts. See Verified Complaint, ¶¶ 18-19 (Sandi and Bobbi Cote-Whitacre are seeking rights in regard to healthcare and pension benefits); ¶ 25 (Amy Zimmerman and Tanya Wexler are seeking financial, medical and social benefits); ¶¶ 32-33 (Mark Pearsall and Paul Trubey are seeking legal structure, retirement benefits, and healthcare rights); ¶¶ 40-41 (Katrina and Kristin Gossman are seeking legal obligations, spousal financial benefits from the FBI and healthcare benefits); ¶¶ 47-48 (Judith and Lee McNeil-Beckwith are seeking survivor and healthcare benefits); ¶¶ 54-56 (Wendy Becker and Mary Norton are seeking legal and social protections of marriage, and financial benefits); ¶ 63 (Michael Thorne and James Theberge are seeking healthcare benefits and financial security); ¶¶ 69-70 (Edward Butler and Leslie Schoof are seeking financial security and healthcare benefits). As non-residents, the Couples cannot possibly obtain these benefits in Massachusetts. If the Couples have any legal injury, it is caused solely by their own states' unwillingness to provide the benefits they desire, not by Massachusetts declining to marry non-residents as a matter of public policy. Massachusetts has no interest in the Couples' legal rights in their home states that would justify judicial revision of the legislative policies expressed in M.G.L. c. 207, §§ 11 and 12. Moreover, same-sex "marriage" is not a privilege protected by the Privileges and

---

<sup>1</sup> *Amici* Raymond Flynn and Thomas Shields are the plaintiffs in *Flynn v. Johnstone*, Case No. 04-3136-A. Plaintiffs Flynn and Shields have filed a motion to consolidate their lawsuit with these cases.

Immunities Clause in Article IV, § 2 of the United States Constitution.<sup>2</sup> Accordingly, the Plaintiffs cannot show irreparable harm and are not entitled to a preliminary injunction.

**I. THE PLAINTIFFS CANNOT PREVAIL ON THE MERITS**

**A. The Couples Have No Right to Export Massachusetts Domestic Relations Law to Their Home States**

The Plaintiff Couples are not seeking the protection of Massachusetts marriage law in Massachusetts. Instead, they are seeking a Massachusetts marriage license solely as a catalyst to try to trigger access to benefits in their home states, not to enjoy the protections of Massachusetts law. There can be no constitutional infirmity in declining to issue a marriage license to someone from a state where the marriage is prohibited. A non-resident plaintiff has no constitutional right to have a state apply forum law to matters not concerning the forum state.

In *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 321 (2003), the Supreme Judicial Court (“SJC”) stated that the Commonwealth is a partner in every civil marriage. The SJC based that statement on the fact that the Commonwealth determines “who may marry and what obligations, benefits, and liabilities attach to civil marriage . . . [and] defines the exit terms.” *Id.* Massachusetts certainly has an interest in those issues for its own residents, but not for non-residents—indeed, the Commonwealth has no ability to be a “partner” in a marriage outside its borders.

The U.S. Supreme Court has long held that states need not make their domestic relations laws equally applicable to non-residents. In *Sosna v. Iowa*, 419 U.S. 393

---

<sup>2</sup> This brief addresses only arguments not raised in the Attorney General’s Opposition to Preliminary Injunction, and adopts the Attorney General’s statement of the standards for a preliminary injunction. It will focus primarily upon the claims by the Couples, but applies equally to the Clerks if not specifically limited to the Couples.

(1975), the Court rejected a challenge to the durational residency requirement that Iowa statutes imposed on persons seeking a divorce. The Court noted that it had rejected durational residency requirements for welfare payments, voting rights, and medical care, but that “none of those cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed.” *Id.* at 406. The Court then held that “[u]ntil such time as Iowa is convinced that appellant intends to remain in the State, it lacks the ‘nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.’” *Id.* at 407 (quoting *Williams v. North Carolina*, 325 U.S. 226, 229 (1945)). States may not have the same degree of concern over the validity of marriage licenses in other states as they do in the validity of divorce decrees. *Cf. id.* (discussing state interest in protecting divorce decrees from collateral attack). However, they certainly have the ability to limit “the creation of legal relations and responsibilities of the utmost significance” to persons who reside within the jurisdiction, particularly where those relations and responsibilities are not recognized in other jurisdictions.

The Couples attempt to analogize their situation to the six-year-old slave girl who gained freedom when her “owner” brought her to Massachusetts. (See Couples’ PI Mem. at 13). In *Commonwealth v. Aves*, 35 Mass. 193, 217 (1936), the SJC ruled that the girl had full protection of Massachusetts law while in the Commonwealth. However, the SJC specifically declined to rule that, having become free in Massachusetts, the girl could then return to Louisiana as a free person. *Id.* at 218. In fact, the Court suggested that voluntarily returning would constitute waiver of the freedom gained by entering Massachusetts. *Id.*

The Plaintiff Couples are like the girl in *Aves* in that they have full access to the rights of Massachusetts residents if they wish to reside in Massachusetts. However, what they are demanding is the right to unilaterally export Massachusetts marriage law to their own states to serve only their personal interests, not those of Massachusetts. This would be like the slave girl, after obtaining freedom in Massachusetts, demanding that the SJC rule that she could return to Louisiana as a free person. The SJC declined to make such a ruling.

The Supreme Court discussed the limits on a State's interest in applying its own laws to non-residents in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts* a class of 28,000 plaintiffs were suing to recover interest on royalty payments that had been delayed for years. Kansas courts ruled that they could apply Kansas law to the entire class of plaintiffs, even though "over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for [the] lawsuit." *Id.* at 815. The defendants objected to applying Kansas law to non-Kansas plaintiffs' claims because Kansas provided a higher interest rate than other states. The Supreme Court ruled that when there is a substantive difference in the laws of different states:

for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

*Id.* at 818 (citation omitted). The Court further observed that plaintiffs cannot always choose the substantive rules to be applied to their affairs. *Id.* at 820. It concluded that "[g]iven Kansas' lack of 'interest' in claims unrelated to that State, and the substantive

conflict with jurisdictions such as Texas, . . . application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.” *Id.* at 822.

Non-residents of Massachusetts stand in the same relationship to Massachusetts law as most of the class members stood in relation to Kansas law in *Shutts*. As in *Shutts*, this Commonwealth has no relationship with the Plaintiff Couples’ affairs at issue except for the non-resident Couples’ effort to obtain benefits from Massachusetts that they cannot obtain under their own states’ laws. Massachusetts has no obligation to extend its laws to non-residents in a matter in which the non-residents are coming to Massachusetts solely to export the benefit of those laws to another state. If the Couples were to sue their home states in a Massachusetts court, the court could not, consistent with due process, apply Massachusetts marriage law to the lawsuit. *Id.* at 818. Simply put, the Couples do not have greater rights as against Massachusetts, in this circumstance, than they would have against their own state governments.

Although the Commonwealth may permit non-residents to marry in Massachusetts, regardless of the laws of other states, it is not obligated to do so. *See id.* (particular set of facts may permit application of more than one state’s laws). Massachusetts has no interest in extending its laws to out-of-state residents or transactions. *Cf. id.* at 822; *Edgar v. Mite Corp.*, 457 U.S. 624, 644 (1982) (because state had no legitimate interest in protecting non-residents while not within the state, attempting to do so violated Interstate Commerce Clause). Massachusetts is well within its rights in limiting certain benefits to residents, or to persons who intend to be residents. *Cf. Anderson v. State, Dep’t of Rev.*, 26 P.3d 1106, 1110 (Alaska 2001) (denying Alaska permanent fund dividends to former resident who made infrequent and short visits to

Alaska); *State, Dep't of Rev. v. Hale*, 978 P.2d 1276, 1277-78 (Alaska 1999) (absent former resident who intended to return permanently to Alaska qualified for permanent fund dividends). From the Couples' recitation of the close ties some of them have with Massachusetts, it seems evident that they could easily become residents, if they chose, without disrupting their lives. (See Couples' PI Mem. at 37-38.) But that does not mean Massachusetts must treat them as though they are residents.

**B. Same-Sex "Marriage" Is not a Privilege under the U.S. Constitution**

The Couples are likewise unable to show that they have been denied a "privilege" within the meaning of the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution. They claim that marriage is a fundamental personal right protected under the Privileges and Immunities Clause, (see Couples PI Mem. at 27-29), and therefore Massachusetts must permit visitors the same right as residents to obtain marriage licenses. Even if the Couples were correct that marriage is a "privilege" (the Attorney General has shown that they are not), that would not help them, for the term "marriage," under federal law and the federal Constitution, does not include same-sex couples.

**1. Federal Law Defines Marriage as the Union of a Man and a Woman**

For purposes of federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. This definition of "marriage," adopted by Congress in 1997, is consistent with the United States Supreme Court's use of the term for more than 100 years in writing about the fundamental right of marriage.

In 1885, after a nearly fifty-year battle over the meaning and structure of marriage, the Supreme Court defined marriage as follows:

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

*Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (emphasis added) (ruling that Congress could constitutionally withhold right to vote from polygamists). No Supreme Court decision discussing the fundamental right to marry has ever defined marriage differently than *Murphy*.

## **2. The U.S. Supreme Court Has Ruled that There Is No Fundamental Right to Same-Sex “Marriage”**

Significantly, the United States Supreme Court has considered and rejected the claim that there is a constitutional right to same-sex “marriage.” In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972), the United States Supreme Court considered and rejected the claims by two men that Minnesota’s exclusion of same-sex couples from marriage violated the Ninth and Fourteenth Amendments to the United States Constitution. The Court upheld the Minnesota Supreme Court’s ruling that there is no fundamental right to same-sex “marriage” under the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, and that excluding same-sex couples from marriage does not constitute irrational or invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. *See Baker*, 191 N.W.2d at 186-87. The Minnesota Supreme Court had

ruled that the state’s definition of marriage “does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.” *Id.* at 187.

Prior to 1988, plaintiffs like those in *Baker* had an automatic right to Supreme Court review “[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.” 28 U.S.C. § 1257(2) (as amended July 29, 1970, Pub. L. 91-358, 84 Stat. 590). On direct appeal, the Supreme Court “dismissed for want of a substantial federal question.” *Baker*, 409 U.S. at 810.

The United States Supreme Court’s dismissal of the *Baker* appeal for want of a substantial federal question was a decision on the merits that is binding on all other courts considering the same issues:

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

*Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added).<sup>3</sup> The Supreme Court ruled that the three-judge district court panel in *Mandel* erred in assuming that a summary affirmance by the Court necessarily adopts the reasoning of the opinion below. *Id.* at 176. However, the Court reiterated its prior holding “that lower courts are bound by summary actions on the merits by this Court,” (quoting *Hicks v. Miranda*, 422

---

<sup>3</sup> The elimination of the Court’s appellate jurisdiction in 1988 does not change the applicability of this rule to current cases. 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4014 (2003) (“Abolition of the appeal jurisdiction does not change this rule. Lower courts must continue to honor it”).

U.S. 332, 344 (1975)), and clarified that the decision is binding in regard to “the precise issues presented and necessarily decided . . . .” *Mandel*, 432 U.S. at 176.<sup>4</sup>

The Jurisdictional Statement in the appeal from the Minnesota Supreme Court’s rejection of the claims of a right to same-sex “marriage” raised the issues of whether excluding same-sex couples from marriage:

deprives appellants of liberty and property in violation of the due process and equal protection clauses [and] . . . constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Appellants’ Jurisdictional Statement at 11, 18, *Baker v. Nelson* (Feb. 11, 1972). The appellants argued that “[t]he right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment.” *Id.* at 11 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923); emphasis added). Their right-to-privacy argument relied upon *Griswold*, *Loving*, and *Boddie*. *Id.* at 18-19. The Supreme Court’s dismissal of the appeal for want of a substantial federal question was a rejection of the merits of these claims. Under *Baker v. Nelson*, there is no federal due process, equal protection, or privacy right to same-sex marriage in the Ninth or Fourteenth Amendments to the U.S. Constitution. Courts are “not free to disregard this pronouncement.” *Hicks*, 422 U.S. at 344.

---

<sup>4</sup> In *Hicks*, the Court ruled that “(v)otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . .” *Hicks*, 422 U.S. at 344 (quoting Justice Brennan in *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); also citing R. Stern & E. Gressman, *Supreme Court Practice* 197 (4th ed. 1969) (“The Court is, however, deciding a case on the merits, when it dismisses for want of a substantial question”); C. Wright, *Law of Federal Courts* 495 (2d ed. 1970) (“Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits”).

The courts that have discussed the nature of the dismissal in *Baker* have recognized that it was a decision on the merits and binding on other courts. See *McConnell v. Noonan*, 547 F.2d 54, 56 (8th Cir. 1976) (“the Supreme Court’s dismissal of the appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on lower federal courts”); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (Supreme Court’s dismissal of *Baker* appeal was “an important adjudication on the merits”), *aff’d on other grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir.) (noting that the Supreme Court’s dismissal of the *Baker* appeal “operates as a decision on the merits”), *cert. denied*, 458 U.S. 1111 (1982); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. 1993) (dismissal in *Baker* “is a holding that the constitutional challenge was considered and rejected”) (quoting trial court opinion with approval).

In view of *Murphy* and *Baker*, other cases addressing the fundamental right to marriage are referring to the union of a man and a woman. Accordingly, even if “marriage” is a fundamental personal right protected under the Privileges and Immunities Clause, that does not make same-sex “marriage” a privilege. The Plaintiff Couples have no constitutional right to obtain a marriage license from Massachusetts.

## **II. THE PLAINTIFFS HAVE NO IRREPARABLE HARM**

Subsequent to the filing of the Attorney General’s Opposition to Preliminary Injunction, which clearly pointed out the Couples’ lack of standing to challenge M.G.L. c. 207, § 11, the Couples amended their Complaint to attack § 12 as well. Alleging an injury under § 12 is of no help to the Couples, for they still have no irreparable harm.

The Plaintiffs’ assertion of irreparable harm is based upon their unwarranted claims that non-residents have a constitutional right to the protection of Massachusetts

law in their own states, and that same-sex “marriage” is a privilege under the U.S. Constitution. They have no such rights, and, accordingly, no cognizable injury from enforcement of §§ 11 and 12. If the Couples have an injury, it is from the lack of a federal fundamental right to same-sex “marriage,” or from their own State’s decisions to prohibit same-sex “marriage.” What they are seeking here is not redress of injury, but legal leverage to use against their own state governments. (See Couples’ PI Mem. at 42, n.52, “unable to seek a determination in their home states as to whether their Massachusetts marriage license would be respected.”)<sup>5</sup> That point is illustrated by the recently filed case of *Wilson v. Ake*, Case No. 8:04-CV-1680-T-30TBM (M.D. Fla., July 23, 2004), which is relying upon a Massachusetts marriage license issued to a non-resident couple to attack the federal and Florida Defense of Marriage Acts in a federal court in Florida. The inability to gain an advantage in a non-Massachusetts lawsuit is not a harm that this Court should consider for purposes of a preliminary injunction. Enjoining application of §§ 11 and 12 would not further any valid Massachusetts interest, since Massachusetts can have no partnership in a marriage in another state, and the

---

<sup>5</sup> The Couples do not have a “right” to have a Massachusetts marriage license recognized in their home states. As their own cases hold, states need not recognize marriages that are contrary to public policy. *See Commonwealth v. Graham*, 157 Mass. 73, 75 (1892) (no need to recognize marriage if “the statutes declare such a marriage void, or the marriage is one deemed ‘contrary to the law of nature, as generally recognized in Christian countries’”); *Commonwealth v. Lane*, 113 Mass. 458, 463 (1873) (marriage not recognized if “contrary to the law of nature as generally recognized in Christian countries,” or if “contrary to the policy of our own laws”). At most, this is an issue of comity, not Full Faith and Credit under the U.S. Constitution. *Cf. Milliken v. Pratt*, 125 Mass. 374, 380 (1878) (referring to comity as basis of recognizing contracts, including marriages, from other jurisdictions); *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 202) (“Indiana’s recognition of the existence of a foreign marriage is a matter of comity”; rejecting trial court’s holding that Full Faith and Credit required recognition); *Gaines v. Poindexter*, 155 F. Supp. 638, 643 (W.D. La. 1957) (marriage recognition “rests on comity alone”) (quoting 55 C.J.S., Marriage § 4(2)).

Commonwealth has no interest in providing legal protection to persons outside its borders. *Cf. Goodridge*, 440 Mass. at 321; *Shutts*, 472 U.S. at 822; *Edgar*, 457 U.S. at 644.

Moreover, the Clerks' assertion of irreparable harm is meritless. In view of the Couples' lack of a right to a Massachusetts marriage license, and the fact that the Clerks' denial of marriage licenses is mandated by the Commonwealth, any lawsuit by a non-resident couple against an individual clerk would be frivolous. The Clerks' reference to 42 U.S.C. § 1983 is particularly specious in view of the current state of federal law regarding same-sex "marriage," as shown above. And finally, the concern with being "branded in the public eye as homophobic" simply states the Clerks' "politically correct" bias.<sup>6</sup> There is nothing "homophobic" about opposing radical changes to the institution of marriage, much less complying with the governing law that limits this social engineering experiment to Massachusetts.

#### CONCLUSION

For the foregoing reasons, along with those stated in the Attorney General's Opposition, this Court should deny the motions for preliminary injunction.

---

<sup>6</sup> A "phobia" is a "persistent, irrational fear of a specific object, activity, or situation that leads to a compelling desire to avoid it." Webster's Unabridged Dictionary (Random House 1999). The Clerks' use of the term "homophobic" is utterly inapposite—opposition to same-sex "marriage" is grounded in sound social science, good public policy and the experience of all major civilizations for millennia. Such well-grounded opposition is in no way "phobic."

Respectfully submitted,

RAYMOND FLYNN AND THOMAS A. SHIELDS  
By their Attorneys,

---

Philip D. Moran, Esq.  
(MA Bar No. 353920)  
265 Essex Street, Suite 202  
Salem, MA 01970  
Telephone: (978) 745- 6085  
Facsimile: (978) 741-2572

David R. Langdon\*  
(OH Bar No. 0067046)  
Jeffrey A. Shafer\*  
(OH Bar No. 0067802)  
LAW & LIBERTY INSTITUTE  
11175 Reading Road, Ste. 103  
Cincinnati, Ohio 45241  
Telephone: (513) 577-7380  
Facsimile: (513) 577-7383

Benjamin W. Bull\*  
(AZ Bar No. 009940)  
Glen Lavy\*  
(AZ Bar No. 022922)  
Dale Schowengerdt\*  
(AZ Bar No. 022684)  
ALLIANCE DEFENSE FUND  
15333 North Pima Road, Ste. 165  
Scottsdale, Arizona 85260  
Telephone: (480) 444-0020  
Facsimile: (480) 444- 0025

\* Pending admission *Pro hac vice*

## **CERTIFICATE OF SERVICE**

[Phil to insert]