

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-H</p>

DEFENDANTS' OPPOSITION TO CLERKS' AND COUPLE'S  
MOTIONS FOR PRELIMINARY INJUNCTIONS

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## INTRODUCTION

The Clerks' and Couples' sweeping challenges to the validity and enforcement of G.L. c. 207, §§ 11 and/or 12, have nationwide implications that may in turn have serious ramifications for the Commonwealth, its relations with other states, its same-sex couples who are or wish to be married, and the public interest. These challenges should not be decided on the foreshortened schedule of a preliminary injunction proceeding. Fortunately, there is no need to so do, because the requested injunctions either are unnecessary to prevent any imminent irreparable harm to the Clerks or the Couples, or would not actually prevent the harm they allege. Indeed, the Clerks and the Couples lack standing to raise (and thus this Court lacks jurisdiction to consider) any of their constitutional claims, leaving only their statutory claims for the Court to consider.

Moreover, neither the Clerks nor the Couples have demonstrated a likelihood of success on the merits of any of their claims. Rather than giving a summary of argument here, the state Registrar of Vital Records and Statistics (RVRS)<sup>1</sup> respectfully refers the Court to the Table of Contents for this memorandum, which is intended to provide such an overview. The Registrar adds only that, contrary to the Clerks' and Couples' suggestion, Goodridge does not make the outcome of this case a foregone conclusion. Justice Greaney, whose concurrence provided the critical fourth vote in Goodridge, stated: "The argument, made by some in the case, that legalization of same-sex marriage in Massachusetts will be used by persons in other States as a

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<sup>1</sup> This memo will generally use the term "Registrar" to refer to all defendants, except where the context is clear that the reference is to the Registrar alone, or where separate reference to another defendant is required. The Clerks have named as defendants the Attorney General, the Commissioner of Public Health, and the Registrar, all in their official capacities. The Couples have named the Commissioner and Registrar in their official capacities, as well as the Department of Public Health and the Registry of Vital Records and Statistics (RVRS).

tool to obtain recognition of a marriage in their State that is otherwise unlawful, is precluded by the provisions of G.L. c. 207, §§ 11, 12, and 13.” Goodridge v. Department of Public Health, 440 Mass. 309, 348 n.4 (Greaney, J., concurring). Moreover, language used throughout the Goodridge majority’s decision recognizes that other states are entitled to reach their own conclusions about same-sex marriage and that nothing in Goodridge is intended to force the issue in, or on, other states. See Part III.B.2 infra.

### FACTUAL AND LEGAL BACKGROUND

#### 1. Relevant Statutes

General Laws c. 207, § 11, provides: “No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.” General Laws c. 207, § 12, provides: “Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.” City and town clerks are responsible for applying the provisions of both statutes, as indicated by the text of section 12 (which is expressly directed to clerks) and by G.L. c. 207, § 50, making clear that any official who “issues a certificate of notice of intention of marriage knowing that the parties are prohibited by section eleven from intermarrying” is criminally punishable. These statutes were first enacted by St. 1913, c. 360.

To assist clerks in implementing these sections, the 1913 Legislature also enacted another

statute (St. 1913, c. 752, now codified in part at G.L. c. 207, § 37), originally requiring the Secretary of the Commonwealth (who at the time carried out the state’s functions in the marriage process), and today requiring the Commissioner of Public Health, to “furnish to the clerk or registrar of every town a printed list of all legal impediments to marriage, and the clerk or registrar shall forthwith post and thereafter maintain it in a conspicuous place in his office.” This function is now performed by the state Registrar of Vital Records and Statistics (RVRS), who acts under the Commissioner.<sup>2</sup> See Affidavit of Stanley E. Nyberg, state Registrar of Vital Records and Statistics (submitted herewith), ¶ 4.

Pursuant to G.L. c. 207, § 20, individuals seeking to marry must fill out a Notice of Intention to Marry, on a form furnished by the Registrar, and submit it to a city or town clerk. The Notice of Intention must include “a statement of absence of any legal impediment to the marriage, to be given before such town clerk under oath by both of the parties to the intended marriage,” and such oath “shall be to the truth of all the statements contained therein whereof the party subscribing the same could have knowledge[.]” Id. If the Notice of Intention meets all legal criteria, the clerk (after a three-day waiting period, which may be waived by court order)

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<sup>2</sup> See G.L. c. 17, § 4. The Registrar “shall, under the supervision of the Commissioner, enforce all laws relative to the registry and return of births, marriages, and deaths, and may prosecute in the name of the commonwealth any violations thereof.” See Goodridge v. Department of Public Health, 440 Mass. 309, 314 (2003). The Registrar furnishes to local clerks the “notice of intention of marriage” forms, which the parties wishing to marry must use in order to apply to a clerk for a certificate of marriage (also known as a marriage license at this stage). G.L. c. 207, § 20. Also, once a marriage license is issued to the parties, and completed by the person solemnizing the marriage, it must be returned to the issuing clerk, see G.L. c. 207, § 40, who must then, after making a certified copy, return the original, completed certificate of marriage to the state Registrar. G.L. c. 46, § 17A. Compliance with the laws governing notices of intention and certificates of marriage is within the purview of the Registrar, who is to “enforce all laws relative to the registry and return of births, marriages and deaths and may prosecute in

then issues to the parties a certificate that is commonly known as a “marriage license.” See G.L. c. 207, § 28; Nyberg Aff. ¶ 4. The parties then have the marriage solemnized by a person qualified to do so, G.L. c. 207, §§ 38-39, and that person (the solemnizer or officiant) completes the marriage license by filling in the place and date of the marriage and returns it to the issuing clerk for registration. Id. § 40; Nyberg Aff. ¶ 4.

The clerk keeps a copy of what is now termed the Certificate of Marriage and sends the original form and documentary evidence to the state Registrar for preservation, binding, indexing, and reporting purposes. G.L. c. 46, §§ 17A, 17C; G.L. c. 111, § 2. Nyberg Aff. ¶¶ 25-26. In the ordinary course, the Registrar would not bind and index any Certificates of Marriage celebrated in May of 2004 until June 2005 at the earliest. Nyberg Aff. ¶ 25. Under G.L. c. 207, § 45, however, a copy of the Certificate of Marriage, as kept by the city or town clerk or by the person by whom the marriage was solemnized, “shall be prima facie evidence of such marriage.” See also G.L. c. 46, §§ 19, 29 (clerk’s attested record of marriage “shall be prima facie evidence of the facts recorded”).

## 2. Current Implementation of Marriage Statutes

Until the Supreme Judicial Court decided Goodridge in 2003, the Registrar believes that Massachusetts had not had marriage laws in recent years that were substantially less restrictive than other states or jurisdictions in the United States. Nyberg Aff. ¶ 6. For example, in most states and jurisdictions, just as in Massachusetts, the legal age of consent to marry without parental permission or a court order is 18 years old. Thus, there has been little reason to believe that people would come to Massachusetts to avoid their own states’ marriage laws. Nyberg Aff.

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the name of the commonwealth any violations thereof.” G.L. c. 17, § 4.

¶ 6. Nevertheless, the requirements of § 11 have been included in the list of legal impediments to marriage that RVERS sent to each clerk, which each clerk has posted in his or her office pursuant to G.L. c. 207, § 37. Nyberg Aff. ¶ 6; see Clerks’ Affs. Ex. F, G, H, and I. And in an October of 1995 RVERS publication, clerks were specifically instructed, “upon taking the oath of the couple, [to] explain completely that this is a legally binding oath and make sure they have been referred to the Impediments to Marriage poster. Try to provide some level of importance to the oath taking so that the couple will understand that this is an important document.” Nyberg Aff. ¶ 7; see Clerks’ Aff. Ex. C at p. 5. An out-of-state couple would thus be stating under oath that they faced no impediment in their home state.<sup>3</sup>

In response to Goodridge, RVERS changed the Notice of Intention form to eliminate references to “bride” and “groom” and also to seek information about where the applicants, if not Massachusetts residents, intend to reside, as well as seeking information about other impediments such as consanguinity and affinity that had not previously been requested on the form. Nyberg Aff. ¶ 9; compare Clerks’ Affs. Ex. B, J (pre-and post-Goodridge Notices of

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<sup>3</sup> The Registrar respectfully disagrees (see Nyberg Aff. ¶ 7) with the assertions in the Clerks’ Affidavits that, in the pre- Goodridge period, they “were instructed [by DPH] not to make any independent determination of whether applicants [from out of state] would face any legal impediments to marriage under the laws of the state of their residence” and that clerks “should make no effort beyond accepting the couple’s own statement to determine whether the couple’s marriage would be void under the laws of the state where they resided.” E.g., Clerk Johnstone’s Affidavit ¶¶ 7, 13 (emphasis added). Although in the pre-Goodridge period, detailed enforcement of G.L. c. 207, §§ 11 and 12 was not a stated priority for RVERS, the current Registrar is unaware and does not believe that RVERS ever affirmatively instructed clerks to ignore the existence of other states’ marriage impediments in the manner the Clerks suggest. Also, the Couples err in stating that RVERS does not keep records distinguishing between resident and non-resident marriages. Couples’ Memo at 31 & n. 37 (citing Couples’ Ex. 18). As the cited exhibit itself states, and the Nyberg Affidavit (¶ 27) confirms, RVERS maintains such data, but has not yet generated any standards reports or other documents that reflect such data. RVERS

Intention). Before Goodridge took effect on May 17, 2004, the Registrar saw published reports that same-sex couples from other states intended to come to Massachusetts to marry, and thus there appeared to be reason to believe that violations of §§ 11 and 12 might occur unless renewed emphasis was placed on their enforcement. Nyberg Aff. ¶ 8.

RVRS decided that conducting informational sessions for the clerks would be beneficial so that the clerks would understand what information the revised forms were requiring, and what to do once they had that information. On April 15, 2004, RVRS invited the clerks to attend one of five informational sessions that were being held across the commonwealth in early May. Nyberg Aff. ¶ 10.<sup>4</sup> At each of the informational sessions, the clerks were told that the goal of the session was to promote the values of consistency, equality, competence, and courtesy. In particular, the clerks were told that: consistency is important so that the law is consistently applied across the state and within each city and town; equality is important so that all persons are treated equally regardless of their race, creed, age, or sexual orientation; competence is important so that the clerks have a thorough understanding of what the law requires so that they are comfortable in their dealings with the public; and courtesy is important because it will help the clerks to manage the strong feelings that the public may have regarding marriage between persons of the same sex. Nyberg Aff. ¶ 13.

The clerks were informed that when an individual indicates on the Notice of Intention

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expressly offered to generate such a report for the Couples' counsel here. Couples' Ex. 18.

<sup>4</sup> More than 400 individuals attended the informational sessions. The goal of these sessions was to inform the clerks about the new judicial definition of marriage and to discuss the implications of that definition for the marriage registration process. To ensure that all of the clerks received the informational materials, RVRS sent copies of all of the documents that were distributed at the informational sessions to each of the clerks. Nyberg Aff. ¶ 12.

that he or she does not reside in Massachusetts and does not intend to reside in Massachusetts, the clerk should present that individual with the list of legal impediments to marriage in Massachusetts and his or her home state to be furnished by RVRS pursuant to G.L. c. 207, § 37. On the bottom of the Notice of Intention form, each individual must swear under oath, subject to the penalties of perjury, that he or she has reviewed the list of impediments to marriage for his or her place of residence and that there is an absence of any legal impediment to the marriage. Nyberg Aff. ¶ 17.

In addition, the clerks were informed that they should decline to issue a marriage license if, based on comparing the factual information on the Notice of Intention with the list of legal impediments furnished by RVRS, there is a legal impediment to that person marrying in Massachusetts or his or her home state. Clerks were instructed to do so for all couples and all impediments, not just for same sex couples. Nyberg Aff. ¶ 18.

By letter dated May 11, 2004, RVRS sent out to each clerk a guide to the legal impediments to marriage in the fifty states, the District of Columbia, and U.S. territories. Nyberg Aff. ¶ 19; see Clerks' Affs. Ex. K. The guide lists various impediments to marriage, including age, consanguinity, affinity, and sex for each state and jurisdiction. These lists were prepared by attorneys for the commonwealth after review of the relevant law of each of the states and jurisdictions.<sup>5</sup> These lists will be amended and updated as necessary. Nyberg Aff. ¶ 19; see

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<sup>5</sup> Same-sex marriage has been the subject of recent litigation and legislation in other states. As a check to ensure that the Commonwealth's conclusions regarding other states' laws were correct, the Governor sent a letter on April 28, 2004, to the Governor and Attorney General of each of the other states and territories of the United States. Nyberg Aff. ¶ 20. In that letter, the Governor stated his understanding that same-sex marriage is not permitted under the laws of any other jurisdiction in the nation. He indicated that, unless he received an authoritative

Clerks' Affs. Ex. L. For example, the Registrar anticipates that the list will be updated to reflect impediments based on other states' divorce laws, e.g., waiting periods after a divorce becomes final. Nyberg Aff. ¶ 19.

As Goodridge took effect on May 17, 2004, published reports indicated that clerks in Provincetown, Somerville, Springfield, and Worcester were accepting Notices of Intention, and were issuing marriage licenses, to same-sex couples who indicated on the Notice of Intention that they were from jurisdictions outside of Massachusetts, and intended to continue to reside in those jurisdictions, without regard to whether marriage between persons of the same sex is void or prohibited in those jurisdictions. Nyberg Aff. ¶ 21. Acting on the Registrar's behalf, the Office of the Governor's Legal Counsel asked those city and town clerks to send for review all Notices of Intention and Certificates of Marriage from May 17, 2004 through the date of the request. Id. ¶ 23. The request was for all Notices of Intention and Certificates, not just those filed by same-sex couples. Id.

Among the Notices of Intention that were received from those cities and towns were those of same-sex couples who stated that they reside and intend to continue to reside in another state. Nyberg Aff. ¶ 24. These included the Notices submitted by the five plaintiff Couples who have now received marriage licenses and had their marriages solemnized.<sup>6</sup> Also received was a

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statement to the contrary from a state or territory, Massachusetts would not issue a marriage license to same-sex couples from that state or territory. None of the fourteen other states' responses received to date have indicated that marriage of a same sex couple is permitted in that state. Nyberg Aff. ¶ 20.

<sup>6</sup> The Registrar of course does not concede, by using this terminology here and later in this memorandum, that those five Couples validly received licenses or were legally married; the issuance of the licenses violated § 12. The five Couples are Sandra and Roberta Cote-Whitacre of Vermont, Amy Zimmerman and Tanya Wexler of New York, Mark Pearsall and Paul Trubey

Notice of Intention from Springfield submitted by an opposite-sex couple in which the male stated that he resided and intended to continue to reside in Puerto Rico and was 19 years old and the female stated that she was 15 years old. Nyberg Aff. ¶ 24. Copies of these forms were forwarded to the Office of the Attorney General. Id.

The Office of the Attorney General then wrote to counsel for Provincetown, Somerville, Springfield, and Worcester, stating that the actions of their respective clerks “raise significant questions under G.L. c. 207, §§ 11 and/or 12, and, before we institute enforcement action, we write to request your immediate explanation of how these actions may be reconciled with those statutes.” Clerks’ Affs. Ex. M; Affidavit of David R. Kerrigan (submitted herewith), ¶ 3. The letter explained in detail the governing law as interpreted by the Registrar and concluded: “until we receive a satisfactory explanation, we ask that you advise your clerk’s office to cease and desist from such actions.” Id.

Among the various responses to this request was a letter from the Springfield City Solicitor, dated May 26, 2004, stating in part:

I understand that the practice of the Springfield City Clerk has been to rely on the affirmation of no impediments to marriage which is signed by marriage applicants. Is the Attorney General ordering the Springfield City Clerk to do something more than rely on that affirmation when the applicant is a same-sex couple?

Kerrigan Aff ¶ 6 & Ex. A. The Office of the Attorney General responded that same day as follows:

The position of the Registrar is that all couples must be shown the list of impediments for Massachusetts and any other state(s) or jurisdiction(s) in which

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of Connecticut, Katrina and Kristin Gossman of Connecticut, and Judith and Lee McNeil-Beckwith of Rhode Island. See Couples’ Compl. ¶¶ 15-51; Couples’ Ex. 27 (notices of intention).

they reside and intend to reside. If the factual information on the Notice-of-Intention form as completed by the applicants themselves shows that there is an impediment to marriage on the list issued by the Registrar pursuant to G.L. c. 207, § 37, then the Clerk may not rely on the applicants' statement that there is no impediment. That is true regardless of the type of impediment involved, i.e., whether the impediment is based on age, consanguinity or affinity, marital status, or same-gender status of applicants who reside and intend to continue to reside in other states.

Kerrigan Aff. ¶ 6 & Ex. B (emphasis added). Shortly thereafter, the Springfield City Solicitor responded that the Springfield Clerk would cease accepting notices of intention from same-sex couples whose indicated that they resided and intended to continue to reside in other states.

Kerrigan Aff. ¶ 6.

The Office of the Attorney General also asked for an explanation of Springfield's acceptance of a notice of intention from the opposite sex couple, one member of which was 19 years old and resided and intended to continue to reside in Puerto Rico, and the other member of which was 15 years old. Kerrigan Aff ¶¶ 2-4. The Springfield City Solicitor responded that the couple had submitted a Probate Court order authorizing the marriage, and he subsequently sent a copy of the order, which the Office of the Attorney General has forwarded to the Registrar for review. Kerrigan Aff. ¶ 4-5.

The other cities and towns ultimately stated that they would cease accepting notices of intention from out-of-state same-sex couples, at least temporarily, and this action followed.

### 3. The Clerks' and Couples' Claims and Requests for Preliminary Relief

The Clerks claim that the Registrar's enforcement of §§ 11 and 12 is unconstitutionally discriminatory and has "stripped them of the discretion conferred on them by statute" to rely solely on the applicants' statement, on their Notice of Intention, that there is no impediment to

their marriage. Clerks' Compl. Introduction, ¶¶ 50-52. They seek a preliminary injunction barring the defendants from (1) "ordering [the Clerks] to cease and desist" from accepting notices of intention to marry from out-of-state same-sex couples who state under oath that there is no impediment to their marriage;<sup>7</sup> and (2) taking other enforcement action that would prevent the Clerks from issuing marriage licenses to such couples. Clerks' Motion at 1.

The Couples claim that § 11 (but not § 12) lacks a rational basis in violation of state constitutional equal protection and due process guarantees, and violates the federal constitution's Privileges and Immunities Clause. Couples' Compl. ¶¶ 92, 94. They also argue that the Registrar is misinterpreting § 11 to require the denial of marriage licenses to same-sex couples from even those states whose laws do not declare same-sex marriages "void." Couples' Compl. ¶ 96. They also claim that the Registrar has violated G.L. c. 111, § 2, by not recording and indexing the Couples' marriage certificates. Couples' Compl. ¶¶ 98-100. The Couples seek a preliminary injunction (1) barring the defendants from enforcing § 11 (but not § 12) with respect to non-resident same-sex couples; and (2) "requiring the defendants to process and index non-

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<sup>7</sup> This request to enjoin the defendants from "ordering" the Clerks to cease and desist is entirely superfluous and may be ignored, because the defendants never issued such an "order," have no intention of doing so, and do not claim any statutory authority to do so. The Attorney General merely sent a letter "ask[ing]" that the Clerks cease and desist unless and until they could offer a satisfactory explanation of how their actions could be squared with §§ 11 and 12. Clerks' Affs. Ex. M at 5; see Kerrigan Aff. Ex B (letter from Attorney General stating: "the Attorney General has no statutory authority to issue an order to the Springfield City Clerk to stop issuing marriage licenses to same-sex couples from other states. The Attorney General does, however, have the authority and duty to seek court enforcement of state officials' reasonable interpretations of state law."). Nothing in G.L. c. 17, § 4 (authorizing Registrar to enforce laws relative to marriage registration) addresses the issuance of cease-and-desist "orders," nor does the Attorney General claim any general authority to issue such orders. This memorandum, therefore, will focus only on the Clerks' request to enjoin other enforcement action.

resident same-sex couples' marriage applications in the ordinary course.”<sup>8</sup> Couples' Motion ¶ 5.

4. The Critical Distinction Between Marriages that are “Void” and  
Those that are Merely “Prohibited.”

The Registrar agrees with the Couples that the question whether a marriage is “void” is distinct from whether it is “prohibited.” See Couples' Memo at 21 & n.22.<sup>9</sup> In particular, the question whether a marriage would be “void” if contracted in another state (for purposes of applying § 11) is a separate question from whether it is “prohibited” by that other state's laws (for purposes of applying § 12).<sup>10</sup> The Registrar does not contend that a same-sex marriage

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<sup>8</sup> The Couples' motion also seeks, as preliminary relief, “a declaration that Section 11 is unconstitutional as applied to non-resident same-sex couples.” Couples' Motion, ¶ 5. There is, however, “no authority for such a ‘preliminary declaration.’” MBTA Advisory Bd. v. MBTA, 382 Mass. 569, 574 (1981) (citing G.L. c. 231A). This part of the Couples' motion must therefore be denied.

<sup>9</sup> The Couples cite Christensen v. Christensen, 14 N.W.2d 613, 615 (Neb. 1944) (“It is generally held that a marriage is not void unless the statutes so declare, and that courts should not so construe it unless the legislative intent to such effect is clear and unequivocal”); see Couples' Ex. 4. Cf. Sutton v. Warren, 51 Mass. 451, 453-44 (1845) (recognizing distinction between marriages that are void, as opposed to merely voidable); Commonwealth v. Lane, 113 Mass. 458, 462-65 (1873). See also Couples' Ex. 19 (May 17, 2004 letter from Connecticut Attorney General to Governor of the Commonwealth, recognizing, at p. 2, distinction under Connecticut law between whether marriage is “void” and whether it is “permitted” or “authorized”). Of course, a marriage that is expressly declared by another state's law not to be “valid” (or some equivalent term or phrase) would appear to be “void” even if the statute does not use that term; but that issue need not be confronted now, as none of the Couples resides in such a state.

<sup>10</sup> To recap, § 11 provides (with emphasis added): “No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.” And § 12 provides (with emphasis added): “Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.”

would be “void” if contracted in any of the particular states in which the plaintiff Couples reside—only that it is “prohibited” by those states’ laws.

Thus the Registrar does not contend that § 11 renders void any of the marriages of the five Couples who have already received marriage licenses and had their marriages solemnized, see supra n. 6,<sup>11</sup> nor does the Registrar contend that § 11 (as distinct from § 12) bars issuance of marriage licenses to the three Couples who were denied licenses.<sup>12</sup> (This will be explained in detail infra with respect to the three unmarried Couples; the Registrar will explain how the laws of the states where they reside—Maine, New Hampshire and Rhode Island—merely prohibit same-sex marriages in those states, without declaring them void.) For this reason, as will be argued infra, none of the plaintiff Couples has been injured by, and thus they lack standing to challenge, § 11. This lack of standing is a jurisdictional bar. In Massachusetts, the legality of the five Couples’ marriages is in question, and licenses should be denied to the three unmarried Couples, only under § 12, which they do not challenge, and which their argument about the purported misapplication of § 11 inexplicably ignores. See Couples’ Memo at 21, 24.

### ARGUMENT

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<sup>11</sup> The Registrar’s list of other states’ impediments to marriage, Clerks’ Affs. Ex. K, does not identify any of those Couples’ states as one where same-sex marriage would be “void” if contracted. In contrast, the Registrar’s list identifies numerous other states—e.g., Arizona, Arkansas, and Delaware—as ones where same-sex marriage would indeed be “void” if contracted. See Clerks’ Aff. Ex. K. This is in accordance with the express terms of those states’ laws. See Ariz. Rev. Stat. §§ 25-101(C) (“Marriage between persons of the same sex is void and prohibited.”); Ark. Code Ann. § 9-11-109 (“A marriage between persons of the same sex is void.”); Del. Code Title 13 §§ 101(a) (“A marriage is prohibited and void between . . . persons of the same gender.”).

<sup>12</sup> These three Couples are Michael Thorne and James Theberge of Maine; Edward Butler and Leslie Schoof of New Hampshire; and Wendy Becker and Mary Norton of Rhode

The standard for issuance of a preliminary injunction is familiar. “[T]he judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.” Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980) (footnotes omitted).<sup>13</sup> In addition, “when a party seeks to enjoin governmental action, the judge must also consider whether the grant of an injunction would adversely affect the public interest.” Student No. 9 v. Board of Education, 440 Mass. 752, 762 (2004). Neither the Clerks nor the Couples have made these showings here.

I. NEITHER THE CLERKS NOR THE COUPLES ALLEGE ANY  
IMMINENT IRREPARABLE HARM THAT WOULD BE  
PREVENTED BY THE PRELIMINARY INJUNCTIONS THEY  
RESPECTIVELY REQUEST.

The Clerks do not allege any substantial risk of real, tangible, imminent harm to them

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Island. Couples’ Complt. ¶¶ 52-71.

<sup>13</sup> “Since the judge’s assessment of the parties’ lawful rights at the preliminary stage of the proceedings may not correspond to the final judgment, the judge should seek to minimize the harm that final relief cannot redress, by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party.” Id. at 616 (citation and internal quotation omitted).

from enforcement of G.L. c. 207, §§ 11 and 12; they offer only unfounded speculation about possible prosecution, possible civil lawsuits, and possible public criticism of them for following the law as directed by the defendants. As for the Couples, the five Couples who have already received marriage licenses in violation of § 12, and had their marriages solemnized, face no imminent harm, as the process of the Registrar's binding and indexing of their certificates of marriage would not occur until June 2005 at the earliest. The three Couples who have not received marriage licenses will not benefit from the injunction they request against the enforcement of § 11, because issuance of marriage licenses to them is not barred by § 11, but only by the separate provisions of § 12, which their complaint does not challenge and against which they seek no injunction. Moreover, there are alternatives for these Couples who may wish to be married immediately; for example, in Quebec, where same-sex marriage is legal without regard to residency.<sup>14</sup>

A preliminary injunction is available only where the moving party shows, inter alia, that it is "necessary to prevent imminent harm to it" that could not be redressed by a judgment on the merits. Packaging Industries, 380 Mass. at 617 & n.11. The risk of harm must be "substantial," id.; "[b]are allegations or speculation" about irreparable harm are insufficient. Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640, 644 (1987). The moving party must establish "injury that is not remote or speculative, but is actual and imminent." Sierra Club v. Larson, 769 F. Supp. 420, 422 (D. Mass.1991); see, e.g., Narragansett Indian Tribe v. Guilbert, 934 F.2d 4 (1st Cir. 1991); Public Service of New Hampshire v. West

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<sup>14</sup> See Human Rights Campaign website, International Marriage Rights, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=14813&TEMPLATE=/Conte>

Newbury, 835 F.2d 380 (1st Cir. 1987). Moreover, an injunction should not be granted where it would serve no useful purpose in protecting the moving party's rights. See Levine v. Black, 312 Mass. 242, 244 (1942). Based on these principles, neither the Clerks nor the Couples are entitled to preliminary relief.

A. The Clerks' Professed Fears of Prosecution,  
Litigation, and Damage to Their Reputations are  
Insufficient to Warrant a Preliminary Injunction.

The Clerks assert that enforcement of §§ 11 and 12 must be enjoined to protect them from three types of alleged irreparable harm: (1) the risk of prosecution for violations of § 11; (2) the risk of civil suits by out-of-state same-sex couples who have been denied marriage licenses; and (3) the risk that acting in accordance with §§ 11 and 12 “could cause them to be branded in the public eye as homophobic.” Clerks’ Memo at 30. None of these purported risks warrants preliminary relief; the first is legally insufficient and the second and third are far too speculative.

As for prosecution, even assuming arguendo the dubious proposition that the Clerks face any real threat of prosecution,<sup>15</sup> the well-established rule is that “[t]he threat of criminal prosecution is not, in itself, ground for [injunctive] relief. . . . ‘Very special circumstances’ . . . are required.” Knox v. Massachusetts Soc. for Prevention of Cruelty to Animals, 12 Mass. App. Ct. 407, 408 (1981) (citations omitted). A threatened prosecution should not be enjoined “unless it is clear that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its processes into disrepute.” Bunker Hill Distributing, Inc. v. District Attorney for Suffolk County,

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<sup>15</sup> The Attorney General’s letter alluded briefly to G.L. c. 207, § 50 (the statute making issuance of marriage licenses in violation of § 11 a criminal offense) only to remove any question that might be raised about whether clerks are responsible for enforcing § 11, which does not itself mention clerks. See Clerks’ Aff. Ex. M at 3. The Attorney General’s letter did not

376 Mass. 142, 146 (1978) (citations and internal quotations omitted). As to the “inadequate remedy at law” factor, usually the opportunity to raise at a criminal trial all of one’s defenses to the criminal charge (including the defense that the statute in question is unconstitutional) is considered adequate, thus barring injunctive relief against a prosecution. Norcisa v. Board of Selectmen of Provincetown, 368 Mass. 161, 168, 170-71 (1975); see DuBois v. Chief of Police of Watertown, 389 Mass. 488, 489-90 (1983). That opportunity is inadequate in “very special circumstances,” e.g., multiple, vexatious, and/or harassing prosecutions. Norcisa, 368 Mass. at 168-71; see Dunigan Enterprises, Inc. v. District Attorney for the Northern District, 11 Mass. App. Ct. 254, 260 & n.12 (1981). The Clerks allege no such risk here.<sup>16</sup>

As for the risk of civil suits by out-of-state same-sex couples who have been denied marriage licenses, the Clerks offer no factual basis whatsoever for believing that such suits will occur. Their affidavits merely recite that such suits are possible, without identifying any out-of-state couple or anyone else who has even discussed or threatened, let alone instituted, such a suit. E.g. Johnstone Aff. ¶ 24. Indeed, more than half of the plaintiff Clerks do not even claim to have received any inquiries, let alone marriage license applications, from any out-of-state same-sex couples. Those Clerks’ professed fears of litigation by such couples are particularly weak. See Ellis Aff. ¶¶ 16-21; McNulty Aff. ¶¶ 16-21; Stover Aff. ¶¶ 16-22; Pizer Aff. ¶¶ 16-22; Marple

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threaten prosecution or refer to criminal sanctions.

<sup>16</sup> The Clerks cite Frawley v. Watson, 14 Mass. L. Repr. 141, 2001 Westlaw 1631719 (Mass. Super. Ct. Dec. 12, 2001), for the proposition that “a threat of criminal prosecution is considered irreparable harm.” Clerks’ Memo at 30. But in that case the plaintiff sought not to enjoin a prosecution (none had been threatened and indeed prosecutors had stated that none would be instituted), but instead to enjoin his public employer from interviewing him about alleged misconduct unless and until he could obtain a proper, formal grant of immunity. 2001 Westlaw 1631719 at \*1, \* 5. Accordingly, the court there had no occasion to consider the principles discussed above, which are plainly applicable here.

Aff. ¶¶ 16-22, Tari Aff. ¶¶ 16-22; Wood Aff. ¶¶ 22-27. The other Clerks do not allege that any of the out-of-state same-sex couples they have turned away has even hinted at litigation. It appears far more likely that any such couples wishing to litigate would sue state officials such as the Registrar, rather than suing the Clerks, who—by the filing of this suit—have very publicly declared their disagreement with the enforcement of §§ 11 and 12 and their sympathies with such couples. Indeed, the plaintiff Couples have done exactly that: sued the Registrar, not the Clerks. In short, the imagined possibility of litigation against the Clerks does not constitute imminent irreparable harm.<sup>17</sup>

The Clerks finally claim irreparable harm based on the purported risk that acting in accordance with §§ 11 and 12 “could cause them to be branded in the public eye as homophobic.” Clerks’ Memo at 30. Again, however, they offer no evidence in support of this notion; their affidavits do not cite a single instance in which any of them has been subjected to

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<sup>17</sup> Moreover, even if the threat of litigation were real, the burden and expense of litigation do not constitute irreparable harm sufficient to justify preliminary relief. Cf. FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980) (expense and disruption of defending against protracted administrative proceedings is not irreparable harm); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51 (1938) (rejecting claim that “the mere holding of the prescribed administrative hearing would result in irreparable damage”); R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 374-75 (1993) (delay and expense of full litigation on merits was not “irremediable hardship” such as would justify immediate appeal of interlocutory order); In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 20 (1st Cir. 1982) (burdensomeness of ongoing litigation did not warrant mandamus relief against trial court); GTE Products Corp. v. Stewart, 414 Mass. 721, 724-25 (1993) (loss of litigation advantage not irreparable harm). Cf. also Norcisa, 368 Mass. at 170-72 (injury incidental to defending a criminal prosecution brought in good faith was insufficient to justify injunction against prosecution). Finally, to the extent the Clerks purport to fear personal liability, they do not explain (1) why any plaintiff would seek monetary as opposed to injunctive relief (after all, same-sex couples’ interest is in getting married, not in recovering damages, as the Couples’ current lawsuit shows); (2) why they would not be protected by qualified immunity (as it is certainly not “clearly established” that their implementation of §§ 11 and 12 violates anyone’s rights); or (3) why, if somehow found liable, they would not be entitled to indemnification under G.L. c. 258, § 9.

the slightest public criticism for enforcing §§ 11 and 12. In light of the very well-publicized filing of this suit, in which the Clerks have forcefully declared their disagreement with §§ 11 and 12, made it known that they are abiding by those statutes only under threat of enforcement action by the defendants, and taken steps (including filing the current motion) to free themselves of what they perceive as those statutes' unlawful constraints, it is virtually impossible to believe that any of the Clerks will be publicly portrayed or perceived as homophobic or otherwise suffer any damage to his or her reputation. The Clerks have effectively inoculated themselves from such criticism.<sup>18</sup> And to whatever extent any reputational damage may somehow occur, the Clerks do not explain why they could not pursue defamation claims (in their individual capacities) to recover money damages for such harm, just as officials were allowed to do in the cases cited in the Clerks' Memo at 31.<sup>19</sup> Those cases did not hold that defamation of public officials is irreparable harm that could not be remedied by money damages, nor does Ross-Simons v. Baccarat, Inc., 217 F.3d 8, 13 (1<sup>st</sup> Cir. 2000), also cited by the Clerks, establish any such principle.<sup>20</sup> In short, the claimed fear of damage to the Clerks' reputations is neither imminent nor irreparable, and thus provides no basis for preliminary relief.

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<sup>18</sup> Moreover, the public may be expected to understand that the Clerks cannot take it upon themselves to refuse to enforce laws with which they disagree or take it upon themselves to determine that laws are unconstitutional. See, e.g., Tsongas v. Secretary of the Commonwealth, 362 Mass. 708, 713 (1972) (officials "had no authority to depart from the statutes on the ground that the statutes were unconstitutional"). The Clerks may, of course, seek to address §§ 11 and 12 through the legislative process, if they wish.

<sup>19</sup> Pulchaski v. School District of Springfield, 161 F. Supp. 2d 395, 408 (E.D. Pa. 2001); MacElree v. Philadelphia Newspapers, Inc., 674 A.2d 1050, 1055 (Pa. 1996).

<sup>20</sup> Ross-Simons was a case about injury to business goodwill and reputation where, in the particular circumstances, the losses from a threatened breach of contract would not be easily quantifiable so as to make a damages award sufficient, and so the breach was enjoined. Id.

B. The Couples' Claimed Irreparable Harms Are  
Either Not Imminent or Would Not be Prevented by  
the Injunction They Request.

The Couples' allegations of harm are insufficient. In the case of those five Couples who have already been issued marriage licenses and had their marriages solemnized, they face no imminent harm from the Registrar's failure to take certain ministerial steps with respect to their Certificates of Marriage, as the first of those steps would not be taken until June 2005 in any event. In the case of those three Couples who seek marriage licenses and allege irreparable harm from their inability to marry, the injunction they request against the enforcement of § 11 would not avoid the claimed harm, because it is not § 11, but only the separate provisions of § 12, that prohibit them from obtaining marriage licenses.

1. The five Couples whose marriages  
have been solemnized face no  
imminent harm.

The five Couples whose marriages have been solemnized seek an injunction "requiring the defendants to process and index non-resident same-sex couples' marriage applications in the ordinary course." Couples' Motion ¶ 5. But such processing, even for opposite-sex couples married at the same time as the five plaintiff Couples, would not occur for at least a year in any event; it is not "imminent." The relevant statute, G.L. c.111, § 2, provides in pertinent part:

The commissioner [of public health] shall prepare from the birth, marriage and death records received by him under the provisions of chapter forty-six,<sup>21</sup> . . . such

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<sup>21</sup> Under G.L. c. 46, § 17A, "the clerk of each city and town shall, on or before the tenth day of the second month following every month in which marriages are solemnized, transmit to the state registrar upon forms furnished by him, the original record of such marriages and all

statistical tables as he deems useful, and shall make annual report thereof to the general court. . . . He shall, as soon as is reasonably practicable, cause the birth, marriage and death records to be bound with indexes thereto and shall retain their custody.

The Registrar carries out these functions for the Commissioner. Nyberg Aff. ¶¶ 25-26. Under this statute, certificates of marriages solemnized in May 2004 should be received by the Registrar during July 2004, and “[i]n the normal course of business,” the Registrar “would not bind these records until June 2005, at the earliest,” and “would complete annual reports regarding the 2004 birth, marriage and death records in 2006 or 2007 at the earliest.” Nyberg Aff. ¶¶ 25-26.

Therefore, if the Registrar were to refuse to bind the five Couples’ certificates of marriage in the same manner as he binds other certificates of marriage (whether for Massachusetts same-sex couples or any opposite-sex couples), such refusal would not occur until June 2005 at the earliest. Nor does that delay affect the five Couples’ ability to assert and attempt to prove that they are lawfully married. Under G.L. c. 207, § 45, a copy of the certificate of marriage, as kept by the city or town clerk or by the person by whom the marriage was solemnized, “shall be prima facie evidence of such marriage.” See also G.L. c. 46, §§ 19, 29 (clerk’s attested record of marriage “shall be prima facie evidence of the facts recorded”). The five Couples may obtain copies of their certificates of marriage from the relevant city or town clerk, and use them as they please (as one Couple has reportedly already done<sup>22</sup>), without regard

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documentary evidence. Certified copies of the marriages shall be retained by said clerk.”

<sup>22</sup> “Katy [Gossman], an FBI agent, said she has already used her marriage license to obtain medical benefits for Kristin under her health plan at work. With the dangerous nature of

to what the Registrar may do with respect to binding and indexing such certificates or reporting on them to the Legislature under G.L. c. 111, § 2. Accordingly, the five Couples face no imminent irreparable harm that would warrant an injunction requiring the Registrar immediately to bind and index their certificates.

2. The three Couples who have not obtained marriage licenses could not marry even if the requested injunction issues.

The three Couples who have not yet obtained marriage licenses allege that their inability to marry is causing them irreparable harm, and they seek a preliminary injunction barring the defendants from enforcing § 11 with respect to non-resident same-sex couples. But such an injunction would not remedy the claimed harm, because it is not § 11 but § 12 (which the Couples do not challenge) that bars the three Couples from marrying.<sup>23</sup> Under § 12, a city or town clerk could not issue a marriage license to any of the three Couples, because the clerk could not lawfully “satisfy himself, by requiring affidavits or otherwise, that such person is not

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her work, Katy, 40, also rushed to have Kristin, 38, listed as her beneficiary on her life insurance and pension.” Laura Walsh, Lesbian Couple Seeks to Maintain Marriage, Lancaster Online (Meriden, Conn.), July 5, 2004, [http://www.lancasteronline.com/pages/news/ap/4/gay\\_marriage\\_couple](http://www.lancasteronline.com/pages/news/ap/4/gay_marriage_couple) (last visited July 8, 2004). The couple is also reportedly using their marriage license to apply for a new Connecticut driver’s license for Kristin using the last name Gossman, as shown on the marriage license. Id.

<sup>23</sup> To recap once again, § 11 provides (with emphasis added): “No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.” And § 12 provides (with emphasis added): “Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from

prohibited from intermarrying by the laws of the jurisdiction where he or she resides.” Any clerk who issued such a license to any of the three Couples would have unlawfully abused his or her discretion (as explained in Part II.C infra), because each of the three Couples resides and intends to continue to reside in a state where same-sex marriage is prohibited.

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intermarrying by the laws of the jurisdiction where he or she resides.”

a. Plaintiffs Thorne and Theberge of Maine.

Plaintiffs Michael Thorne and James Theberge reside in Maine. See Couples' Compl. ¶ 59. Maine law provides: "Same sex marriage prohibited. Persons of the same sex may not contract marriage." Me. Rev. Stat. Title 19A § 701(5) (2003). The Registrar's list of impediments, issued pursuant to his authority under G.L. c. 207, § 37, so indicates. See Clerks' Affs. Ex. K. Thus, as explained in Part II.C infra, no clerk could lawfully conclude that Thorne and Theberge are "not prohibited from intermarrying by the laws of the jurisdiction where [they] reside[]." G.L. c. 207, § 12. Nothing in Maine law, however, declares that a same-sex marriage contracted in Maine is "void" or the equivalent, and thus § 11 does not bar Thorne and Theberge's marriage.<sup>24</sup>

Accordingly, without an injunction against enforcement of § 12, which they do not request, Thorne and Theberge cannot marry, and thus cannot avoid the harms they allege, even if enforcement of § 11 is enjoined. Such an injunction therefore should not issue; indeed, Thorne and Theberge are not even injured by, and have no standing to challenge, § 11.

b. Plaintiffs Butler and Schoof of New Hampshire.

Plaintiffs Edward Butler and Leslie Schoof reside in New Hampshire. See Couples' Compl. ¶ 65. New Hampshire Rev. Stat. § 457:1 is entitled "Marriages Prohibited; Men" and provides, inter alia: "No man shall marry . . . any other man." New Hampshire Rev. Stat. §

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<sup>24</sup> Maine does have two statutes (Me. Rev. State. Title 19A § 701(1), 701(1-A), discussed in Part I.B.3 infra, providing that certain marriages (including same-sex marriages) contracted in other states are considered void in Maine. But that does not trigger § 11, the operation of which turns instead on whether the marriage of a couple from another jurisdiction (e.g., Maine) "would be void if contracted in such other jurisdiction[.]" Nothing in Maine law declares same-sex marriage void if contracted in Maine; same-sex marriages are void in Maine only if contracted in another state by residents of Maine or persons who subsequently come to

457:2 likewise prohibits a woman from marrying any other woman. The Registrar’s list of impediments, issued pursuant to his authority under G.L. c. 207, § 37, so indicates. See Clerks’ Affs. Ex. K. Thus, Butler and Schoof are “prohibited from intermarrying by the laws of the jurisdiction where [they] reside[.]” G.L. c. 207, § 12. Nothing in New Hampshire law, however, declares that a same-sex marriage contracted in New Hampshire is “void” or the equivalent, and thus § 11 does not bar Butler and Schoof’s marriage. Without an injunction against enforcement of § 12, which they do not request, Butler and Schoof cannot marry, and thus cannot avoid the harms they allege, even if enforcement of § 11 is enjoined. Such an injunction therefore should not issue; indeed, Butler and Schoof are not even injured by, and have no standing to challenge, § 11.

c. Plaintiffs Becker and Norton of Rhode Island.

Plaintiffs Wendy Becker and Mary Norton reside in Rhode Island. See Couples’ Compl. ¶ 52. The Rhode Island Attorney General released a statement on May 17, 2004 (see Couples’ Ex. 15), declining to answer the Governor of the Commonwealth’s question whether same-sex marriage would be void if contracted in Rhode Island, declaring: “No Rhode Island court has addressed or interpreted whether or not Rhode Island’s marriage laws permit same-sex couples to marry or whether same-sex marriages, if performed in Rhode Island, would be void.”<sup>25</sup> The

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Maine.

<sup>25</sup> His statement also recognized the existence of a separate question: whether a same-sex marriage legally performed in Massachusetts would be recognized as a marriage under Rhode Island law. See Couples’ Ex. 15. That issue is discussed further infra. For now it is sufficient to note that for purposes of applying §§ 11 and 12, it is irrelevant whether another state would recognize a same-sex marriage if validly performed in the Commonwealth. This is because §§ 11 and 12 make the validity and permissibility of a marriage in the Commonwealth turn on whether the marriage could be validly or legally contracted in the couple’s home state, not whether it would be recognized there after being contracted in the Commonwealth.

Registrar, however, must nevertheless address the issue in compiling the list of impediments pursuant G.L. c. 207, § 37, and the Registrar’s list states that same sex marriage is not permitted in Rhode Island, but does not assert that same-sex marriage would be “void” or the equivalent if contracted in Rhode Island. See Clerks’ Affs. Ex. K.

Although plaintiffs Becker and Norton have not (at least at this stage) argued that same-sex marriage is not prohibited under Rhode Island law—i.e., they make no claim that § 12 does not apply to them—the Registrar nevertheless explains here, for the Court’s information, the basis of his conclusion that same-sex marriage is prohibited in Rhode Island. That state’s marriage laws use (1) gender-specific terms, e.g., prohibiting a man from marrying specified female relatives and a woman from marrying specified male relatives, R.I. G.L. §§ 15-1-1, 15-1-2; as well as (2) terms such as “husband” and “wife,” id. §§ 15-1-5, 15-1-6; and (3) other phrases clearly indicating that marriage is between a man and a woman.<sup>26</sup> The plain meaning of these statutes,<sup>27</sup> including their use of the commonly understood term “marriage,” is that only a man

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<sup>26</sup> “Persons intending to be joined together in marriage in this state must first obtain a license from the clerk of the town or city in which: (1) The female party to the proposed marriage resides; or in the city or town in which (2) The male party resides, if the female party is a nonresident of this state; or in the city or town in which (3) The proposed marriage is to be performed, if both parties are nonresidents of this state.” R.I. G.L. § 15-2-1 (emphasis added). “Both the bride and groom shall subscribe to the truth of data in the application” for a marriage license. Id. § 15-2-7 (emphasis added).

<sup>27</sup> Rhode Island follows the familiar rules of statutory construction that “when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings; [w]hen confronted with statutory provisions that are unclear and ambiguous, however, we examine statutes in their entirety in order to glean the intent and purpose of the Legislature[; and] [i]n so doing, we consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.” Providence & Worcester Railroad Co. v. Pine, 729 A.2d 202 (R.I. 1999) (citations and internal quotations omitted).

and a woman may marry in Rhode Island. This is precisely the same reasoning used by the Supreme Judicial Court in Goodridge to conclude, based on the common meaning of “marriage” and similar provisions in Massachusetts statutes, that those statutes did not allow same-sex couples to marry. Goodridge, 440 Mass. at 318-19 (rejecting plaintiffs’ argument that because nothing in G.L. c. 207 “specifically prohibits marriages between persons of the same sex,” the statute could be interpreted to permit such marriages, thus avoiding any constitutional question).<sup>28</sup> Rhode Island law plainly does not authorize same-sex marriage,<sup>29</sup> and the Registrar, in keeping with the purpose of § 12 to respect the marriage policies of other states as to residents of those states, reasonably and sensibly interprets this lack of authorization as the equivalent of a prohibition for purposes of § 12.

Thus, Becker and Norton are “prohibited from intermarrying by the laws of the jurisdiction where [they] reside[.]” G.L. c. 207, § 12. Nothing in Rhode Island law, however, declares that a same-sex marriage contracted in Rhode Island is “void,” and thus § 11 does not bar Becker and Norton’s marriage. Without an injunction against enforcement of § 12, which

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<sup>28</sup> The Goodridge court reasoned that “[t]he intended scope of G. L. c. 207 is also evident in its consanguinity provisions. . . . Sections 1 and 2 of G. L. c. 207 prohibit marriages between a man and certain female relatives and a woman and certain male relatives, but are silent as to the consanguinity of male-male or female-female marriage applicants. . . . The only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry.” 440 Mass. at 319. The Registrar draws the identical conclusion from the analogous Rhode Island consanguinity statutes, which prohibit a man from marrying specified female relatives and a woman from marrying specified male relatives, but say nothing about consanguinity of same-sex marriage license applicants. R.I. G.L. §§ 15-1-1, 15-1-2.

<sup>29</sup> Apart from Rhode Island statutes, “[a]lthough common-law marriages have long been recognized as valid in [Rhode Island], . . . the existence of a common-law marriage must be established by clear and convincing evidence that the parties seriously intended to enter into the husband-wife relationship.” DeMelo v. Zompa, 844 A.2d 174, 177 (R.I. 2004) (citations and internal quotations omitted; emphasis added). Thus, to the extent that persons may marry outside

they do not request, Becker and Norton cannot marry, and thus cannot avoid the harms they allege, even if enforcement of § 11 is enjoined. Such an injunction therefore should not issue; indeed, Becker and Norton are not even injured by, and have no standing to challenge, § 11.

3. Even if the three Couples could obtain an injunction allowing them to marry in Massachusetts, that injunction would do little if anything to prevent the harms they allege.

Even if the three Couples obtained an injunction that somehow allowed them to marry in the Commonwealth, e.g., an injunction against enforcement of § 12 (which they do not request and which should not issue for other reasons as well<sup>30</sup>), that would do little to prevent the harms they allege, because those marriages would be void and/or not recognized in two of the Couples' home states (Maine and New Hampshire) and would be of uncertain status in the third Couple's home state (Rhode Island). The harms the Couples allege--"the ability to associate and express themselves through marriage" as well as all of marriage's "legal and social, tangible and intangible protections," Couples' Memo at 41--would be most likely to occur in the states where

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of the statutory framework discussed above, plainly only opposite-sex couples may do so.

<sup>30</sup> If the enforcement of § 12 were enjoined, presumably the three unmarried Couples would promptly marry. This would effectively grant them final relief, which a preliminary injunction should not ordinarily do. In the Matter of McKnight, 406 Mass. 787, 792 & n.4, 800-802 (1990) ("preliminary" injunction should not grant final relief). "A preliminary injunction is, by definition, an interlocutory order entered to preserve temporarily the status quo pending a full trial on the merits." Id. at 792 n.4 (emphasis added). "Courts disfavor injunctions that disturb, rather than preserve, the status quo[.]" United Steelworkers v. Textron, Inc., 836 F. 2d 6, 10 (1st Cir. 1987). Here, the status quo is that the three Couples are not married, and that status should not be disturbed unless and until the Couples obtain final relief that allows them to marry. If a preliminary injunction allowed them to marry, and the Registrar later prevailed on the merits, it

they actually live, not Massachusetts, and a Massachusetts marriage would do little or nothing to prevent those harms in these other states. As explained below, this is plainly so for plaintiffs Thorne and Theberge of Maine and plaintiffs Butler and Schoof of New Hampshire, and very much in question for plaintiffs Becker and Norton of Rhode Island.

If plaintiffs Thorne and Theberge somehow married in Massachusetts, they would nevertheless return to Maine, where a statute provides that “Any marriage performed in another state that would violate any provisions of subsections 2 to 5 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State.” Me. Rev. Stat. Title 19A § 701(1-A) (emphasis added). Because “subsection (5)” of Title 19A, § 701, expressly prohibits same-sex marriage, see Part I.B.2.a supra, even if Thorne and Theberge were somehow to marry in Massachusetts, their marriage would not be recognized in their home state of Maine, and indeed would be void there. The same Maine statute also provides that “When residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State.” Me. Rev. Stat. Title 19A § 701(1). This statute, too, would result in Thorne and Theberge’s Massachusetts marriage (were they able to obtain one) being void in Maine.

It is not apparent how a Massachusetts civil marriage that would be entirely void and not entitled to any legal recognition in Thorne and Theberge’s own home community in Maine would further the couple’s “right to associate and express themselves through marriage.” And of course a Massachusetts civil marriage that would be entirely void and not entitled to any legal

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is unclear if or how the legality of their marriages would then be established.

recognition in Thorne and Theberge's own home community in Maine would do little or nothing to give them marriage's "legal and social, tangible and intangible protections." Couples' Memo at 41. Thorne and Theberge do not allege that they visit Massachusetts regularly, or even occasionally, which might make a Massachusetts marriage valuable to them (and thus important to prevent irreparable harm) because of the tangible and intangible benefits it would confer on them when physically present here. The most they say is that they "still feel very connected to Massachusetts" based on their past residence here, which ended one year ago when they moved to Maine. Couples' Compl. ¶ 62. In short, a Massachusetts marriage would do little to prevent any imminent irreparable harm to Thorne and Theberge such as would warrant a preliminary injunction.

The same is true as to plaintiffs Butler and Schoof of New Hampshire. Under N.H. Rev. Stat. § 457:3,<sup>31</sup> "[m]arriages legally contracted outside the state of New Hampshire which would be prohibited under RSA 457:1 or RSA 457:2<sup>32</sup> if contracted in New Hampshire shall not be legally recognized in this state." Thus, even if Butler and Schoof were somehow to marry in Massachusetts, their marriage would not be legally recognized in their home state of New Hampshire. Just as with Thorne and Theberge, Butler and Schoof do not allege that they visit Massachusetts regularly, or even occasionally, which might make a Massachusetts marriage valuable to them in preventing irreparable harm when they are physically present here. Butler and Schoof left Massachusetts in 1978 and apparently have not lived here since. Couples'

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<sup>31</sup> As amended by Chapter 100:1 of the New Hampshire Acts of 2004, approved and effective May 14, 2004.

<sup>32</sup> As noted supra, these statutes, inter alia, prohibit a man from marrying any other man and a woman from marrying any other woman.

Compl. ¶ 67. Just as with Thorne and Theberge, it may seriously be questioned whether such a marriage will really prevent any of the irreparable harms--expressive, intangible, and tangible--that Butler and Schoof assert. Therefore, no preliminary injunction is warranted.

For plaintiffs Becker and Norton of Rhode Island, the picture is cloudier. The Rhode Island Attorney General's May 17 statement recognized that it was an open question whether a same-sex marriage legally performed in Massachusetts would be recognized as a marriage under Rhode Island law. See Couples' Ex. 15. He said: "This 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. Public policy can be determined by statute, legal precedent, and common law." He expressed no view on whether the Rhode Island courts would find that recognizing a Massachusetts same-sex marriage would run contrary to any strong Rhode Island public policy, and he noted generally that answers to question about same-sex marriage "will ultimately come from the courts[.]" Couples' Ex. 15.

At this point, therefore, it is unclear whether allowing plaintiffs Becker and Norton to marry in Massachusetts would have any expressive value, or provide them any tangible or intangible benefits, in their home state of Rhode Island. They do not allege that they visit Massachusetts regularly or even occasionally. Couples' Compl. ¶¶ 52-58. The burden is on the moving parties to show that a preliminary injunction is necessary to prevent imminent irreparable harm, and Becker and Norton have not carried that burden.

II. THE CLERKS HAVE NO LIKELIHOOD OF SUCCESS ON  
THE MERITS OF THEIR CLAIMS.

The Clerks have no likelihood of success on the merits, for three main reasons. First,

they may not legally assert a claim that the Registrar’s enforcement of §§ 11 and 12 is unconstitutionally discriminatory, because a long line of Supreme Judicial Court decisions establishes that local officials cannot challenge the constitutionality of state statutes or state officials’ actions. Part A, infra. Second, even if the Clerks could assert a discriminatory enforcement claim, it would fail on the merits, because the Registrar lawfully exercised his enforcement discretion to place increased emphasis on enforcing §§ 11 and 12 once it became clear that widespread violations could be expected after Goodridge took effect in May 2004. The Registrar’s increased enforcement effort has been evenhanded and has not discriminated against similarly-situated persons. Part B, infra. Third, the Clerks’ claim that the Registrar’s enforcement effort has “stripped them of the discretion conferred on them by statute” is based on the erroneous premise that the Clerks have discretion to ignore the Registrar’s statutorily authorized list of other states’ legal impediments to marriage and rely instead on a couple’s sworn statement on the notice-of-intention that there is no impediment, even when the facts on that same notice-of-intention clearly show otherwise. The Clerks have considerable discretion in determining the facts, but no discretion to ignore undisputed facts showing that there is a legal impediment to the marriage. Part C, infra. Finally, the Clerks’ proffered “good reason why the reverse evasion statute has never been enforced” (Clerks’ Memo at 24-28) does not advance any of their legal claims. Part D, infra.

A. The Clerks Lack Authority to Challenge the  
Constitutionality of the Registrar’s Enforcement of  
§§ 11 and 12.

The Clerks lack any authority to assert their “discriminatory enforcement” claim, which

is an equal protection claim,<sup>33</sup> because of the well-established rule that local officials and entities cannot challenge the constitutionality of state statutes or state officials' actions. In Spence v. Boston Edison Co., 390 Mass. 604, 610 (1983), the Supreme Judicial Court recognized a “long-standing and far-reaching prohibition on constitutional challenges by governmental entities to acts of their creator State.” This includes challenges to the constitutionality of state statutes and “the constitutionality of the acts of another of the State’s agencies.” Id. Thus in Spence, the Boston Housing Authority was not allowed to raise equal protection and due process challenges to the rate-setting procedures of the state Department of Public Utilities. Id. at 607-10.

The constitutional provisions invoked by the BHA give rights to the citizens which may not be infringed by the government. The words used to describe those entitled to these protections are “people” (Mass. Declaration of Rights, art. 1), “individual” (Mass. Declaration of Rights, art. 10), “subject” (Mass. Declaration of Rights, art. 12), “citizens” or “persons” ( U.S. Const. amend. XIV). The BHA does not have these rights.

Spence, 390 Mass. at 608 (emphasis in original). “In 1923, the United States Supreme Court held that a ‘City cannot invoke the protection of the Fourteenth Amendment against the State.’ Newark v. New Jersey, 262 U.S. 192, 193, 196 (1923). This principle has often been reiterated.” Spence, 390 Mass. at 609 (citing cases). The court has “since applied the Spence doctrine in a

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<sup>33</sup> That the Clerks’ claim is an equal protection claim is clear from the two cases upon which they rely. See Yerardi’s Moody Street Rest. & Lounge v. Board of Selectmen, 878 F.2d 16, 21 (1<sup>st</sup> Cir. 1989) (identifying selective treatment claim as an “equal protection” claim); id. at 20 (same); Daddario v. Cape Cod Comm’n, 56 Mass. App. Ct. 764, 773 (2002) (same).

wide range of cases.” MBTA v. Auditor of the Commonwealth, 430 Mass. 783, 792 (2000).<sup>34</sup> (citing cases). The Clerks therefore may not challenge on constitutional grounds the enforcement of §§ 11 and 12. They may, of course, seek to address those sections through the legislative process if they wish.

To whatever extent the Clerks also mean to argue that they have standing to assert the constitutional rights of the out-of-state same-sex couples to whom they wish to issue marriage licenses, the Clerks are incorrect. See Clerks’ Memo at 29 (citing Griswold v. Connecticut, 382 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972)). In those cases, private parties convicted for furnishing contraceptives to third persons were allowed to assert those persons’ constitutional privacy rights to receive contraceptives, where the parties convicted either had a professional medical relationship with, or otherwise were advocates for the rights of, the third persons, and had an adequate incentive to assert those rights.

The standing doctrine applied in the particular circumstances of those cases is not applicable here. Cf. Norfolk County Hosp. v. Commonwealth, 25 Mass. App. Ct. 586, 588

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<sup>34</sup> The MBTA court cited the following examples: “Clean Harbors of Braintree, Inc. v. Board of Health of Braintree, 415 Mass. 876, 878 (1993) (board, municipal agency of town, cannot challenge constitutionality of State statute); Brookline v. The Governor, 407 Mass. 377, 386 (1990) (Liacos, C.J., concurring) (municipality cannot challenge constitutionality of State statute based on its enactment as an ‘outside section’ of the general appropriation act); Trustees of Worcester State Hosp. v. The Governor, 395 Mass. 377, 380 (1985) (takings claim barred because governmental entities cannot challenge constitutionality of State statutes).” MBTA, 430 Mass. at 792. Spence is subject to two limited exceptions, neither of which applies here. First, “agencies ... have standing to challenge the constitutionality of a State statute when it is alleged that the statute represents legislative encroachment on judicial power in violation of art. 30.” LaGrant v. Boston Hous. Auth., 403 Mass. 328, 331 (1988) (public entity could act as surrogate to assert judiciary’s art. 30 rights because judiciary could not initiate litigation on its own). Second, a municipality may challenge a statute as violative of the home rule amendment, Mass. Const. amend. art. 89, see Clean Harbors, 415 Mass. at 880-81; apparently because that amendment (unlike, e.g., the equal protection clause) explicitly confers constitutional protections

(“proper focus in evaluating irreparable harm” was on plaintiff public hospitals and physicians, “not their nonparty patients,” and harm to plaintiffs “must be direct”), rev. denied, 402 Mass. 1104 (1988). The Clerks are neutral public officials who have no professional relationship with, or statutory responsibility or incentive to advocate for, particular non-Massachusetts couples who wish to marry. In the Commonwealth, standing to assert the rights of third persons (“representational” or “jus tertii” standing ) “is infrequently granted” and requires, inter alia, that “there must be some genuine obstacle that renders the third party unable to assert the allegedly affected right on his or her own behalf.” Planned Parenthood League of Mass. v. Bell, 424 Mass. 573, 578 (1997) (citation and internal quotations omitted); cf. Eisenstadt, 405 U.S. at 446 (case for according standing to assert third parties’ rights was stronger where those parties could not assert their own rights). Here, as the Couples’ suit clearly shows, there is no obstacle to out-of-state same-sex couples asserting the allegedly affected right on their own. Cf. Slama v. Att’y Gen., 384 Mass. 620, 624 (1981) (denying city’s claim of representational standing to assert rights of its voters, where “it is neither difficult nor impossible for qualified voters to assert their claims”; there was “no reason to depart from the general rule that ‘[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party,’” quoting Barrows v. Jackson, 346 U.S. 249, 255 (1953)). See also Spence, 390 Mass. at 610-11 (Boston Housing Authority not allowed to assert equal protection claims on behalf of its tenants against state agency, where BHA made no argument that it was “a statutorily authorized surrogate for tenants’ rights,” and tenants had intervened and were actively asserting their claims). In particular, the Clerks should not be heard to assert out-of-state same-sex couples’ interests in

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on municipalities.

challenging § 12, where the Couples themselves have declined to bring any such challenge.

B. Even if the Clerks Could Assert a Discriminatory Enforcement Claim, the Claim would Fail on the Merits.

Even if the Clerks could assert a discriminatory enforcement claim, it would fail on the merits, because the Registrar lawfully exercised his enforcement authority to place increased emphasis on enforcing §§ 11 and 12 once it became clear that violations might occur after Goodridge took effect in May 2004. Nyberg Aff. ¶ 8. The relevant comparison is not between past and current enforcement efforts,<sup>35</sup> but between current enforcement efforts regarding same-

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<sup>35</sup> Even if the Registrar had never taken any action to enforce §§ 11 and 12, which is certainly not the case, see Nyberg Aff. ¶¶ 6-7, lack of prior enforcement of a statute does not bar its current enforcement. E.g., Fitchburg Gas and Elec. Light Co. v. Department of Telecommunications and Energy, 440 Mass. 625, 636 (2004); see Doris v. Police Comm'r of Boston, 374 Mass. 443, 449 (1978) (“It would indeed be a most serious consequence if we were to conclude that the inattention or inactivity of government officials could render a statute unenforceable and thus deprive the public of the benefits or protections bestowed by the Legislature”). If discrimination against similarly-situated persons could be established simply by comparing past enforcement against a group to current enforcement against that group, then government officials could never alter their enforcement policies, which is clearly not the law. “The discretion granted to an administrative agency is particularly broad when [the] agency is concerned with fashioning remedies and setting enforcement policy.” Boston Preservation Alliance, Inc. v. Secretary of Environmental Affairs, 396 Mass. 489, 498 (1986) (internal quotations and citation omitted); see Zachs v. DPU, 406 Mass. 217, 228 (1989); Levy v. Board of Registration and Discipline in Medicine, 378 Mass. 519, 525 (1979). Courts do not interfere with discretionary agency decisions not to take enforcement action, even when a particular alleged violation has been brought to the agency’s attention. See Angelico v. Commissioner of Insurance, 357 Mass 407, 411 (1970); Berman v. Board of Registration in Medicine, 355 Mass 358, 360 (1969); Ames v. Attorney General, 332 Mass. 246, 250-52 (1955); Brierley v. Walsh, 299 Mass. 292, 295 (1938); cf. Heckler v. Cheney, 470 U.S. 821 (1985) (holding that agency’s refusal to take enforcement action is not reviewable under federal Administrative Procedure Act). Moreover, neither the Clerks nor the Couples provide any reason to believe that there were any significant numbers of violations of §§ 11 and/or 12 between 1913 and 2004. There is no evidence in the record at all as to how the statutes were enforced prior to 1976, when enforcement was transferred from the Secretary of State’s office to the Department of Public

sex couples and those regarding opposite-sex couples. Although the violations to be anticipated starting in May 2004 would largely if not entirely involve same-sex couples, the Registrar recognizes that heightened enforcement efforts should be fairly applied to all applicants, to attempt to prevent any violations by opposite-sex couples as well. Thus the Registrar's increased enforcement effort has been evenhanded and has not discriminated against similarly-situated persons. See Yerardi's, 878 F.2d at 21; Daddario, 56 Mass. App. Ct. at 773. In particular:

Clerks were instructed that equality is important so that all persons are treated equally regardless of their race, creed, age, or sexual orientation. Nyberg Aff. ¶ – (emphasis added).

Clerks were informed that they should decline to issue a marriage license if, based on comparing the factual information on the Notice of Intention with the list of legal impediments furnished by RVRS, there is a legal impediment to that person marrying in Massachusetts or his or her home state. Clerks were instructed to do so for all couples and all impediments, not just for same sex couples. Nyberg Aff. ¶ 13.

The revisions to the Notice of Intention form included new fields requesting information relevant to other impediments, such as consanguinity and affinity. Compare Clerks' Affs. Exs. B, J (pre- and post-Goodridge Notice of Intention forms).

The RVRS guide to the legal impediments to marriage in other states lists not just gender, but a range of impediments to marriage, including age, consanguinity and affinity, and other factors, for each state. Nyberg Aff. ¶ 19; see Clerks' Affs. Ex. K. These lists will be amended and updated as necessary. Nyberg Aff. ¶ 19; see Clerks' Affs. Ex. L. For example, the Registrar anticipates that the list will be updated to reflect impediments based on other states' divorce laws, e.g., waiting periods after a divorce becomes final. Id. Clerks have already been instructed to seek more information about the finality of divorces. Nyberg Aff. ¶ 28.

When press reports indicated that some city and town clerks were issuing marriage licenses to same-sex couples from other states, the Office of the Governor's Legal Counsel, acting on the Registrar's behalf, asked those city and town clerks to send all Notices of Intention accepted on or after May 17, 2004 for review, not just those filed by same-sex couples. Nyberg Aff. ¶¶ 23.

When one of the cities (Springfield) submitted a copy of a notice of intention from an

opposite-sex couple in which the 19-year-old male resided and intended to continue to reside in Puerto Rico and the female was 15 years old (a situation that would present separate impediments under the laws of Puerto Rico and Massachusetts<sup>36</sup>), this was forwarded to the Attorney General. Nyberg Aff. ¶ 24; see Clerks Ex. K (list of impediments for Puerto Rico). The Attorney General took appropriate action to obtain further information from Springfield officials and to forward that information to the Registrar for his review. Kerrigan Aff. ¶¶ 2-5.

When Springfield wrote to the Attorney General asking if same-sex couples should be treated differently than opposite-sex couples, the Attorney General promptly and forcefully disabused Springfield of any such notion. Springfield's letter stated: "I understand that the practice of the Springfield City Clerk has been to rely on the affirmation of no impediments to marriage which is signed by marriage applicants. Is the Attorney General ordering the Springfield City Clerk to do something more than rely on that affirmation when the applicant is a same-sex couple?" The Attorney General immediately responded as follows (see Kerrigan Aff. ¶ 6 & Ex. B (emphasis added):

The position of the Registrar is that all couples must be shown the list of impediments for Massachusetts and any other state(s) or jurisdiction(s) in which they reside and intend to reside. If the factual information on the Notice-of-Intention form as completed by the applicants themselves shows that there is an impediment to marriage on the list issued by the Registrar pursuant to G.L. c. 207, § 37, then the Clerk may not rely on the applicants' statement that there is no impediment. That is true regardless of the type of impediment involved, i.e., whether the impediment is based on age, consanguinity or affinity, marital status, or same-gender status of applicants who reside and intend to continue to reside in other states.

The Clerks' various critiques of the Registrar's approach in no way establish unequal treatment of a subset of similarly-situated persons. The Clerks are simply wrong in asserting that enforcement of §§ 11 and 12, while heightened for same-sex couples, remains for opposite-sex couples "essentially the same as it always has been." Clerks' Memo at 13. Clerks have now been furnished lists of impediments from other states that might affect opposite-sex couples, and

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<sup>36</sup> In the Commonwealth, a person under eighteen may not marry except with permission of a probate or district court. G.L. c. 207, §§ 7, 24-25. Under Puerto Rico law, a person under twenty-one must present the consent of a parent or guardian, with specified exceptions for, inter

have been instructed to apply these in exactly the same manner as with same-sex couples. In particular, clerks were informed that, as to both opposite- and same-sex couples, they should decline to issue a marriage license if, based on comparing the factual information on the Notice of Intention with the list of legal impediments furnished by RVRS, there is a legal impediment to that person marrying in Massachusetts or his or her home state. Nyberg Aff. ¶ 18. All out-of-state couples must be shown the list of impediments from their state and must, in order to obtain a license, swear that they are not aware of any impediment. Id. ¶ 17. And if the Notice of Intention nevertheless shows an impediment, a clerk is no more entitled to rely on an opposite-sex couple's sworn statement of no impediment than the clerk is entitled to rely on such a statement by a same-sex couple. Kerrigan Aff. Ex. B.

The fact that the plaintiff Clerks have issued numerous licenses to out-of-state opposite-sex couples since May 17, 2004, establishes nothing, because the Clerks--who are in the best position to know--do not identify a single instance in which such an opposite-sex couple was allowed to marry despite an actual impediment based on their home state's laws. Clerks' Memo at 13. This in and of itself is fatal to the Clerks' selective enforcement claim. Cf. Commonwealth v. Franklin, 376 Mass. 885, 894 (1978) (defendant alleging selective prosecution must show, inter alia, that "a broader class of persons than those prosecuted has violated the law").

Nor does it matter that some of the states from which those couples hailed prohibit marriage of persons who are "physically impotent," "weak-minded," or incapable of marriage due to "physical cause" or "by reason of force, duress, or fraud." Clerks' Memo at 13. These

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inter alia, persons over eighteen and females between fourteen and sixteen. Clerks' Affs. Ex. K.

impediments all appeared on the Registrar's lists; the relevant state's list was presumably shown to each applicant as instructed by the Registrar; and each applicant presumably signed the statement under oath, as required by G.L. c. 207, § 20, that he or she had reviewed the applicable list of impediments, that there was an absence of any legal impediment, and that all of the statements in the Notice of Intention of which the applicant "could have knowledge" were true. G.L. c. 207, § 20; see Clerks' Affs. Ex. J (Notice of Intention form). Each of the applicants thus effectively stated under oath that, as a factual matter, he or she was not (depending on the state) "physically impotent," "weak-minded," or incapable of marriage due to "physical cause" or "by reason of force, duress, or fraud." These impediments may, of course, also involve conclusions of law, to which the applicants cannot swear,<sup>37</sup> but the applicants may swear to the facts, and if no facts indicating an impediment are present, issues of law are moot. Any clerk who was in doubt about the truth of the facts underlying any statement of the absence of an impediment could have invoked G.L. c. 207, § 35, to inquire further into the relevant facts. That statute provides (with emphasis added):

The clerk or registrar may refuse to issue a certificate of marriage if he has reasonable cause to believe that any of the statements made in the notice of intention are incorrect; but he may, in his discretion, accept depositions under oath, made before him, which shall be sufficient proof of the facts therein stated to authorize the issuing of a certificate. He may also dispense with the statement

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<sup>37</sup> E.g., Commonwealth v. AmCan Enterprises, 47 Mass. App. Ct. 330, 337 (1999) (affidavit improper where it "stated the ultimate fact and conclusion of law") (citing cases); S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., 343 Mass. 635, 639 (1962) (question seeking witness' opinion as to matter of law was properly excluded) (citing cases); Commonwealth v. Brady, 370 Mass. 630, 635 (1976).

of any facts required by law to be given in a notice of intention of marriage, if they do not relate to or affect the identification or age of the parties, or a former marriage of either party, if he is satisfied that the same cannot with reasonable effort be obtained.

That the Notice of Intention form itself does not contain blank fields asking for information about “impotence,” “weak-mindedness,” and other specific impediments that are particular to a few states, hardly establishes unequal treatment of same-sex couples. The applicant still must sign a sworn statement that he or she has reviewed the list of impediments from his/her home state and that none of them is applicable, to the full extent that the applicant “could have knowledge” of such matters. G.L. c. 207, § 20. It would be impractical for a single Notice of Intention form to have blanks asking about every possible impediment in every state and other jurisdiction; the resulting form would be unworkably long, and most of it would be irrelevant (and confusing) to most applicants. In any event, the Notice of Intention form clearly does ask not only for a statement of gender but also for facts relevant to the other most common impediments—e.g., age, consanguinity and affinity, and status of any prior marriage. Thus the Notice of Intention form does not, merely by asking about the applicant’s gender, treat same-sex couples differently than all other applicants, or treat out-of-state same-sex couples differently than all other out-of-state applicants.

Likewise, the instruction to clerks that they should decline to issue a marriage license if, based on comparing the factual information on the Notice of Intention with the list of legal impediments furnished by RVRS, there is a legal impediment to that person marrying in Massachusetts or his or her home state, applies to all impediments as to which facts are shown on

the face of the Notice of Intention, not just the applicants' same-gender status. Nyberg Aff. ¶ 18; Kerrigan Aff. Ex. B. For example, if applicants from Maine state on the Notice of Intention that they are first cousins,<sup>38</sup> but nevertheless sign the sworn statement that they know of no impediment, the clerk should not issue them a marriage license. Thus this instruction to clerks does not require them to treat out-of-state same-sex couples differently than all other out-of-state applicants.

Nor is there merit to the Clerks' argument (Clerks' Memo at 15) that the incompleteness of the Registrar's lists of other states' impediments establishes impermissible differential treatment of same-sex couples. If the lists included only the impediment of being of the same gender, the Clerks might have a point, but the lists clearly include many other impediments as well. Clerks' Aff. Ex. K. The task of assembling a complete, comprehensive, and fully accurate list of all impediments applicable in each of the other states and territories is a considerable one. But the lists are being updated to be more inclusive—for example, to reflect impediments based on other states' divorce laws and waiting periods after a divorce becomes final. Nyberg Aff. ¶ 19. And clerks have already been instructed, as part of the recent enforcement changes,<sup>39</sup> to ask assertedly divorced applicants about the finality of divorce decrees and, where relevant, to ask to

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<sup>38</sup> This is not an impediment in the Commonwealth, but in Maine is an impediment rendering the marriage void unless the couple provides a certificate that they have received genetic counseling. See Me. Rev. Stat. Title 19-A, §§ 701:2, 751:1; Clerks' Ex. K. If the couple presented such a certificate to a clerk in Massachusetts, of course, the clerk could issue the license, just as could a Maine clerk.

<sup>39</sup> That in past years clerks may have been instructed not to ask for proof of divorce, Clerks' Memo at 15, is simply irrelevant to whether current enforcement is evenhanded. Similarly irrelevant is the fact that prior to May 2004, the clerks were not informed about other states' impediments based on mental competency. Clerks' Memo at 15 n.7. As of May 2004, clerks are being so informed, again showing that current enforcement does not impermissibly

see a copy of the decree. Nyberg Aff. ¶ 28. As for waiting periods after divorce, although there is no particular reason to believe that persons from the six faraway states in question will come to Massachusetts to avoid their home states' impediments related to such waiting periods,<sup>40</sup> the Registrar recognizes that the impediments lists should be as complete as possible, to provide for even more evenhanded enforcement than under the impediments lists issued just prior to May 17, 2004.

Because the Clerks have failed to meet the first part of the selective-enforcement test—discrimination against a subgroup of similarly-situated persons—there is no need to reach the second part of the test, in which the Clerks claim that such discriminatory enforcement is motivated by impermissible animus against same-sex couples. Whatever the public statements of the Governor of his policy views on same-sex marriage, the Registrar, recognizing the greatly increased likelihood of violations of §§ 11 and 12 in the post-Goodridge period,<sup>41</sup> has exercised

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single out same-sex couples.

<sup>40</sup> According to the Clerks' Memo at 15 n.6, the states that impose (or merely allow for a particular divorce decree to impose) a waiting period after a divorce becomes final are Alabama, Mississippi, North Dakota, Oklahoma, Texas, and Wisconsin. It seems most unlikely that a person who resides in one of those states, and who wishes to avoid such an impediment by marrying in another state, would travel all the way to Massachusetts, rather than simply crossing into one of the many directly neighboring states that have no such impediment.

<sup>41</sup> Although the Clerks insist that this cannot be true, *i.e.*, that violations were likely even prior to Goodridge, their examples do not support this claim (which is irrelevant in any event, because current enforcement is evenhanded). Aside from the unconvincing example of waiting periods after divorce, *see* preceding footnote, the Clerks point to the fact that when §§ 11 and 12 were enacted in 1913, more than half the states still prohibited interracial marriage. Clerks' Memo at 19. But those were all far-away states, as shown in Couples' Ex. 40, Figure 8—the closest state with such a prohibition in 1913 or any time thereafter was Delaware. Any Delaware couple seeking to avoid that prohibition would have been far more likely simply to have crossed into a neighboring state such as New Jersey or Pennsylvania—or perhaps even to New York or even Connecticut—rather than coming all the way to Massachusetts. The Clerks also note that Maine and New Hampshire do not allow first cousins to marry, whereas Massachusetts does.

his lawful discretion (see supra n.35) to increase enforcement of these duly-enacted and presumptively-constitutional statutes, and the Registrar has made every effort to do so in a manner that treats same- and opposite-sex out-of-state marriage applicants evenhandedly.

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Clerks' Memo at 20. But both Maine and New Hampshire also have marriage evasion laws that would have rendered void any attempt by their residents to evade the prohibition on marriage of cousins by marrying in Massachusetts. Maine Rev. Stat. Ann. Title 19A, § 701(1); N.H. Rev. Stat. § 457:43. Moreover, as to all of these impediments, there is simply no evidence available on the extent of enforcement of §§ 11 and 12 from 1913 through 1976; it thus cannot be presumed, much less concluded, that the statute was not enforced. (The Couples cite an increase in non-resident marriages in Massachusetts in an unspecified period leading up to 1943, assertedly due to neighboring states' adoption of premarital medical examinations (Couples' Memo at 37 n.45, citing Couples' Ex. 35 at p. 48), but the source they rely upon does not include the underlying data or specifics of other states' laws, so the assertion is impossible to evaluate.) Finally, if the Clerks are correct that even prior to Goodridge there was substantial reason to think persons would come to Massachusetts to evade their home states' marriage laws, then the Clerks can hardly quarrel with the Registrar's current attempt to enforce §§ 11 and 12 across the board.

C. The Clerks' Claim that the Registrar has "Stripped Them of Their Statutory Discretion" is Meritless.

The Clerks have no likelihood of success on their claim that the Registrar's enforcement effort has "stripped them of the discretion conferred on them by statute." The claim is based on the erroneous premise that the Clerks have discretion to ignore the Registrar's statutorily authorized list of other states' legal impediments to marriage, and to rely instead on a couple's sworn statement on the Notice of Intention that there is no impediment, even when the undisputed facts on that same Notice of Intention clearly show otherwise. This is not the law. The Clerks rely on § 12's provision that a clerk must "satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides." That a clerk has some discretion under this statute cannot be doubted. But that discretion is not unlimited, and it cannot be abused.<sup>42</sup>

Critically, the same 1913 Legislature that enacted what is now § 12 also enacted what is now G.L. c. 207, § 37, which requires that "[t]he commissioner of public health shall furnish to the clerk or registrar of every town a printed list of all legal impediments to marriage, and the clerk or registrar shall forthwith post and thereafter maintain it in a conspicuous place in his office." See St. 1913, cc. 360, 752. Both statutes had the same effective date: January 1, 1914. See id. The Legislature thus required state officials to provide a list of marriage impediments to local clerks, for the obvious purpose of assisting the clerks in enforcing §§ 11 and 12, and doing

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<sup>42</sup> Moreover, it is subject to the provision in G.L. c.17, § 4, that the Registrar "shall, under the supervision of the Commissioner, enforce all laws relative to the registry and return of births, marriages, and deaths, and may prosecute in the name of the commonwealth any violations thereof." See Goodridge, 440 Mass. at 314. The Registrar also has discretion in interpreting the laws (such as § 12) he is charged with enforcing. E.g., Grocery Mfrs. of America, Inc. v. DPH, 379 Mass. 70, 75 (1979).

so in uniform fashion throughout the Commonwealth. That Legislature cannot at the same time have intended § 12 to confer on clerks the discretion to ignore the state's § 37 list of impediments; the § 37 list cannot have been intended to be merely advisory. Sections 12 and 37 must be read together in a way that gives reasonable effect to each. The Registrar's interpretation does so, whereas the Clerks' interpretation renders § 37 virtually inoperative at the Clerks' "discretion."

The reference in § 12 to a clerk satisfying himself "by requiring affidavits or otherwise" suggests that the clerk has discretion in making factual determinations—discretion that the Registrar fully recognizes and the Clerks make no claim to have been deprived of. But, in light of § 37 authorizing the commissioner (at whose direction the Registrar acts to enforce the marriage laws, G.L. c. 17, § 4) to make determinations of law about what are impediments to marriage, it cannot be dispositive for purposes of § 12 that a couple might sign the notice of intention containing the sworn statement (under the penalties of perjury as required by G.L. c. 207, § 20) that they know of no impediment to their marriage. Under that statute, "the oath or affirmation . . . shall be to the truth of all the statements contained therein whereof the party subscribing the same could have knowledge . . . ." The affidavit plainly calls for affirmation of matters of fact, not matters of law. See supra n.37. To the same effect is the separate statute allowing clerks, where there is reasonable cause to doubt the correctness of a statement on a Notice of Intention, to accept depositions under oath as "sufficient proof of the facts therein stated to authorize the issuing of a [license]." G.L. c. 207, § 35 (emphasis added). See also G.L. c. 46, §§ 19, 29 (clerk's attested record of marriage "shall be prima facie evidence of the facts recorded"); id. § 13(a) (clerk may accept affidavit in order to supply missing facts or correct

factual errors in marriage records).

Even if the couple states (as the Notice of Intention requires, see Clerks' Affs. Ex. J) that "I have reviewed a list of impediments to marriage for my place of residence and hereby state that there is an absence of any legal impediment to the marriage," such a statement does not supersede the list of impediments issued by the Registrar under § 37. If the factual information on the Notice of Intention form as completed by the applicants themselves shows that there is an impediment to marriage on the list issued by the Registrar, then the clerk may not rely on the applicants' statement that there is no impediment, regardless of the type of impediment involved. For the clerk to do so is at a minimum a clear abuse of discretion, and more likely in excess of the clerk's legal authority under § 12. That authority extends to determinations of fact-- not determinations of law, at least where they conflict with determinations of law made by the Registrar under § 37.

A simple example makes the point clear. If an applicant states on the Notice of Intention that he or she is seeking to enter a second marriage, but that his or her first marriage has not ended by divorce or death of the spouse, and nevertheless the applicant signs the sworn statement that he or she knows of no impediment, the clerk cannot possibly rely on that sworn statement to issue a marriage license. This would completely disregard of the law that an existing marriage is an impediment (as shown on the § 37 list, see Clerks' Affs. Ex. I) and the fact of the existing marriage (as shown on the Notice of Intention). The clerk has discretion to inquire further, and determine any issues of fact that might exist concerning the status of the prior marriage, by requiring affidavits under § 12 or depositions under § 35. But the clerk lacks any discretion or legal authority to disregard an undisputed fact that indicates an impediment as shown on the

Registrar's § 37 list.

D. The Clerks' Proffered "Good Reason Why the  
Reverse Evasion Statute has Never Been Enforced"  
Does Not Advance their Claims.

The Clerks offer what they call "good reason"—more accurately, three reasons—why, they say, §§ 11 and 12 have never been enforced. Putting to one side that there has been some enforcement of § 11 since 1976, Nyberg Aff. ¶¶ 6-7, and that there is no evidence one way or the other about enforcement in the pre-1976 period, none of the Clerk's proffered "reasons" is relevant to any of their legal claims, and thus none of the "reasons" requires any extended discussion here.

The Clerks first assert that §§ 11 and 12 were enacted as a part of a 1912-13 backlash against the interracial marriage of the black prizefighter Jack Johnson and a white woman, Lucile Cameron. The evidence clearly does not support this allegation--as will be discussed in Part III.B.5 infra in connection with the Couples' equal protection and due process claims, and whether there is a rational basis for § 11— but in any event the allegation does not advance any of the Clerks' legal claims. The Clerks next assert that §§ 11 and 12 were intended as part of a proposed nationwide system that never materialized, so that §§ 11 and 12 have never been capable of serving their "intended purpose." This, too, appears to relate to the claim that the statutes lack any rational basis, but only the Couples, not the Clerks, make such a claim, and in any event the assertion misses the point discussed in Part III.B.1 infra that in rational basis review, the Legislature's actual motivation for enacting a statute is irrelevant. Finally, the Clerks argue that §§ 11 and 12 would require the Commonwealth to enforce other states' marriage

restrictions, “no matter how abhorrent to the public policy of Massachusetts.” Clerks’ Memo at 24. This ignores that Massachusetts public policy is defined by statute (subject to constitutional constraints), and in this instance the public policy established by §§ 11 and 12 is to respect other state’ marriage laws with respect to those states’ residents who come here to marry, regardless of what public policy may be as to marriages between Massachusetts residents. Whether § 11’s policy is constitutional is an issue raised only by the Couples and will therefore be discussed infra.

### III. THE COUPLES’ CLAIMS ARE UNLIKELY TO SUCCEED ON THE MERITS.

The Couples are unlikely to succeed on the merits of their claims that § 11 (but not § 12) lacks a rational basis in violation of state constitutional equal protection and due process guarantees, violates the federal constitution’s Privileges and Immunities Clause, and is being misinterpreted by the Registrar to bar all out-of-state same-sex couples from marrying here. First, as mentioned above, the Registrar simply does not interpret § 11 in this manner; rather, § 11 bars only those couples whose home states declare same-sex marriages void. None of the Couples resides in such a state, and thus none of the Couples has been injured by, or has standing to challenge, § 11; this Court lacks jurisdiction to hear their challenge. Part A, infra. Second, even if the Couples could surmount this jurisdictional barrier, § 11 clearly does have numerous rational bases, including (1) furthering the many interests served by marriage itself, by preventing persons from marrying here if their marriage would be unrecognized and unregulated in their home state, and (2) promoting other states’ respect for the marriages of Massachusetts residents and to minimize the potential for retaliatory action by other states. Part B, infra. Third, § 11 does not violate the Privileges and Immunities Clause. Part C, infra. Finally, the Couples’

one-paragraph argument that § 11 violates an asserted state constitutional “fundamental right to marry of same-sex couples” has no likelihood of success; even if there were any such “fundamental” right, it would be subject to reasonable regulations such as § 11. Part D, infra.<sup>43</sup>

A. The Couples Lack Standing to Challenge § 11.

As explained in Part 4 of the Factual and Legal Background section supra, § 11 bars same-sex marriages in the Commonwealth only by those couples whose home states declare same-sex marriages void. None of the plaintiff Couples resides in such a state, and thus none of the Couples has been injured by, or has standing to challenge, § 11. See Part I.B.2 supra (explaining that laws of home states of three unmarried Couples do not declare same-sex marriages contracted in those states “void,” but merely prohibit it).<sup>44</sup> Accordingly, this Court lacks jurisdiction to hear their challenge.

Standing is “an issue of subject matter jurisdiction” and is “of critical significance.” Ginther v. Commissioner of Ins., 427 Mass. 319, 322 (1998). “[O]nly persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate

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<sup>43</sup> The Couples also include a footnote arguing that the Registrar is obligated under G.L. c. 111, § 2, to bind and index their Certificates of Marriage. Couples’ Memo at 21 n.23. As it is so plain that the Couples face no imminent irreparable harm in this connection, because in the ordinary course of business the Registrar would not bind their Certificates until June of 2005 at the earliest, see supra Part I.B.1, the Registrar will not now present argument on the merits of this issue. The preliminary injunction on this point should plainly be denied because of lack of any imminent irreparable harm; there will be time enough before June 2005 to establish whether the Certificates should be bound.

<sup>44</sup> For the sake of brevity the Registrar forgoes any discussion here of the laws of the other five plaintiff Couples’ home states. The Registrar anticipates that none of those Couples would argue, contrary to the Registrar’s view, that the laws of their home states (Vermont, New York, and Connecticut, as well as Rhode Island which was discussed supra) do in fact declare

branch of government.” Id. (citations and internal quotations omitted). “Respect for the separation of powers has led this court . . . to be extremely wary of entering into controversies where we would find ourselves telling a coequal branch of government how to conduct its business.” Alliance, AFSCME/SEIU v. Commonwealth, 427 Mass. 546, 548 (1998) (dismissing, for lack of standing, challenge to constitutionality of Governor’s exercise of item veto power). Insofar as this is a declaratory judgment action, the Couples’ standing is essential to the Court’s jurisdiction over such an action. E.g., Enos v. Secretary of Env’l Aff., 432 Mass. 132, 134-35 (2002). Chapter 231A does not provide an independent basis for jurisdiction, and a prayer for declaratory relief does not obviate the need to show standing. Id. at 135; Pratt v. City of Boston, 396 Mass. 37, 42-43 (1985). In another declaratory judgment action where the Supreme Judicial Court found a jurisdictional element lacking, the court concluded: “‘we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to ‘settle’ it for the sake of convenience and efficiency,’ Raines v. Byrd, 117 S. Ct. 2312, 2318 (1997), where there is no proper jurisdictional basis for our proceeding to the merits.” Alliance, AFSCME/SEIU v. Commonwealth, 425 Mass. 534, 538-39 (1997).

This Court should do likewise and decline to consider the Couples’ challenges to § 11.

B. Section 11 Has Numerous Conceivable Rational Bases.

Even if the Couples had standing, they cannot meet what is their heavy burden, on their equal protection and due process claims, to show that § 11 does not serve “a legitimate purpose in a rational way” and does not “bear a reasonable relation to a permissible legislative objective.” Goodridge, 440 Mass. at 329-30 (citations and internal quotations omitted).

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same-sex marriages void if contracted in that state.

1. The Couples have the heavy burden of showing beyond a reasonable doubt that there is currently no conceivable rational basis for § 11.

The Couples bear a “heavy burden.” Leibovich v. Antonellis, 410 Mass. 568, 576 (1991). “A legislative enactment carries with it a presumption of constitutionality, and the challenging party must demonstrate beyond a reasonable doubt that there are no ‘conceivable grounds’ which could support its validity;” the Court examines “only ‘whether the statute falls within the legislative power to enact, not whether it comports with a court’s idea of wise or efficient legislation.’” Id. (citations omitted). “A classification will be considered rationally related to a legitimate purpose ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” Massachusetts Federation of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 777 (2002) (citations and internal quotations omitted). The question is whether the Court can “visualize possible legitimate public purposes for the legislation and, in the absence of a factual record establishing the lack of any conceivable rational basis for the legislation,” the Court must conclude that the statute satisfies that constitutional requirement. Opinion of the Justices, 401 Mass. 1211, 1219 (1987) (emphasis added); see Commonwealth v. Henry’s Drywall Co., 366 Mass. 539, 543 (“a statutory classification will not be set aside as a denial of equal protection or due process if any state of facts reasonably may be conceived to justify it”). “The rational basis test does not require that [the Court] agree with the Legislature’s classification[],” so long as there is a conceivable rational basis for it. Harlfinger v. Martin, 435 Mass. 38, 50 (2001).

Moreover, “it is irrelevant for constitutional analysis whether a reason now advanced in support of a statutory classification is one that actually motivated the Legislature.” Prudential

Ins. Co. v. Commissioner of Revenue, 429 Mass. 560, 568 (1999) (citing FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993)). And the Court must consider the rationality of the law at present, not as of some prior time. This is because “if a law served no legitimate state interest when passed, but a legitimate state interest served by the law has since appeared, it would be inane to require the legislature to repeal the earlier law, and re-enact it with an announcement of the appropriate, legitimate state purpose.” Baltimore Gas & Electric Co. v. Heintz, 582 F. Supp. 675, 679 (D. Md. 1984).<sup>45</sup>

2. Contrary to the Couples’ Suggestion,  
Goodridge Supports, Rather than  
Undermines, the Validity of §11.

The Couples would have this Court believe that, in light of Goodridge, the invalidity of § 11 is virtually a foregone conclusion. That is not so. Indeed, Justice Greaney, whose concurrence provided the critical fourth vote in Goodridge, stated: “The argument, made by some in the case, that legalization of same-sex marriage in Massachusetts will be used by persons in other States as a tool to obtain recognition of a marriage in their State that is otherwise unlawful, is precluded by the provisions of G.L. c. 207, §§ 11, 12, and 13.” Goodridge, 440

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<sup>45</sup> The Baltimore Gas decision was reversed on other grounds, 760 F.2d 1408 (4<sup>th</sup> Cir. 1985), but it should be noted that the District Court, while discussing equal protection review as described in the text, did not rule on the plaintiff’s equal protection claim, having invalidated the statute on Commerce Clause grounds. On appeal, the Commerce Clause holding was reversed and the statute was upheld on equal protection grounds. Also, the Supreme Judicial Court has similarly recognized that changed conditions may render a statute that was rational at one time irrational at another. Owen v. Meserve, 381 Mass. 273, 276 (1980). This necessarily is a two-way street; even if a statute was irrational when enacted, or became irrational based on changed conditions, still later changes could render the statute rational once again. See also Harlfinger v. Martin, 435 Mass. 38, 50 (2001) (that court had declined to adopt a particular distinction as a matter of common law did not mean it was irrational for the Legislature subsequently to adopt

Mass. at 348 n.4 (Greaney, J., concurring).

Moreover, language used throughout the Goodridge majority decision recognizes that other states are entitled to reach their own conclusions about same-sex marriage and that nothing in Goodridge is intended to force the issue in, or on, other states; the Goodridge court carefully and repeatedly limited the reach of its decision to Massachusetts “residents” or “citizens.” Rejecting the argument that recognizing same-sex marriage would lead necessarily to interstate conflict, the court stated:

We would not presume to dictate how another State should respond to today’s decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State’s Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution suggests.

440 Mass. at 340-341 (emphasis added); see id. at 346 (barring same-sex marriage “disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social importance. This is impermissible under [Mass. Const.] art. 1”) (emphasis added); id. at 348-49 (Greaney, J., concurring) (marriage laws must be measured against state Constitution, which is “the final statement of the rights, privileges and obligations of the citizens,” quoting Loring v. Young, 239 Mass. 349, 376-77 (1921)) (emphasis added). Even

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that distinction by statute).

more recently, in the Opinions of the Justices, 440 Mass. 1201 (2004) regarding whether limiting same-sex couples to civil unions would be constitutional, the four-Justice majority concluded:

We do not abrogate the fullest measure of protection to which residents of the Commonwealth are entitled under the Massachusetts Constitution. Indeed, we would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere.

Id. at 1209 (emphasis added) (also repeating caveat in Goodridge that “each State is free to address difficult issues of individual liberty in the manner its own Constitution demands”). As the Goodridge court declared, “Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.” Goodridge, 440 Mass. at 312 (emphasis added). In short, both Goodridge and the related Opinions of the Justices recognize that each state has, at a minimum, a legitimate interest (subject to federal constitutional constraints) in reaching its own conclusions regarding what marriages are valid or should be allowed under its own laws.

The Couples nevertheless insist that because under Goodridge, “it is a violation of the Massachusetts Constitution to bar a same-sex couple from marrying because they are a same-sex couple, . . . Section 11 presents no rational basis for deviating from that clear constitutional principle.” Couples’ Memo at 12. This simply mischaracterizes what § 11 does. Section 11 respects the marriage laws of other jurisdictions, whatever they might be, with regard to same-sex marriage or otherwise. There are a number of jurisdictions where same-sex marriage is legal—the Canadian provinces of Ontario, British Columbia, and Quebec, and the countries of

Belgium and the Netherlands<sup>46</sup>— and § 11 would not prohibit same-sex couples from those jurisdictions from marrying in the Commonwealth.

The Couples cannot escape this truth by characterizing their claim as an “as-applied” challenge to § 11, *i.e.*, a challenge to it only insofar as it affects same-sex couples. Section 11 makes no classification between same- and opposite-sex couples, and the Couples cannot challenge a statutory classification that does not exist. To the extent § 11 deprives some out-of-state same-sex couples (along with some out-of-state opposite-sex couples) of the ability to marry here, the question is simply whether there is a rational basis for doing so, a question not addressed in Goodridge.

The Couples also insist that “comity is not a rational basis” because “constitutional guarantees trump comity interests.” Couples’ Memo at 14. What is at issue here, however, unlike in the cases cited by the Couples, is not merely some general principle of comity, but a specific Massachusetts statute expressly according respect to other states’ marriage laws.<sup>47</sup> The question is whether that specific statute, § 11, is consistent with Massachusetts equal protection and due process guarantees. Goodridge examined only whether statutes excluding same-sex couples from marriage, while making marriage available to similarly-situated opposite-sex

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<sup>46</sup> See Human Rights Campaign website, International Marriage Rights, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=14813&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited July 9, 2004).

<sup>47</sup> For example, in Commonwealth v. Aves, 35 Mass. 193 (1836), the court reasoned that “the law arising from the comity of nations”—*i.e.*, general principles calling for respect for Louisiana’s laws under which slavery was legal—could not supersede Massachusetts constitutional and statutory provisions under which slavery was illegal. Id. at 217-18; see id. at 210 (Massachusetts Constitution of 1780 abolished slavery). What is at issue here, in contrast, is not a general principle of comity, but § 11, a duly-enacted and presumptively constitutional statute requiring a form of comity.

couples, was consistent with those guarantees. Goodridge did not determine the validity of a statute making both same- and opposite-sex out-of-state couples' ability to marry here dependent on their home states' marriage laws. In short, the statutory classification made by § 11—between out-of-state couples whose marriages would be void if contracted in their home states, and out-of-state couples whose marriages would not be thus void—is entirely different than the statutory classification (of same-sex vs. opposite-sex couples) invalidated in Goodridge.

3. Section 11 furthers the many interests served by marriage itself, by preventing persons from marrying here if their marriage would be unrecognized and unregulated in their home state.

The Commonwealth has created civil marriage, and comprehensively regulates it, to protect the interests of the public, the spouses, and their children. Section 11 serves all of those interests by preventing persons from marrying here if their marriage would be unrecognized and thus unregulated in their home state. As Goodridge recognized, the marriage relationship is of critical importance to the Commonwealth, as well as to the spouses and their children. 440 Mass. at 321-25, and thus the Commonwealth has an undeniable interest in ensuring that the relationship is regulated, either by the Commonwealth or another state, to protect these interests.

Not only is civil marriage a creation of government, but, “[i]n a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.” Goodridge, 440 Mass. at 321. “[T]he terms of the marriage,” including “what obligations, benefits, and liabilities attach to civil marriage—are set by the Commonwealth.” Id. “Civil marriage is created and regulated through exercise of the police power,” which is “the Legislature’s power to enact rules to regulate conduct, to the extent that such laws are ‘necessary to secure the health, safety, good

order, comfort, or general welfare of the community.” Id. at 321-22 (emphasis added; citation omitted).

Without question, civil marriage enhances the “welfare of the community.” It is a “social institution of the highest importance.” . . . Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.

Goodridge, 440 Mass. at 322 (citation omitted).

Marriage also grants significant rights to the spouses, such as property rights, in exchange for the spouses’ “agree[ment] to what might otherwise be a burdensome degree of government regulation of their activities.” Id. at 322. And “[w]here a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage.” Id. at 325. “[M]arital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one’s parentage.” Id. at 325.

Accordingly, it is rational for the Commonwealth to require that in order to marry here, persons must reside either here or in some other State where their marriage is similarly

recognized and regulated. The Couples cannot on the one hand assert that the Commonwealth is constitutionally required to confer the status, rights, and duties of marriage upon them, and yet on the other hand deny the Commonwealth's legitimate interest in ensuring that the couple's marital status will be recognized, and those marital rights and duties will be enforceable, in the public interest as well as for the protection of each of the spouses and their children. Section 11 serves this interest, by preventing persons from marrying here if they reside in a State where their marriage would be void and thus unrecognized and unregulated.

Again, “[i]n a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.” Goodridge, 440 Mass. at 321. Section 11 ensures that there really is “an approving State”—not merely a State that creates the relationship and then sees the spouses depart for another State where their marriage is disapproved of to the point of being declared void ab initio. Section 11 ensures insofar as possible that the couple, in order to marry here, will reside in a State (either the Commonwealth or another jurisdiction in which same-sex marriage is not void) that has the power to protect, and a declared interest in protecting, the spouses as spouses, as well as the power to protect their children. The Couples' attack on § 11 attempts to reduce the State's critical “third partner” role, as recognized in Goodridge itself, to a mere formality.

In a related vein, if same-sex couples who cannot validly marry in their home states are married here, and then disputes arise in those marriages that require divorce, separation, child custody, and support proceedings, such couples may have no choice but to return to here--to the only state that is certain to recognize the validity of their marriage--and resort to the courts of the Commonwealth to resolve their disputes. This could involve the courts in making adjudications

that, once the couple returned to their home state, the Massachusetts courts might lose the power to enforce, or that might be collaterally attacked in those other states. It could also become a significant burden on the court system. These sorts of concerns were sufficient to lead the Supreme Court to uphold a state's one-year durational residency requirement for obtaining a divorce, Sosna v. Iowa, 419 U.S. 393, 407 (1975)--and indeed the Commonwealth has residency requirements for seeking a divorce, G.L. c. 208, §§ 4, 5--but the Commonwealth certainly is not limited to the residency requirement as a means of protecting its court system from being burdened in this fashion and from being forced into such an awkward and hazardous role in adjudicating ongoing disputes between non-residents. The Commonwealth may legitimately seek to avoid creating in the first place a nationwide class of married couples that have no connection to the Commonwealth other than that they were married here and, if in need of a divorce and associated judicial remedies, would have to return here. Section 11 rationally serves this legitimate interest.<sup>48</sup>

4. Section 11 rationally serves to promote other states' respect for the marriages of Massachusetts residents and to minimize the potential for retaliatory action by other states.

Section 11 also serves what the Sosna Court termed a State's valid interest "in avoiding officious intermeddling in matters in which another State has a paramount interest," Sosna, 419

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<sup>48</sup> This rationale is not necessarily limited to same-sex couples. If the Commonwealth marries an opposite-sex couple whose marriage in their home state would be void based on some other impediment, that couple likewise may have no choice but to return to the courts of the

U.S. at 407; that is, the existence of marriage relationships between that other State's citizens. This rationale applies across the board to all out-of-state couples affected by § 11, not just same-sex couples. But such "officious intermeddling" on the particular issue of same-sex marriage could have specific implications now, both for the Commonwealth's own married same-sex couples and for the Commonwealth itself.

The principle underlying § 11 is that of comity—that each state should honor the marriage policies of other states, at least as to those other states' residents—out of respect, even if there is no overriding legal obligation to do so. It is plainly in the Commonwealth's strong interest that its marriage policies, and the marriages of its residents, be respected in and by other states to the greatest extent possible. If the Commonwealth chooses not to honor other states' policies as to their own residents, interstate friction could easily result, and those other states might well take action injurious to the Commonwealth and its residents.

For example, thirty-seven of the other forty-nine states currently have laws that bar recognition of same-sex marriages, and most if not all of those laws declare same-sex marriage to be "void," "not valid," or the equivalent.<sup>49</sup> However, many of these same states, particularly since Goodridge, are now considering writing bans on same-sex marriage into their state constitutions; this year alone, proposed amendments will appear on the ballot in states including

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Commonwealth in the event they need a divorce.

<sup>49</sup> See Human Rights Campaign website, Marriage/Relationship Laws: State by State, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=20716&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66> (last visited July 9, 2004). Three additional states have constitutional bans: Alaska, Nebraska and Nevada. Alaska Const. Art. 1, § 25 ; Neb. Const. Art. 1, § 29; Nev. Const. Art. 1, § 21.

Arkansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Oklahoma, and Utah.<sup>50</sup> All of these states' same-sex couples are barred by § 11 from marrying here, because all of these states' laws declare same-sex marriage to be "void," "not valid," or the equivalent.<sup>51</sup> Although these states would currently deny recognition to the marriages of Massachusetts same-sex couples, that is merely by statute; to write such a denial of recognition into a state's constitution makes it much more difficult to eliminate later, should attitudes about same-sex marriage change. If Massachusetts begins performing marriages between those states' same-sex couples, who would likely return to their home states and begin to seek recognition of their marriages and challenge the laws that deny them such recognition, it is rational to believe that those states are more likely to constitutionalize their non-recognition of same-sex marriage. This threatens to make virtually permanent the harm faced by Massachusetts same-sex married couples who may travel through, work or vacation in, or move to those states. Section 11 helps reduce this likelihood, by avoiding marriages that are contrary to these other states' policies.<sup>52</sup>

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<sup>50</sup> See Human Rights Campaign website, Marriage-Related State Constitutional Amendments, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=20232&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited July 9, 2004). Other states are considering amendments that may go on the ballot in future years. *Id.*

<sup>51</sup> Ark. Code. Ann. § 9-11-109; Ky. Rev. Stat. 402.020(1)(d); La. Civ. Code arts. 89, 94, 96; Mich. Comp. Laws §§ 551.1, 557.271(2); Miss. Code § 93-1-1(2); Mo. Rev. Stat. § 451.022(2); Okla. Stat. Title 43, § 3.1; Utah Code § 30-1-2-5.

<sup>52</sup> Although the Court need not reach the issue (as the Couples do not challenge § 12), similar and additional rational bases could be articulated for § 12. For example, as mentioned above, Rhode Island currently follows the "celebration rule" (that a marriage valid where celebrated is valid everywhere unless contrary to clearly expressed public policy), although it is uncertain whether that state would recognize a same-sex marriage validly celebrated in another state such as the Commonwealth. Couples' Ex. 15. There is currently pending in Rhode Island, however, a bill that would declare "Same sex marriages void" and would further declare: "Any marriage between persons of the same sex is against the strong public policy of this state. Any

Moreover, any state whose resident same-sex couples are precluded by § 11 from marrying in Massachusetts might, if those residents began to marry here, be more likely to support the pending proposal for a federal constitutional amendment that would ban same-sex marriage in every state, including the Commonwealth.<sup>53</sup> Section 11 helps reduce the possibility of such a backlash at the national level. Even if the proposed amendment is not approved by the current Congress, it is rational to think that support for the amendment could grow in future years if same-sex couples from every other state are able to come to Massachusetts to marry and then return to their home states and begin litigation to seek recognition of their marriages. Once again, section 11 helps to reduce this possibility.

It makes no difference that this or any other Governor might not, as a policy matter, wish to discourage federal and state constitutional amendments restricting same-sex marriage. What matters is that a rational legislator could view § 11 as serving these interests. The Court's task in rational basis review is to determine whether there is a conceivable basis for § 11, and it is the defendants' duty to offer such conceivable rational bases for the Court's consideration whether

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marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state." See Human Rights Campaign website, Rhode Island Legislation/Ballot Initiatives Affecting GLBT People, [http://www.hrc.org/Template.cfm?Section=Search\\_the\\_Law\\_Database&Template=/CustomSource/Law/StateDisplay.cfm&StateCode=RI&LawFlag=0&StatusInd=legcurrentlsna](http://www.hrc.org/Template.cfm?Section=Search_the_Law_Database&Template=/CustomSource/Law/StateDisplay.cfm&StateCode=RI&LawFlag=0&StatusInd=legcurrentlsna) (last visited July 10, 2004). It is plainly rational to think that if § 12 did not prevent Massachusetts clerks from issuing marriage licenses to Rhode Island same-sex couples, the issuance of such licenses could create increased support for the pending bill, the enactment of which would injure Massachusetts same sex couples who travel to, work in, or move to Rhode Island.

<sup>53</sup> The pending proposal for a federal constitutional amendment, sponsored by Senator Wayne Allard and Representative Marilyn N. Musgrave of Colorado, provides: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." H.J. Res.

the defendants or other public officials agree with them or not.

A rational legislator who supports same-sex marriage for Massachusetts residents could view § 11 as an important tool in avoiding a national backlash that could increase barriers to the recognition of such marriages elsewhere and could even lead to the end of same-sex marriage in Massachusetts itself. Such a legislator might think that, in the interests of ultimately bringing about other states' recognition of the marriages of Massachusetts same-sex couples, those states would be more likely to ease their policies against non-recognition, and same-sex marriage could gradually gain in other states the popular and political acceptance that will ultimately benefit Massachusetts couples, if such states considered the issue in their own due course, through their own political and judicial processes, and as Massachusetts same-sex married couples move to those other states in the ordinary course.

Understandably, the plaintiff Couples may disagree with this rationale—although their claim that Goodridge itself rejected the rationale is plainly wrong<sup>54</sup>--and no doubt a rational

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56, S.J. Res. 26. Senate debate on the amendment began on July 9, 2004.

<sup>54</sup> The Couples assert that “rank speculation about how other States or the federal government might act if ‘comity’ were not fully accorded . . . cannot constitute a rational basis for Section 11. See Goodridge, 440 Mass. at 340-41.” Couples’ Memo at 15. What the cited passage from Goodridge actually said, however, in rejecting the argument that recognizing same-sex marriage would lead necessarily to interstate conflict, was:

We would not presume to dictate how another State should respond to today’s decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State’s Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution suggests.

440 Mass. at 340-341 (emphasis added). This hardly says that action by other states in response to Massachusetts’ allowing those other states’ same-sex couples to marry here—particularly

legislator could disagree with it as well. Those who wish to see the acceptance of same-sex marriage in other states (whether for the benefit of Massachusetts same-sex married couples who go to those states, or otherwise) might think that the best means to that end is not (1) to control its spread and thus avoid forcing the issue in other states, as § 11 does; but instead (2) to allow couples from all over the country to marry immediately in Massachusetts and return to their home states to demonstrate to those states' citizens and legislators what same-sex marriage is (and is not) about. Under the rational basis test, however, it is enough to uphold the statute that “the question is at least debatable[.]” Prudential Ins. Co. of America v. Commissioner of Revenue, 429 Mass. 560, 570 (1999).<sup>55</sup>

Also, even if other states are unable to muster the supermajority support in Congress and by the states that is necessary to amend the federal constitution, such states might take other action at the federal level that would constitute more direct retaliation against the Commonwealth.<sup>56</sup> They could, for example, seek federal legislation (requiring only a simple

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action that could actually harm Massachusetts' own same-sex married couples—cannot provide a rational basis for barring such out-of-state couples from marrying here.

<sup>55</sup> That a joint session of the Legislature recently approved a proposed constitutional amendment that would ban same-sex marriage and create civil unions does not mean that the effects of § 11 as discussed above do not meet the rational basis test. What matters is what the Legislature could rationally believe, not what a majority of the current Legislature may actually believe. The defendants are unaware of any case in which a court has attempted to count legislative noses to see if a current majority could be expected to support a particular rational basis offered to the court.

<sup>56</sup> Fears of retaliatory action by other states are hardly imaginary. Retaliatory action between states, to protect in-state interests, has occurred, and been upheld against constitutional challenge, in other contexts. *E.g.*, Prudential, 429 Mass. at 567-70 (retaliatory tax laws aimed at pressuring other states to maintain low taxes on Massachusetts insurers met rational basis test) (citing Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981) (rejecting federal equal protection and commerce clause challenges to California's retaliatory tax)). If Massachusetts were to marry same-sex couples who reside in states where such

majority vote in Congress) that would deny federal funding to state programs or entities that recognize or serve same-sex married couples.<sup>57</sup> A rational Massachusetts legislator, regardless of his or her position on same-sex marriage, could certainly view § 11 as a legitimate means of minimizing the likelihood of other states' or Congress' taking such retaliatory action.

There are thus ample conceivable rational bases for § 11. That § 11 was originally envisioned as part of a uniform law to be adopted by all of the states, and that such uniform adoption never occurred, does not mean that § 11 is irrational. Nor is § 11 irrational merely because it may not serve the various possible interests the Couples identify for it. A rational legislator could believe that § 11 protects all of the interests served by the Commonwealth's creation and regulation of the marriage relationship in the first place; protects the Commonwealth's court judgments from being unenforceable and/or collaterally attacked and protects the courts themselves from being burdened; serves what the Supreme Court views as a legitimate state interest in avoiding interference in matters of greater concern to other states;

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marriages are void if contracted, those states could conceivably retaliate against Massachusetts in other ways as well. Thus, State A could enact a law under which, if a person resides and intends to continue to reside in a state [read: Massachusetts] that allows State A's residents to contract marriages that would be void if contracted in State A, that person may not marry in State A, even if the person meets all of State A's other requirements. Section 11 obviously serves to avoid provoking other states into enacting such laws.

<sup>57</sup> Cf. New York v. United States, 505 U.S. 144, 167, 185 (1992) (upholding, against Tenth Amendment and Guaranty Clause claims, federal statute conditioning federal funding on states' taking action to dispose of nuclear waste; in providing funding to states, Congress may attach conditions that bear some relationship to purposes of federal spending); South Dakota v. Dole, 483 U.S. 203, 207-209 (1987) (upholding, against Tenth Amendment challenge, requirement that states raise drinking age as condition to receipt of federal highway funds). A federal statute might also affect funding to non-governmental entities. See Rust v. Sullivan, 500 U.S. 173 (1991) (upholding federal statute denying federal funds to public and private non-profit family planning projects that provide abortion counseling, referrals, or advocacy) (citing, inter alia, Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (holding that Congress could, in exercise of its spending power, reasonably refuse to subsidize lobbying

advances the interests of ultimate recognition of Massachusetts' same-sex couples' marriages in other states; and protects the Commonwealth from retaliation by other states. The Couples' equal protection and due process challenges cannot succeed.

5. Section 11 as enacted in Massachusetts is not "tainted by racial animus."

The Couples' allegation that the enactment of § 11 was motivated by racial animus is legally irrelevant, as the question under the rational basis test is not what may originally have motivated the Legislature, but whether there is currently any conceivable rational basis for the law. The rational bases explained above have nothing to do with race, and the Couples are obviously unable to argue that § 11 currently has any racially discriminatory effect so as to make it invalid.<sup>58</sup> Nevertheless, the nature of the Couples' charge warrants the following refutation.

At the August 1912 annual conference of the Commissioners on Uniform State Laws, the Commissioners received a report of their Committee on Marriage and Divorce recommending a uniform "Act Relating to and Declaring Void Marriages in Another State or Country in Evasion or Violation of the Laws of this State." According to Commissioner Ernst Freund, a professor at the University of Chicago, the original goal of the drafters was to prevent evasion of existing divorce laws: "The bill is aimed chiefly at certain provisions in the divorce statute which forbids the guilty party to remarry either within a certain time, one year, or, in New York, in the life time of the other party." Couples' Ex. 29 at 40-41; see id. at 15. As expanded in committee and

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activities of tax-exempt charitable organizations)).

<sup>58</sup> A statute does not violate equal protection principles unless it was both (1) enacted for a racially discriminatory purpose and (2) has a racially discriminatory impact. E.g., Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977) (citing Washington v. Davis, 426 U.S. 229, 242 (1976)). No one argues that § 11 has any racially discriminatory impact today, as anti-miscegenation laws were invalidated three decades

finally adopted by the Commissioners, however, the effect of the proposed uniform act was to “give full effect to the prohibitory laws of each state by making void all marriages contracted in violation of [state] prohibitions,” listing, as examples of such prohibitions, “marriages with *particeps criminis* [i.e., with an accomplice, a prohibition created by the divorce laws of some states in cases of adultery], or with a minor without parental consent, or within a specified time after entry of final decree in divorce, or between a white and a colored person.” *Couples’ Ex. 29* at 127-28. The proposed uniform law was first adopted in Vermont in 1912, and later in three other states other than Massachusetts.<sup>59</sup>

In January of 1913, in Massachusetts, the Commonwealth’s own Board of Commissioners for the Promotion of Uniformity of Legislation in the United States (made up of the Commonwealth’s representatives in the national body), proposed the Uniform Marriage Evasion Act for adoption in Massachusetts. 1913 Senate Bill No. 234. The petition described the bill merely as “legislation to make uniform the law relating to marriage in another state or country in evasion of the laws of the state of the domicile.” The bill was enacted by the Legislature and approved by the Governor on March 26, 1913, as St. 1913, c. 360; it now appears at G.L. c. 207, §§ 10-13, 50. The Board of Commissioners’ annual report for 1913 recorded merely that the “Board introduced a bill embodying the uniform law on marriage outside the State in evasion of the law of the domicile. This was passed without opposition.”

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

<sup>59</sup> See 15 V.S.A. §§ 5, 6. Louisiana adopted the law in 1914, L.S.A.-R.S. 9:222 (subsequently repealed by La. Acts 1972, No. 171, § 1); and Illinois and Wisconsin in 1915, I.L.C.S. 5/216 and 217 and W.S.A. 765.04 and 765.30. Also, in 1979, New Hampshire adopted N.H. Rev. Stat. § 457:43 and 44 (mirroring G.L. c. 207, §§ 10 and 11). As a result of the lack of widespread adoption of the Act, the Commissioners on Uniform State Laws withdrew it from the list of active uniform acts in 1943. See *Couples. Ex. 28* at 64. However, it remains the law in

Report of the Board of Commissioners for the Promotion of Uniformity of Legislation in the United States, 1913, Pub. Doc. No. 86, at p. 5 (1914). There was no mention whatsoever of any purpose on the part of the Legislature to limit interracial marriages, nor may such a purpose be inferred, given that, as explained infra, Massachusetts had repealed its laws prohibiting interracial marriage in 1843. Had there been any hint of a purpose to limit interracial marriages, surely the Legislature would not have enacted the law “without opposition,” as reported by the Board.

As of 1913, Massachusetts had for sixty years had a strong policy against laws forbidding interracial marriage. In 1841, a Special Committee of the House of Representatives, resoundingly recommending repeal of the Commonwealth’s laws forbidding interracial marriages, had summarized its reasons as follows:

. . . that the Legislature had come to the conclusion, that this “last relic of the old slave code of Massachusetts,” which perpetuated distinctions among citizens never contemplated by the Constitution, which slandered the innocent, which robbed widows and orphans, which trampled on the divine institution of marriage, which granted entire immunity to the most beastly licentiousness, ought to be obliterated from the Statute Book of this Commonwealth, “as contrary to the principles of Christianity and Republicanism.”

See 1841 House No. 7. The Legislature repealed the prohibition on interracial marriage in 1843. St. 1843, c. 5. Indeed, the NAACP, in its 1913 campaign against antimiscegenation bills elsewhere in the country, did so “in the language of William Lloyd Garrison in 1843, in his successful campaign for the repeal of a similar law in Massachusetts[.]” *Couples’ Ex.* 50 at 83-84 (quoting letter from NAACP’s W.E.B. DuBois, who in turn quoted Garrison at length).

Thus, although in 1912 the national Commissioners recognized that one of the many

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Massachusetts, New Hampshire, Vermont, Wisconsin, and Illinois.

effects of the uniform law would be to prevent evasion of some states' laws against interracial marriage, there is not the slightest evidence that this particular effect was ever communicated to, let alone desired by, the 1913 Massachusetts Legislature.

The Couples' "evidence" to the contrary is purely circumstantial and seriously flawed. The Couples note that, as of 1913, fully thirty other states forbade interracial marriage. Massachusetts, however, was an unlikely haven for couples seeking to evade these prohibitions, such that the Legislature's enactment of § 11 could give rise to any inference of an intent to close the door to them. Those were all far-away states, as shown in Couples' Ex. 40, Figure 8; the closest state with such a prohibition in 1913 or any time thereafter was Delaware. Any Delaware couple seeking to avoid that prohibition would have been far more likely simply to have crossed into a neighboring state such as New Jersey or Pennsylvania—or perhaps even to nearby New York or even Connecticut—rather than coming all the way to Massachusetts.

The Couples also attempt to link Massachusetts' enactment of the law to a national controversy surrounding the marriages of the prominent black boxer Jack Johnson to white women, which controversy began with the suicide of Johnson's first wife in September 1912, continued after Johnson began a relationship with (and married) a white woman named Lucille Cameron in Illinois in December of 1912, and involved the indictment of Johnson for violating the federal Mann Act. Couples' Memo at 17. This conveniently ignores that even the national Commissioners' proposal of the Uniform Law occurred in August 1912, see Couples' Ex. 29, before the Couples say the Johnson controversy erupted. The Couples note that a federal constitutional amendment and various state laws banning interracial marriage were proposed in late 1912 and 1913, but the amendment was obviously defeated, as were all of the proposed state

laws except Nebraska's. Couples' Ex. 41 at 84. No such bill was ever proposed in Massachusetts or any other New England state. Id. If the nationwide hysteria regarding interracial marriage had truly reached and affected the Commonwealth, one would have expected a direct response—a proposed ban—rather than an indirect response (if a response it was) such as the adoption of the Uniform Marriage Evasion Act. Yet there was no proposal to ban interracial marriage here.

The closest the Couples can come—indeed, the sole evidence they have of the slightest sentiment against interracial marriage in Massachusetts—is the reported December 1912 statement of then-Governor Foss of the Commonwealth, supposedly made in Richmond, Virginia and then criticized in a New York newspaper, that he favored such a ban. Couples' Exs. 38, 39. Assuming arguendo that the Governor even made such a statement—which the New York newspaper itself found “surpris[ing],” given that he was from a Northern state that had “no vulgar and debasing public sentiment on the subject to defer or cater to,” Couples' Ex. 39—the Governor obviously did not care enough to take any action. He neither proposed any such bill, nor mentioned the subject in his January 1913 annual address, nor mentioned it (or for that matter the evasion law) in any of his special messages to the Legislature in January through March of 1913 (when the evasion law was enacted). See 1913 Acts and Resolves pp. 1199-1286 (Governor's annual address and special messages through March 1913).<sup>60</sup>

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<sup>60</sup> The Couples fall flat in their attempt to “provide some perspective upon that general time period” in Massachusetts. Couples' Memo at 18 n.17. It is enough to note the clear error in their allegation that in 1914, members of the Massachusetts Congressional delegation supported criminalizing interracial marriage in the District of Columbia. The allegation is directly contradicted by the very source they cite, “The Crisis,” a publication of the NAACP. See Couples' Ex. 31 at 22. The NAACP had sent a questionnaire to candidates for Congress, and all of the Massachusetts candidates who responded gave what the NAACP viewed as “favorable

The Couples also claim that “[g]iven the law’s meteoric race through the Massachusetts Legislature during the height of the Jack Johnson-Lucile Cameron affair, historians have concluded that the 1913 law ‘was a defense mechanism against being subjected to the type of situation and attendant criticism which Illinois suffered as a result of the Jack Johnson fiasco.’” Couples’ Memo at 18-19. This claim is misleading on two levels: first, the law was enacted as chapter 360 of the acts of 1913, and thus 359 other bills (chapters 1 through 359 of the acts of 1913) had an even more “meteoric race” through the Legislature. Plainly, the time between the bill’s proposal and enactment shows nothing about why it was enacted. Second, the historians cited by the Couples said absolutely nothing about the speed with which the bill was passed. Couples’ Ex. 37 at 909, Couples’ Ex. 36 at 232, 256.

Indeed, the most that the first of these historians could say was that, given that the Massachusetts and Vermont evasion laws were enacted during the height of the Johnson-Cameron controversy, “it is not unreasonable to presume that these laws were a defense mechanism” against criticism of the type that assertedly occurred in Illinois. Couples’ Ex. 37 (Martyn dissertation) at 909 (emphasis added). Martyn presents absolutely no Massachusetts-specific evidence of any such racial motivation. His own subjective willingness to presume it proves nothing. The second of the historians cited by the Couples cites no evidence at all, but only the Martyn dissertation, and he distorts its conclusion by claiming it said the Massachusetts and Vermont legislation “was intended to prevent these two New England states—both of which allowed their own citizens to intermarry—from becoming temporary havens for interracial couples attempting to avoid antimiscegenation laws in their own states.” Couples’ Ex. 36

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answers,” i.e., they “Promise[d] to Vote Right,” on the question whether they would oppose a

(Kennedy book) at 256 (emphasis added). What to Martyn was a merely not-unreasonable presumption (although based on no Massachusetts-specific evidence) has to Kennedy become an established fact—even though Kennedy himself recognizes that Massachusetts and Vermont “might have been expected to be among the least affected by animus against miscegenation.” Id. (emphasis added).<sup>61</sup> Kennedy makes no attempt to reconcile the obvious contradiction. Id. His opinion of the Massachusetts Legislature’s motivation is plainly entitled to no weight whatsoever.<sup>62</sup>

In sum, the Couples’ equal protection and due process challenges to § 11 have no likelihood of success on the merits.

C. The Couples Do Not State a Claim under the Privileges and Immunities Clause.

The Couples also argue at length that § 11 violates the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution. Couples’ Memo at 24-39. This claim suffers from a threshold incongruity, because that Clause “‘establishes a norm of comity’ . . . that is to prevail among the States with respect to their treatment of each other’s residents,” Matter of

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law invalidating interracial marriage in the District of Columbia. Couples’ Ex. 31 at 22.

<sup>61</sup> It bears repeating not only that Massachusetts had repealed its anti-miscegenation law in 1843, but also that in 1913, the closest state with an anti-miscegenation law was Delaware, from which it was hardly likely that couples seeking to avoid the law would travel all the way to the Commonwealth. See supra.

<sup>62</sup> Kennedy also cites (Couples’ Ex. at 36 p. 232) a 1927 Yale Law Journal note stating that the Massachusetts and Vermont evasion laws operated to enforce the anti-miscegenation laws of other states. But that note (Couples’ Ex. 30) merely states that the laws would have had that effect, and says nothing about the motivation of either the Massachusetts or Vermont Legislatures. See Couples’ Ex. 30 at 865 & n.29. The Couples characterize that note as one by a “contemporary legal commentator” (Couples’ Memo at 19), but it is an unsigned law review note, presumably by a law student, who—writing fourteen years after enactment of the Massachusetts law—neither claims nor would have had any apparent reason to have any insight

Jadd, 391 Mass. 227, 228 (1984) (quoting Hicklin v. Orbeck, 437 U.S. 518, 523 (1978)), and a primary purpose of § 11 is, as the Couples themselves acknowledge earlier, just such interstate comity. See Couples’ Memo at 14-15. Section 11 thus advances rather than undermines the Clause’s core concern. For this reason and the additional ones advanced below, the Couples do not assert a cognizable Article IV, § 2 claim.<sup>63</sup>

The Privileges and Immunities Clause provides that the “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2, cl. 1. Under the Clause, “a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the ‘Privileges and Immunities of Citizens in the several States’ that he visits.” Saenz v. Roe, 526 U.S. 489, 501 (1999).<sup>64</sup> The Clause “does not, however, guarantee to the temporary visitor of a state the enjoyment of all the rights enjoyed by bona fide residents of that state.” Bach v. Pataki, 289 F.Supp.2d 217, 226 (N.D.N.Y. 2003);

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into the Legislature’s motivation.

<sup>63</sup> The “Interstate” Privileges and Immunities Clause of Article IV should not be confused with the “National” Privileges and Immunities Clause of the Fourteenth Amendment, U.S. Const. amend. 14, § 1, which protects only those privileges and immunities conferred by citizenship in the United States, rather than by citizenship in a particular state. Slaughterhouse Cases, 83 U.S. 74 (1873). The Couples make no claim that they have been denied privileges and immunities to which they are entitled by their United States citizenship, and they indeed acknowledge that the Fourteenth Amendment’s Privileges and Immunities Clause has no application to this case. Couples’ Memo at 26 n 28.

<sup>64</sup> In addition to the protection that the Clause provides to transitory visitors to a state, the Saenz Court identified two additional components of what it described as a “right to travel”: “the right of a citizen of one State to enter and to leave another State, and, for those travelers who elect to become permanent residents, the right [under the Fourteenth Amendment’s separate Privileges and Immunities Clause, see preceding footnote] to be treated like other citizens of that state.” Id. at 500. The Couples make no claims under these two other components of the right to travel. Couples’ Memo at 26 n.28. They instead attempt to avail themselves of the protection that Article IV’s Privileges and Immunities Clause accords to visitors, explicitly asserting that they “intend to reside outside the Commonwealth.” Id.

see Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 383 (1978) (“Nor must a State always apply all its laws . . . equally to anyone, resident or nonresident, who may request it so to do”). The basic standard for what the Clause does cover is well established:

The Supreme Court has settled upon a two-part standard for assessing challenges brought under the Clause, once [a] classification burdening out-of-staters is established. First, courts must determine whether the classification strikes at the heart of an interest so “fundamental” that its derogation would “hinder the formation, the purpose, or the development of a single Union of the States.” Baldwin, 436 U.S. at 383 . . . . If the classification bears on such a “fundamental” right, the analysis proceeds to a second stage, whether the defendant can overcome the challenge by showing a “substantial reason” for the difference in treatment. [United Building v.] Camden, 465 U.S. [208], 222 [(1984)].

Utility Contractors Ass’n v. Worcester, 236 F. Supp. 2d 113, 117-18 (D. Mass. 2002); accord Jadd, 391 Mass. at 228-29.

The Couples’ claim does not satisfy this standard in three separate respects. First, the statutory classification is not in fact drawn along the resident-nonresident line that the Couples assert, and the Privileges and Immunities Clause is not even implicated in this matter. See Part 1 infra. Second, even if the requisite resident-nonresident classification were to exist, § 11 does not burden a right that is “fundamental” as the Supreme Court has defined that term for purposes of Art. IV, § 2. See Part 2 infra. Third, even if there were a resident-nonresident classification burdening a fundamental right, a substantial reason for any difference in treatment would exist. See Part 3 infra. For each of these reasons, the Privileges and Immunities claim cannot prevail.

1. Section 11 distinguishes between those non-residents whose marriages would and would not be void in their home states, rather than between residents and nonresidents.

The most basic problem with the Couples’ claim is that § 11 does not in fact discriminate

between residents and nonresidents. Section 11 by its terms makes no such distinction; it indeed does not even refer to residents. The statute instead differentiates between two types of nonresidents—those whose marriages would be void if contracted in their home states, and those whose marriages would not be void. Section 11 allows the latter to marry validly in Massachusetts, while the former’s attempted marriages here are “null and void.” Id. The Legislature addresses Massachusetts residents in the immediately preceding section of Chapter 207, and it treats them in the same manner that § 11 treats nonresidents, declaring “null and void” any resident’s out-of-state marriage if that marriage would be void if contracted within the Commonwealth. G.L. c. 207, § 10 (also enacted by St. 1913, c. 360). Residents and nonresidents thus stand on the same footing under these two statutes: those whose marriages would not be void if contracted in their home states may marry here, while those whose marriages would be thus void may not. Id. §§ 10-11. Because “residents and non-residents are ‘subject to the same duties, impositions, and restrictions’ under the challenged statutes, [ §§ 10 and 11 ] do not violate the Privileges and Immunities Clause.” Ga. Ass’n of Realtors, Inc. v. Ala. Real Estate Comm’n, 748 F. Supp. 1487, 1492 (M.D. Ala. 1990) (quoting Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 n.7 (1985)); accord Tolchin v. Sup. Ct. of the State of N.J., 111 F.3d 1099, 1111 (3rd Cir. 1997); Hammond v. Ill. State Bd. of Educ., 624 F. Supp. 1151, 1155 (S.D. Ill. 1986).

The fact that § 11 advances rather than hinders the main purpose of the Privileges and Immunities Clause strongly reinforces this conclusion. As previously noted, the Clause “establishes a norm of comity,” Austin v. New Hampshire, 420 U.S. 656, 660 (1975), a descriptive phrase that the Supreme Court has repeatedly utilized. Supreme Court of Va. v.

Friedman, 487 U.S. 59, 64 (1988); Hicklin, 437 U.S. at 523; Baldwin, 436 U.S. at 382. The Clause “appears in the so-called States’ Relations Articles,” Baldwin, 436 U.S. at 379,<sup>65</sup> and it “imposes a direct restraint on state action in the interests of interstate harmony.” United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208, 220 (1984); accord Austin, 420 U.S. at 662 (“Clause . . . implicates not only the individual’s right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism”); Silver v. Garcia, 760 F.2d 33, 37 (1st Cir. 1985) (“clause acts primarily as a restraint upon state action which interferes with interstate harmony”). In particular, the Clause aims to prevent escalating retaliatory enactments by states upset with each other. Austin, 420 U.S. at 662, 667; see also Int’l Org. of Masters, Mates & Pilots v. Andrews, 831 F.2d 843, 846 (9th Cir. 1987) (statute that did not “pressure[] other states to legislate or retaliate in response” did not violate Clause).

Section 11 directly furthers these core constitutional policies. The statute thus promotes comity and interstate harmony by respecting the judgments of other states on a matter of intensely local concern. It similarly deters rather than incites retaliation by honoring other states’ policies regarding their own residents. In sharp contrast, the Couples seek to supplant this respectful accommodation with a policy that is pointedly antagonistic to the longstanding positions of our sister states. The claims in this case “cannot be squared with the underlying policy of comity to which the Privileges and Immunities Clause commits us,” Austin, 420 U.S. at 666, and the Court should reject them for the threshold reason that § 11 does not contain a resident/nonresident distinction that implicates the Clause.

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<sup>65</sup> A separate Supreme Court decision in fact refers to Article IV as “the comity article of

2. Marriage is not a fundamental right for purposes of the Privileges and Immunities clause, which focuses instead on economic rights and concerns.

Even if the Court were to conclude that § 11 did directly discriminate between residents and nonresidents, the Couples still would fail to state a claim under the Privileges and Immunities Clause. This is because, as previously noted, the Clause does not prohibit all differential treatment by one state of citizens of other states; rather, it applies only to those rights that “bear on the vitality of the Nation as a single entity,” i.e., those that are “sufficiently basic to the livelihood of the Nation” to be termed “fundamental.” Baldwin, 436 U.S. at 388; see Friedman, 487 U.S. at 64; Silver, 760 F.2d at 36-37. While the Couples point to decisions in other legal contexts to try to assert that marriage is a “fundamental” right for Article IV purposes, Couples’ Memo at 27-29, “the term ‘fundamental’ has been used to describe several very different concepts in constitutional analysis.” Mass. Council of Construction Employers, Inc. v. Mayor of Boston, 384 Mass. 466, 474 (1981). Whether a right is fundamental for Fourteenth Amendment purposes is thus not dispositive in the Privileges and Immunities context. Id. at 474-75; Daly v. Harris, 215 F. Supp. 2d 1098, 1111 n.17 (D. Hawaii 2002) (“The Court is not persuaded that all rights protected by the Fourteenth Amendment are necessarily ‘fundamental’ for purposes of the Privileges and Immunities Clause”).<sup>66</sup>

The definition of “fundamental” under Article IV, § 2 stands on a different footing

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the Constitution.” Austin, 420 U.S. at 661.

<sup>66</sup> It also is by no means established that same-sex marriage is a “fundamental right” even for Fourteenth Amendment purposes. Standhardt v. Superior Court, 77 P.3d 451, 455-60 (Ariz. 2003) (same-sex marriage not a Fourteenth Amendment fundamental right); Dean v. District of Columbia, 653 A.2d 307, 331-33 (D.C. App. 1995) (same). The Court need not reach

because “the Privileges and Immunities Clause was intended to create a national economic union.” Piper, 470 U.S. at 279-80 (emphasis added); accord Connecticut v. Crotty, 346 F.3d 84, 94 (2nd Cir. 2003); A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d 865, 870 (3rd Cir. 1997). This is because “the framers of the Constitution were concerned with avoiding ‘the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.’” A.L. Blades, 121 F.3d at 869-70 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)). To counteract these commercially self-destructive tendencies, the Clause “encourages a national economy by allowing persons to cross states lines freely in pursuit of economic gain,” Silver, 760 F.2d at 36, and by “preventing barriers to free trade and commerce between the states,” Salem Blue Collar Workers Ass’n v. City of Salem, 832 F. Supp. 852, 861 (D.N.J. 1993), aff’d 33 F.3d 265 (3rd Cir. 1994).<sup>67</sup>

Consistent with this overwhelmingly economic focus, the Supreme Court to date has recognized only four categories of activity as “fundamental” for Privileges and Immunities purposes: (1) pursuit of a trade, business, or profession; (2) ownership and transfer of property; (3) access to the courts; and (4) payment of taxes on the same footing as state residents. Baldwin, 436 U.S. at 383; Austin, 420 U.S. 656, 661 (1975).<sup>68</sup> In contrast, “direct public

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this issue in the present case, as the Couples do not press any Fourteenth Amendment claims.

<sup>67</sup> The Commerce Clause serves similar purposes, and the Supreme Court indeed recognizes a “mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause.” Hicklin, 437 U.S. at 531. While the Couples cite Dunn v. Blumstein, 405 U.S. 330, 338 (1972), for the proposition that “the Clause protects not only national unity but also personal interests,” Couples’ Memo at 25, Dunn is in fact an equal protection case, and it is accordingly inapposite here.

<sup>68</sup> The Supreme Court in Saenz referenced a “right to travel” in conjunction with the Privileges and Immunities Clause, but it used that phrase to provide a shorthand overall description of the types of commercial-based rights already accorded protection under the

employment” is not fundamental, Salem, 33 F.3d at 270; accord A.L. Blades, 121 F.3d at 871; and neither are financial assistance for professional education, Kuhn v. Vergiels, 558 F. Supp. 24, 28 (D. Nev. 1982); interscholastic sports, Alerding v. Ohio High School Athletic Ass’n, 779 F.2d 315, 317 (6th Cir. 1985); recreational boating, Hawaii Boating Ass’n v. Water Transp. Facilities Div., 651 F.2d 661, 666-67 (9<sup>th</sup> Cir. 1981); or recreational elk hunting. Baldwin, 436 U.S. at 388.<sup>69</sup>

In short, activities necessary to private economic pursuits—conducting a trade, business or profession, owning and transferring property, having access to the courts, and paying taxes on the same terms as state residents—are fundamental for Privileges and Immunities purposes, whereas activities that are recreational, activities that are merely preparatory to economic activity, and activities constituting public employment are not.<sup>70</sup> Not surprisingly given the case

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Clause, rather than to establish a new stand-alone “fundamental right” for Article IV purposes. Saenz, 526 U.S. at 501-02.

<sup>69</sup> While the Supreme Court’s actual holdings regarding Article IV fundamental rights have all involved economic-type interests, the Court has stated in dicta that the protection of the Privileges and Immunities Clause is not strictly limited to economic interests. Piper, 470 U.S. at 274 n.11. As support for this proposition, the Piper Court cited Doe v. Bolton, 410 U.S. 179, 200 (1973), where the Court summarily found that a Georgia statutory residency requirement for women seeking abortions violated the Clause. However, Doe articulated its ruling in terms of the interstate pursuit and purchase of “medical services,” id., a phrase with commercial implications that later decisions have also adopted. See, e.g., Daly, 215 F. Supp. 2d at 1110 (“procure medical services”); see also Baldwin, 436 U.S. at 394 (Burger, C.J., concurring) (“The Clause assures noncitizens the opportunity to purchase goods and services on the same basis as citizens”). Doe also was decided prior to Baldwin, and it did not employ Baldwin’s fundamental rights analysis. Indeed, Justice Brennan, dissenting in Baldwin, 436 U.S. at 401, suggested that Doe could not be explained under Baldwin’s “fundamentality” approach, and he accused the Court of changing course by adopting that approach, which the Court has followed ever since.

<sup>70</sup> The Couples therefore read far too much into the “Washington’s List” case, Corfield v. Coryell, 6 F. Cas. 546 (No. 3,230) (CC E.D. Pa. 1825), when they cite it for the supposed rule that anything related to the “enjoyment of life and liberty” or the “pursu[it] and obtain[ing] of happiness” necessarily constitutes an Article IV fundamental right. Couples’ Memo at 27-28.

law's focus on economics, the Registrar has not found any case holding that marriage is fundamental within the meaning of the Privileges and Immunities Clause. See Couples' Memo at 28 (conceding that Supreme Court has never so held). That the "marriage industry" may provide ancillary economic benefits to the Commonwealth does not alter this conclusion.<sup>71</sup>

The Couples' requested ruling that marriage is "fundamental" would break new ground and go against the grain of the large predominance of prior decisions, which again concern economic-based rights. See, e.g., Salem, 33 F.3d at 268-70 (declining to find public employment to be "fundamental" given Clause's focus on interstate commerce). The requested ruling also would undermine other states' "inherent power, so far as concerned [their] own citizens, over the marriage relation [and] its formation," Harding v. Townsend, 280 Mass. 256, 262 (1932), by facilitating legal challenges to the marriage laws of those states. This would run counter to the Supreme Court's longstanding recognition of states' historically strong interest in this area. See, e.g., Sosna, 419 U.S. at 407 (state has legitimate interest in avoiding "officious intermeddling in matters in which another State has a paramount interest," such as divorce). In addition, it would roil the Commonwealth's relations with those other states, thereby contravening the comity

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Financial assistance for professional education may be one person's primary vehicle for the pursuit of happiness, but it is not "fundamental" under Article IV. Kuhn, 558 F. Supp. at 28. The Couples also make an inapposite argument regarding what constitutes "national citizenship," Couples' Memo at 28-29, despite the fact that national citizenship rights are the subject of the Fourteenth Amendment's separate Privileges and Immunities Clause, which again is not at issue in this case. Id. at 26 n.28; see supra.

<sup>71</sup> The Couples note that a marriage usually generates ancillary economic benefits for the state where the couple celebrates it. Couples' Memo at 28-29. However, the same could also be said for professional education, public employment, or interscholastic sports, none of which enjoys "fundamental" status under Article IV. Kuhn, 558 F. Supp. at 28; Salem, 33 F.3d at 270; Alerding, 779 F.2d at 317. The controlling legal standard looks at the intrinsic nature of the asserted right itself, rather than its ancillary effects.

concerns that underlie the Clause. See authorities cited in Part III.C.1 supra.<sup>72</sup> The Court should heed the tenor of prior Article IV decisions and hold that marriage does not constitute a fundamental right for purposes of the Privileges and Immunities Clause.<sup>73</sup>

3. Section 11 is closely related to the Commonwealth’s substantial interest in interstate comity, as shown by longstanding precedent upholding choice of law “borrowing” statutes.

Even if one were to assume for the sake of argument both that § 11 discriminates between residents and nonresidents and that it implicates a “fundamental” right within the meaning of the Privileges and Immunities Clause, § 11 remains valid unless the Court is persuaded that the statute is “not closely related to the advancement of a substantial state interest.” Friedman, 487 U.S. at 65. This cannot be said of § 11, because it directly advances the substantial state interests that led to the creation of civil marriage in the first place. See Part III.B.3, supra. Section 11 also serves the interest of interstate comity, which is unquestionably a “substantial state interest” under the Clause, since establishing a “norm of comity” is in fact the Clause’s own core purpose. See, e.g., Jadd, 391 Mass. at 228; see generally Part III.C.1, supra. Section 11 also directly

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<sup>72</sup> In light of these concerns, the Couples’ requested redirection of longstanding constitutional doctrine is particularly inappropriate for a motion for preliminary injunction, given the limited time for consideration and reflection available for such a ruling.

<sup>73</sup> The Couples also separately argue, without citation to directly supporting authority, that any right protected by the Massachusetts Constitution is ipso facto a fundamental right for Privileges and Immunities purposes. Couples’ Memo at 26-27. This contention has no support in (and indeed flies in the face of) the Supreme Court’s carefully articulated standards, reviewed supra, for determining when a right is fundamental under Article IV. The cases are clear that the fact that a right may exist under state law is not dispositive of whether it is fundamental for purposes of the Clause. Baldwin, 436 U.S. at 383 (“Nor must a State always apply all its laws . . . equally to anyone, resident or nonresident, who may request it so to do”); Bach, 289 F. Supp. 2d at 226 (Clause “does not, however, guarantee to the temporary visitor of a state the enjoyment of all the rights enjoyed by bona fide residents of that state”).

advances that interest, for all of the reasons set forth in Parts III.C.1 and 2 supra. In particular, the statute “furthers the [Commonwealth]’s parallel interests in both avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own [marriage] decrees to collateral attack.” Cf. Sosna, 419 U.S. at 407 (discussing divorce). The statute additionally reduces the risk that the Commonwealth may face retaliatory action by other states, as described in Part III.B.4 supra.

Cases upholding choice-of-law “borrowing” statutes directly support this conclusion. Under one common type of borrowing statute, a state will utilize another state’s statute of limitations if (1) the cause of action arose in that other state, (2) the other state’s limitations period is shorter than the forum state’s, and (3) the plaintiff is a nonresident. See, e.g., N.Y. C.P.L.R. § 202 (McKinney 2004).<sup>74</sup> The parallels with § 11 are clear: under these borrowing statutes a nonresident’s lawsuit cannot proceed in the forum state if it would be barred in the other state, just as under § 11 a nonresident’s marriage is barred in Massachusetts if it would be void in that person’s home state.<sup>75</sup> Even though these borrowing statutes look to another state’s law to preclude a cause of action, and even though they explicitly discriminate between residents

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<sup>74</sup> If, in contrast, the plaintiff is a resident of the forum state, then this type of borrowing statute will not adopt the shorter limitations period of the other state, even though the cause of action arose there. Id. The Commonwealth’s own borrowing statute borrows the other state’s limitations period without regard to the current residence of the plaintiff. G.L.c. 260, § 9.

<sup>75</sup> Section 11 thus “borrows” the other state’s marriage laws to the same extent that a borrowing statute borrows the other state’s limitations period. While the Couples make an extended argument that borrowing another state’s rules regarding void marriages is not wise policy under traditional common law considerations for choice of law, Couples’ Memo at 36-38, they overlook the fact that it is the Legislature that made the relevant choice-of-law determination here when it enacted § 11. Whether or not that legislative decision is wise choice-of-law policy is entirely beside the point; all that matters is that § 11 is in fact a choice-of-law rule.

and nonresidents in doing so, the courts have repeatedly upheld them against Privileges and Immunities claims. Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 562 (1920); Flowers v. Carville, 310 F.3d 1118, 1125 (9th Cir. 2002) (“The Supreme Court has held that states can apply their borrowing statutes to foreigners while exempting their own citizens”); Bennett v. Hannelore Enterprises, Ltd., 296 F. Supp. 2d 406, 413 (E.D.N.Y. 2003) (“it is well settled that New York’s borrowing statute is not unconstitutional merely because it provides non-residents with a different statute of limitations than residents”); Helsinki v. Appleton Papers, 952 F. Supp. 266, 274 (D. Md. 1997). These rulings extend to the accrual and tolling of a limitations period as well as to its length, Owens Corning v. Carter, 997 S.W.2d 560, 575-76 (Tex. 1999), and a similar finding of constitutionality obtains for a choice of law rule that incorporates another state’s cap on the amount of damages. Skahill v. Capital Airlines, Inc., 234 F. Supp. 906, 908-09 (S.D.N.Y. 1964).<sup>76</sup> The Court should reach the same decision here regarding the Commonwealth’s “borrowing” of other states’ bars on marriage, consistent with the comity interests that underlie all of these borrowing rules. For this reason and the others previously set forth, the Couples’ Privileges and Immunities claim plainly fails.

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<sup>76</sup> Saenz declined to accept what the Solicitor General claimed was a “specialized choice-of-law” argument for California legislation that tied the amount of welfare benefits for newly arrived California residents to the amount they had received in their prior state of residence. Saenz, 526 U.S. at 509. However, the Supreme Court did so in the context of the Fourteenth Amendment’s Privileges and Immunities Clause, id., which is not at issue here. See supra. The present case instead concerns the Article IV Clause, and the relevant Supreme Court case is accordingly Canadian Northern Rwy., 252 U.S. at 562, which specifically upholds a choice-of-law statute against an Article IV challenge. Section 11 also far more closely resembles a traditional choice-of-law provision than did the level-of-benefits legislation at issue in Saenz. Both § 11 and Canadian Northern’s borrowing statute preclude a specific legal status for residents of another state (in one instance, marriage; in the other, a viable cause of action) based on the law of that other state. This is a quintessential exercise of choice of law. Saenz, in contrast, involved a law that made the level of benefits paid to California’s own residents depend

D. Section 11 Does Not Violate Any State  
Constitutional “Fundamental Right to Marry of  
Same-sex Couples.”

The Couples’ one-paragraph argument that § 11 violates an asserted state constitutional “fundamental right to marry of same-sex couples” has no likelihood of success. First, the Supreme Judicial Court, like the United States Supreme Court, has been extremely reluctant to recognize new rights as “fundamental” for due process or equal protection purposes.<sup>77</sup> Second, even if the Supreme Judicial Court were to recognize a fundamental right of same-sex couples to marry, it would surely recognize the identical right on the part of opposite-sex couples. In short, the Couples appear to be arguing that they enjoy the same assertedly fundamental right to marry as do opposite-sex couples, and that the fundamentality of this right means that any restrictions on marriage must pass “strict scrutiny.” Couples’ Memo at 39. But even the Supreme Court, in recognizing that certain rights relating to marriage are “fundamental,” expressly did “not mean to

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on the laws of the states in which they formerly resided.

<sup>77</sup> Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (due process); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) (equal protection); see, e.g., Tobin’s Case, 424 Mass. 250, 252-53 (1997) (no fundamental right to receive workers’ compensation benefits); Doe v. Superintendent of Public Schools, 421 Mass. 117, 130 (1996) (no fundamental right to education); Williams v. Sec’y of EOHS, 414 Mass. 551, 565 (1993) (no fundamental right to receive mental health services); Matter of Tocci, 413 Mass. 542, 548 n.4 (1992) (no fundamental right to practice law); Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 269 n.5 (1992) (no fundamental right to operate motor vehicle); English v. New England Medical Ctr., Inc., 405 Mass. 423, 428 (1989) (no fundamental right to recover tort damages); Commonwealth v. Henry’s Drywall Co., 366 Mass. 539, 542 (1974) (no fundamental right to pursue one’s business); cf. Aime v. Commonwealth, 414 Mass. 667, 674 n.10 (1993) (noting that recognizing right to be free from physical restraint “does not involve judicial derivation of controversial ‘new’ rights from the Constitution”). See generally Williams, 414 Mass. at 565 n.17 (noting that recognition of claimed fundamental right to receive mental health services “would represent an enormous and unwarranted extension of the judiciary into the DMH’s authority”).

suggest that every state regulation which relates in any way to the incidents or prerequisites for marriage must be subjected to rigorous scrutiny.” Zablocki v. Redhail, 434 U.S. 374, 386 (1978). “To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.” Id.

As Goodridge recognized, the marriage relationship is of critical importance to the Commonwealth, as well as to the spouses and their children. 440 Mass. at 321-25. See Part III.B.3 supra. The Commonwealth has an undeniable interest in ensuring that the relationship is regulated (either by the Commonwealth or another state), for the protection of the public interest, for the protection of each of the spouses, and for the protection of any children of the marriage. Accordingly, it is reasonable for the Commonwealth to require that in order to marry here, persons must either reside here (including by having moved here to establish residence and marry) or reside in some other state where their marriage is recognized and regulated.<sup>78</sup> Section 11 serves this interest, by preventing persons from marrying here if the state where they reside and intend to continue to reside is one where their marriage would be void, and thus unrecognized and unregulated.

#### IV. THE PUBLIC INTEREST WEIGHS AGAINST ISSUING ANY INJUNCTION.

It is not in the public interest to bar the enforcement of § 11 (as requested by the Couples) or of both §§ 11 and 12 (as requested by the Clerks). The Couples’ argument to the contrary is nothing more than a repetition of their claim that their constitutional rights are being violated and

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<sup>78</sup> As argued above, the Couples cannot on the one hand assert that the Commonwealth is constitutionally required to confer the status, rights, and duties of marriage upon them, and yet on the other hand deny the Commonwealth’s legitimate interest in ensuring that the couple lives in a place where that marital status will be recognized, and those marital rights and duties will be enforceable, in the public interest as well as for the protection of each of the spouses and their

that such asserted constitutional violations can never be in the public interest. Couples' Memo at 44-45. If they are wrong on the merits, as they are, then enforcement of § 11 does no harm to their constitutional rights or to the public interest. In suggesting that enjoining the enforcement of § 11 will not injure the Commonwealth, *id.* at 43-44, the Couples entirely ignore how §11 serves the public interest in ensuring that the marriage relationship is subject to regulation, for the benefit of the public as well as that of the spouses and their children. See Part III.B.3 supra. The Couples also ignore the potential for other states and for Congress to take action that could have serious ramifications for the Commonwealth and its residents, if the Commonwealth begins allowing same-sex couples to marry here even though their marriages are void in their home states. See Part III.B.4 supra. The Clerks, in arguing that enjoining the enforcement of §§ 11 and 12 serves the public interest, likewise ignore these potential harms.

#### CONCLUSION

For the foregoing reasons, the Clerks' and Couples motions for preliminary injunctions should be denied.

Respectfully submitted,

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children.

Date: July 12, 2004