



discretion under Chapter 207 of the Massachusetts General Laws. Plaintiffs have failed to state any claim entitling them either to the extraordinary remedy of mandamus or to declaratory relief.

### FACTS

For the purposes of this Motion to Dismiss, Defendant Johnstone incorporates herein the factual allegations asserted in Plaintiffs' Amended Complaint.

### ARGUMENT

#### I. PLAINTIFFS LACK STANDING TO BRING AN ACTION FOR DECLARATORY JUDGMENT

In their Amended Complaint, Plaintiffs allege that Defendant Johnstone accepted certain Notices of Intention of Marriage and issued certain marriage licenses in violation of G.L. c. 207, § 11, and they seek a declaration from this Court that those marriages – which Plaintiffs never identify -- are null and void. Plaintiffs are two individuals who live in the Commonwealth of Massachusetts. Besides “hav[ing] in common with all citizens of the Commonwealth an interest in the enforcement of the laws of Massachusetts,” Amended Complaint ¶ 4, Plaintiffs allege no connection to or interest in the unidentified marriages they allege were contracted in violation of G.L. c. 207, § 11.

In order to bring a declaratory judgment action, Plaintiffs must show, among other things, that they have standing and that an actual controversy exists between the parties. Villages Dev. Co. v. Secretary of Env'tl. Affairs, 410 Mass 100, 106, 571 N.E.2d 361, 365 (1991). Even giving the Amended Complaint the generous reading required under Rule 12(b)(6), Nader v. Citron, 372 Mass. 96, 98, 360 N.E.2d 870, 872 (1977), Plaintiffs have failed to meet their burden.

Standing is not conferred by the declaratory judgment statute. Enos v. Secretary

of Envtl. Affairs, 432 Mass. 132, 135, 731 N.E.2d 525, 528 (2000). Standing requires that the Plaintiffs have a “definite interest in the matters in contention in the sense that [plaintiff’s] rights will be significantly affected by a resolution of the contested point.” Bonan v. City of Boston, 398 Mass. 315, 320, 469 N.E.2d 640, 644 (1986). See also Massachusetts Ass'n of Indep. Ins. Agents v. Commissioner of Ins., 373 Mass. 290, 292-293, 367 N.E.2d 796 (1977); School Comm. of Cambridge v. Superintendent of Cambridge, 320 Mass. 516, 518, 70 N.E.2d 298 (1946). It has long been recognized in this Commonwealth that “standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.” Enos, 432 Mass. at 135, 731 N.E.2d at 528 (quoting Pratt v. City of Boston, 396 Mass. 37, 42, 483 N.E.2d 812, 816 (1985) (quoting Valley Forge College v. Americans United for Separation of Church & State, 454 U.S. 464, 486, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982))). Rather, “[a] party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.” Enos, 432 Mass. at 135, 731 N.E.2d at 528 (quoting Massachusetts Ass's of Indep. Ins. Agents, 373 Mass. at 293, 367 N.E.2d 796). Thus, in order to maintain their declaratory judgment action, the Plaintiffs must show that they have definite interests at stake which are affected by the resolution of controversy they describe.

In the instant action, Plaintiffs seek a declaration that certain marriage licenses issued by Defendant Johnstone are null and void. Neither Plaintiff Flynn nor Plaintiff Shields have alleged that they are parties to any of the marriages at issue. They also have alleged no interest in or relationship to the parties whose marriages they seek to invalidate. Aside from a generalized interest in the statutes relating to marriage,

Plaintiffs have articulated no real or threatened injury or personal interest affected by the controversy alleged in the Amended Complaint which entitles them to seek declaratory relief against these Defendants. Pratt v. City of Boston, 396 Mass. 37, 42 (1985) (only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the court to pass on the validity of the acts of another branch of government).

Plaintiffs clearly disagree with the Supreme Judicial Court's decision in Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003), but Plaintiffs' disagreement with this ruling, and even their apparent disagreement with how Defendant Johnstone has exercised his discretion under G.L. c. 207, however fervent and deeply held, does not constitute an interest or an injury conferring standing, nor does it constitute an actual controversy. Compare Cote-Whitacre v. Department of Public Health, et al., No. 04-2656-G (Suffolk Superior Court, filed June 18, 2004) (plaintiffs are non-resident same-sex couples seeking declaratory judgment resolving real controversy concerning their rights under G.L. c. 207, § 11). Because the Plaintiffs have failed in this action to show any interest in or injury resulting from Defendant Johnstone's actions as alleged in their Amended Complaint, Plaintiffs lack standing to bring this action.

Moreover, because Plaintiffs have failed to show any real or threatened injury or interest which would be affected by the resolution of the controversy described in their Amended Complaint, there is no actual controversy between the parties for this Court to resolve.

**II. PLAINTIFFS' DECLARATORY JUDGMENT ACTION MUST BE DISMISSED BECAUSE IT FAILS TO MEET THE STATUTORY PREREQUISITES OF CHAPTER 231A**

The statutory requirements for a declaratory judgment action are set forth in G.L. c. 231A. Section 8 of this chapter states:

When declaratory relief is sought, **all persons shall be made parties who have or claim any interest which would be affected by the declaration**, and no declaration shall prejudice the rights of persons not parties to the proceeding.

(emphasis added.) Plaintiffs seek a declaration nullifying certain unidentified marriages performed pursuant to marriage licenses issued by Defendant Johnstone. However, the Plaintiffs themselves apparently were neither married nor prevented from marrying in May 2004, and the couples whose marriages they seek to nullify by this Court's declaration have not been made parties to this action. There is no wiggle room in section 8's requirement that **all** persons whose interests would be affected by the court's declaration **shall** be made parties to the action. And there is no question that nullifying or voiding the marriages described in the Amended Complaint would prejudice the rights of persons who are not parties to this proceeding. Because the Plaintiffs have failed to name as parties any of the couples whose marriages they seek to nullify, this action must be dismissed. Gannon v. Mayor of Revere, 401 Mass. 232, 233, 515 N.E.2d 1195, 1196 (1987) (granting declaratory relief in the "absence of other persons who have an interest in any declaration of rights and duties" would be inappropriate). See also Mass. R. Civ. P. 19(a) (requiring joinder of all necessary parties).

In addition, an action for declaratory relief is appropriate only in those cases where the declaratory judgment will terminate the controversy. Section 3 of G.L. c. 231A states, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy..." On June 18, 2004, a Complaint for Declaratory and Injunctive Relief was filed in Suffolk Superior Court by thirteen cities and towns in Massachusetts, challenging the constitutionality of G.L. c. 207, §§ 11 and 12 as applied

to the marriage of same-sex couples who reside outside Massachusetts. Douglas Johnstone v. Thomas Reilly, et al., No. 04- 2655-G (Suffolk Superior Court, June 18, 2004). Any declaration this Court may make with respect to marriages Plaintiffs allege were contracted in violation of G.L. c. 207, § 11 in this action may not, therefore, terminate the underlying controversy concerning the constitutionality of section 11. Jacoby v. Babcock Artificial Kidney Center, 364 Mass. 561, 563, 307 N.E.2d 2 (1974) (denying declaratory relief because entire controversy was being adjudicated in another proceeding). The litigation in the Johnstone v. Reilly matter will terminate the controversy concerning section 11, as the real parties in interest are the plaintiffs and defendants in that action. Given the fact that this declaratory judgment action will not terminate the controversy concerning section 11, the Court may exercise its discretion in dismissing this action.

### III. PLAINTIFFS' ACTION IN THE NATURE OF MANDAMUS MUST BE DISMISSED BECAUSE IT ATTACKS DISCRETIONARY ACTS

Plaintiffs also assert an action in the nature of mandamus, G.L. c. 249, §5, under the “public right doctrine” to compel Defendant Johnstone to perform his duties in accordance with G.L. c. 207, §§ 12 and 20. While it is true that “under the public right doctrine, any member of the public may seek relief in the nature of mandamus to compel the performance of a duty required by law,” Tax Equity Alliance for Massachusetts v. Commissioner of Revenue, 423 Mass. 708, 714, 672 N.E.2d 504, 508 (1996), Plaintiffs cannot invoke the public right doctrine in this case. The public right doctrine is appropriate only in those cases seeking to compel the performance of a ministerial, mandatory duty – it cannot be used to challenge the constitutionality of a statute and, more importantly, it cannot be used to compel a discretionary act. Perella v.

Massachusetts Turnpike Auth., 55 Mass. App. Ct. 537, 539-540, 772, N.E.2d 70, 73 (2002); 40 M.P.S. Administrative Law §1916.

It is clear from the plain language of the relevant provisions of Chapter 207 that the marriage statutes confer discretion on Defendant Johnstone, and it is appropriate for him to exercise his lawful discretion when accepting Notices of Intention of Marriage.

General Laws Chapter 207, section 12, states:

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.

In addition, section 20 of Chapter 207 provides, in part:

The clerk shall require written notice of intention of marriage, on forms furnished by the state registrar of vital records and statistics, containing such information as is required by law and also 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....

Finally, section 35 of Chapter 207 states in relevant part:

The clerk or registrar ... 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 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.

These sections of Chapter 207 plainly authorize Defendant Johnstone to exercise his discretion when accepting Notices of Intention of Marriage submitted to him. Section 12 requires Defendant Johnstone “*to satisfy himself*” that the person is not prohibited from intermarrying in the state where he or she resides. Section 35 provides that Defendant Johnstone “*may, in his discretion, accept depositions under oath*” and “*may also dispense*” with the statement of certain facts given in the Notice of Intention of Marriage,

*“if he is satisfied* that the same cannot with reasonable effort be obtained.” These italicized phrases are the very definition of the exercise of discretion, and Plaintiffs cannot escape the rule that “[r]elief in the nature of mandamus does not lie for discretionary acts.” Matter of Electric Mut. Liability Ins. Co. Ltd. (No. 2), 426 Mass. 1007 n.1, 689 N.E.2d 773, 774 n.1 (1998).

#### CONCLUSION

For the foregoing reasons, Defendant Douglas Johnstone requests that this Court dismiss Plaintiffs’ First Amended Complaint seeking declaratory judgment and an order in the nature of mandamus.

Respectfully Submitted  
By His Attorney,



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CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of June, 2004, I served the foregoing document on every other party to this action by mailing a copy thereof, by First Class Mail, postage prepaid, to:

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