

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY

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RAYMOND L. FLYNN, et al.,

Plaintiffs,

No. SJ-2004-0232

v.

DOUGLAS JOHNSTONE, et al.

Defendants.

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**DEFENDANT JOHN J. LONG'S MEMORANDUM OF LAW  
IN SUPPORT OF HIS MOTION TO DISMISS**

In this action, the Plaintiffs Raymond Flynn and Thomas Shields describe themselves as citizens of the Commonwealth who essentially seek two things: 1) a declaration that Massachusetts marriages of gay and lesbian couples who are non-residents are null and void; and 2) an order in the nature of mandamus to defendant city and town clerks, directing them to cease issuing marriage licenses to non-resident gay and lesbian couples from a state that "prohibits or does not recognize same-sex marriage." Amended Complaint, ¶ 23 and p. 9 Requests for Relief A and B.<sup>1</sup>

Defendant John J. Long, the Somerville City Clerk, moves to dismiss the Complaint pursuant to Rules 12(b)(1) and (6) of the Massachusetts Rules of Civil Procedure on the grounds that the defendants lack standing to bring their claims. *Ginther v. Commissioner of Insurance*,

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<sup>1</sup>Although the relief section of the complaint does not mention gay and lesbian couples, the body of the complaint is focused on the Massachusetts marriages of only gay and lesbian non-resident couples.

427 Mass. 319, 322 (1998) (lack of standing may be raised by motion to dismiss under Mass. R. Civ. P. 12(b)(1) or (6)). The plaintiffs lack standing to seek declaratory relief as to the validity of the nonresidents' marriages since neither Flynn nor Shields has any personal rights that are threatened with injury by these marriages and there is no actual controversy between the parties. As to the claim for mandamus relief against the defendant clerks, the plaintiffs also lack standing because 1) they have no personal rights at stake, 2) they are not entitled to assert standing under the "public right" doctrine, 3) the clerks have considerable discretion in carrying out their duties under the marriage laws, and 4) there are other remedies specified in the marriage statutes, all making mandamus inappropriate. Finally, the request for mandamus relief is moot because the defendants have stopped issuing marriage licenses to non-resident same sex couples after receiving cease and desist letters from the Attorney General.<sup>2</sup>

Since plaintiffs lack standing, the court lacks subject matter jurisdiction and the Amended Complaint fails to state a claim upon which relief may be granted and should be dismissed.

#### Statutory Scheme

In this action, plaintiffs seek to compel the defendants to "perform their duties pursuant to G.L. c. 207, §§ 12 and 20." Amended Complaint, ¶ 1. The role of the city and town clerks in carrying out the state's marriage laws is set forth in Chapter 207. Section 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

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<sup>2</sup>The clerks, including defendant Long, have questioned the Attorney General's directives in a recently filed lawsuit that challenges the state's discriminatory application of the marriage laws against nonresident gay and lesbian couples. See *Douglas Johnstone et al. v. Thomas Reilly, et al.*, Suffolk Superior Court Civ. No. 04-2655-G (complaint filed on June 18, 2004).

the laws of the jurisdiction where he or she resides.<sup>3</sup>

Section 20 provides:

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 ... Said forms containing the parties' written notice of intent to marry shall constitute a public record. In addition to such forms, the town clerk shall also require the parties to furnish information required for a separate report to be transmitted to the state registrar, including the social security number and residence address of both parties, and such other information as may be required by federal or state law.... The oath or affirmation to such notice shall be to the truth of all the statements contained therein whereof the party subscribing the same could have knowledge, and may be given before the town clerk or before a regularly employed clerk in his office designated by him in writing and made a matter of record in the office....

Also relevant here is Section 35 which provides:

The clerk or registrar may refuse to issue a certificate [of intention to marry] if he has reasonable cause to believe that any of the statements contained in the notice of intention of marriage 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 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.

Section 4 of G.L. chapter 17 provides an enforcement mechanism under the marriage laws. The Registrar of Vital Records and Statistics "shall, under the supervision of the Commissioner [of the Department of Public Health], 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

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<sup>3</sup>Section 12 should be read in conjunction with Section 11 which 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." The applicability of this section to only gay and lesbian nonresidents who seek to marry in the commonwealth is the subject of the clerks' lawsuit in *Johnstone*.

thereof.”<sup>4</sup> Finally, Section 50 of G.L. c. 207 provides for criminal penalties against a clerk who issues a certificate of notice of intention of marriage with the knowledge that the parties are prohibited by section 11 from marrying, including penalties of a fine of between \$100 and \$500 or imprisonment for up to one year or both.

#### Facts<sup>5</sup>

The Complaint states that plaintiffs, like all citizens of the Commonwealth, have “an interest in the enforcement of the laws of Massachusetts.” Amended Complaint, ¶ 4. Plaintiffs then recite several sections of Chapter 207 and allege that defendant Long and the other defendants are refusing to enforce these provisions and their offices are “issuing marriage licenses to non-residents of Massachusetts who do not intend to reside in Massachusetts and whose state of residence prohibits or does not recognize same-sex marriage.” Amended Complaint, ¶ 23.

The following facts are also relevant to the motion to dismiss for lack of standing under Rule 12(b)(1). Massachusetts has no residency requirement for marriage. Up until May 2004, municipal clerks were instructed by the state to rely on the Notice of Intention to Marry completed by a couple to determine whether they satisfy the requirements for marriage. Long

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<sup>4</sup>The Attorney General has exclusive powers to direct litigation in which the Commonwealth is a party. G.L. c. 12, § 3.

<sup>5</sup>Under Rule 12(b)(1), the judge may consider affidavits and other matters outside the face of the complaint that are used to support the movant’s claim that the court lacks subject matter jurisdiction. *Ginther*, 427 Mass. at 322 n.6. The relevant facts are taken from the plaintiffs’ Amended Complaint, from the Affidavit of Sarah Wunsch, and the Affidavit of Somerville City Clerk John Long which was submitted to Suffolk Superior Court in *Johnstone et al. v. Reilly et al.*, Civ. No. 04-2655-G (filed on June 21, 2004). These affidavits are attached to John Long’s Motion to Dismiss in this case.

Affidavit, ¶¶ 7-8 (attached as Exhibit B to the Wunsch Affidavit). Only if issues of age were apparent were the clerks to do more. The Notice forms required both members of the couple to sign the following statement under oath:

We/I hereby state that there is an absence of any legal impediment to the marriage and do hereby depose and say that all of the statements as set forth in the above notice, whereof we/I could have knowledge are true and are made under the penalties of perjury (c. 4, s. 6, Rule 6 General Laws).

Long Affidavit, ¶ 7. In May, 2004 the Registrar of Vital Records and Statistics wrote to the clerks, enclosing a guide to purported legal impediments to marriage in 57 jurisdictions and instructing clerks not to issue a certificate of marriage to any same-sex couple that resides or intends to continue to reside in a state other than Massachusetts. Long Affidavit, ¶ 16.

Believing that these new directives about only gay and lesbian non-resident couples illegally discriminated and possibly were unconstitutional, the Mayor of Somerville announced that the clerk would issue marriage licenses to same-sex non-resident couples in the same way they were issued to heterosexual non-resident couples. Long Affidavit, ¶ 17. On May 21, 2004, the Attorney General of Massachusetts threatened enforcement action against Somerville and ordered the City to “cease and desist” from accepting Notices of Intention to Marry from same-sex couples who stated they resided outside of Massachusetts. Long Affidavit, ¶ 20.

In response to the cease and desist letter from the Attorney General, the Somerville City Clerk stopped accepting notices of intention to marry from non-resident same sex couples, Long Affidavit, ¶ 21, but he has joined with twelve other municipal clerks in a lawsuit against the Attorney General and the Registrar of Vital Records, seeking a declaration that Mass. G.L. c. 207, §§ 11-12 are unconstitutional as directed by state officials to be applied to same sex couples.

Affidavit of Sarah Wunsch, ¶ 4, and Complaint in *Johnstone*, attached thereto as Exhibit C .

## ARGUMENT

### I. THE PLAINTIFFS LACK STANDING TO CHALLENGE THE VALIDITY OF PARTICULAR MARRIAGES AND TO SEEK ENFORCEMENT OF THE STATE’S MARRIAGE LAWS.

“The question of standing is one of critical significance.” *Tax Equity Alliance v. Commissioner of Revenue*, 423 Mass. 708, 715 (1996).

‘From an early day it has been an established principle in this Commonwealth that only 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 [another] branch of government’

*Pratt v. City of Boston*, 396 Mass. 37, 42 (1985) (internal citations omitted); *see also Ginther*, 427 Mass. at 322-323 (“To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury”) (internal citations omitted). The plaintiffs here have suffered no personal injury whatsoever and cannot meet the requirements for standing to sue.

#### A. PLAINTIFFS LACK STANDING TO SEEK DECLARATORY RELIEF AS TO THE VALIDITY OF MARRIAGES INVOLVING OTHERS.

The plaintiffs seek a declaration that “marriages contracted in violation of G.L. c. 207, § 11 are null and void....” Amended Complaint at Page 9. Yet, they are neither parties to any of these alleged marriages nor directly affected by any such marriage. Nor are they the government agency assigned by statute to enforce the state’s marriage laws. Plaintiffs Flynn and Shields fail to meet the requirements to bring an action for declaratory relief under G.L. c. 231A because they cannot show legal standing or demonstrate that there is an actual controversy between the parties.

*Massachusetts Association of Ind. Insurance Agents v. Commissioner of Insurance*, 373 Mass.

290, 292 (1977).

An actual controversy within the context of G.L. c. 231A is 'a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation.'

*Bunker Hill Distributing Co. v. District Attorney for Suffolk County*, 376 Mass. 142, 144 (1978)

(internal citation omitted). The plaintiffs must be seeking relief from "uncertainty and insecurity with respect to rights, duties, status and other legal relations" and the declaration that is requested should "have an immediate impact on the **rights of the parties.**" *Massachusetts Association of Ind. Insurance Agents, supra*, 373 Mass. at 292 (emphasis added). Here, of course, any declaration about the validity of nonresident marriages would have no impact on any rights of the plaintiffs. The plaintiffs have no concrete or particularized interest that is different from any other member of the general public in the validity of the marriages of non-resident gay and lesbian couples. Where no rights of the plaintiffs are at stake personally and they have suffered no injury, they lack standing to seek a declaratory judgment regarding the validity of other couples' marriages. *See Slama v. Attorney General*, 384 Mass. 620, 623-624(1981) (city lacked standing to challenge action of AG because AG's action did not affect any right belonging to the city itself).

**B. PLAINTIFFS LACK STANDING TO BRING AN ACTION IN THE NATURE OF MANDAMUS REGARDING THE ROLE OF THE CLERKS IN ISSUING MARRIAGE LICENSES.**

**1. Plaintiffs lack any personal interest in the way the clerks carry out their duties regarding the marriage of nonresidents.**

In general, the same important standing requirements must be met by plaintiffs bringing

an action in the nature of mandamus pursuant to G.L. c. 249, § 5. Plaintiffs “must have a particularized interest, personal to them, in order to have standing to seek mandamus.” *Alliance, AFSCME/SEIU v. Commonwealth of Massachusetts*, 427 Mass. 546, 549 (1998). Plaintiffs concede they have no such distinct or personal interest, acknowledging in their Complaint that they “have in common with all citizens of the Commonwealth an interest in the enforcement of the laws of Massachusetts.” Amended Complaint, ¶ 4. Instead, they invoke the “public right doctrine,” (*id.*) a very narrow exception to the usual standing requirements which simply does not apply to this case.

**2. Plaintiffs do not meet the requirements to invoke the “public right” exception to normal standing rules.**

The “public right” doctrine provides an exception to typical standing requirements in rare cases by giving an individual with no direct private interest in a matter standing to sue for enforcement of a duty in the public interest. Because this rule is so at odds with normal standing requirements, it is narrowly construed and rarely applied. *Alliance, AFSCME*, 427 Mass. at 550-551.

[The public right doctrine] is the principle that where a public officer owes a specific duty to the public to perform some act or service not due the government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer any member of the public may compel by mandamus the performance of the duty required by law.

*Kaplan v. Bowker*, 333 Mass. 455, 460 (1956). *See also Tax Equity Alliance, supra*, 423 Mass. at 714 (where the public right doctrine applies, “the people are considered the real party in interest and the individual plaintiff need not show that he has any legal interest in the result”).

Here, as in *Kaplan v. Bowker*, the clerks’ duties under the marriage laws are owed to the

government, not to the people as such. The few instances where the courts have found standing based on the public right doctrine have mainly involved election and voting issues where the community that constituted the “public” was the real party in interest. *See, e.g., Brewster v. Sherman*, 195 Mass. 222, 225 (1907) (in regard to local ballot question, all the inhabitants of the town had an interest in having ballots properly counted). That is not true of the statutory scheme under which the plaintiffs bring their claims. The Government, including the Department of Public Health and the Registrar of Vital Records (as well as individuals involved in subsequently disputed marriages), are the real parties in interest for enforcement of the Commonwealth’s marriage laws.

Furthermore, in order to invoke the “public right” doctrine, the plaintiffs must demonstrate that there is no other method of enforcement available to ensure that officials are carrying out their specific duties. *Kaplan v. Bowker, supra*, 333 Mass. at 460. *See also Perella v. Massachusetts Turnpike Authority*, 55 Mass. App. Ct. 537, 540 (2002) (when no other remedy was open or available, a private person would be permitted to maintain a petition for a writ of mandamus without the showing he had any private interest beyond his interest as a citizen in the proper execution of the laws). Plainly, there is another method of enforcement of the marriage laws, spelled out by the legislature in the statutory scheme, and it is in the hands of the Registrar of Vital Records. The Attorney General’s cease and desist letters to the clerks are a demonstration of the use of the statutory enforcement mechanism.<sup>6</sup>

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<sup>6</sup>Defendant Long responded to the Attorney General’s cease and desist letter by ceasing to accept notices of intention to marry from gay and lesbian couples who stated they resided outside of Massachusetts. Long Affidavit at ¶ 21. This action moots the plaintiffs’ request for an order in the nature of mandamus to the same effect.

In addition, the public right doctrine does not apply at all where conduct of the defendant officials is discretionary as opposed to ministerial. The doctrine applies only “where a public officer owes a *specific duty* to the public to perform some act or service not due the government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer....” *Kaplan v. Bowker*, 333 Mass. at 460 (emphasis added). A general obligation of officials to “obey the law” “is not a sufficient ground for action by persons who are not injured.” *Id.* at 460-461. Mandamus is generally inappropriate when government officials have discretion to exercise in the carrying out of their duties. *Urban Transport, Inc. v. Mayor of Boston*, 373 Mass. 693, 698 (1977).

Here, as the marriage laws cited above show, the clerks have been given discretion in carrying out requirements under the law that they satisfy themselves that a nonresident is not prohibited from marrying in Massachusetts. For example, the clerk *may* require affidavits *or otherwise* to satisfy himself that a nonresident is not prohibited from marrying in his or her home state. G.L. c. 207, § 12. There is no one required method and indeed the sworn statement from the couples that there is no bar has been sufficient for all nonresident applicants up until the May 2004 order from the Registrar of Vital Records and it continues to be sufficient for heterosexual couples who are nonresidents but may be subject to a variety of requirements in their home states. Long Affidavit, ¶¶ 7-12, 16, 21. Another example of the discretion the clerks possess is in G.L. c. 207, § 35, stating that the clerk “*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...*” (emphasis added).

The clerks’ obligations under these statutes are far from being clearly and unequivocally legally mandated. They permit the use of judgment and discretion, and since the public right doctrine cannot be invoked where the public action in question is discretionary, plaintiffs lack standing to seek mandamus even under the public right doctrine. *See Kaplan, supra*, 333 Mass. at 460 (doctrine requires specific duty to the public to perform some specific act); *Perella v. Massachusetts Turnpike Authority*, 55 Mass. App. Ct. 537, 541 (2002) (rejecting mandamus action to compel agency generally “to comply with the law of the Commonwealth.”)

#### CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed for lack of subject matter and failure to state a claim upon which relief may be granted.

Respectfully submitted,

JOHN J. LONG, Somerville City Clerk

By his attorneys,



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Dated: June 30, 2004

CERTIFICATE OF SERVICE

I, Sarah Wunsch, hereby certify that on this 30<sup>th</sup> day of June, 2004, I served copies of the foregoing document by sending a copy by first class mail addressed to each of the following:

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