COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Superior Court
Civil Action No. 04-2656-G

SANDRA and ROBERTA COTE-WHITACRE,
AMY ZIMMERMAN and TANYA WEXLER,
MARK PEARSALL and PAUL TRUBEY,
KATRINA and KRISTIN GOSSMAN,
WENDY BECKER and MARY NORTON,
MICHAEL THORNE and JAMES THEBERGE, and
EDWARD BUTLER and LESLIE SCHOOF
Plaintiffs

v.

DEPARTMENT OF PUBLIC HEALTH,
CHRISTINE C. FERGUSON, in her official capacity as Commissioner
of the Department of Public Health,
REGISTRY OF VITAL RECORDS AND STATISTICS, and
STANLEY E. NYBERG, in his official capacity as Registrar of Vital Records
and Statistics,
Defendants

ASSENTED-TO MOTION FOR AMENDED AND FINAL JUDGMENT

In furtherance of the remand by the Supreme Judicial Court in *Cote-Whitacre v. Dept. of Pub. Health*, 446 Mass. 350 (2006), the Plaintiffs seek to amend this Court's October 2, 2006 Judgment to clarify that the New York Plaintiffs were fully, legally eligible to marry in Massachusetts and to have final judgment enter in this case with respect to all of the Plaintiff couples and their claims. The proposed form of Amended and Final Judgment is attached as Exhibit A.

In support of this Motion, the Plaintiffs state as follows:

1. New York Plaintiffs Amy Zimmerman and Tanya Wexler married in Somerville, Massachusetts on May 19, 2004 after disclosing their non-resident status and their intent to return to New York after their marriage. *See Second Amended Verified Complaint Seeking Declaratory and Injunctive Relief and Mandamus* ("Second Amended Complaint"), ¶¶ 21-28.

2. At the time of their marriage, the Commonwealth contended that no out-of-state same-sex couple residing in New York and intending to continue to reside in New York could marry in Massachusetts by virtue of M.G. L. c. 207, §12.

3. In its March 30, 2006 decision, a majority of the SJC justices concluded that the Defendants had misconstrued G.L. c. 207, §12. The SJC remanded for a determination as to whether the states of New York and Rhode Island "prohibited" same-sex couples from marrying in those states such that otherwise qualified, same-sex couples from those states would be ineligible to marry in Massachusetts under G.L. c. 207, § 12. *See Cote-Whitacre,* 446 Mass. at 352 (rescript).

4. On remand, this Court determined that, when properly construed, G.L. c. 207, § 12 only bars the marriage of out-of-state same-sex couples in Massachusetts if the couples' respective home state's positive law (i.e., by constitutional amendment, statute, or controlling appellate decision) contains an express pronouncement against the issuance of marriage licenses to same-sex couples in that state. *See Cote-Whitacre v. Dept. of Pub. Health,* 21 Mass. L. Rptr. 513, 514, 2006 WL 3208758 at *2 (Mass. Super., Sept. 29, 2006) (on remand, holding that Chief Justice Marshall's concurring opinion set forth the proper and controlling interpretation of G.L. c. 207, §12).

5. This Court then determined that marriage for same-sex couples is currently prohibited in New York (*see* October 2, 2006 Judgment) by virtue of the July 6, 2006 decision in *Hernandez v. Robles,* 7 N.Y.3d 338, 855 N.E.2d 1 (2006), and that "same-sex marriage … is not prohibited in Rhode Island." *See Cote-Whitacre v. Dept. of Pub. Health,* 21 Mass. L. Rptr. 513, 514, 2006 WL 3208758 at *2 (Mass. Super., Sept. 29, 2006) (on remand).

6. The Plaintiffs maintain that no express prohibition against the marriage of same-sex couples -- within the meaning of *Cote-Whitacre* -- existed in New York law prior to July 6, 2006, the date of the *Hernandez* decision. Therefore, any marriages of New York residents in

Massachusetts during the period from May 17, 2004 through July 6, 2006 -- including the New York Plaintiffs' marriage in Massachusetts on May 19, 2004 -- are fully valid and did not (and do not) violate G.L. c. 207, §§11-12. In support of their position, the Plaintiffs served a motion and memorandum of law under Rule 9A directed to the issue of "prohibition" under New York law. A copy of the Plaintiffs' memorandum of law on that issue is attached to this Motion as Exhibit B.

7. The Defendants do not contest the legal issue addressed in Plaintiffs' prior motion and memorandum on the issue of New York law, namely, that New York law pre-*Hernandez* did not "prohibit" the marriage of same-sex couples for purposes of G.L. c. 207, §12. Therefore, the parties have agreed to the withdrawal of that motion in favor of the present Motion for an Amended and Final Judgment, which clarifies that point.

8. A final judgment is also appropriate at this time because the Plaintiffs' remaining claims have been, or are being, addressed by: (a) the March 30, 2006 decision of the SJC (*see Cote-Whitacre,* 446 Mass. at 352); (b) the decision and judgment of this Court on September 29, 2006 and October 2, 2006, respectively (*see Cote-Whitacre*, 21 Mass. L. Rptr. at 514); (c) the amendment of the October 2, 2006 Judgment requested in this Motion; and (d) the Commonwealth's binding and indexing in April 2007 of the marriage licenses issued to certain Plaintiff couples, rendering Plaintiffs' claims in that regard moot.

9. The Defendants assent to the entry of an Amended and Final Judgment in the form attached hereto as Exhibit A.

WHEREFORE, the Plaintiffs request that an amended and final judgment be entered in accordance with Exhibit A.

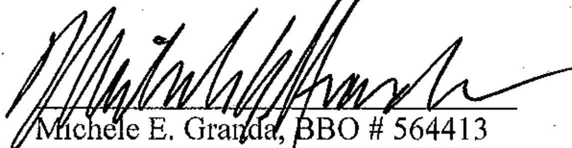
Respectfully submitted,

THE PLAINTIFF COUPLES

Sandra and Roberta Cote-Whitacre
Amy Zimmerman and Tanya Wexler
Mark Pearsall and Paul Trubey
Katrina and Kristin Gossman
Wendy Becker and Mary Norton
Michael Thorne and James Theberge
Edward Butler and Leslie Schoof

By their Counsel,

GAY & LESBIAN ADVOCATES & DEFENDERS



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Dated: May 10, 2007

ASSENTED TO:

THE DEFENDANTS

DEPARTMENT OF PUBLIC HEALTH, et al

By their Counsel,

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A

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court Department
of the Trial Court

Civil Action No. 04-2656-G

SANDRA and ROBERTA COTE-WHITACRE,
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MICHAEL THORNE and JAMES THEBERGE, and
EDWARD BUTLER and LESLIE SCHOOF,

Plaintiffs,

v.

DEPARTMENT OF PUBLIC HEALTH,
CHRISTINE C. FERGUSON, in her official capacity as
Commissioner of the Department of Public Health;
REGISTRY OF VITAL RECORDS AND STATISTICS, and
STANLEY E. NYBERG, in his official capacity as Registrar of
Vital Records and Statistics,

Defendants.

AMENDED AND FINAL JUDGMENT

It is ORDERED, ADJUDGED, AND DECLARED:

In response to the order of the Supreme Judicial Court in *Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 352 (2006) (rescript), same-sex marriage only became "prohibited" in New York on July 6, 2006, and is not "prohibited" in Rhode Island.

All remaining claims are dismissed in their entirety without prejudice.

Dated at Boston, Massachusetts, this __ day of May, 2007.

____
Justice of the Superior Court

B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Superior Court
Civil Action No. 04-2656-G

SANDRA and ROBERTA COTE-WHITACRE,
AMY ZIMMERMAN and TANYA WEXLER,
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STANLEY E. NYBERG, in his official capacity as Registrar of Vital Records and Statistics,
Defendants

MEMORANDUM OF LAW IN SUPPORT OF MOTION ON REMAND OF NEW YORK PLAINTIFFS AMY ZIMMERMAN AND TANYA WEXLER TO DETERMINE THEIR ELIGIBILITY TO MARRY IN MASSACHUSETTS

New York Plaintiffs Amy Zimmerman and Tanya Wexler were not prohibited by G.L. c. 207, §§11-12 from marrying in Massachusetts on May 19, 2004. For purposes of §§11-12, New York law did not expressly prohibit same-sex couples from marrying until July 6, 2006, the date of the New York Court of Appeals decision in *Hernandez v. Robles,* 7 N.Y.3d 338, 855 N.E.2d 1 (2006). Because the Defendants never should have applied §§11-12 to the New York Plaintiffs -- either by attempting to prevent the New York Plaintiffs' marriage from ever occurring or, later, to denigrate the validity of their already-acquired marriage license -- this Court should enter preliminary and permanent relief for the New York Plaintiffs in the form of a judgment on their Second Amended Verified Complaint Seeking Declaratory and Injunctive Relief and Mandamus ("Second Amended Complaint").

FACTUAL AND LEGAL BACKGROUND[1]

Plaintiffs Amy Zimmerman and Tanya Wexler married in Somerville, Massachusetts on May 19, 2004 after disclosing their non-resident status and their intent to return to New York after their marriage. *See Second Amended Verified Complaint Seeking Declaratory and Injunctive Relief and Mandamus* ("Second Amended Complaint"), ¶¶ 21-28.

Though they were able to obtain a marriage license (*i.e.*, a marriage certificate), the Commonwealth has contended for almost three years now that Plaintiffs Amy Zimmerman and Tanya Wexler's marriage is nonetheless illegal, invalid, or voidable by virtue of §12.[2] The Commonwealth has long asserted that the New York Plaintiffs' marriage would have been "prohibited" in New York (*i.e.*, their home state) within the meaning of §12 such that they never should have received a marriage license from the Somerville municipal clerk in the first place. Amy Zimmerman and Tanya Wexler joined this lawsuit to challenge the Commonwealth's interpretation and enforcement of §§11-12, including its repetitive and harmful assertions that their marriage was erroneously obtained and is thus invalid.

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[1] For a comprehensive summary of the factual and procedural background of this matter, *see Cote-Whitacre v. Dept. of Pub. Health*, 446 Mass. 350, 352-57 (2006) (Spina, J., concurring) (affirming denial of motion for preliminary injunction) and *Cote-Whitacre v. Dept. of Pub. Health*, 21 Mass. L. Rptr. 513, 514, 2006 WL 3208758 at *1 (Mass.Super.Ct., Sept. 29, 2006) (on remand).

[2] *See Defendant's Opposition to Clerks' and Couple's Motions for Preliminary Injunctions*, filed July 12, 2004 at 8 n. 6 ("The Register of course does not concede … that [the New York Plaintiffs] validly received licenses or were legally married; the issuance of the licenses violated §12."); *SJC Brief of Appellees*, filed June 24, 2005, at 4 n. 2 ("The Register of course does not concede … that [the New York Plaintiffs] validly received licenses or were legally married; the issuance of the licenses violated §12."); *id.* at 145 n. 126 ("Contrary to the Couples' claim …, the Registrar has not asserted that marriages in violation of §12 are 'void[.]' … [The Registrar has] asserted only that marriages contracted in violation of §12 were entered into illegally; such marriages might be voidable …"). *See also* Yvonne Abraham & Raphael Lewis, *Romney Turns to AG for Halt to Licensing, Targets Marriage by Gay Outsiders*, Boston Globe, May 21, 2004, at A1 ("The state registrar, [Romney] said, would refuse to record the marriages of the 10 out-of-state residents he identified and all those others who state on their applications that they have no intention of moving here. That step, he said, renders their marriages automatically invalid under a 1913 law that voids Massachusetts marriages if they would be void in the state in which a couple resides."); Frank Phillips & Yvonne Abraham, *Defiance, Rebuke on Gay Marriage*, Boston Globe, May 12, 2004, at A1 (Governor threatened legal action against clerks who marry nonresident gay couples; "If they choose to break the law, we will take appropriate enforcement action, refuse to recognize those marriages, and inform the parties that the marriage is null and void.")

The SJC Rejected the Commonwealth's Interpretation of §§11-12

On March 30, 2006, the Supreme Judicial Court issued its decision on the Plaintiffs' Motion for Preliminary Injunction. *See Cote-Whitacre*, 446 Mass. at 350. Though affirming in large part this Court's denial of their motion, the SJC ruled that the Defendants had erred in their interpretation of §12 and directed that the cases of the Rhode Island and New York Plaintiffs proceed in this Court for a determination of whether couples from those states were outside the reach of §12, properly construed.

According to the SJC, otherwise qualified, out-of-state couples of the same sex should be able to marry in Massachusetts under §§11-12 as long as their marriages would not have been "void" or "prohibited" if contracted in their respective home states. *See Cote-Whitacre,* 446 Mass. at 391 (Marshall, C.J., concurring).

Governing Standard on Remand

On remand, this Court appropriately determined that Chief Justice Marshall's construction of §§11-12 represents the binding rule of law governing whether a marriage is "void" or "prohibited" for purposes of §§11-12. *See Cote-Whitacre*, 21 Mass. L. Rptr. at 516, 2006 WL 3208758 at *4. Thus, in order for the Commonwealth to substantiate its use of §12 to deny marriage rights to an out-of-state same-sex couple, marriage for same-sex couples must be "prohibited" by an express pronouncement in the home state's positive law (i.e., by constitutional amendment, statute, or controlling appellate decision). *See Cote-Whitacre,* 446 Mass. at 384-85 (Marshall, C.J., concurring). According to Chief Justice Marshall,

> G.L. c. 207, §12, plainly requires the Commonwealth to refrain from issuing marriage licenses to any out-of-State couple whose nuptials would be directly prohibited in their home State and, conversely, to issue marriage licenses and solemnize marriages *in all other cases.*

Id. at 385 (emphasis added).[3]

The Status of Already-Married Out-of-State Couples

Notably, the SJC directed a further determination from this Court on the eligibility of the New York Plaintiffs to marry in Massachusetts even though the sole New York couple in the case had already married.[4] The SJC's directive that this Court, on remand, opine on the New York Plaintiffs' marriage eligibility underscores the fact that there are consequences for marriages contracted in violation of §§11-12. To the extent an out-of-state same-sex couple who married in Massachusetts came from a state that would have declared their marriage "void" if contracted at home (*e.g.*, Maine), the couples' resulting marriage would violate §11 and be deemed void as a matter of Massachusetts law. *See Cote-Whitacre*, 446 Mass. at 359-60 and n. 8 (Spina, J., concurring). If an out-of-state same-sex couple who married in Massachusetts hailed from a state that would have "prohibited" their marriage -- but not declared it "void" -- if contracted at home (*e.g.*, Vermont, Connecticut, New Hampshire), the couples' resulting marriage would violate §12 and be considered "voidable" as a matter of Massachusetts law. *Id.* at 361-62 and n. 10-11. Alternatively, if, as the New York Plaintiffs contend, §§11-12 does not apply to them at all, their marriage would be perfectly valid and carry no defect as a result of G.L. c. 207, §§11-12.

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[3] For a more detailed explication of Chief Justice Marshall's governing standard, *see* Plaintiffs' Memorandum of Law Regarding Rhode Island Law In Support Of Rhode Island Plaintiffs' Ability To Marry (filed June 14, 2006) at 6-7, 10-14.

[4] *See Cote-Whitacre*, 446 Mass. at 352 (rescript) ("As to the New York and Rhode Island Plaintiffs, their cases shall proceed to Superior Court, on an expedited basis, for a determination whether same-sex marriage is prohibited in those States."); *Id.* at 393 (Marshall, C.J., concurring) ("I conclude that the New York and Rhode Island plaintiff couples should be afforded the opportunity to present evidence that their respective States of residence would not prohibit their marriages because in neither State is there a constitutional amendment, statute, or controlling appellate decision to that effect. They should be provided an opportunity to present evidence that their marriage is not expressly 'prohibited' by their home State's positive law, *i.e.*, by constitutional amendment, statute, or controlling appellate decision.") (internal citation omitted).

The New York Plaintiffs' Claims on Remand

In late spring of 2006, when this Court was first faced with the obligation to evaluate the New York Plaintiffs' claims on remand,[5] pending before the New York Court of Appeals was the *Hernandez* case, which presented New York's high court with the first opportunity to squarely address the right of same-sex couples to marry in New York.[6] Oral argument in *Hernandez* took place on May 31, 2006, as scheduled. Appreciating that a favorable ruling for the *Hernandez* plaintiffs would have fully resolved the remanded New York issue now before this Court,[7] the parties agreed to await the New York Court of Appeals' ruling in *Hernandez* before proceeding any further in this Court with the New York Plaintiffs' claims.[8]

Yet, on July 6, 2006, the New York Court of Appeals issued an unfavorable decision for the *Hernandez* plaintiffs. *See Hernandez,* 7 N.Y.3d at 356-57, 855 N.E.2d at 5. For the first time, the New York high court definitively precluded same-sex couples from marrying in New York. *Id.* In *Hernandez,* the New York high court interpreted the gendered terms in New York's domestic relations law as a prohibition on New York's issuance of marriage licenses to same-sex couples and also declared the prohibition to be constitutional. *Id.* Although this Court quite correctly determined that *Hernandez* constituted a "controlling appellate decision" prohibiting New York couples from marrying in New York -- and thus disqualifying them from marrying in

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[5] *See* Notice of Scheduling of Hearing dated May 5, 2006.

[6] *See Hernandez v. Robles,* 805 N.Y.S.2d 354 (N.Y.App.Div. 2005), *affirmed* 7 N.Y.3d 338, 356-57, 855 N.E.2d 1, 5 (2006). Four other affirmative marriage cases were effectively consolidated with *Hernandez* for the New York Court of Appeals' simultaneous determination. *See Samuels v. N.Y. State Dep't of Public Health,* 811 N.Y.S.2d 136 (N.Y.App.Div. 2006), *affirmed sub nom Hernandez v. Robles,* 7 N.Y.3d 338, 357, 855 N.E.2d 1, 5 (2006); *Seymour v. Holcomb,* 811 N.Y.S.2d 134 (N.Y.App.Div. 2006), *affirmed sub nom Hernandez v. Robles,* 7 N.Y.3d 338, 357, 855 N.E.2d 1, 5 (2006); *Kane v. Marsolais,* 808 N.Y.S.2d 566 (N.Y.App.Div. 2006), *affirmed sub nom Hernandez v. Robles,* 7 N.Y.3d 338, 357, 855 N.E.2d 1, 5 (2006); *Shields v. Madigan,* 783 N.Y.S.2d 270 (N.Y.Sup.Ct. 2004), *affirmed* 820 N.Y.S.2d 890 (2006) (directing affirmance for the reasons stated in *Hernandez v. Robles,* 7 N.Y.3d 338, 357, 855 N.E.2d 1, 5 (2006)). Consistent with past practice, the New York Plaintiffs use the term "*Hernandez*" to refer to all five of these New York marriage cases unless the context requires otherwise.

[7] That possibility would only have occurred if the New York high court had ruled in favor of the right of same-sex couples to marry in New York.

[8] *See* Amended Notice of Scheduling of Hearing dated May 16, 2006.

Massachusetts by virtue of §12 -- that decision did not obviate the need for further proceedings in this Court on the eligibility of the New York Plaintiffs to have married in Massachusetts when they did (*i.e.*, on May 19, 2004).

ARGUMENT

NEW YORK LAW DID NOT "PROHIBIT" MARRIAGE FOR SAME-SEX COUPLES (FOR PURPOSES OF SECTION 12) UNTIL JULY 6, 2006.

Plaintiffs Zimmerman and Wexler now have the opportunity granted by the SJC "to present evidence to rebut the Commonwealth's claim" that New York law "prohibited" their marriage within the meaning of Section 12. *See Cote-Whitacre*, 446 Mass. at 352 (rescript) and 392 (Marshall, C.J., concurring).

Despite a thorough canvassing of New York law, Plaintiffs Zimmerman and Wexler have found no statement expressly forbidding the marriage of same-sex couples in New York's positive law (*i.e.*, by constitutional amendment, statute, or controlling appellate decision) prior to the July 6, 2006 decision by the New York Court of Appeals in *Hernandez. See* 7 N.Y.3d at 356-57, 855 N.E.2d at 5.

At the time of their marriage, the Defendants advanced only one justification for the application of §§11-12 to the New York Plaintiffs: "Marriage between persons of the same-sex *is not permitted* under the law of New York." *See* Commonwealth's *Guide to Legal Impediments to Marriage for 57 Registration Jurisdictions* (dated May 11, 2004) (emphasis added), the relevant excerpt of which is attached hereto as Exhibit 1.[9] *See also* Commonwealth's current *Guide to Legal Impediments to Marriage for 57 Registration Jurisdictions* (dated June 21, 2005) at http://www.mass.gov/Eeohhs2/docs/dph/vital_records/impediment.pdf. Following the SJC's March 30, 2006 decision in *Cote-Whitacre*, as previously interpreted by this Court, *see* 21 Mass. L.

[9] The Defendants' May, 2004 Guide to Legal Impediments to Marriage was previously filed with this Court in June, 2004. *See* Appendix of Documents In Support of Plaintiff Couples' Motion for Preliminary Injunction, Exhibit 25 and Appendix to *Johnstone* Clerks' Affidavits, Exhibit K.

Rptr. at 516, 2006 WL 3208758 at *4, the Defendants' previously-asserted reason for applying §§11 or 12 to the New York Plaintiffs is wholly insufficient. Chief Justice Marshall's opinion unequivocally rejected the Commonwealth's (and Justice Spina's) argument that "any marriage that is not expressly *permitted* by the law of the couple's home State must be deemed 'prohibited' by that State." *Cote-Whitacre*, 446 Mass at 383 (Marshall, C.J., concurring). In Chief Justice Marshall's view, whether New York itself would issue marriage licenses to same-sex couples is not relevant; rather, what is relevant is whether the express requirements of Section 12 have been met. *Id.* at 384.

In Addendum B of their appellate brief to the SJC, the Defendants provided a chart purporting to summarize the marriage laws in other jurisdictions, including New York. A copy of the relevant page from Addendum B on New York law (the "New York Chart") is attached hereto as Exhibit 2. This summary chart did not include any "controlling appellate decisions" in New York on the direct question of marriage rights for same-sex couples. *See Cote-Whitacre*, 446 Mass. at 383 n. 1 (Marshall, C.J., concurring) (rejecting the contention that the lower court decision in *Hernandez* -- or any of the other then-pending marriage cases in the lower New York courts cited by Justice Spina at pages 361-62 -- could be a "controlling appellate decision" for purposes of §12, at least prior to the New York Court of Appeal's eventual adjudication of *Hernandez* on July 6, 2006).

The Defendants may surely point out, as they did in their summary New York Chart, that the marriage licensing statutes in New York include gender-specific terms (e.g., male/female, bride/groom) and consanguinity restrictions that track along gender lines. Yet, this Court properly rejected that type of "evidence" when it ruled in favor of the Rhode Island Plaintiffs,[10] and it should do so here as well. Chief Justice Marshall made clear that a Massachusetts court should not resort to interpretative processes when examining another State's laws pursuant to

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[10] *See* 21 Mass. L. Rptr. at 516, 2006 WL 3208758 at *4.

§12. *See, e.g., Id.* at 387 n.4 (Marshall, C.J., concurring).[11] Notwithstanding the Defendants' assertion of this point in its appellate brief, the SJC's March 30, 2006 opinion expressly held that New York is *not* a state "where same-sex marriage is expressly prohibited by statute." *Id.* at 392 and 392 n.11 (Marshall, C.J., concurring) (identifying the statutes in Maine, New Hampshire, Connecticut, Vermont, and Maine that expressly forbid same-sex couples from marriage and noting that Rhode Island and New York couples should be able to pursue selective enforcement claims because their marriages are *not* expressly prohibited by statute). Notably, even Justice Spina's opinion places New York in the category of states that do not *expressly* forbid marriage for same-sex couples by statute. *See id.* at 360 n. 9 (Spina, J., concurring) (delineating New York's Domestic Relations Law's legal impediments to marriage, none of which mention that a couple of the same sex would be prohibited by statute from marrying in New York).

Because there was no express prohibition in New York positive law against the marriages of same-sex couples being licensed in New York between May 17, 2004 and July 6, 2006, the Defendants' contention that the New York Plaintiffs (or any other New York same-sex couple who may married here between May 17, 2004 and July 6, 2006) erroneously contracted their marriage in Massachusetts in violation of §§11 or 12 is itself erroneous as a matter of Massachusetts law.

[11] In the absence of a direct statement on the question, to allow the Commonwealth to roam the law of another state to predict or divine the meaning of that state's laws, would be, in Chief Justice Marshall's words, to invite the Commonwealth "to act as the final arbiter of the penumbras of another State's 'continually evolving' common law on same-sex marriage, and only same-sex marriage," *Id.* at 384; "to cherry-pick the pronouncements as to same-sex marriage to which it will give credence," *Id.*; to do "serious damage to the principle of limited government," *Id.*; and to go beyond the intent of Section's 12 enactors whose choice of words "urge [] restraint when determining which marriages the Legislature intends to declare 'prohibited.'" *Id.* at 388.

CONCLUSION

For the foregoing reasons, New York Plaintiffs Amy Zimmerman and Tanya Wexler respectfully request that this Court direct the entry of judgment in their favor and declare that G.L. c. 207, §§11 and 12 did not render New York same-sex couples ineligible to marry in Massachusetts prior to July 6, 2006.

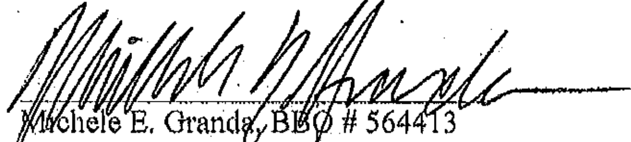
Respectfully submitted,

THE NEW YORK PLAINTIFF COUPLE

Amy Zimmerman and Tanya Wexler

By their Counsel,

GAY & LESBIAN ADVOCATES & DEFENDERS



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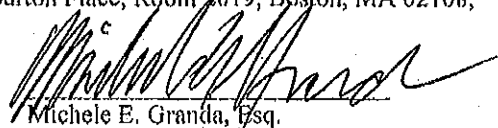
Dated: April 11, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this day, a copy of the foregoing document was served upon the attorney of record for the Defendants, Assistant Attorney General Peter Sacks, One Ashburton Place, Room 2019, Boston, MA 02108, by hand delivery and by e-mail.

4/11/07
Date



Michele E. Granda, Esq.

NEW YORK

Age: A person who is 18 years old may contract for marriage.

Age Waiver: A person who is over 16 years old, but under 18 years old, must have written consent of both parents, or guardian if both parents are dead. If one parent has been missing for more than 1 year, the other parent may present a sworn statement of consent. If the parents divorced, the consent of the custodial parent is required. If a parent has been adjudicated incompetent, a certified copy of the adjudication, and the written consent of other parent is required.

A person who is under 16 years old must have the consent of a parent or guardian, and judicial approval.

Consanguinity/affinity: A marriage is void if it is between an ancestor and a descendant, a brother and sister of either whole or half blood, and uncle and niece or an aunt and nephew.

Marriage is void if contracted by a person whose husband or wife from a former marriage is living, unless the former marriage has been annulled or legally dissolved.

Sex: Marriage between persons of the same sex is not permitted under the law of New York.

Other: A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party is: incapable of consent for want of understanding; incapable of entering into marriage from physical cause; consent to such marriage by reason of force, duress or fraud; or has been incurably mentally ill for five years or more.

Consolidated Laws
DOM – Domestic Relations
Article 2

New Mexico	"New Mexico statutes, as they currently exist, contemplate that marriage will be between a man and a woman. . . . Thus, it appears that the present policy of New Mexico is to limit marriage to a man and a woman. . . . Until the laws are changed through the legislative process or declared unconstitutional by the judicial process, the statutes limit marriage in New Mexico to a man and a woman. . . . Thus, in my judgment, no county clerk should issue a marriage license to same sex couples because those licenses would be invalid under current law." Letter from New Mexico Attorney General Patrica Madrid to State Sen. Timothy Z. Jennings, Feb. 20, 2004, available at http://pub.bna.com/fl/madridopn.htm (last visited June 23, 2005): N.M. Stat. Ann. § 40-1-4 (2004) (adopted 1862-63) All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state. See Leszinske v. Poole, 798 P.2d 1049, 1053-56 (N.M. App. 1990) (recognizing that § 40-1-4 may be subject to an exception where an out-of-state marriage violates a strong public policy of New Mexico).
New York	"State law permits only heterosexual marriage." Seymour v. Holcomb, 790 N.Y.S. 2d 858, 862-63 (N.Y. Sup. Feb. 23, 2005) (citing other N.Y. cases); see id. at 863-66 (upholding constitutionality of Domestic Relations Law (DRL) insofar as it limited marriage to opposite-sex couples). Note: the Tompkins County Supreme Court Clerk's Office states that, as of May 17, 2005, several notices of appeal had been filed. See also Hernandez v. Robles, 2005 WL 633778 at *6-*8 (N.Y. Sup. Feb. 4, 2005) (agreeing with N.Y. Attorney General's informal opinion that "both the inclusion of gender-specific terms in multiple sections of the DRL, and the historical context in which it was enacted, indicate that the Legislature did not intend to authorize same-sex marriage"; relying on similar reasoning in Goodridge); see id. at * 20-*-26 (ruling DRL unconstitutional in that regard). Note: Hernandez is on appeal to the Appellate Division, 1st Dept.. See http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=204 (last visited June 23, 2005). See Informal Opinion of the N.Y. Attorney General (Mar. 3, 2004) at 7-11 (R.A. 679-83) (also available at 2004 WL 551537 (DRL's gender-specific references and historical context indicate Legislature did not intend to authorize same-sex marriage; "even absent an express prohibition, courts could read such a restriction into the DRL to give effect to the Legislature's apparent intent"); id. at 27-28 (R.A. 699-700) (recognizing that this interpretation of DRL raised constitutional issues best resolved by courts; advising clerks not to issue marriage licenses to same-sex couples until courts adjudicated such issues). See id. at 25-28 (R.A. 697-700) (addressing separate question whether New York would recognize a same-sex marriage validly celebrated elsewhere; citing general rule that New York recognizes marriages validly celebrated elsewhere unless recognition "has been expressly prohibited by statute, or the union is abhorrent to New York's public policy"; citing Langan v. St. Vincent's Hospital of N.Y., 765 N.Y.S. 2d 411 (N.Y. Super. 2003) (concluding that New York's public policy does not preclude recognition of Vermont civil unions, for purposes of construing term "spouse" in statute allowing spouses to bring wrongful death actions); concluding that "New York presumptively requires that parties to [same-sex] unions must be treated as spouses for purposes of New York law"). Note: as noted by the N.Y. Attorney General at p. 27 (R.A. 699), Langan was appealed to the Appellate Division, 2d Dept. The appeal, No. 2003-04702, was argued on June 22, 2004; it remains under advisement as of June 9, 2005.