COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court Department
of the Trial Court

Civil Action No. 04-2656-G

SANDRA and ROBERTA COTE-WHITACRE, et al.,

Plaintiffs,

v.

DEPARTMENT OF PUBLIC HEALTH, et al.,

Defendants.

PLAINTIFF COUPLES' REPLY TO DEFENDANTS' OPPOSITION TO CLERKS' AND COUPLES' MOTIONS FOR PRELIMINARY INJUNCTIONS

The Plaintiff Couples (the "Couples") are entitled to a preliminary injunction enjoining the Defendants from enforcing G.L. c. 207, §§11-12 (the "1913 Law") as-applied to non-resident same-sex couples.

A. *Goodridge* and *Opinions of the Justices* Render Unconstitutional Any Attempt to Deny Marriage Rights to Same-Sex Couples as Same-Sex Couples.

This case "is not a matter of social policy but of constitutional interpretation." *Opinions of the Justices*, 40 Mass. 1201, 1206 (2004). *Goodridge* ruled, "We declare that barring an individual from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." 440 Mass. 309, 344. The decision canvassed all of chapter 207. *Id*. at 317. Whether the Commonwealth relies upon §11 or §12 is immaterial: given the scope of and sweeping declaration in *Goodridge*, both statutes are unconstitutional when applied to deny marriage to gay and lesbian couples.

The Commonwealth does not contest, because it cannot, the bedrock principle that the liberty and equality provisions of the Massachusetts Constitution apply equally to residents and non-residents. *Compare* Pls.Br., 12-13 with Def.Br., 54-58. All of the Couples enjoy these protections generally, and like others, they also specifically enjoy the protections in *Goodridge* and the *Opinions*

of the Justices finding and reiterating that gay people cannot be denied marriage rights. It is now the supreme law that the Commonwealth may not deny marriage rights to same-sex couples. Because the Constitution's protections do not distinguish based on residency, the attempt to do so in §§11 and 12, and to thereby deny marriage to non-resident same-sex couples, fails as a matter of law.

Defendants cannot blunt the obviously devastating impact of *Commonwealth v. Aves. See* Pls.Br., 12-13. It is a distinction without a difference that *Aves* involved the general comity principle of respect laws for other states laws and that the challenged statutes expressly incorporate the laws of other states. Def.Br., 57-58. The touchstone is the Massachusetts Constitution, which bars Massachusetts from enforcing laws of other states when those laws are unconstitutional under Massachusetts' own mandates, whether involving slavery or marriage. If the Commonwealth had enacted a "slaveholders' rights" statute allowing them to keep their "property" while in Massachusetts and thereby give effect to slavery laws, that statute, too, would have fallen under Article I of our Constitution once *Aves* decided slavery was repugnant to the Massachusetts Constitution. In the same vein, where the challenged statutes require Massachusetts to enforce other States' discriminatory marriage laws, it must give those laws no effect after *Goodridge* and the *Opinions of the Justices*.[1]

Unable to deny that the Couples enjoy state constitutional protections, the Commonwealth resorts to misreading *Goodridge* as limited to residents. The dicta in Justice Greaney's footnote citing §§11 and 12 is unavailing because all parties agree that the constitutionality of §§11 and 12 was not before the Court and was neither briefed nor argued. Moreover, in the follow-up *Opinions of the Justices*, Justice Greaney joined the other three *Goodridge* majority justices in rejecting "deference to other jurisdictions" -- the Defendants' alleged *raison d'etre* for §§11 and 12 -- as a justification for denying marriage rights to same-sex couples and substituting civil unions.

[1] In this as-applied challenge, it matters not that §11 as a facial matter distinguishes between marriages "void" in a home State or "not void" in a home State. What matters is the impact of the Commonwealth's application of the challenged statutes on otherwise qualified same-sex couples. *Compare* Def.Br., 57, 76, with Section B(3), *infra*.

Opinions of the Justices, 440 Mass. at 1208. The footnote simply cannot bear any weight either for upholding the challenged statutes or for limiting *Goodridge* to residents.[2]

Finally, the uncontroversial statements in *Goodridge* and the *Opinions of the Justices* respecting the autonomy of other States to decide their own marriage policy is not a defense of the challenged statutes. Acknowledging the power of other States to protect their own interests neither limits *Goodridge* to residents nor bolsters §§11 and 12. *Goodridge* is clear about the one central point here: Massachusetts public officials must extend the full measure of constitutional protections to all individuals (*see, e.g. Goodridge*, 440 Mass. at 312) whether they reside or visit here. *Compare* Def.Br., 55-61. As in other cases, statutes may become void because of altered circumstances. *Vigeant v. Postal Telegraph Cable Co.*, 260 Mass. 335, 341 (1927). Plainly, the altered circumstances here are rulings finding a liberty and equality right to marry for same-sex couples.

B. Defendants Are Purposely and Arbitrarily Applying The 1913 To Deny Marriage Rights to Gay and Lesbian Couples.

Defendants' reliance on the 1913 Law to deny marriage rights in Massachusetts to gay and lesbian residents of all 49 other states and U.S. territories (i) is fueled by discriminatory animus against gays and lesbians; (ii) relies upon a distorted and revisionist reading of the 1913 Law; and (iii) is open to challenge on an as-applied basis.

1. The Statutes Are Enforced With Invidious Motivation.

While the Defendants have leeway in selecting enforcement priorities, their application of the law is always subject to constitutional review. Included within application of the law is the very choice about whether to enforce a law or not. The "element of invidious discrimination" changes everything. *Bachrach v. Sec'y of the Comm.*, 382 Mass. 268, 274-75 (1981). "As *Yick Wo. v. Hopkins* and its progeny show, discriminatory intent may be gathered from the actual

[2] While the *Goodridge* decision twice uses the term "residents", it is replete with references to "persons" and "individuals." 440 Mass. at 312 (holding applied "to all individuals" deserving of protections under the Massachusetts

administration of a facially neutral law. *New York Times Co. v. Comm'r of Revenue*, 427 Mass. 399, 406 (1998).

Defendants urge this Court to take its eye off of the ball. Def.Br., 37. The fact that the challenged laws were not enforced for decades, despite modest differences in States' marriage laws, is extremely telling in this as-applied challenge.[3] As Defendants readily concede, including at page 6 of their brief, it was only the possible violations of §11 by same-sex couples that were deemed intolerable and sparked enforcement of this previously moribund statute. Enforcing the challenged laws only upon the advent of marriage for same-sex couples but not because of other violations condemns it from the outset. As an equal protection matter, it raises "the inevitable inference that the disadvantage imposed is born of animosity . . ." *Romer v. Evans*, 517 U.S. 620, 634 (1996), which is not a legitimate state interest. *Id*. at 635 (invalidating provision disadvantaging gay people).

The Defendants' suggestion that this Court focus only on present enforcement of the statute is not correct and is ultimately self-defeating. To be sure, marriage limitations based on age and consanguinity are now "on the list" (although non-gay couples have many more options for marriage than do gay people at present), but that is irrelevant. The goal and "certain consequences" of applying §§11 and 12 was to deny marriage to same-sex couples from all 49 states. *School Cte. Of Springfield v. Bd. of Educ.*, 366 Mass. 315, 329 n.21 (1974). In the Springfield case, local officials were barred from relying on a state law forbidding busing as a remedy for school segregation. *Id*. at 327. Had they been allowed to eliminate busing from their plans, it "would [have] tend[ed] to reverse or impede the progress" toward desegregation and would have violated the state Constitution. *Id*. In the same vein, Defendants cannot rely on §§11 and 12 when the certain consequences are to again deny gay people the right to marry. In the face

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Constitution, including "every person properly in its reach").

[3] *See* Def.Br., 4; DPH Instructions, App. 17, frame 26; AG Cease & Desist Letter, App. 21, p. 3.

of the Defendants' clear intent to discriminate against gay and lesbian couples, the fact that some non-gay people may be barred from marrying as well does not save the law from this as-applied challenge. *Compare Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (where facially neutral state constitutional provision was impermissibly motivated based on race, the fact that it also discriminated against poor whites did not save it). In sum, the Commonwealth's enforcement of the 1913 Law is a classic example of a law enforced with "with an evil eye and an unequal hand." *Yick Wo v. Lee*, 118 U.S. 356, 373-74 (1886).

2. The Commonwealth's Arguments Regarding §12 Are Both A Significant Concession and a Post Hoc Justification for Denying Marriage Rights.

Having no other choice in this litigation, the Commonwealth concedes that, as a matter of statutory construction, the term "void" in §11 would only prevent the marriages of some same-sex couples, but not all. Def.Br., 12-13. At the very least, this concession means that the six Plaintiff Couples from "non-void" States[4] will succeed on the merits because (i) they are not subject to §11 and (ii) the Commonwealth cannot substantiate its tortured reading of §12 to bar marriage to persons from "non-void" States.

In order to bar the door to <u>all</u> non-resident same-sex couples, the Commonwealth must press an incongruous interpretation of the 1913 Law: claiming that §11 and §12 have different applications *vis-à-vis* different States' laws.[5] *See* Def.Br., 12-13, 22-27. Yet, following the lead of Governor Romney, the Defendants forced municipal clerks to bar 100% of all non-resident gay and lesbian couples under the auspices of §11. *See* DPH Instructions, App. 17, frames 23-26, 39.[6] Facing this unwarranted application of §11, Defendants seek to justify their actions by converting

[4] Notably, Plaintiffs Michael Thorne and James Theberge from Maine have standing to challenge §11 because their marriage in Maine would be "void" under §11. *See* 19A Me. St. Rev. Ann. §§701 and 751 (declaring "void" marriages prohibited in §701 such as a marriage by a same-sex couple).

[5] With their Amended Complaint, the Couples' standing (under §§11 or 12, or both), is unassailable, even under the Commonwealth's interpretation of the 1913 Law.

[6] In the DPH training, Governor Romney's counsel explained: "Section 11 means that if a person lives and intends to continue to live in another state or jurisdiction and cannot legally get married in that state or jurisdiction, her marriage 'shall be null and void.'" App. 17, frame 24.

§12 into a substantive bar to marriage for same-sex couples from the remaining "non-void" States.[7] Toward this end, the Commonwealth seizes upon the term "prohibited" in §12 to strengthen the 1913 Law's prohibitory effect. Although this reading has the desired effect of effectuating the complete exclusion of non-resident same-sex couples, this post hoc interpretation of §12 is untenable. The provisions of Chapter 207 "must be construed, where capable, so as to constitute a harmonious whole consistent with the legislative purpose." *See Labor Relations Commission v. Board of Selectman of Dracut*, 374 Mass. 619, 624 (1978) (citation omitted). Yet, the Commonwealth's reading of §12 renders §11 meaningless. Section 12 merely exists to enforce §11; it cannot extend the law's reach to preclude couples from "non-void" states too.

Sections 11 and 12 are part of a (now withdrawn) uniform law called the Uniform Marriage Evasion Act. This Act also amended G.L. c. 207, §10 and enacted G.L. c. 207 §§13, and 50. The development of the statutory language by the Commissioners on Uniform State Laws demonstrates a clear intent to bring within its substantive provisions only marriages that are void, not merely prohibited. In the course of drafting the marriage evasion statue, which was the only portion of the law under consideration initially, the Committee on Marriages and Divorce first proposed that the evasion statute directed at residents (now §10) nullify any out-of-state marriage if the residents' marriage would have violated any laws "forbidding or declaring void" the marriage in-state.[8] The language of the Act ultimately passed by the Conference and recommended to the States, however, changed the words "forbidding or declaring void" to "prohibited and declared void." *See* Report, p. 5 (section 1). In addition, the Act passed by the Conference added a reverse evasion statute directed at non-residents (later adopted verbatim by

[7] Prior to this litigation, the Attorney General also contended that §11 was the operative provision and that "void" did not necessarily have a meaning distinct from "prohibited": "Clerks have been placed on notice by the Registrar, under his statutory authority, that same-sex marriage is void or prohibited in all other states, i.e., that parties from those states 'are prohibited by section eleven from intermarrying[.]' G.L. c. 207, §50." *See* AG Cease & Desist Ltr., App. 21, p. 3.

[8] See Proceedings of the Twenty-Second Annual Conference of Commissioners on Uniform State Laws, 1912-1913, Report of the Committee on Marriage and Divorce, p. 25, and initial draft of a bill at p. 126 (emphasis added), App. 29.

the Legislature as §11) that prohibited marriages that "would be void" in the parties' home state. The change in the language of the evasion statute from "forbidden or declared void" to "prohibited and declared void," together with the use of the word "void" in the reverse evasion statute, evinces a deliberate and conscious choice that to come within the scope of these statutes a marriage must not merely be prohibited, but also void.

Although the use of the word "prohibited" in §12, viewed in isolation, appears to conflict with the use of the word "void" in §11, other provisions of c. 207 clarify that §12 refers back to the substantive provisions of §11. *See, e.g.,* G.L. c. 207, §50 (providing for penalties upon an "official issuing a certificate of notice of intention of marriage knowing that the parties are *prohibited by Section eleven* from intermarrying…") (emphasis added). The use of the word "prohibited" in §50, just as in §12, refers back to the substantive prohibition of §11 – *i.e.*, that a marriage be "void" in the home state.

Moreover, the Commonwealth's reading of §12 renders §11 meaningless. The Commonwealth contends that municipal clerks should not have issued licenses to the five married Couples under §12 because their marriages are "prohibited" in their home state.[9] Even though the marriages are not "void" under §11, a prohibited marriage that the clerks should have stopped but did not is of questionable validity in the Commonwealth's eyes.[10] Thus, according to the Commonwealth, just because the clerk extends a license does not mean that one's marriage is *per se* valid or beyond challenge, even if the applicants were from a "non-void" state like the five married Couples. Def.Br. at 12-13. Accordingly, the Commonwealth is reading §12 as a

[9] The Commonwealth states that the licenses provided to the five Plaintiff Couples from the "non-void" states of New York, Connecticut, Rhode Island, and Vermont violate §12 and refuses to concede the validity or the legality of these marriages, although they admit that §11 does not affect them. *See* Def.Br., 8 n.6, 12-13. *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.") (emphasis added), App. 44.

prohibition on all marriages: not just preventing clerks from issuing licenses, but also invalidating the marriages themselves. If that is so, then §11 serves absolutely no purpose.

3. An As-Applied Challenge to the Constitutionality of the 1913 Law is Appropriate.

The Commonwealth's rechacterization of the comparator classes at issue here is beside the point in this as-applied challenge. *See supra*, note 1. That the 1913 Law does not explicitly classify between groups is irrelevant because an as-applied challenge focuses on the classifications created by the government's discriminatory application of the statute, not by the terms of the statute itself.[11] *See Commonwealth v. Chou*, 433 Mass. 229, 238 (2001) (as-applied challenge questions the unequal operation of an otherwise valid statute against a class of persons); *Mass. Prisoners Ass'n Political Action Comm. v. the Acting Governor*, 435 Mass. 811 (2002) (considering constitutionality of restriction on soliciting contributions in government buildings as applied to prisoners).[12] Notably, the *Goodridge* Court ruled unconstitutional the Commonwealth's application of the marriage statutes to exclude otherwise qualified same-sex couples from marriage even though the marriage statutes themselves did not explicitly exclude same-sex couples. Similarly, the Couples challenge the application of §11 to them as same-sex couples; and whether the statute expressly singles them out is irrelevant.

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[10] Section 12 concerns the clerks' responsibilities under the licensing statutes. A clerk's violation of §12 has no effect on the validity of any marriage itself. The only statute affecting the validity of a non-resident marriage in this context is §11.

[11] Thus, even if, *arguendo*, the Commonwealth's administration of §11 treats same-sex couples the same as all other out-of-state couples on a procedural level, the Commonwealth's importation of the discriminatory laws of the other states makes §11's application to same-sex couples different. If the Commonwealth is going to apply these laws under §11, then the Commonwealth is responsible for the ways in which the sister States' laws treat same-sex couples differently.

[12] *See also Neff v. Comm'r of Dep't of Indus. Accidents*, 421 Mass. 70, 86 (1995) (O'Connor, J., dissenting); *Hall-Omar Baking Co. v. Comm'r of Labor & Ind.*, 344 Mass. 695, 709 (1962) (statute pertaining to licensing of "hawkers" and "peddlers" as applied to a bakery company selling its products at retail through driver-salesmen was unconstitutional); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447 (1985) (addressing constitutionality of zoning ordinance as applied to specific home for mentally retarded persons rather than validity of ordinance's provisions in general); *McGuire v. Reilly*, 230 F. Supp. 2d 189, 192 (D. Mass. 2002) (in challenge to application of statute regulating speech near reproductive health facilities to exclude anti-choice protesters only, question "is whether the Act, as applied to a real and concrete factual setting," violates the constitutional rights of some, even while others' rights are not being infringed); *id* , at 191 n.5 ("In an 'as-applied' challenge, a plaintiff contends that application of a statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional, … and asks only that the reviewing court declare the challenged statute unconstitutional on the facts of the particular case." (internal quotations omitted)).

C. The Commonwealth's Arguments Do Not Justify the Present Discrimination Against Non-Residents, Even if the Court Were to Consider Them.

"Rationality review is not 'toothless.'" *Murphy v. Comm. of Comm. of Dep't of Indus. Accs.*, 415 Mass. 218, 233 (1993) (cited in *Goodridge*, 440 Mass. at 330 n. 20). Even this lowest level of equal protection analysis requires the Court to look carefully at the purpose to be served by the statute in question: "the classification [must] serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *English v. New England Med. Ctr.*, 405 Mass. 423, 428 (1989) (cited in *Goodridge*, 440 Mass. at 330).

1. The Commonwealth Has No Legitimate Interest in Restricting Massachusetts Licenses to Only Those Who Will Not be Discriminated Against Elsewhere.

The Commonwealth's assertion that it can restrict marriage licenses to protect the regulation of marriage is hopelessly circular. Not only will States and other entities sort out these issues in accordance with their own law and constitutional guarantees, but the Supreme Judicial Court rejected this very argument in *Opinions of the Justices,* 440 Mass. at 1208. Even if "deference to other jurisdictions" motivated that law (*i.e.*, the civil union bill) and non-recognition of marriages for Massachusetts residents was an established fact, that was no justification for denying same-sex couples the right to marry in Massachusetts. *Id.*

The SJC, in *Goodridge* and *Opinions of the Justices*, was able to reconcile the requirements of the Massachusetts Constitution and the autonomy of other States because the other States have their own laws that should be adequate to protect their desired interests. Invalidating the 1913 Law will not interfere with any other State's laws. The Commonwealth's contention that non-residents must forego their right to the protection of the laws while in Massachusetts in order to guarantee the autonomy of the other States is not rational. The harm alleged here -- that married same-sex couples will be released into a world that must confront the validity of their Massachusetts marriage licenses -- sprang from *Goodridge* and the invalidation of the 1913 Law presents nothing new.

The Commonwealth's asserted interest of ensuring respect for its licenses is not connected to the statutory language of §§ 11 and 12 or its enforcement actions. Sections 11 and 12 look to the prohibitions embedded in the other State's laws, not to whether the other States will recognize a marriage validly entered and celebrated out-of-state. In fact, Massachusetts has yet to inquire as to whether any sister State will respect a Massachusetts marriage of same-sex couples. Governor Romney sought to determine whether marriages by same-sex couples were "permitted" in the sister States, not whether the States would recognize the marriages once validly licensed and certified. Then, confronted with the knowledge that several states like Rhode Island, New York, and Connecticut might respect the Massachusetts marriages of their resident same-sex couples, the Governor's spokesman made clear that the opinions of other attorneys general to that effect would "not alter Romney's position that nonresidents cannot legally marry in Massachusetts. . ." *See, e.g.*, Raphael Lewis & Stephanie Ebbert, *Wedding Day*, Boston Globe, 5/18/04, at A1, App.50.

Consistent with *Goodridge*'s formulation that marriage involves "two willing spouses and an approving state," Massachusetts can be the "approving state" for residents and non-residents alike. 440 Mass. at 321. Massachusetts has an obligation to provide the benefits, rights and responsibilities of marriage to those receiving a Massachusetts marriage license. Although Massachusetts cannot control how other States respect persons legally married within Massachusetts's borders, while in Massachusetts, there should be no question that non-resident married couples have the right to be treated equally, *e.g.,* visiting each other in the emergency room, claiming the remains of the other in the event of a tragedy, or simply obtaining joint insurance for a vacation home. Many of the Couples have deep connections to Massachusetts and still spend significant time within the state's borders. Given the tangible and intangible nature of marriage's protections, the Commonwealth's contention that a Massachusetts marriage license can only have value if it is respected by two States (*i.e.*, Massachusetts and another state) is contrary to *Goodridge* and denigrates the inherent nature of marriage.

Finally, for Massachusetts to place its own stamp of approval on the discriminatory laws of the other States irrationally serves to bolster the idea that the marriages of same-sex couples are inferior or unworthy. By these actions, Massachusetts makes it harder for its own same-sex couples to receive recognition of their Massachusetts marriage when outside the Commonwealth's borders.

2. Rank Speculation about Retaliation Against Massachusetts Residents Cannot Justify the Denial of Marriage Rights for Non-Resident Same-Sex Couples.

The Commonwealth's claim that it is rational to bar out-of-state same-sex couples from marrying to prevent "officious intermeddling" in the marriage policies of other States and to blunt possible retaliation against Massachusetts residents does not justify different treatment for non-resident same-sex couples. In addition to the reasons set forth above, this proposition also fails for three additional reasons. First, any retaliation or negative collateral consequences is "more fanciful than real." *Coffee-Rich, Inc. v. Comm. of Pub. Health*, 348 Mass. 414, 424 (1965). The other States enacted their own discriminatory policies both before and after *Goodridge*; there is no conceivable basis for believing that enforcement of the 1913 Law will make any difference whatsoever. Second, fear of speculative retaliation has no limiting principle; any hypothetical possibility of retaliation could constitute a legitimate reason for denying rights. Third, under the Privileges and Immunities Clause, the desire to fence out undesirable groups, even for the sole reason of protecting the Commonwealth's own residents, is the very harm the Clause was designed to protect against. *See Saenz v. Roe*, 526 U.S. 489, 499 n.11 (1999).

D. The Privileges and Immunities Prevents the Commonwealth from Enforcing the 1913 Law.

The Privileges and Immunities Clause ("the Clause") is designed to ensure that the United States functions as one nation by requiring each State to treat citizens of the other forty-nine sister States fairly when they are within their borders. *See Toomer v. Witsell,* 334 U.S. 385, 396 (1948) ("It was designed to insure to a citizen of State A who ventures into State B the same privileges

which the citizens of State B enjoy."). The Clause's "fair treatment" principle promotes national unity and harmony. Yet, the "comity" the Commonwealth seeks to promote -- guaranteeing enforcement of the discriminatory laws of the sister States -- is directly at odds with the Clause's requirement of equal treatment of non-residents within any given State. Although the Commonwealth has seemingly anointed itself overseer of interstate relations and has unilaterally elected to "enhance" interstate relations by advancing the interests of the sister States over the competing interests of non-residents, the Clause does not allow disparate treatment of non-residents in this fashion or for these reasons.

1. Differential treatment of non-residents triggers the Clause's protections.

State action that treats residents and nonresidents differently with respect to a state-given benefit triggers analysis under the Clause. Massachusetts marriage laws blatantly distinguish between residents and nonresidents. Only nonresidents are subject to §11. To marry in Massachusetts, residents must satisfy all licensing requirements of Massachusetts law. Yet, nonresidents must satisfy all licensing requirements of Massachusetts law, and in addition, on account of §§11-12, they must also satisfy all licensing requirements of their home state. Thus, non-residents are treated differently from residents because only non-residents are subject to the prohibitory laws identified in the Commonwealth's new list of legal impediments. *See* App. 25. That some non-residents are allowed to marry under §§11-12 does not excuse the fact that all out-of-state residents are being treated differently.[13] In sum, because Massachusetts marriage laws subject residents and nonresidents to different statutes and eligibility tests, §§11-12 trigger a constitutional inquiry under the Clause.

2. Marriage is protected under the Clause as a privilege of state citizenship.

[13] The Clause is concerned with the extra-burden placed on non-residents, not the outcome of the extra test. A law that completely prevents non-residents from working in Massachusetts implicates the Clause just as would a law that makes non-residents' ability to work in Massachusetts contingent upon their home state's express authorization of marriage for same-sex couples. Due to the contingency, the second statute targets less than all out-of-staters for this discriminatory

The Commonwealth misrepresents the nature of the state benefits protected by the Clause. The Clause is designed "to bind the citizens of the several States socially and politically as well as commercially." *See* Laurence Tribe, American Constitutional Law (3d ed.), p. 1260. The Commonwealth would ask this Court to believe that there are only four categories of privileges. What the Commonwealth fails to mention is that the Clause covers a much broader range of activities and rights. In *Corfield v. Coryell* 6 F. Cas. 546 (No. 3,230) (CC ED Pa. 1825), the Supreme Court recited a list of activities deserving protection under the Clause which were recently reaffirmed in *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 281 n.10 (1985). These rights included "those privileges and immunities which are . . . fundamental. . .[such as] the enjoyment of life and liberty . . . and [the right] to pursue and obtain happiness and safety." *Corfield* 6 F. Cas. at 552. Marriage is unquestionably a privilege protected by the Clause.[14]

3. The Commonwealth has no substantial reason for continuing to enforce §11 and does not claim that nonresidents or same-sex couples are a peculiar source of evil.

Because §§11 and 12 treat non-residents differently from residents and because marriage is a protected interest under the Clause, the Commonwealth must satisfy the heightened scrutiny requirements triggered by the Clause. *See Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298-99 (1998) (requiring the offending state to demonstrate that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.")[15] The Commonwealth's justifications

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burden, but like §§11-12, it targets only out-of-staters for that burden. By placing an extra burden on non-residents, Massachusetts is providing different access to the privileges it offers within the State.

[14] The Couples agree that what is fundamental under the Clause does not have to be a fundamental right under the Fourteenth Amendment. Indeed, basic and essential things affecting interstate relations are protected by the Clause even if they may not be "fundamental" in other constitutional contexts. As a factual matter, however, the SJC has recognized the fundamental importance of marriage in *Goodridge,* equating exclusion from marriage to exclusion from the full range of human experiences. *Goodridge*, 440 Mass. at 326.

[15] To prove a substantial reason, the Commonwealth must demonstrate that the excluded non-residents are "a peculiar source of evil" at which these statutes are aimed. *Toomer*, 334 U.S. at 398. Yet, the Commonwealth cannot argue that same-sex couples themselves are the source of evil.

fail this heightened constitutional scrutiny for the same reasons that its justifications fail to even satisfy rational review under the Massachusetts Constitution. *See* Section C, *supra*.

In fact, the Commonwealth's defense to its discriminatory treatment of non-residents highlights the very concerns the Clause is intended to protect. The Commonwealth cannot justify what it is doing to non-residents based upon the laws of their home States. Under the Clause, the constitutionality of Massachusetts's statutes affecting non-residents cannot "depend upon the present configuration of the statutes of another State." *Lunding*, 522 U.S. at 314; *Austin v. New Hampshire*, 420 U.S. 656, 667-68 (1975).[16] The fact that other States restrict the rights of their own citizens does not excuse Massachusetts from its own obligation under the Clause to treat non-residents equally when they are in Massachusetts's territory. Similarly, the fact that a sister State may consent to discrimination against its residents while in Massachusetts territory does not promote comity within the meaning of the Clause. *See Travis*, 252 U.S. at 82 ("A State may not barter away the right … to enjoy the privileges and immunities of citizens when they go into other States."). Massachusetts cannot regulate interstate harmony by forcing non-residents to bear the brunt of the discrimination.

Massachusetts should not be able to elevate its power as a single State to determine what is best for the Nation as a whole. Nor is it well situated to make political or legal calculations for the Nation by, for example, predicting what the laws of each State require or how those laws are best enforced. In fact, by taking matters into its own hands, Massachusetts finds itself prohibiting marriages that other States have said they would respect. Massachusetts cannot pursue its purported interests in license regulations in this way because there are less restrictive alternatives to accomplish that interest than discriminating against all non-residents (*e.g.*, determining which states would respect the marriages and license accordingly).

[16] *See also* Tribe, §6-37 ("[T]he law of a challengers home state or former home state is irrelevant . . . For a state to subdivide visitors … into classes based upon the state from which [the visitor] came … and to accord better or worse

E. The Couples Have Demonstrated the Irreparable Harm They Face from Defendants' Denial of Marriage Rights

The Couples have proved irreparable harm – not only is there a constitutional violation here (which is *per se* irreparable); but the couples are also being denied the tangible and intangible benefits available to them while in Massachusetts and elsewhere.[17] The Defendants, collectively, have indicated a clear intent to treat the licenses issued to the five Couples marriages differently than other marriages. It is no defense to isolate one defendant, the Registrar, and assert that he has yet to formally disregard these licenses. The Defendants have put the five Couples' marriages in jeopardy by questioning their validity. Def. Br., 8 n.6. Simply because the Defendants have asserted this invalidity out of whole cloth -- without reference to or reliance upon any legal authority -- does not mean that the five Couples need to live with the uncertainty the Defendants have presently manufactured.[18]

CONCLUSION

For the foregoing reasons, the Couples respectfully request that this Court grant their Motion for a Preliminary Injunction.

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treatment to each visitor … based on the state from which that visitor belongs, would be incompatible with the Constitution of 'a more perfect Union' and, in particular, with . . . Article IV's Privileges and Immunities …").

[17] For example, Plaintiffs Thorne and Theberge, the Maine couple, have deep social, legal, and economic roots in Massachusetts: they visit family and friends here regularly, their pension funds are managed here, and they transact professional and personal business in the Commonwealth. *See* Supplemental Affidavit of Thorne and Theberge. Like the other Couples, their Massachusetts marriage, if allowed, will provide them with real social and legal protections while in Massachusetts.

[18] The Commonwealth touts the fact that the Couples can marry in certain Canadian Provinces. Yet, it can be no answer to state and federal constitutional violations or irreparable harm that the right sought can be provided elsewhere in the world. Through their claims, the Couples assert their right to enjoy this benefit within the Commonwealth and within the United States.

Respectfully submitted,

THE PLAINTIFF COUPLES

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Dated: July __, 2004

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party by e-mail and first class mail hand on July 23, 2004.

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Michele Granda, Esq.