COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

DOUGLAS JOHNSTONE, CLERK OF THE TOWN OF PROVINCETOWN, et al., Plaintiffs, v. THOMAS REILLY, ATTORNEY GENERAL, et al., Defendants.	CIVIL ACTION NO. 04-2655-G
SANDRA AND ROBERTA COTE-WHITACRE, et al., Plaintiffs, v. DEPARTMENT OF PUBLIC HEALTH, et al., Defendants.	CIVIL ACTION NO. 04-2656-H

DEFENDANTS' SUR-REPLY MEMORANDUM IN OPPOSITION TO CLERKS' AND COUPLES' MOTIONS FOR PRELIMINARY INJUNCTIONS

The state Registrar of Vital Records and Statistics and his co-defendants submit this memorandum to demonstrate that, even after the filing of their reply materials, (1) neither the Clerks nor the Couples have shown sufficient risk of imminent irreparable harm to warrant a preliminary injunction; (2) the Clerks still lack authority or standing to assert, or any likelihood of success on, their constitutional claims; and (3) the Couples have not shown a likelihood of

success on either their constitutional or statutory claims. Finally, plaintiffs have failed to carry their burden of showing that the public interest would be served, or at least not harmed, by issuance of the injunctions. For ease of reference, the Registrar will follow the same order of argument here as he followed in his original opposition to the Clerks' and Couples' motions.

I. NEITHER THE CLERKS NOR THE COUPLES ALLEGE SUFFICIENT IMMINENT IRREPARABLE HARM TO WARRANT ISSUANCE OF PRELIMINARY INJUNCTIONS.

The mere claim of a constitutional violation does not by itself establish irreparable harm,[1] and the Clerks' and Couples' more specific claims of harm fail on the facts and the law.

A. The Clerks Fail to Show Imminent Irreparable Harm.

The Clerks argue that absent an injunction, they "will be unable to discharge their oath to 'support the Constitution of the Commonwealth' without risking criminal prosecution." Clerks' Reply at 13. This is insufficient to show imminent irreparable harm warranting an injunction. First, it is primarily a mere re-labeling of the Clerks' claim that they are likely to win on the

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[1] Cases holding that deprivation of a constitutional right is per se irreparable harm "are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief." Public Service Co. of New Hampshire v. Town of West Newbury, 835 F.2d 380, 382 (1st Cir. 1987) (holding that alleged denial of procedural due process was not per se irreparable harm). The Supreme Judicial Court has not to the Registrar's knowledge adopted any broader principle; T&D Video, Inc. v. City of Revere, 423 Mass. 577, 582 (1996), originally cited by the Couples (Memo at 40) for the proposition that any constitutional violation equated to irreparable harm, was a First Amendment case, relied solely on other such cases, and said nothing about other types of constitutional violations. The large majority of the cases discussed in the Couples' other main authority, 11A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2948.1 at 161 (1995), appear to fall within the categories described in Public Service Co.. At issue here, in contrast, is not any constitutional right to marry, but equal protection and due process challenges to statutes that restrict marriage and are alleged merely to fail rational basis review, or are alleged to be

merits, rather than a showing on the separate issue of imminent irreparable harm pending a ruling on the merits. Second, the Clerks are plainly wrong in arguing that the risk of criminal prosecution here presents the "very special circumstances" they acknowledge are the type of irreparable harm necessary to warrant an injunction. The Clerks take the extreme position that such "very special circumstances" are present here because "enforcement authorities [are] pursuing 'a deliberate pattern and practice of constitutional violations[.]'" Clerks' Reply at 14 (quoting Dunigan Enterprises, Inc. v. District Attorney for the Northern District, 11 Mass. App. Ct. 254, 257 (1981)). But Dunigan relied on Norcisa v. Board of Selectmen of Provincetown, 368 Mass. 161 (1975), where the court gave clear examples of the types of prosecutorial action that would,[2] and would not,[3] warrant injunctive relief. Dunigan itself gave a similar example of

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selectively enforced based on animus against a non-suspect class.

[2] The Norcisa court, 368 Mass. at 168, found "instructive" a comparison of its holdings in Kenyon v. Chicopee, 320 Mass. 528 (1946) (injunctive relief warranted) to its holding in Shuman v. Gilbert, 229 Mass. 225 (1918) (injunctive relief not warranted). The Norcisa court (368 Mass. at 170) described Kenyon as follows:

> In the Kenyon case . . . we reversed interlocutory decrees sustaining demurrers where the bill alleged that members of Jehovah's Witnesses had been repeatedly, on different dates, arrested, prosecuted, and convicted under an unconstitutional ordinance, prohibiting distribution of handbills, that on at least two occasions a defendant judge had convicted some of the plaintiffs despite being shown United States Supreme Court decisions holding such an ordinance unconstitutional, that the defendants well knew that the ordinances were unconstitutional and void, that the plaintiffs' means of paying bail fees and of posting bail and appeal bonds were exhausted, and that the defendants had threatened to and would continue to make false arrests, all to the irreparable damage of the plaintiffs' attempts to exercise their constitutional rights. In these circumstances, we held that an injunction against further prosecutions could properly issue, if the allegations were ultimately proved.

[3] The Norcisa court described Shuman as follows (368 Mass. at 168-69, quoting Shuman; emphasis added):

> In the Shuman case, six merchants alleged that the defendant chief of

a case where such relief was appropriate.[4] This case is so far from the facts of the two cases finding relief appropriate as to make further discussion unnecessary.

The Clerks further note that clerks in other states have been sued by same-sex couples challenging the denial of marriage licenses. Clerks' Reply at 13 n.11. That says nothing about the likelihood of such suits against the plaintiff Clerks here, where the Clerks' suit clearly and publicly announces that but for the Registrar's actions they would issue licenses to out-of-state same-sex couples, and none of the Clerks has been threatened with any litigation by such a couple. Instead, the Couples have sued the Registrar. The Clerks' professed fear of civil suits

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> police of Northampton threatened to prosecute them for conducting a business without a license, which they claimed they were not obligated to obtain. The plaintiffs' bill sought to make out a case of irreparable damage and inadequacy of legal remedy by alleging, inter alia, that it would take several months to obtain a decision on the case from an appellate court and that in the intervening period the loss of profits and advantageous business relations would cause the plaintiffs great and irreparable damage. To these averments, a demurrer was sustained. This court upheld the sustaining of the demurrer. After noting that in the event of multiple, oppressive, and wrongful prosecutions, an injunction might properly issue, we said: 'A possibility that complaints may be lodged against six persons is not enough under these circumstances to make out a case of multiplicity. The allegations as to repeated complaints are not sufficient to warrant the inference that the courts of this commonwealth will countenance continued and oppressive prosecutions when once a genuine test case open to fair question has been presented and is on its way to final decision.'

[4] The Dunigan court pointed to Dombrowski v. Pfister, 380 U.S. 479 (1965), where, in the words of the Dunigan court (11 Mass. App. Ct. at 260 n.12), an injunction issued because:

> [T]he plaintiffs offered to prove that the prosecutorial authorities threatened to enforce statutes against the plaintiffs without any expectation of securing valid convictions, that despite a summary vacation of search and arrest warrants by a State judge for lack of probable cause, the prosecutorial authorities continued to threaten new indictments and prosecutions based on the evidence ordered suppressed by the State judge, and that the prosecutorial authorities were engaging in a plan of arrests, seizures, and threats of prosecution for the sole purpose of harassing the plaintiffs in order to discourage them from attempting to vindicate important constitutional rights.

does not show that any irreparable harm is imminent. See Registrar's Opposition at 17-18.

The Clerks finally repeat their professed fear of public condemnation for their role in enforcing §§ 11 and 12. But the fact that a public opinion poll in a single newspaper found (prior to the Clerks' filing suit with Provincetown's Clerk as the lead plaintiff) that 80% of respondents believed Provincetown should resume marrying out-of-state same-sex couples (Clerks' Reply at 14) hardly shows that those respondents believe Provincetown's Clerk to be homophobic or otherwise worthy of condemnation. In short, the Clerks face no imminent irreparable harm.

B. The Couples Fail to Show Sufficient Imminent Irreparable Harm.

The only thing new in the Couples' reply on the issue of irreparable harm (Couples' Reply at 15) is the citation to the Affidavit of Michael Thorne and James Theberge, in which that Maine couple details their continuing contacts with Massachusetts and the harm they say might befall them in Massachusetts if they are not allowed to marry immediately. That asserted harm relates only to them (and thus could not support preliminary relief for the other Couples), and the Court may (and should) evaluate it to determine its imminence and irreparability.

Moreover, even if the Court found Thorne and Theberge's assertions otherwise sufficient –and most especially if the Court somehow found that the other Couples had also shown imminent irreparable harm–the Court should balance against this circumstance the fact that the Couples are effectively seeking final relief, which a preliminary injunction should not grant. In the Matter of McKnight, 406 Mass. 787, 792 & n.4, 800-02 (1990); see Registrar's Opposition at 27 n.30. If a preliminary injunction issues allowing them to marry, and then the Registrar prevails on the merits, there is no clear avenue for undoing the Massachusetts consequences of

what would have been a marriage in violation of Massachusetts law.[5] There is no express procedure in G.L. c. 207 for the Registrar (as opposed to a spouse, in a suit against the other under § 14) to initiate a proceeding to determine the validity or legality of a marriage.

For this reason, "the [Court] should seek to minimize the harm that final relief cannot redress, by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party." Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980) (citation and internal quotation omitted; emphasis added). The Clerks are correct that the "status quo" to be preserved is "the last uncontested status which preceded the pending controversy," Clerks' Reply at 11 (quoting United Steelworkers v. Textron, Inc., 836 F. 2d 6, 10 (1st Cir. 1987)), but they ignore reality in going on to assert that the "last uncontested status" was "the state of affairs that existed before the defendants implemented their new enforcement regime." The last uncontested status was that out-of-state same-sex couples could not marry here–that was the status prior to Goodridge; it was the status when Goodridge was issued with Justice Greaney's footnote recognizing the effect of §§ 11 and 12, see 440 Mass. at 348 n.4; and it was the status before Goodridge took effect, when the Registrar made clear his view that §§ 11 and 12 barred such marriages. An injunction would upset this status quo.

Although the Couples are correct (Reply at 15 n.18) that the availability of Canadian marriages is not relevant to the merits of their claims here, it is relevant to whether a preliminary

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[5] If a preliminary injunction issued allowing Thorne and Theberge to marry here, and § 11 were later upheld on the merits, Thorne and Theberge's marriage would be void by the terms of § 11 (see Part III.A infra), although the consequences of such a ruling for any marriage-dependent events that had occurred in the interim are difficult to catalogue here. Moreover, the marriages of the other two Couples who have not yet married (see Registrar's Opposition at nn.6,

injunction is necessary to prevent imminent irreparable harm. On this record it is undisputed that, even without any action by this Court, the Couples could immediately marry in Canada and that those marriages would obtain the same degree of recognition in Massachusetts (and any other state) as if they had been performed here. The Couples may thus protect their interests, without the Court disturbing the status quo by requiring public officials to take action that might later be found to have violated Massachusetts law and that there is no clear avenue for undoing.

II. THE CLERKS ARE UNLIKELY TO SUCCEED ON THE MERITS.

The Clerks are unlikely to succeed on the merits, both because they lack authority and standing to assert an equal protection claim and because the claim is factually and legally flawed.

A. The Clerks May Not Assert Their Constitutional Claim.

The Clerks' various attempts to avoid the Spence doctrine are unsuccessful. In Spence v. Boston Edison Co., 390 Mass. 604, 610 (1983), the court recognized a "'long-standing and far-reaching prohibition on constitutional challenges by governmental entities to acts of their creator State,'" including equal protection challenges to the actions of state officials, and the court has "since applied the Spence doctrine in a wide range of cases." MBTA v. Auditor of the Commonwealth, 430 Mass. 783, 792 (2000) (quoting Spence; citing cases). If, as the Clerks implausibly suggest, local officials may evade this "long-standing and far-reaching prohibition," "applied . . . in a wide range of cases," simply by pleading a declaratory judgment claim, the Spence doctrine would be reduced to a nullity. The courts have applied Spence to bar declaratory judgment actions, and indeed the Supreme Judicial Court has made clear that Spence applies regardless of the form of the action.[6] Even if local officials believe state actions affecting

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12), would not automatically be void if contracted here in violation of Massachusetts law.

[6] In Trustees of Worcester State Hosp. v. The Governor, 395 Mass. 377, 380 (1985), in

those officials are unconstitutional–i.e., even if there is an "actual controversy" over whether the state actions at issue may permissibly affect local officials' performance of their duties–Spence still bars the challenge. The reason is that local officials in their official capacities simply do not have equal protection rights against state government. Spence, 390 Mass. at 607-10. Thus the Clerks' equal protection claim, to the extent they are attempting to assert their own rights, is barred.[7]

Nor are the Clerks aided by District Attorney for the Suffolk District v. Watson, 381 Mass. 648 (1980). In that case, as it was presented to the Supreme Judicial Court, a district attorney asserted that a death penalty statute was constitutional, but four first-degree-murder defendants asserted that the statute violated their state constitutional right against cruel or unusual punishments. "The plaintiff [district attorney] asserts and the defendants deny that [the statute] is consistent with art. 26 of the Declaration of Rights." Id. at 659. Declaratory relief was appropriate not merely because the enforcement authority's duties were implicated but because

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holding that public hospital trustees could not bring a declaratory judgment action claiming an unconstitutional taking of hospital property, the court made clear that, under Spence, "[t]he plaintiffs, as a governmental corporate entity, lack standing to seek declaratory or injunctive relief, or relief by way of mandamus, based on those constitutional challenges. . . . Furthermore, governmental entities 'cannot assert a cause of action under 42 U.S.C. § 1983.'" Trustees of Worcester State Hosp., 395 Mass. at 380-81 (citing and quoting Spence; emphasis added). See also City of Boston v. Board of Educ., 392 Mass. 788, 789, 793 & n.6 (1984) (in city's declaratory judgment action regarding duty to pay for special education services, Spence would have barred any attempt by city to assert constitutional claims); Comm'rs of Hampden County v. Town of Agawam, 45 Mass. App. Ct. 481, 481, 483 (1998) (commissioners' action seeking declaratory relief on ground that state statute was unconstitutional was barred by Spence).

[7] For purposes of the present motion, the Court need not resolve whether it would aid the Clerks to amend their complaint (as they say they intend, Clerks' Reply at 4 n.1) to assert individual capacity claims. Such claims could relate only to the possibility of criminal prosecution under § 50 for violation of § 11, because otherwise the Clerks in their individual capacities have no duties with regard to §§ 11 or 12. See Pawlick v. Birmingham, 438 Mass. 1010 (2002) (rescript). And the possibility of a criminal prosecution does not, in these

there was an actual controversy between the enforcement authority and the targets of that enforcement over whether the statute violated the targets' constitutional rights, id., and because a declaratory judgment could most efficiently resolve that controversy and thus potentially avoid the need to follow the numerous "extraordinary procedures" that the statute required in criminal prosecutions where the Commonwealth sought the death penalty. Id. at 660.

This case is nothing like Watson. Here, the Clerks assert that enforcement of the statutes is unconstitutional; the Clerks sue state enforcement officials, rather than the couples who are the targets of the enforcement; and there is no actual controversy between the Clerks and the couples against whom the Clerks are statutorily obligated to enforce the law. Nothing in Watson suggests that public officials may sue to establish that state laws or enforcement actions are unconstitutional, whether in a suit against the private parties who would be the target of enforcement (i.e., a couple) or against state officials involved in enforcement (e.g., the Registrar).

A public official's duty is to enforce duly-enacted and presumptively-constitutional statutes, not to go to court with the goal of establishing that those statutes violate private parties' constitutional rights. This is particularly so where there is no obstacle whatsoever to those parties coming forward to assert their own constitutional rights, as the Couples have done here.

Finally, the Clerks' attempt to assert the rights of out-of-state couples is not aided by Doe v. Bolton, 410 U.S. 179 (1973), for three reasons. In Doe, private physicians were allowed to challenge the constitutionality of statutes restricting the provision of abortions, where those statutes made the physicians criminally liable for violations. Id. at 188-89. First and most obviously, the physicians in Doe were private individuals, not public officials subject to

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circumstances, constitute irreparable harm warranting a preliminary injunction. See supra.

constraints like the Spence doctrine. Second, in Doe the challenged abortion statutes were invalid in part because they "unduly infringe[d] on the physician's right to practice." Doe, 410 U.S. at 199 (emphasis added). The Clerks, in their capacity as public officials, do not and cannot assert any comparable deprivation of their own constitutional rights here. Third and finally, the Doe Court relied in part on Griswold v. Connecticut, 381 U.S. 479 (1965), where the private parties challenging the constitutionality of a statute prohibiting use of contraceptives were a physician and a Planned Parenthood official who had given contraceptives to a married couple (and had been convicted as accessories to the crime of contraceptive use), thus giving them "standing to raise the constitutional rights of the married people with whom they had a professional relationship." Griswold, 381 U.S. at 481; see Doe, 410 U.S. at 189 (citing Griswold). Here, the Clerks have no such relationship with marriage license applicants that would allow them to assert the applicants' constitutional rights. Registrar's Opposition at 33-34.

B. The Clerks' Selective Enforcement Claim is Unlikely to Succeed on the Merits.

Even if they had standing to raise it, the Clerks' selective enforcement claim is unlikely to succeed on the merits. The most obvious defect in their claim is that the Clerks have not shown a single instance in which, once enforcement of §§ 11 and 12 was heightened in May 2004, any opposite-sex out-of-state couple has actually been issued a marriage license in violation of §§ 11 and/or 12, let alone that any such violation was due to the Registrar's enforcement system rather than some error on the part of a clerk charged with implementing it. As the Clerks themselves acknowledge, a selective enforcement claim requires a showing, inter alia, of selective treatment of a subset of similarly situated individuals. Clerks' Memo at 12, 13; Clerks' Reply at 9 (citing Yerardi's Moody Street Rest. & Lounge v. Board of Selectmen, 878

F.2d 16, 21 (1st Cir. 1989); Daddario v. Cape Cod Comm'n, 56 Mass. App. Ct. 764, 773 (2002)). Here, as in Daddario, "[a]t most we have a general allegation, without any specifics, that others similarly situated were granted permits. This is not enough to support an equal protection claim, even on a motion to dismiss." Daddario, 56 Mass. App. Ct. at 774. See also Commonwealth v. Franklin, 376 Mass. 885, 894 (1978) (defendant alleging selective prosecution "must show that a broader class of persons than those prosecuted has violated the law, . . . that failure to prosecute was either consistent or deliberate, . . . and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex") (emphasis added; citations omitted). The Clerks' inability to show that the Registrar's enforcement of §§ 11 and 12 has resulted in any violations by opposite-sex couples is fatal to their selective enforcement claim.[8]

That current enforcement efforts are not yet comprehensive as to certain marriage impediments from particular other states does not establish "selective treatment" of out-of-state same-sex couples. Current enforcement efforts are comprehensive with regard to the other most common impediments–age, and consanguinity and affinity–which have no correlation with

[8] Any claim of selective enforcement based on a comparison to pre-2004 enforcement would fail all three prongs of the Franklin test. First, there is no showing of any significant number of violations of §§ 11 and 12 before 2004–the most recent apparent violation even suggested in the record is a 1955 marriage of first cousins who intended to live in Ohio, where such marriages were apparently prohibited (although not "void"). See Couples' Ex. 8 at p.3. Second, there is no showing that such violations were known to Massachusetts authorities, and thus no showing "that failure to prosecute was either consistent or deliberate." Finally, assuming that past violations occurred but were deliberately not prosecuted, or that state officials were aware of such violations but still took no action to encourage clerks to increase enforcement of §§ 11 and 12, there is no showing as to those cases "that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex." Franklin, 376 Mass. at 894 (emphasis added). The Clerks' related claim that same-sex couples are entitled to "catch up with the non-resident opposite sex couples who benefited from the old enforcement scheme" (Clerks' Reply at 8) fails for the first two reasons stated above; it is also an estoppel like the one argument rejected in Fitchburg Gas and Elec. Light Co. v. DTE, 440 Mass. 625, 636 (2004).

whether the applicants are of the same or opposite genders. Current enforcement efforts extend to many other impediments as well, in 35 of the other states and jurisdictions covered by the Registrar's impediments list. See Clerks' Aff. Ex. K; Second Affidavit of Stanley E. Nyberg (submitted with this memorandum), ¶ 3 (explaining that impediments list has been updated and made available to clerks). There is no "selective treatment" of out-of-state same-sex couples.

The Registrar will nevertheless respond seriatim to each of the Clerks' specific bullet-pointed claims that enforcement action is impermissibly targeted against same-sex couples. Clerks' Reply at 5-6. The Registrar maintains that his enforcement of §§ 11 and 12 is evenhanded and fully consistent with the terms of those statutes.

- The Registrar's instruction to apply §§ 11 and 12 to an applicant who resides and intends to continue to reside in another state, even if the other applicant resides in Massachusetts, Clerks' Affs. Ex. N at p. 20, is fully consistent with the plain language of §§ 11 and 12, which apply to any applicant who resides and intends to continue to reside out-of-state, without regard to where the other applicant resides. The instruction on its face, like the statutes, applies equally to opposite-sex couples as well as same-sex couples.[9]

- The Governor's form letter to the governors and attorneys general of other states, seeking confirmation of his understanding that same-sex marriage was currently impermissible in those states, was prompted by the national wave of litigation and legislative activity regarding that issue. The Registrar's impediments list is based on a review of the laws of other states, and the Governor's letter was meant to confirm the results of that review with regard to same-sex marriage. See Nyberg Aff. ¶¶ 19-20. That the Governor did not send individualized letters to each state asking about each other impediment reflects the simple fact that the status of such other impediments is not in question around the nation.

- That the responses from the Connecticut and New York Attorneys General noted that there were significant constitutional questions as to the validity of those states' statutes limiting marriage to opposite-sex couples, Clerks' Affs. Ex. Q, R, hardly means that the

[9] The Clerks assert that this is an deprivation of Massachusetts residents' "constitutionally-protected right to marry a person of the same sex." But Goodridge found no constitutional right to marry, only an equal protection and due process right not to be discriminated against by the marriage laws open to opposite-sex couples. Sections 11 and 12 do not violate that right, because they apply equally to opposite-sex couples, including those where only one member of the opposite-sex couple resides and intends to continue to reside elsewhere.

Registrar's impediments list must identify those states as ones where same-sex marriage is permitted. Indeed, both the Connecticut and New York Attorneys General stated that executive officials should follow the statutes as written and that the courts would have to resolve any constitutional questions. Ex. Q at 1; Ex. Q attachment at pp. 1-2; Ex. R attachment at pp. 27-28. The Registrar is simply following the same approach.

- The Clerks unfortunately mischaracterize the April 20, 2004 Oregon trial court decision appearing at Clerks' Affs. Ex. T. Same sex-marriage is not now, and consistent with the terms of the court's opinion might or might not in the future be, permitted in Oregon.[10] Thus the Registrar properly lists Oregon as a state where same-sex marriage currently is not permitted. Clerks' Affs. Ex. K.

- The slide in the Clerks' training materials indicating that same-sex couples from other states should not be issued marriage licenses unless that other state "affirmatively indicated that same sex marriage is permitted in that state," Clerks' Affs. Ex. N at p. 20, did not purport to state the exact requirements of §§ 11 and 12 themselves. Rather, the slide merely reflected and summarized what the Registrar, based on Commonwealth attorneys' review, understood to be the law in every other state, subject to whatever contrary responses might be received to the Governor's letter to those other states.

- The training materials' explanation of the meaning of § 11, see Clerks' Affs. Ex. N at p.12, although imprecise in failing to note that § 11 applies only to states where same-sex marriage is void and not those where it is merely prohibited, does not indicate that the Registrar is improperly applying the statutes. The clerks were also instructed, accurately, that § 12 bars issuance of marriage licenses to persons who reside and intend to continue to reside in states where their marriage would be "prohibited." Id. at p. 15.

As for the Clerks' bullet-pointed claims of lack of enforcement against opposite-sex couples:

- That the notice of intention to marry does not specifically seek facts relevant to certain impediments, applicable in one or a few states, does not mean that no effort is being

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[10] The Oregon decision–now on appeal–found unconstitutional the statutes excluding same-sex couples from the rights and privileges of marriage, but, "following the Vermont Supreme Court's suggested remedy" (which led to the creation of Vermont civil unions), the Oregon court "allow[ed] the legislature ninety days after the commencement of the next regular or special session, whichever comes first, to produce legislation that would balance the substantive rights of same-sex domestic partners with those of opposite-sex married couples." Clerks' Affs. Ex. T at *10. The court enjoined issuance of marriage licenses to same-sex couples, with the injunction to expire if the legislature did not act by the specified time. As the time for legislative action has not expired–the next regular session begins in January of 2005, see http://www.leg.state.or.us/ (last visited July 27, 2004)–and as the court left open the possibility that the Oregon legislature could establish a civil union system like Vermont's (see Clerks' Aff. Ex. T at *8), the Registrar is properly acting in accordance with the current status of Oregon law.

made to enforce these impediments as to opposite-sex couples. See Registrar's Opposition at pp. 38-40. The notice of intention form cannot practically ask about every possible impediment from every individual state–only the most common impediments–but each state's impediments are still shown to applicants from that state, who must state under oath that none of the impediments applies. Id.

- The list of impediments that could apply to opposite-sex couples is not "riddled with holes" and has in fact been updated to reflect waiting-period-after-divorce[11] impediments for 17 states and other jurisdictions. See Second Nyberg Aff. ¶ 3. Additions have been made to the impediments list for Alabama, California, Indiana, Kansas, Mississippi, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Rhode Island, Texas, the Virgin Islands, Virginia, Washington, and Wisconsin. Id. Clerks have been notified of this change. Id. ¶ 4. Further updates and amendments are planned. Id. ¶ 5.

In sum, the Clerks have no likelihood of success on their selective enforcement claim.

D. The Clerks' New "Discriminatory Purpose and Effect" Claim Fails.

The Clerks cannot succeed on their new equal protection theory (Reply at pp. 8-11) that "[b]ecause the defendants' enforcement scheme is discriminatory in intent and effect, it would be impermissible even if it were impartial." Clerks' Reply at 11 (emphasis added). The Clerks rely on various cases–all involving alleged discrimination on the basis of race–where facially neutral laws or government actions were examined to determine if they nevertheless were enacted or taken for a racially discriminatory purpose and had a racially discriminatory effect. The Clerks wrongly suggest that any facially neutral law that was enacted or enforced for a discriminatory

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[11] In further support of their claim that the Registrar lacks interest in enforcing §§ 11 and 12 against opposite-sex couples, the Clerks note that impediments based on other states' divorce statutes were not included in the instruction book issued to clerks, on the ground that such statutes might change over time and it was not possible to list them in the instruction book. Clerks' Reply at 7 (citing Clerks' Affs. Ex. U at 7). The Clerks misleadingly suggest that the Registrar found no such problem with the impediment of being of the same gender as one's intended marriage partner, despite the litigation pending around the nation. Clerks' Reply at 7. In fact, the Registrar's instruction book did not list that impediment, or any impediments from other states, for the express reason that other state' impediments might change over time. Clerks' Affs. Ex. U at 10. The instruction book told clerks to "refer to your separate publication that lists marriage impediments for other states and jurisdictions." Id. (emphasis added). That is

purpose and has a discriminatory effect is per se invalid under the equal protection clause.

That is incorrect. Instead, the inquiry whether a facially neutral law was enacted with discriminatory purpose and effect serves merely to determine whether that facially neutral law actually creates a classification that warrants heightened scrutiny under the equal protection clause. See 3 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 18.4 at pp. 255-56 (3rd ed. 1999). The "discriminatory purpose and effect" analysis applies to facially neutral laws, but not to impartial enforcement schemes as the Clerks suggest. Indeed, it is difficult as a matter of logic to see why or how an enforcement scheme, if "impartial," would nevertheless be evaluated for whether it has a "discriminatory purpose and effect." The Clerks cite no authority or reason for doing so and the Registrar is aware of none. Rather, the equal protection framework for evaluating alleged discrimination in enforcement schemes is quite separate–it is essentially the selective enforcement doctrine discussed above.

Rotunda and Nowak identify three ways in which a classification that might trigger heightened equal protection scrutiny may be established:[12] (1) the law may establish the classification "on its face"; (2) the law may be neutral on its face, or establish a classification that seems to be legitimate, but the law "as applied" by government enforcement officials targets persons based on their membership in some class warranting heightened scrutiny; or (3) "the law may contain no classification, or a neutral classification, and be applied evenhandedly" but in reality "constitut[es] a device designed to impose different burdens on different classifications of persons. If this claim can be proven the law will be reviewed as if it established such a

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the Registrar's impediments list, which has now been updated. See Second Nyberg Affidavit.

[12] See generally Todd v. Commissioner of Correction, 54 Mass. App. Ct. 31, 38 (2002) (citing Rotunda and Nowak's categorization of equal protection claims).

classification in its face." Id. at pp. 255-56 (emphasis added). The first type of claim–an attack on some classification appearing on the face of §§ 11 and 12--has not been made by the Clerks here. The second type of claim, best exemplified (according to Rotunda and Nowak) by Yick Wo v. Hopkins, 118 U.S. 356 (1886), is essentially the same as the Clerks' selective enforcement claim discussed and refuted above. And the third type of claim is aimed at determining whether a law,[13] neutral on its face and evenhandedly enforced, nevertheless contains a classification warranting heightened scrutiny. Such a claim cannot be asserted here "[if] the enforcement scheme [is] unbiased." Clerks' Reply at 9.[14]

That the "discriminatory purpose and effect" test does not itself determine a law's validity, but merely determines whether a facially neutral and evenhandedly-applied law (or other governmental action) contains a classification warranting a particular level of scrutiny, is clear from numerous Supreme Court decisions. In Rogers v. Lodge, 458 U.S. 613, 617-18 (1982), the Court held that electoral districts that had the impact of diluting racial minority

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[13] Rotunda and Nowak elsewhere recognize that the "discriminatory purpose and effect" test is not limited to laws but may also be applied to acts such as the decision to use an employment test, id. at 283 (citing Washington v. Davis, 426 U.S. 229 (1976)), or a zoning decision. Id. at 283-84 (citing Village of Arlington Hts. v. Metropolitan Hous. Devel.Corp., 429 U.S. 252 (1977)).

[14] In the middle of their "discriminatory purpose and effect" argument, the Clerks confusingly shift back to a discussion of their analytically separate "discriminatory enforcement" or "selective treatment" claim, asserting that such a claim is not limited to race discrimination but may be asserted based on any type of invidious discrimination. Clerks' Reply at 10 n.10. The Registrar does not dispute that general proposition, but it has nothing to do with the Clerk's "discriminatory purpose and effect" claim, and the cases cited by the Clerks, as the Clerks' own parenthetical descriptions show, did not involve a "discriminatory purpose and effect" claim such as that discussed above. See Clerks' Reply at 10 n.10 (citing Village of Willowbrook v. Olech, 528 U.S. 562, 563, 565 (2000); DeMuria v. Hawkes, 328 F.3d 704, 705 (2d Cir. 2003); Esmail v. Macrane, 53 F.3d 176, 178-79 (7th Cir. 1995)). Those were so-called "class-of-one" cases, alleging wholly irrational, retaliatory, or bias-motivated government action against a single person (versus selective enforcement against a class of persons), and in any event nothing

voting strength power would trigger equal protection strict scrutiny only if a racially discriminatory purpose were shown. "Absent such purpose, differential impact is subject only to the test of rationality." Id. at 618 n.5 (citing Washington v. Davis, 426 U.S. at 247-48). In Washington v. Davis, in reviewing a city's use of an employment test alleged to have disproportionate impact on black applicants, the Court said that use of the test, neutral on its face and rationally serving legitimate governmental interests, did not trigger equal protection strict scrutiny absent proof that the test was used for a racially discriminatory purpose. 426 U.S. at 242, 246, 247-48. In Arlington Heights, the Court repeated that racially discriminatory impact did not in and of itself invalidate official action; the equal protection clause required only that such action not be arbitrary or irrational, unless there was proof of a discriminatory purpose, in which case such judicial deference disappeared (i.e., strict scrutiny applied). Arlington Heights, 429 U.S. at 264-66. And in Personnel Admin. of Massachusetts v. Feeney, 442 U.S. 256 (1979), in rejecting a claim that a veterans' preference law violated women's equal protection rights, the Court again said that even if a facially neutral law had disproportionate impact upon a specially protected class, that law was subject only to rational basis review, unless it had the purpose of discriminating against that class, in which case the appropriate degree of heightened scrutiny[15] applied. Id. at 272-73.

Thus, even assuming arguendo the illogical proposition that the "discriminatory purpose and effect" analysis may be applied to evenhanded enforcement schemes, and further assuming arguendo that the current enforcement of §§ 11 and 12, despite being evenhanded, has the

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in those cases suggests that anything other than the rational basis test applied in such cases.

[15] The degree of heightened scrutiny varied according to which protected class was involved; classifications based on gender were subject to careful scrutiny, but not the same strict

purpose and effect of discriminating based solely on sexual orientation–which the Registrar strongly disputes both legally and factually–the result would be merely to establish that §§ 11 and 12 contain a classification based on sexual orientation. As that is not a suspect classification,[16] the burden would still be on the Clerks to show that the classification has no rational basis. They have not attempted any such showing, and for many of the same reasons the Registrar has already argued (and discusses further in Part III.B infra) in connection with the Couples' equal protection and due process claims, the Clerks cannot make such a showing. Their claim therefore fails.

III. THE COUPLES ARE UNLIKELY TO SUCCEED ON THE MERITS.

The Couples are unlikely to succeed on the merits of their equal protection and due process claims, their purely statutory claim that the Registrar is misapplying § 12, or their Privileges and Immunities Clause claim.

A. Plaintiffs Thorne and Theberge Have Standing to Challenge § 11.

The Registrar now acknowledges that plaintiffs Thorne and Theberge of Maine do have standing to challenge § 11 (which, unlike § 12, turns on whether a marriage would be void if contracted in the couple's home state). This is because (as noted in the Couples' Reply at 5 n.4), 19-A Me. Rev. Stat. Ann. § 751(1) declares "void" any marriage that is solemnized in Maine and that is prohibited by 19-A Me. Rev. Stat. Ann. § 701, and § 701(5) expressly prohibits same-sex marriages from being contracted in Maine. The Registrar's contrary position in his original Opposition (at 12-13 and 23 n.24) did not take into account § 751(1).

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scrutiny applicable to racial classifications. Id. at 272-73.

[16] See Powers v. Wilkinson, 399 Mass. 650, 657 n.11 (1987) ("suspect classifications are only those of 'sex, race, color, creed, or national origin'" as listed in equal rights amendment,

B. The Couples Fail to Show that §§ 11 and 12 are Invalid under Goodridge or Otherwise Violate Due Process and Equal Protection Guarantees.

1. The Question is Whether There is a Rational Basis for §§ 11 and 12.

The question for this Court is whether the Couple have met their heavy burden of showing the absence of any conceivable rational basis for §§ 11 and 12. The Couples' insistence that Goodridge resolves this case in their favor exaggerates the breadth of the decision. Contrary to the Couples' Reply at pp. 1-2, Goodridge did not recognize any constitutional right of same-sex couples to marry; it recognized instead that such couples had an equal protection and due process right to access to the marriage laws on the same terms as opposite-sex couples, because there was no rational basis for denying such equal access. The question presented here is quite separate: whether there is a rational basis for §§ 11 and 12, which deny out-of-state couples (whether opposite-sex or same-sex) access to marriage in Massachusetts if their marriage would be void or prohibited if contracted in the state where they reside and intend to continue to reside.

Nor is Commonwealth v. Aves, 35 Mass. 193 (1836), in any way controlling here. That decision concluded that general principles of inter-state comity must yield to the Massachusetts Constitution and laws, but it did not say that a Massachusetts statute specifically embodying a principle of inter-state comity (such as §§ 11 and 12) would necessarily violate the Constitution. Any such statute would have to be judged according to the applicable constitutional standard. The Couples' hypothetical "slaveholders' rights" statute, under which Massachusetts would honor and enforce other states' slavery laws even when slavery was unconstitutional in Massachusetts, would no doubt be invalidated under the strict scrutiny applied to statutes that

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amend. art. 106, amending art. 1 of Declaration of Rights).

classify based on race. But, assuming that §§ 11 and 12 may be analyzed as if they expressly incorporated the marriage impediment laws of other states (including those barring same-sex marriage), then §§ 11 and 12 would classify marriage license applicants based, inter alia, on whether their home state declared void (or prohibited) same-sex marriages. That is not a suspect classification. See supra n.16. Thus the question is simply whether there is any conceivable rational basis for Massachusetts to give effect to other states' laws on this subject.

Finally, although it is unclear what the Couples mean by repeatedly characterizing their claim as an "as-applied" challenge, e.g., Couples' Reply at 1, 2 n.1, 3, 4, 5, 8-9, it appears they may be attempting either (1) to expand the scope and increase the degree of judicial scrutiny (by mis-stating the nature of an as-applied challenge[17]) or (2) to establish the relevance of the Registrar's motives for enforcement. To the extent the Couples challenge whether §§ 11 and 12's incorporation of other states' laws regarding same-sex marriage has a rational basis, that is not an "as-applied" challenge, but a challenge to one particular consequence of the language of §§ 11 and 12 themselves; the Couples must show that there is no such rational basis, and questions of the Registrar's enforcement motives are wholly irrelevant. To the extent that the Couples assert an equal protection "selective enforcement" claim, Couples' Reply at 3-5, or (what is the same thing) a "discriminatory application" claim, id. at 8, the question of enforcement motives would be relevant only if the Couples had first shown that they are being subjected to "selective treatment" under §§ 11 and 12, i.e., that, due to the Registrar's

[17] The Couples wrongly cite Comm. v. Chou, 433 Mass. 229, 238 (2001) for the proposition that an "as-applied challenge questions the unequal operation of an otherwise valid statute against a class of persons." Couples' Reply at 8 (emphasis added). What Chou said was quite different: an as-applied challenge questions "the unequal enforcement of an otherwise valid statute against a protected class of persons." Chou, 433 Mass. at 238 (emphasis added).

enforcement system, out-of-state opposite-sex couples have actually been allowed to marry in violation of §§ 11 and 12 at the same time as the Couples are being barred from marrying. For the reasons already discussed supra, the Couples have not made and cannot make any such showing. The Registrar's current enforcement is even-handed, and this there is no need to reach any question of motivation.[18]

2. The Couples Fail to Show that §§ 11 and 12 Lack a Conceivable Rational Basis.

The Couples have failed to carry their burden of showing that §§ 11 and 12 lack any conceivable rational basis. First, the Opinions of the Justices on the civil union bill, 440 Mass. 1201 (2004), did not conclude that deferring to other states' laws barring same-sex marriage could never be a rational basis for any law–only that it was not a rational basis for granting same-sex couples access to civil unions, rather than civil marriage itself, in Massachusetts. The majority Opinion (id. at 1208) was expressly addressing Justice Sosman's separate Opinion, including her argument about same-sex couples that married here and then "moved to another State," and her argument that a same-sex couple's "status as a 'married' couple, and therefore all of the obligations that attend that status, can be made to disappear by the simple expedient of

[18] The Couples repeat the Clerks' error of relying on "discriminatory purpose and effect" cases to argue that the Registrar's enforcement scheme is invalid. Couples' Reply at 4-5 (citing School Comm. of Springfield v. Board of Educ., 366 Mass. 315, 329 n.21 (1974); Hunter v. Underwood, 471 U.S. 222, 232 (1985)). Those cases both involved intentional race discrimination. That increased enforcement of §§ 11 and 12 has the effect of preventing out-of-state same-sex couples (as well as some opposite-sex couples) from marrying here does not in and of itself invalidate the enforcement effort, even if that were the sole purpose of enforcement. The enforcement effort must be evaluated according to the selective enforcement standards already discussed (under which there has been no showing of any current non-enforcement against opposite-sex couples) and §§ 11 and 12 themselves, even assuming arguendo that they were shown to have "discriminatory purpose and effect," must be evaluated according to the standard of review (rational basis) appropriate to the type of discrimination shown.

moving to another State that will not recognize them as 'married.'" Id. at 1215 (opinion of Sosman, J.). Although the degree to which the various Opinions apply to the statutory classification question now before this Court will likely ultimately be decided by the Supreme Judicial Court itself, it seems likely that Justice Sosman was addressing Massachusetts residents, not those who came here from another state solely to get married, and that the majority Opinion was simply addressing Justice Sosman's argument, not couples from out of state. In any event, it cannot be pretended that the majority Opinion (finding no rational basis for allowing same-sex couples access only to civil unions rather than the civil marriage available to opposite-sex couples) addressed either the very different classification in §§ 11 and 12 or whether the rational bases identified by the Registrar here are sufficient to support that particular classification.

Second, the Couples err in suggesting that §§ 11 and 12 are irrational "because the other States have their own laws that should be adequate to protect their desired interests." Couples' Reply at 9 (emphasis added). The rational bases asserted by the Registrar concern the interests of Massachusetts itself and its own residents, not other states' interests. See Registrar's Opposition pp. 55-64. A rational legislator could believe that §§ 11 and 12 do the following:

- protect all of the interests served by the Commonwealth's creation and regulation of the marriage relationship in the first place, with the requirement that there be "an approving state" ready to enforce marital rights and duties for the protection of the public, the spouses, and their children, Goodridge, 440 Mass. at 321, 322-25;

- protect the Commonwealth's court judgments regarding its same-sex married couples from being unenforceable and/or collaterally attacked (cf. Sosna v. Iowa, 419 U.S. 393, 407 (1975) ("Iowa's interests extend beyond its borders and include the recognition of its divorce decrees by other states under the Full Faith and Credit Clause") (emphasis added);

- protect the Commonwealth's courts from being burdened by out-of-state couples returning here in the event of divorce, separation, alimony, and custody proceedings and disputes (because they either lack all access to their own states' courts for such purposes, or lack access to legal protections as favorable as those available to couples recognized as

married in those states);

- serve what the Supreme Court says is a state's own legitimate interest in avoiding "officious intermeddling" in domestic relations matters of paramount interest to other states (Sosna, 419 U.S. at 407; see id. at 409 (recognizing legitimate "state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State");

- advance the interests of ultimate recognition of Massachusetts' same-sex couples' marriages in other states;[19] and

- protect the Commonwealth from retaliation by other states. Cf. Prudential Ins. Co. v. Comm'r of Rev., 429 Mass. 560, 567-570 (1999) (retaliatory tax laws aimed at pressuring other states to maintain low taxes on Massachusetts insurers met rational basis test).

Third, the Couples' argument that "Massachusetts can be the 'approving state' for residents and non-residents alike" (Reply at 10) suggests their view that Massachusetts has no legitimate interest in whether other states recognize marriages contracted here, i.e., no legitimate interest in declining to issue marriage licenses to persons living in states where such marriages would not be recognized. The Couples seek to reduce Massachusetts' critical role as an "approving state" to an empty formality.[20] It cannot be that the Commonwealth is obligated to

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[19] It is true that a federal constitutional amendment barring same-sex marriage in any state was recently defeated in the U.S. Senate. However, the very next week, on July 22, 2004, the U.S. House of Representatives passed a bill that would withdraw from the federal courts any jurisdiction to hear challenges to the interpretation of the federal Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C. See 2003 H.R. 3313, available at http://thomas.loc.gov. That bill, which requires only a simple majority vote to be enacted by Congress, would certainly harm the interests of Massachusetts same-sex married couples who wish to obtain marriage related benefits from the federal government (which DOMA denies them) or who move to other states and wish to challenge those state's laws (authorized by DOMA) barring recognition of same-sex marriages from other states. It is certainly conceivable that enjoining the enforcement of §§ 11 and 12, thus allowing same-sex couples from the other 49 states to come here to marry, would increase the likelihood of enactment of H.R. 3313, to the detriment of Massachusetts same-sex married couples. The Couples' argument that "fear of speculative retaliation has no limiting principle" (Reply at 11) is untrue; the limiting principle is simply whether it is conceivable and rational to fear such retaliation, and here it certainly is.

[20] Neither law nor equity requires useless acts. Cheschi v. Boston Edison, 39 Mass. App.

confer a legal status of high and broad importance on persons who will promptly return to states where that status confers no rights and duties at all and is by law declared void or prohibited. Cf. Sosna, 419 U.S. at 407 (Iowa could establish durational residency requirement for seeking divorce; otherwise Iowa "lacks the nexus between persons and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance") (citation and internal quotation omitted). It likewise cannot be that the Commonwealth has no legitimate interest in the welfare of the children born or adopted as a result of such a marriage, even if those children are in another state. As one of the "three partners" to the marriage (Goodridge, 440 Mass. at 321), the Commonwealth cannot turn a blind eye to whether the children of the marriage it has helped create are receiving the full benefits and protections of that marriage. See id. at 325 (describing numerous benefits that marriage is intended to create for children).

That the particular couples who are plaintiffs in this action have past ties (and claim in their Reply to have continuing ties) to Massachusetts, and that plaintiffs Thorne and Theberge's affidavit asserts their continued frequent presence here, does not change the result. A Massachusetts marriage might be of some value to an out-of-state couple whenever that couple chooses to visit Massachusetts; nevertheless, all of the rational bases identified above continue to be rational so long as that couple does not actually live in Massachusetts. To the extent that such a couple, when they choose to be physically present here, is indeed subject to the Massachusetts laws that created civil marriage to "enhance[] the welfare of the community" (Goodridge, 440 Mass. at 322), then §§ 11 and 12's interest in ensuring an "approving state" would, for that limited time, be served, and so for that limited time, for those particular couples, §§ 11 and 12 (if that were the only interest that they served, which it is not) would be overinclusive. That is not

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Ct. 133, 142 n.10 (1995) (citing cases); Levine v. Black, 312 Mass. 242, 244 (1942)(same).

enough to invalidate a statute under rational basis review. See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778 (2002) ("Some degree of overinclusiveness or underinclusiveness is constitutionally permissible"). Likewise, even if some states that merely "prohibit" same-sex marriage in their own states (rather than declaring it "void") might nevertheless recognize a Massachusetts same-sex marriage, this would present, at most, some degree of overinclusivity. That does not invalidate §§ 11 and 12. It is undisputed that a large majority of states have laws denying recognition to same-sex marriages from other states.

Finally, the Couples gain nothing from their observation that "the desire to fence out undesirable groups, even for the sole purpose of protecting the Commonwealth's own residents," is unconstitutional. Couples' Reply at 11. The case they cite, Saenz v. Roe, 526 U.S. 489, 499 n.11 (1999) (invalidating durational residency restriction on level of welfare benefits) stated only that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." Sections 11 and 12 neither inhibit migration by needy groups (or anyone else) into Massachusetts nor treat same-sex couples as an "undesirable group." Far from "fencing out" such couples, §§ 11 and 12 allow such couples to marry here, if they move here.

In sum, §§ 11 and 12 pass rational basis review.

C. The Registrar Properly Interprets § 12 to Bar Issuance of Licenses to Couples Who Are "Prohibited" From Marrying In Their Home State.

The Registrar properly interprets § 12 as establishing a marriage bar that is broader than that of § 11; the Couples's position that "section 12 merely exists to enforce § 11" is untenable. Couples' Reply at 5-8.[21] Sections 11, 12 and 50 (which serves to enforce § 11 but not § 12)

[21] The Couples' claim that the training materials for clerks relied solely upon and

provide as follows (emphasis added):

§ 11: 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.

§ 12: Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.

§ 50: Any official issuing a certificate of notice of intention of marriage knowing that the parties are prohibited by section eleven from intermarrying, and any person authorized to solemnize marriage who shall solemnize a marriage knowing that the parties are so prohibited, shall be punished by a fine of not less than one hundred or more than five hundred dollars or by imprisonment for not more than one year, or both.

Sections 11 and 12 clearly have different meanings, effects, and enforcement mechanisms, most likely related to the fact that declaring a marriage "void" has far more serious consequences than merely "prohibiting" that marriage. The Registrar thus properly interprets § 12 to bar marriages that are "prohibited" by other states' laws, even if those laws do not declare particular marriages to be "void" so as to trigger § 11.

Section 11 applies directly to the marriage license applicants; it prohibits them from contracting a marriage here that would be void if contracted in their home jurisdiction, and it declares any marriage so contracted here to be void. A clerk who issues a marriage license knowing that § 11 prohibits the marriage, or a person who solemnizes the marriage knowing it to be so prohibited, is liable to criminal punishment under § 50.[22]

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overstated the effect of § 11, Couples' Reply at 5-6, has already been addressed supra in the Registrar's response to the Clerk's sixth bullet-point making essentially the same argument.

[22] Contrary to the Couples' claim (Reply at 7), nothing in § 50 suggests in any way that § 12 merely implements § 11. Section 50 refers to parties "prohibited by section eleven from intermarrying" but does not change (1) the plain language of the prohibition in § 11 against

Section 12, in contrast, applies directly to the clerks, and requires them to satisfy themselves that the applicants are not prohibited from marrying in their home state. Section 12 does not declare any marriage contracted here in violation of § 12 to be "void," here, nor does it otherwise specify the legal effect of the prohibited marriage, nor is it criminally enforceable.

"Void" means "[o]f no legal effect; null." Black's Law Dictionary 1568 (7th ed. 1999). To "prohibit" means only "[t]o forbid by law." Id. at 1228. The Registrar agrees with the Couples that to treat a marriage as "void" is a most serious step that should not be taken unless a statute requires it. Registrar's Opposition at 12 n.9. Incestuous or polygamous marriages are expressly declared void by G.L. c. 207, § 8, but a marriage may be "prohibited" without being "void." For example, G.L. c. 207, § 7, prohibits solemnization of a marriage where one or both parties are minors unless there is a court order under G.L. c. 207, §§ 24 and 25; but if a minor marries, no statute declares the marriage "void." The marriage is merely voidable by a court, as recognized by G.L. c. 207, § 16. See 1 C. Kindregan & M. Inker, Family Law and Practice § 19:3 at 738 (3rd ed. 2002). The distinction is significant.[23] A void marriage is subject to collateral as well as direct attack; a voidable marriage is subject only to direct attack in an annulment proceeding (between the parties) or its equivalent. Id. § 19:2 at 736, § 19:3 at 739. And "[t]he issue of a validity of a marriage that is merely voidable cannot be raised after the death of a party." Id. § 19:3 at 739.

While many states declare same-sex marriage "void" or the equivalent, other states' laws

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marrying here where the marriage would be "void" if contracted in the couple's home state, or (2) the plainly different language of the prohibition in § 12 against issuance of licenses to couples who the clerk is not satisfied are not "prohibited" from marrying in their home state.

[23] For example, being married is one of the circumstances that allows a minor to consent to medical care under G.L. c. 112, § 12F, and nothing in that statute distinguishes between

merely prohibit same-sex marriage (expressly or by necessary implication), without declaring it "void" or the equivalent. The Registrar has already illustrated this point under the New Hampshire and Rhode Island laws applicable to two of the plaintiff Couples. See Registrar's Opposition at 23-27. Likewise, North Dakota prohibits same-sex marriage, but the Registrar finds no North Dakota law declaring such marriages void, even though North Dakota law does declare incestuous and bigamous marriages void.[24] The law appears similar in Oklahoma,[25] South Dakota,[26] and Virginia.[27]

The Couples' claim that § 12 merely implements § 11's bar on "void" marriages, rather than containing its own bar on "prohibited" marriages, is contrary not only to the plain words of

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minors who did and did not have a court order permitting their marriage.

[24] Under N. Dakota Cent. Code 14-03-01, "Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. The marriage relation may be entered into, maintained, annulled, or dissolved only as provided by law. A spouse refers only to a person of the opposite sex who is a husband or a wife." This effectively prohibits same-sex marriage but does not declare it void. In contrast, incestuous and bigamous marriages are expressly declared "void." Id. §§ 14-03-03, 14-03-06.

[25] See 43 Okl. St. Ann. §§1, 3(A); cf. § 2 (incestuous marriages "void"). Oklahoma law provides that same-sex marriages contracted in other states "shall not be recognized as valid and binding in this state," id. § 3.1, which is the equivalent of deeming such marriages void, but the Registrar finds no like provision for same-sex marriages contracted in Oklahoma itself.

[26] See S. Dakota Cod. L. §§ 25-1-1, 25-1-10, 25-1-11; cf. id. §§ 25-1-6, 25-1-8 (incestuous and bigamous marriages "void"). South Dakota has a law denying in-state validity to same-sex marriages contracted in other states, id. § 25-1-38, but the Registrar finds no like provision for same-sex marriages contracted in South Dakota itself.

[27] Under Va. Code Ann. § 20-45.2, "A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable." This prohibits same-sex marriage in Virginia but only declares such marriages "void" if contracted in other states. In contrast, incestuous and bigamous marriages are expressly declared "void." Id. § 20-45.1(a) (citing § 20-38.1).

§ 12 but also to that section's obvious purpose of respecting the marriage laws of other states.[28] And the Registrar's reading of § 12 hardly renders § 11 "meaningless." Couples' Reply at 7. Although a couple whose marriage here is barred by § 11 would most likely also find their marriage here barred by § 12–i.e., if a marriage would be "void" if contracted in the couple's home state, it is most likely "prohibited" there as well–§ 11 still has ample operation independent of § 12. Most importantly, marriages barred by § 11 are void in Massachusetts (unlike marriages barred by § 12)[29], and a clerk's issuance of a license to parties barred from marrying by § 11 (unlike the issuance of a license to parties barred from marrying by § 12) is a criminal offense.

The Couples therefore fail in their claim that the Registrar is misinterpreting § 12.

D. The Couples' Privileges and Immunities Claim Fails.

Due to space limitations the Registrar will address only one of the many dispositive defects in the Couples' Privileges and Immunities Clause claim: the Couples still fail to establish that marriage is a "fundamental right" for purposes of the Clause. The Couples erroneously suggest that the Supreme Court reaffirmed in 1985 that activities protected as "fundamental" include anything that could fall under the heading of "the enjoyment of life and liberty . . . and

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[28] The Couples' reliance on the legislative history of § 10 not only sheds no light on § 12 but is wholly irrelevant where there is no ambiguity in § 12's use of the term "prohibited." Boston Neighborhood Taxi Ass'n v. DPU, 410 Mass. 686, 690 (1991) (where statute is unambiguous, court will not consider legislative history). Also, the 1913 statute was entitled "An Act to Make Uniform the Law Relating to Marriages in Another State in Evasion or Violation of the Laws of the State of Domicile," St. 1913, c. 360 (emphasis added), suggesting that the law reaches marriages that are "prohibited" by another state, not merely those that are "void" in another state. The title is part of the act and may be looked to if issues of interpretation arise. E.g., Kerins v. Lima, 425 Mass. 108, 114 (1997).

[29] That the Registrar views marriages in violation of § 12 as being of "questionable validity," Couples' Reply at 7, does not mean that they are void (which would make § 12 duplicative of § 11 in this regard)–only that they were entered into illegally and might be voidable, which is quite different than the effect of § 11.

[the right] to pursue and obtain happiness and safety." Couples' Reply at 13. In 1825, in Corfield v. Coryell, 6 F. Cas. 546 (No. 3,230) (CC E.D. Pa. 1825), Justice Washington (sitting as Circuit Justice) did include those general words, as well as the following more specific list of rights, as those deemed "fundamental" under the Clause:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal. . . .

But in 1985, the Supreme Court reaffirmed only the precise and specific list of rights just quoted–not the more general catch-all category of "the enjoyment of life and liberty . . . and [the right] to pursue and obtain happiness and safety"–as rights that would "still be protected by the Clause." Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281 n.10 (1985). Justice Washington's more general formulation from 1825 was apparently viewed as embodying a "natural rights" theory–a theory that was later expressly rejected by the Court. See Piper, 470 U.S. at 281 n.10; Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 384 n.20 (1978). Because marriage is not a "fundamental right" under the Clause, the Couples' claim fails.

IV. THE PUBLIC INTEREST DOES NOT FAVOR AN INJUNCTION.

The Clerks improperly dismiss the rational and legitimate public purposes served by §§ 11 and 12 as irrelevant to whether the Commonwealth (i.e., the public interest[30]) would be harmed by an injunction. Clerks' Reply at 12. If the Court agrees that §§ 11 and 12 may rationally be thought to serve any of those legitimate public purposes, then enjoining §§ 11 and

[30] Although the Clerks frame the question as whether the "irreparable harm" that an injunction would cause the Commonwealth outweighs the irreparable harm that denying an injunction would cause the Clerks, "irreparable harm to the Commonwealth" boils down to

12 would harm those public interests–some involving the Commonwealth's interests, as the "third partner" to every marriage, in the welfare of particular couples and their children, and some involving the larger interests of the Commonwealth. That the Registrar does not reiterate those public interests at length here in no way indicates that they are not important.

Second, the Clerks argue that the expense and effort of enforcing §§ 11 and 12 burdens the Commonwealth and its municipalities. But it is for the Legislature, not the courts, to weigh whether the costs of the law outweigh its benefits; as long as the statutes remain on the books, it must be presumed that the Legislature views the benefits as outweighing the costs, and this Court should not second-guess that conclusion.

CONCLUSION

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

Respectfully submitted,

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whether the public interest would be served, or at least not injured, by an injunction.