COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK COUNTY

NO. SJC-09436
(and companion case)

SANDRA AND ROBERTA COTE WHITACRE, ET AL.,
Plaintiffs-Appellants,
v.
DEPARTMENT OF PUBLIC HEALTH, ET AL.,
Defendants-Appellees.

DOUGLAS JOHNSTONE, CLERK OF THE
TOWN OF PROVINCETOWN, ET AL.,
Plaintiffs-Appellants,
v.
ATTORNEY GENERAL, ET AL.,
Defendants-Appellees.

ON APPEAL FROM INTERLOCUTORY ORDERS
OF THE SUPERIOR COURT FOR SUFFOLK COUNTY

BRIEF OF THE APPELLEES

THOMAS F. REILLY
Attorney General

Peter Sacks
Assistant Attorney General
Government Bureau
One Ashburton Place, Room 2019
Boston, Massachusetts 02108-1598
(617) 727-2200, ext. 2064
BBO # 548548

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QUESTIONS PRESENTED

1. Whether the Registrar of Vital Records and Statistics' post-Goodridge enforcement of G.L. c. 207, §§ 11 and 12 is impermissibly "selective," where such enforcement has been even-handedly directed at same-sex and opposite-sex couples alike, and where the Clerks and Couples have not identified any post-Goodridge instance in which, due to the Registrar's enforcement system, an opposite-sex couple has been allowed to marry in Massachusetts despite an impediment posed by their home state's laws.

2. Whether the Registrar's enforcement of §§ 11 and 12 violates equal protection because of its asserted "discriminatory purpose and effect" on same-sex couples, where, even if such purpose and effect were shown, the Couples would still have to prove that enforcement of §§ 11 and 12 as they affect same-sex couples has no conceivable rational basis, and the Couples make no attempt to do so.

3. Whether §§ 11 and 12 themselves lack the rational basis required by due process and equal protection, where a legislator could reasonably conclude that the statutes serve the Commonwealth's interests in, inter alia, (a) ensuring that, for any couple married in Massachusetts but residing and intending to reside elsewhere, there is "an approving

State" standing definitely and immediately ready to enforce marital rights and duties for the protection of the public, the spouses, and their children, Goodridge v. DPH, 440 Mass. 309, 321, 322-25 (2003); and (b) protecting the Commonwealth and its same-sex couples from adverse action by other states (e.g., support for and ratification of a federal constitutional amendment restricting same-sex couples' marriage rights in all states), as well as protecting the prospects for other states' ultimate recognition of Massachusetts same-sex couples' marriages.

4. Whether §§ 11 and 12 violate the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, where (a) the statutes do not discriminate based on non-residency, in that §§ 11 and 12 prohibit marriages here by residents of only some other jurisdictions--those where the couple's marriage would be void or prohibited--and § 10 imposes a similar restriction on Massachusetts residents seeking to evade Massachusetts marriage laws by marrying elsewhere; (b) marriage, although fundamental in other contexts, has never been deemed a "fundamental right" for purposes of triggering Privileges and Immunities Clause scrutiny; and (c) even if the Clause applied, §§ 11 and 12 would still be justified by the Commonwealth's substantial interest in

not creating a marriage relationship here unless the couple lives in "an approving State" that will enforce the spouses' and their children's rights.

5. Whether the Registrar correctly interprets § 12 (barring issuance of marriage licenses to out-of-state couples if the marriage would be "prohibited" in their home state) as having force independent of § 11 (barring issuance of marriage licenses to out-of-state couples if the marriage would be "void" in their home state).

6. Whether the Clerks may assert a selective enforcement (equal protection) claim, either (a) in their official capacities, given the longstanding bar against public entities asserting constitutional claims against the statutes and actions of their creator state; (b) in their individual capacities, where the possibility of criminal prosecution for refusal to follow the Registrar's enforcement directives is purely theoretical and thus insufficient to confer standing; or (c) on behalf of out-of-state couples, where there is no obstacle to such couples asserting their own rights, as shown by the Couples' own suit.

STATEMENT OF THE CASE

The defendant-appellees, the state Registrar of

Vital Records and Statistics and others[1] (referred to collectively as "the Registrar"), request affirmance of orders of the Suffolk Superior Court (Ball, J.) that (1) denied the plaintiff Couples' request for a preliminary injunction against enforcement of G.L. c. 207, §§ 11 and 12; and (2) denied the plaintiff Clerks' motion for reconsideration of a prior order denying them such an injunction. Sections 11 and 12 bar out-of-state couples (whether of the same or opposite genders) from marrying in the Commonwealth if their marriage would be void or prohibited in the state or other jurisdiction where they reside and intend to continue to reside.

Prior Proceedings

On June 18, 2004, plaintiffs--the clerks of thirteen Massachusetts cities and towns ("the Clerks"), and eight out-of-state same-sex couples ("the Couples"), three of which had been refused marriage licenses due to §§ 11 and/or 12[2]--filed separate

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[1] The Attorney General, the Department of Public Health (DPH), its Commissioner, and the Registry of Vital Records and Statistics (RVRS) within DPH.

[2] The other five Couples had obtained marriage licenses, had their marriages solemnized, and thus complained primarily that the Registrar's actions were improperly casting doubt on the validity of their marriages. See infra n.12. The Registrar of course does not concede, by using this terminology, that those five Couples validly received licenses or were legally

actions in Suffolk Superior Court challenging the constitutionality and manner of enforcement of §§ 11 and 12 and seeking preliminary injunctions against such enforcement.[3] RA 1, 139. The cases were consolidated.

On August 18, 2004, the Superior Court issued separate decisions (1) denying the Clerks' motion, for lack of standing to assert constitutional challenges to state statutes and actions; and (2) denying the Couples' motion, for lack of likelihood of success on the merits. RA 301, 108. The Couples timely appealed on September 16, 2004. RA 25. The Clerks, having amended their complaint to assert their claims in their individual (as well as official) capacities, RA 284-86, moved on September 3, 2004, for reconsideration on the issue of standing. RA 304. The Registrar opposed, RA 306, and on September 15, 2004, the court denied the motion "for the reasons set forth in the Defendants' Opposition[.]" RA 310. The Clerks filed a notice of appeal on October 15, 2004--within 30 days of the denial of reconsideration but more than 30 days after denial of their original motion. RA 153, 311. The appeals were docketed in the Appeals Court on December

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married; the issuance of the licenses violated § 12.

[3] The Couples' original complaint did not challenge § 12, but they amended their complaint to add such a challenge. RA 73; see also RA 136-38.

6, 2004, and this Court granted direct appellate review on January 25, 2005.

Legal and Factual Background

1. Relevant Statutes

General Laws c. 207, §§ 11 and 12, first enacted by St. 1913, c. 360, prohibit a couple from marrying in the Commonwealth if either member of the couple resides and intends to continue to reside in a jurisdiction where the marriage would be void or prohibited.

Section 11 provides:

> No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

Section 12 provides:

> Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.[4]

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[4] As originally enacted by St. 1913, c. 360, § 3, the first clause read: "Before issuing a license to marry to a person who resides and intends to continue to reside in another state . . . ." The underlined occurrence of the word "to" was omitted when the law was first codified in 1921 as G.L. c. 207, § 12 (1921 ed.). No party argues that this apparent scrivener's error has any bearing on the issues on this case.

A similar provision, G.L. c. 207, § 10, also enacted in 1913, applies to Massachusetts residents who attempt to evade Massachusetts' marriage impediments by marrying in another jurisdiction.[5]

City and town clerks are responsible for applying the provisions of both §§ 11 and § 12, as indicated by the text of § 12 (which is expressly directed to clerks) and by G.L. c. 207, § 50, making clear that any official who "issues a certificate of notice of intention of marriage knowing that the parties are prohibited by section eleven from intermarrying" is criminally punishable.

To assist clerks in implementing these sections, the 1913 Legislature also enacted another statute (St. 1913, c. 752), which is now codified at G.L. c. 207, § 37, and requires the Commissioner of Public Health to "furnish to the clerk or registrar of every town a printed list of all legal impediments to marriage, and

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[5] Under G.L. c. 207, § 10:

> If any person residing and intending to continue to reside in this commonwealth is disabled or prohibited from contracting marriage under the laws of this commonwealth and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void for all purposes in this commonwealth with the same effect as though such prohibited marriage had been entered into in this commonwealth.

the clerk or registrar shall forthwith post and thereafter maintain it in a conspicuous place in his office." This function is now performed by the state Registrar (acting under the Commissioner), who oversees the Registry of Vital Records and Statistics (RVRS) and whose duties include the uniform implementation of marriage licensing laws.[6]

Pursuant to G.L. c. 207, § 20, persons seeking to marry must fill out a Notice of Intention to Marry, on a form furnished by the Registrar, and submit it to a city or town clerk. The Notice of Intention must include "a statement of absence of any legal impediment to the marriage, to be given before such town clerk under oath by both of the parties to the intended marriage," and such oath "shall be to the truth of all the statements contained therein whereof the party subscribing the same could have knowledge[.]" Id. If the Notice of Intention meets all legal criteria, the clerk (after a three-day waiting period, which may be waived by court order) then issues to the parties a certificate commonly known as a "marriage license."

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[6] See G.L. c. 17, § 4, under which the Registrar "shall, under the supervision of the Commissioner, enforce all laws relative to the registry and return of births, marriages, and deaths, and may prosecute in the name of the commonwealth any violations thereof." Goodridge, 440 Mass. at 314.

See G.L. c. 207, § 28. The parties then have the marriage solemnized by a person qualified to do so, id. §§ 38-39, and that person (the solemnizer or officiant) completes the marriage license by filling in the place and date of the marriage and returns it to the issuing clerk for recording. Id. § 40.[7]

2. Implementation of §§ 11 and 12, pre- and post-Goodridge.

The Registrar believes that until this Court decided Goodridge, Massachusetts had not had marriage laws in recent years that were substantially less restrictive than other states or jurisdictions in the United States. RA 60 ¶ 6. For example, in most states, just as in Massachusetts, the legal age of consent to marry without parental permission or a court order is 18 years old. Thus, there had been little reason to believe that couples would come here to avoid their own states' marriage laws. Id.

Nevertheless, §§ 11 and 12 had not been ignored prior to Goodridge. In 1936 and again in 1973, the proper application of §§ 11 and 12 was the subject of an Opinion of the Attorney General, requested by the

[7] The clerk keeps a copy of what is now termed the Certificate of Marriage and sends the original form and documentary evidence to the Registrar for preservation, binding, indexing, and reporting purposes. G.L. c. 46, §§ 17A, 17C; G.L. c. 111, § 2.

Secretary of the Commonwealth on behalf of the Registrar.[8] See Arg. V infra. And for decades before Goodridge, the requirements of § 11 were included in the list of legal impediments to marriage that the Registrar sent to each clerk, which the clerk posted in his or her office pursuant to G.L. c. 207, § 37. RA 60 ¶ 6, RA 566-69. An October 1995 publication of the Registrar specifically instructed clerks, "upon taking the oath of the couple, [to] explain completely that this is a legally binding oath and make sure they have been referred to the Impediments to Marriage poster. Try to provide some level of importance to the oath taking so that the couple will understand that this is an important document." RA 60-61 ¶ 7, RA 551. An out-of-state couple, by signing the Notice of Intention form, RA 546, would thus be stating under oath that they faced no impediment that would make their marriage void if celebrated in their home state.

In response to Goodridge, the Registrar, inter alia, revised the Notice of Intention form to eliminate references to "bride" and "groom" and also to seek information about where each applicant, if not a

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[8] 1935-36 Op. Att'y Gen. at 20 (Jan. 13, 1936); 1973-74 Op. Att'y Gen. No. 4 at 48 (July 26, 1973). The Registrar served under the Secretary until being transferred to DPH by St. 1976, c. 486.

Massachusetts resident, intends to reside, as well as seeking information about other impediments such as consanguinity and affinity that had not previously been requested on the form. RA 61 ¶ 9;, RA 547, 570. Before Goodridge took effect on May 17, 2004, the Registrar saw published reports that same-sex couples from other states intended to come to Massachusetts to marry. RA 61 ¶ 8. As of May 2004 (and as of the filing of this brief in June 2005), same-sex marriage was either void or prohibited in all 49 other states, the District of Columbia, and Puerto Rico. See Addendum B to this brief.[9] It thus appeared that violations of §§ 11 and 12 might occur unless renewed emphasis was placed on their enforcement. RA 61 ¶ 8.

The Registrar conducted informational sessions and distributed training materials so that municipal clerks would understand what information the revised forms were requiring, and what to do once they had that information. At each of the informational sessions, the clerks were told that the goal of the session was to promote the values of consistency, equality, competence, and courtesy. In particular, the clerks

[9] Addendum B is a chart entitled "Same-Sex Marriage Voidness, Prohibition, and Recognition Law in Other Jurisdictions," prepared by the defendants for the purposes of this brief.

were told that "equality is important so that all persons are treated equally regardless of their race, creed, age, or sexual orientation[.]" RA 61-62 ¶ 13.

The clerks were informed that when a person indicates on the Notice of Intention that he or she does not reside or intend to reside in Massachusetts, the clerk should present that person with the list (issued by the Registrar under G.L. c. 207, § 37) of legal impediments to marriage both in Massachusetts and in his or her home state. RA 62 ¶ 17. On the bottom of the Notice of Intention form, each person must swear under the penalties of perjury that he or she has reviewed the list of impediments to marriage for his or her place of residence and that there is no legal impediment to the marriage. Id.; RA 570.

The clerks were also informed that they should not issue a marriage license if, based on comparing the factual information on the Notice of Intention with the list of legal impediments furnished by the Registrar, there is a legal impediment to that person marrying in Massachusetts or his or her home state. Clerks were instructed to do so for all couples and all impediments, not just same-sex couples. RA 62 ¶ 18.

On May 11, 2004, the Registrar sent to each clerk a guide to the legal impediments to marriage in the

fifty states and the other jurisdictions of the United States. The guide listed impediments including age, consanguinity, affinity, and gender, for each state and jurisdiction. The lists were intended to be (and have been) amended and updated as necessary.[10] RA 62 ¶ 19.

As Goodridge took effect on May 17, 2004, published reports indicated that clerks in Provincetown, Somerville, Springfield, and Worcester were issuing marriage licenses to same-sex couples who indicated on the Notice of Intention that they were from jurisdictions outside of Massachusetts, and intended to continue to reside in those jurisdictions, without regard to whether same-sex marriage is void or prohibited in those jurisdictions. On the Registrar's behalf, the Office of the Governor's Legal Counsel asked those clerks to send for review all Notices of Intention and Certificates of Marriage from May 17, 2004 through the date of the request. The request was for all Notices of Intention and Certificates, not just those filed by same-sex couples. RA 63 ¶ 23.

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[10] In July 2004, the lists were updated to reflect impediments based on other states' divorce laws, e.g., waiting periods after a divorce becomes final. RA 107. The lists were further updated in February 2005, see http://www.mass.gov/dph/bhsre/rvr/impediments1%20.pdf (last visited June 17, 2005), and again in June 2005. See http://www.mass.gov/dph/bhsre/rvr/impediment_20050622.pdf (last visited June 22, 2005).

Among the Notices of Intention that were received from those cities and towns were those of same-sex couples who stated that they reside and intend to continue to reside in another state. These included the Notices submitted by the five plaintiff Couples who had already received marriage licenses and had their marriages solemnized. See supra n.2. Also received was a Notice of Intention from Springfield submitted by an opposite-sex couple in which the male stated that he resided and intended to continue to reside in Puerto Rico and was 19 years old and the female stated that she was 15 years old. Copies of these forms were forwarded to the Attorney General. RA 63 ¶ 24.

The Office of the Attorney General then wrote to counsel for Provincetown, Somerville, Springfield, and Worcester, stating that the actions of their respective clerks "raise significant questions under G.L. c. 207, §§ 11 and/or 12, and, before we institute enforcement action, we write to request your immediate explanation of how these actions may be reconciled with those statutes." RA 629. The letter explained the governing law as interpreted by the Registrar and concluded: "until we receive a satisfactory explanation, we ask that you advise your clerk's office to cease and desist from such actions." RA 633.

Among the responses to this request was a letter from the Springfield City Solicitor, dated May 26, 2004, stating in part:

> I understand that the practice of the Springfield City Clerk has been to rely on the affirmation of no impediments to marriage which is signed by marriage applicants. Is the Attorney General ordering the Springfield City Clerk to do something more than rely on that affirmation when the applicant is a same-sex couple?

RA 66-67, 69. The Office of the Attorney General responded that same day as follows (with emphasis added):

> The position of the Registrar is that <u>all</u> couples must be shown the list of impediments for Massachusetts and any other state(s) or jurisdiction(s) in which they reside and intend to reside. If the factual information on the Notice-of-Intention form as completed by the applicants themselves shows that there is an impediment to marriage on the list issued by the Registrar pursuant to G.L. c. 207, § 37, then the Clerk may <u>not</u> rely on the applicants' statement that there is no impediment. <u>That is true regardless of the type of impediment involved, i.e., whether the impediment is based on age, consanguinity or affinity, marital status, or same-gender status of applicants who reside and intend to continue to reside in other states.</u>

RA 71 (emphasis added). Shortly thereafter, the Springfield City Solicitor responded that the Springfield Clerk would cease accepting notices of intention from out-of-state same-sex couples. RA 67.

The Office of the Attorney General also asked for

an explanation of Springfield's acceptance of a notice of intention from the opposite sex couple, one member of which was 19 years old and resided and intended to continue to reside in Puerto Rico, and the other member of which was 15 years old--a situation that presented separate impediments under the laws of Puerto Rico and Massachusetts.[11] RA 66. The City Solicitor responded that the couple had submitted a court order authorizing the marriage, and he sent a copy of the order, which the Office of the Attorney General forwarded to the Registrar for review. Id.

The other clerks also agreed to stop accepting notices of intention from out-of-state same-sex couples, at least temporarily. These suits followed.

3. The Clerks' and Couples' Claims and Requests for Preliminary Relief.

The Clerks claimed that the Registrar's enforcement of §§ 11 and 12 constitutes selective enforcement in violation of the equal protection clause, and they sought a preliminary injunction barring the defendants from taking enforcement action that would prevent the Clerks from issuing marriage

[11] In the Commonwealth, a person under 18 may not marry except with court permission. G.L. c. 207, §§ 7, 24-25. Under Puerto Rico law, a person under 21 must present the consent of a parent or guardian, with specified exceptions for, inter alia, persons over 18 and females between 14 and 16. RA 614.

licenses to non-resident same-sex couples. The Clerks also claimed that the Registrar's enforcement infringes upon clerks' asserted statutory discretion to determine whether to issue marriage licenses. RA 154-70.

The Couples claimed that §§ 11 and 12 (1) lack a rational basis, in violation of state constitutional equal protection and due process guarantees, and (2) violated the federal Privileges and Immunities Clause.[12] RA 26-26, 73-93. The Couples sought a preliminary injunction barring the Registrar from enforcing §§ 11 and 12 with respect to non-resident same-sex couples. RA 55-56, 91.

4. The Superior Court's Orders

With respect to the Clerks, the Superior Court held that the Clerks in their official capacities had no standing to pursue a selective prosecution (equal protection) claim, given this Court's recognition of a "long-standing and far-reaching prohibition on constitutional challenges by governmental entities to acts of their creator State." RA 302 (quoting MBTA v. Auditor of the Comm., 430 Mass. 783, 792 (2000); Spence

[12] The Couples also challenged the Registrar's handling of marriage certificates for the five Couples who had obtained marriage licenses, had their marriages solemnized, and whose completed licenses were returned to local clerks. That claim was not a focal point of the preliminary injunction proceedings, however, and the Couples have not pressed it in this appeal.

v. Boston Edison Co., 390 Mass. 604, 610 (1983)). The Superior Court did not discuss the Clerks' statutory claim (which the Registrar had not disputed the Clerks' standing to raise). RA 301-03.

After the Clerks moved for reconsideration based on having amended their complaint to assert their claims in their individual capacities, RA 304, the Superior Court denied the motion "for the reasons set forth in the Defendants' Opposition[.]" RA 310. Those reasons included, inter alia, that the theoretical possibility that the Clerks in their individual capacities could be prosecuted under G.L. c. 207, § 50, for issuing marriage licenses in violation of § 11, was, as a matter of law, an insufficient threat of harm to confer standing.[13] RA 306-08.

With respect to the Couples, first, the Superior Court (without objection from the Registrar) treated the selective enforcement claim as if raised by the Couples[14] (as well as the Clerks), and rejected that

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[13] The Registrar had also opposed reconsideration on the ground that, even if the Clerks could pursue a selective enforcement claim, the Superior Court had already ruled, in denying the Couples' preliminary injunction motion, that a selective enforcement claim was unlikely to succeed on the merits (see infra), and such a claim was no stronger in the Clerks' case than in the Couples' case. RA 308.

[14] At the preliminary injunction hearing, the court had foreshadowed that it might do so, by noting

claim. RA 122-24. The court concluded that local clerks had been instructed to apply §§ 11 and 12 equally: to all out-of-state couples (whether same-sex or opposite-sex), and for all impediments to marriage in the couple's home state (including, e.g., age, consanguinity and affinity, and status of any prior marriage, as well as whether the couple was of the same gender). RA 123. Also, while the Registrar acknowledged that enforcement of §§ 11 and 12 received new emphasis after Goodridge because of the increased likelihood of violations, the Registrar and other defendants appeared to be enforcing §§ 11 and 12 evenhandedly. Thus the Couples had "failed to establish that . . . they, compared with others similarly situated, were selectively treated[.]" RA 122-23.[15] As the court elsewhere concluded, "the enforcement has been even-handed, and the defendants have not discriminated against similarly-situated persons." RA 124.

The court also rejected the Couples' claim that §§ 11 and 12 lacked any rational basis, in violation of

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that the Couples could easily amend their complaint to include such a claim, and the Registrar did not object.

[15] The court also ruled that the Couples had failed to show that "such selective treatment was based on impermissible considerations . . . ." RA 123.

due process and equal protection principles. RA 124-25. The court first noted the various statements of the Goodridge majority, and the four Justices who wrote jointly in Opinion of the Justices, 440 Mass. 1201 (2004), that referred to extending marriage rights to same-sex couples who are "residents of the Commonwealth." RA 111-13; see RA 121 (Goodridge "carefully and repeatedly limited the reach of its decision to Massachusetts 'residents' or 'citizens'"). The court also noted the Goodridge concurrence's statement that "[t]he argument . . . that legalization of same-sex marriage in Massachusetts will be used by persons in other States as a tool to obtain recognition of a marriage in their State that is otherwise unlawful, is precluded by the provisions of G.L. c. 207, §§ 11, 12, and 13." RA 111, 121 (quoting Goodridge, 440 Mass. at 348 n.4 (Greaney, J., concurring)).

The court also noted the Goodridge majority's statement that "[i]n a real sense, there are three partners to every civil marriage: two willing spouses and an approving State." Goodridge, 440 Mass. at 321, quoted at RA 111. The court then concluded that § 11[16]

[16] The court found it unnecessary to distinguish between §§ 11 and 12 "as it is established that they must be read together" as part of the same statutory

had a rational basis, as follows:

> Massachusetts has a legitimate interest in protecting the interests served by the Commonwealth's creation and regulation of the marriage relationship 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 321-325. Thus, it is rational for the Commonwealth to require that in order to marry here, persons must reside here or in a jurisdiction where their marriage is similarly recognized and regulated. Safeguarding the benefits, obligations, and protections of the parties, including the children, of a marriage that the Commonwealth has helped create, is a legitimate governmental objective.

RA 124.

The Couples had also argued that §§ 11 and 12 were enacted in 1913 in order to deter interracial couples from coming to Massachusetts to marry if barred by doing so by their home states, and that this asserted history undercut the statutes' rationality. The court did not accept this historical argument, RA 115-16, and the Couples do not press it on appeal.

Finally, the court rejected the Couples' claim

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scheme. RA 120; see RA 118. Although the Registrar agrees that the sections must be read together, and that the rational basis accepted by the court supports both statutes, the Registrar is unsure of the basis for the court's apparent view that § 11 reaches marriages merely "prohibited," as well as those made "void," by other states' laws, RA 118--a reading that is broader than the ones advanced by either the Couples or the Registrar. See Arg. V infra.

that §§ 11 and 12 violate the Privileges and Immunities Clause, which provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The court noted the settled principle that only if a right granted by a state to its residents is deemed "fundamental" for purposes of the Privileges and Immunities Clause may the state be required to extend that right to non-residents. RA 126. The court rejected the claim that the right to marry was "fundamental" for purposes of the Clause. RA 128.

Alternatively, even if a "fundamental" right were at stake, differential treatment is permissible under the Clause "where there is a valid justification for the distinction other than the mere fact of non-residency." RA 127 (citations omitted). Such a justification existed here, because, as the court had already concluded in its rational basis analysis concerning the need for an "approving State," "the Commonwealth has a substantial interest in ensuring that the marriage relationship is regulated for the protection of the interests of the public, the spouses, and their children." RA 128 (citing Goodridge).

These appeals followed. The Registrar notes that the Clerks did not timely appeal from the denial of

their preliminary injunction motion, which had asserted a "usurpation of clerks' statutory discretion" claim as well as an equal protection/selective enforcement claim. The Clerks timely appealed only from the denial of their motion for reconsideration, which had pressed only the constitutional claim. RA 152-53, 304. Thus their statutory claim is not before this Court.

SUMMARY OF ARGUMENT

I. The Couples' and Clerks' selective enforcement claim fails, because the Registrar's current enforcement effort has not discriminated against same-sex couples or in favor of opposite-sex couples. Even the Clerks--who are in the best position to know--cannot identify a single instance of an out-of-state opposite-sex couple being allowed to marry here in violation of §§ 11 or 12. This failure to prove that the statutes are not being equally enforced against opposite-sex couples is fatal to the selective enforcement claim. (pp. 29-31.)

More particularly, the Registrar's current enforcement system is evenhanded, treating same-sex and opposite-sex couples exactly alike, and that is the proper inquiry; a comparison of past to current enforcement efforts is irrelevant. The Registrar is not "over-enforcing" other states' impediments to same-

sex marriage, which is currently either void or prohibited in every other American jurisdiction. Nor is the Registrar "under-enforcing" opposite-sex marriage impediments; rather, he has fully and accurately instructed the Clerks to enforce them. As the Clerks have not shown any unequal enforcement against same-sex couples, there is no need to examine the "motives" for the Registrar's system. (pp. 31-48.)

II. The Registrar's enforcement system does not violate equal protection because of its claimed "discriminatory purpose and effect" on same-sex couples. "Discriminatory purpose and effect" analysis is not a ground for per se invalidation of government action, but instead is used merely to determine whether facially neutral government action should be treated as containing a classification of particular groups, in which case such action is then subject to the appropriate level of equal protection scrutiny. That is strict scrutiny in the race cases relied on by the Couples, but is merely rational basis scrutiny in this case, because sexual orientation is not a suspect classification. And the Registrar's current enforcement system is rational, both because of the violations of §§ 11 and 12 to be expected after Goodridge, and because of the many rational bases for

§§ 11 and 12 themselves. (pp. 48-57.)

III. Sections 11 and 12 have ample rational bases and thus satisfy equal protection and due process requirements. Goodridge does not resolve that issue; the classification found irrational in Goodridge is quite separate from the one at issue here. Sections 11 and 12 further the many interests served by marriage itself, by assuring that no marriage is performed here unless there is an "approving State" as envisioned in Goodridge, one that confers benefits on the marriage and stands ready to enforce the spouses' duties to each other and their children. It is rational to believe that, of the 49 states where same-sex marriage is void or prohibited, the vast majority will not recognize a Massachusetts marriage of a same-sex couple from that state. Thus it is rational for §§ 11 and 12 to prevent such marriages from occurring here. (pp. 57-81.)

Moreover, if an out-of-state same-sex couple's Massachusetts marriage broke down, Massachusetts courts would likely be the only courts available to grant a divorce. Yet the resulting divorce judgments, particularly insofar as they awarded child custody and support, alimony, and a division of marital property, could easily be refused enforcement or collaterally attacked in other states, a result the Commonwealth has

a legitimate interest in avoiding. Sosna v. Iowa, 419 U.S. 393 (1975). The Commonwealth also has a legitimate interest "in avoiding officious intermeddling in matters in which another State has a paramount interest," i.e., the existence of marriages between that other State's citizens. Sosna, 419 U.S. at 407. And the Commonwealth has a legitimate interest in avoiding the interstate friction and possible retaliation that could occur if the Commonwealth allows marriages of out-of-state same-sex couples despite their home states' express policies barring such marriages. Such retaliation (e.g., in the form of a federal constitutional amendment barring same-sex marriage in any state) could harm the Commonwealth and its resident same-sex married couples. Sections 11 and 12 rationally serve to prevent all of these harms. (pp. 81-94.)

IV. Sections 11 and 12 do not discriminate against non-residents in violation of the Privileges and Immunities Clause. First, § 11 in particular treats non-residents in the exact same manner as another marriage evasion statute, G.L. c. 207, § 10, treats Massachusetts residents; this is fatal to the claim of discrimination against non-residents. (pp. 94-98.) Second, the Clause protects only certain

rights found to be "fundamental" to the promotion of "interstate harmony" and a "national economic union." Marriage, although fundamental for Fourteenth Amendment purposes, does not meet the Clause's criteria for "fundamentality," and the only Supreme Court decision in the area holds that marriage-related rights are not protected by the Clause. (pp. 99-117.)

Third, even if marriage were "fundamental" under the Clause, §§ 11 and 12 are valid, because they are closely related to the Commonwealth's substantial interests in interstate harmony, in the welfare of prospective marital couples and their children, and in minimizing the likelihood of the Commonwealth's courts being called upon to issue divorce judgments that will be unenforceable or collaterally attacked in other states. Sections 11 and 12 are much like the choice-of law "borrowing" statutes that have been upheld under the Clause; choice-of-law provisions unquestionably serve substantial state interests. (pp. 117-38.)

V. The Registrar properly interprets § 12 as establishing a marriage bar distinct from § 11. Section 12 expressly bars a marriage here if it would be "prohibited" in the couple's home state, even if the home state does not treat such a marriage as "void," which would trigger § 11. This interpretation accords

with § 12's plain language, its purpose, the title of the 1913 statute that enacted it, and two Opinions of the Attorney General from 1936 and 1973. (pp. 138-48.)

VI. If the Court finds it necessary to reach the issue, the Clerks may not assert an equal protection selective enforcement claim in any capacity in this case. The Clerks in their official capacities do not assert that their own equal protection rights have been violated, nor do they have such rights, under the doctrine of Spence v. Boston Edison Co., 390 Mass. 604 (1983). (pp. 148-54.) The Clerks in their individual capacities lack standing because they fail to allege sufficient actual or imminent harm to themselves. Their professed fears of criminal prosecution and personal civil liability are too remote and speculative to confer standing, nor does their "oath of office" theory support standing, absent some other, more concrete injury. (pp. 154-61.) Finally, the Clerks have no jus tertii standing to assert the rights of out-of-state couples, where there is no real obstacle to such couples asserting their own rights, as the Couples have in fact done here. Recent Supreme Court decisions make clear that showing such an obstacle is a "precondition" to jus tertii standing. (pp. 161-64.)

ARGUMENT

I. THE SELECTIVE ENFORCEMENT CLAIM IS UNLIKELY TO SUCCEED ON THE MERITS.

Whether asserted by the Clerks or the Couples,[17] the equal protection selective enforcement claim is unlikely to succeed on the merits, because the Registrar's enforcement effort has been evenhanded and has not discriminated against any subset of a group of similarly-situated persons. See Yerardi's Moody Street Rest. & Lounge v. Bd. of Selectmen, 878 F.2d 16, 21 (1st Cir. 1989); Daddario v. Cape Cod Comm'n, 56 Mass. App. Ct. 764, 773 (2002). The Registrar lawfully exercised his enforcement authority to place increased emphasis on enforcing §§ 11 and 12 once it became clear that violations might occur after Goodridge took effect in May 2004.[18] RA 61 ¶ 8. Although the violations

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[17] The Court need not reach the question whether the Clerks may assert this claim, because the Couples clearly may do so, were treated as having done so below, see supra p. 18, and have expressly adopted the claim on appeal. Couples Br. at 44-45. The Registrar agrees that in the particular circumstances of this case, the Couples have sufficiently raised the claim, and so the Clerks' ability to do so is a moot point. If the Court finds it necessary to reach the issue, the Registrar explains in Arg VI. infra why the Clerks may not raise the selective enforcement claim.

[18] "The discretion granted to an administrative agency is particularly broad when [the] agency is concerned with fashioning remedies and setting enforcement policy." Boston Preservation Alliance, Inc. v. Sec'y of Env'l Aff., 396 Mass. 489, 498 (1986) (internal quotations and citation omitted); see Zachs

thus anticipated would largely if not entirely involve same-sex couples, the Registrar recognized that heightened enforcement efforts should be fairly applied to all applicants, so as to prevent violations involving opposite-sex couples as well. RA 61-62 ¶¶ 13, 18. As a result, even the Clerks--who are in the best position to know--cannot identify a single instance of an out-of-state opposite-sex couple being allowed to marry here in violation of §§ 11 or 12, i.e., despite an impediment based on their home state's laws.[19] This failure of proof is, by itself, fatal to the selective enforcement claim. See Comm. v. Franklin, 376 Mass. 885, 894 (1978) (defendant alleging selective prosecution must show, inter alia, that "a broader class of persons than those prosecuted has violated the law");[20] United States v. Armstrong, 517

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v. DPU, 406 Mass. 217, 228 (1989); Levy v. Bd. of Reg. and Discipline in Medicine, 378 Mass. 519, 525 (1979).

[19] Thus the Clerks' assertion (Br. at 27) that up to 50 out-of-state opposite-sex couples have been allowed to marry in Massachusetts since May 2004 proves nothing. There is no reason to think that such marriages in any way violated §§ 11 or 12.

[20] Even if the Clerks could show any violation of §§ 11 or 12 as to an opposite-sex couple, they would also have to show that the violation was due to the Registrar's enforcement system or some decision of the Registrar thereunder, vs. an error by a local clerk charged with implementing the system. See Franklin, 376 Mass. at 894 (requiring showing "that failure to prosecute was either consistent or deliberate"). The

U.S. 456, 465 (1996) (to show selective prosecution based on race, claimant must show, inter alia, that similarly situated individuals of a different race were not prosecuted).[21]

A. The Registrar's Enforcement Effort Has Been Evenhanded.

That the Registrar's enforcement effort has been evenhanded is shown by the following:

- Clerks were instructed at the outset that all persons should be treated equally regardless of their race, creed, age, or sexual orientation. RA 61-62 ¶ 13 (emphasis added).

- Clerks were informed that they should not issue a marriage license if, based on comparing the factual information on the Notice of Intention with the Registrar's list of legal impediments, there is an impediment to the person marrying in Massachusetts or his or her home state. Clerks were instructed to do so for all couples and all impediments, not just for same-sex couples. RA 62

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third prong of the Franklin test--whether the differential treatment was based on an impermissible classification, id.--need not be reached here, as discussed infra.

[21] See also New York Times Co. v. Comm'r of Revenue, 427 Mass. 399, 407 (1998); United States v. Peterson, 233 F.3d 101, 105 (1st Cir. 2000); cf. McGuire v. Reilly, 386 F.3d 45, 65 (1st Cir. 2004) (rejecting abortion protesters' First Amendment challenge to alleged selective enforcement of clinic "buffer zone" law, where "there is no evidence that police turned a blind eye toward pro-abortion speech while not turning a blind eye to possible transgressions by [anti-abortion plaintiffs]. The evidence shows that the police responded to all incidents involving pro-abortion personnel [of] which they have been made aware.")

¶ 18, RA 71.[22]

- The revisions to the Notice of Intention form included new fields requesting information relevant to other impediments, such as consanguinity and affinity. Compare RA 547, 570.

- The Registrar's lists of other states' marriage impediments include not just gender, but a range of impediments to marriage, including age, consanguinity and affinity, and other factors, for each state. RA 62 ¶ 19; see RA 572-627. The lists have been amended and updated as necessary. RA 62 ¶ 19; RA 628; RA 106-07; see supra n.10.

- When press reports indicated that some city and town clerks were issuing marriage licenses to same-sex couples from other states, the Office of the Governor's Legal Counsel, acting on the Registrar's behalf, asked those city and town clerks to send all Notices of Intention accepted on or after May 17, 2004 for review, not just those filed by same-sex couples. RA 63 ¶ 23.

- When Springfield submitted a notice of intention from an opposite-sex couple which raised a question whether the marriage was consistent with §§ 11 and 12 and the marriage laws of Puerto Rico, see supra pp.15-16, the Attorney General took appropriate action to obtain further information from Springfield officials and to forward it to the Registrar for review. RA 63 ¶ 24, 66 ¶¶ 2-5.

- When Springfield wrote to the Attorney General asking if same-sex couples should be treated differently than opposite-sex couples, the Attorney General promptly and forcefully disabused Springfield of any such notion. RA 69, 71-72.

As shown infra, this examination of current

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[22] For example, first cousins may marry in Massachusetts, but not in Arizona, as shown on the Registrar's impediments list. RA 575. Thus, if Arizona applicants sign the sworn statement that they know of no impediment, but nevertheless state on the Notice of Intention that they are first cousins, the clerk should not issue them a marriage license.

enforcement efforts against different subsets of a similarly-situated group (out-of-state couples seeking to marry here) is the proper focus. The Clerks' comparison of current to past enforcement efforts is irrelevant. Moreover, the Clerks' various critiques of the Registrar's current approach in no way establish unequal treatment of out-of-state same-sex couples.

B. Comparison of Past to Current Enforcement Efforts Is Irrelevant.

The relevant comparison is not between past and current enforcement efforts, but between current enforcement efforts regarding same-sex couples and those regarding opposite-sex couples. Even if the Registrar had never before taken any steps to implement §§ 11 and 12 (which is not the case, see supra pp. 9-10), there would be nothing wrong with changing enforcement policy in response to a newly arisen category of likely violations, particularly where, as here, the new enforcement policy evenhandedly targets all potential violations, not just the newly arisen ones.

Even complete lack of prior enforcement of a statute would not, by itself, bar current enforcement of the statute. E.g., Fitchburg Gas and Elec. Light Co. v. Dep't of Telecomm. and Energy, 440 Mass. 625,

636 (2004). "It would indeed be a most serious consequence if we were to conclude that the inattention or inactivity of government officials could render a statute unenforceable and thus deprive the public of the benefits or protections bestowed by the Legislature." Doris v. Police Comm'r of Boston, 374 Mass. 443, 449 (1978). If impermissible discrimination could be established simply by comparing past to current enforcement, then government could never alter its enforcement policies, even in response to changed circumstances, which cannot be the law.[23] (The Clerks' and Couples' claim that here, the changed enforcement policy is invalid because of its "discriminatory purpose and effect," is addressed in Arg. II infra.)

Moreover, the Clerks offer no reason to think that there were any significant numbers of violations of §§ 11 or 12 from 1913 to 2004, let alone any that

[23] Cf. Comm. v. Tate, 424 Mass. 236, 240 (1997) (change in law does not per se create equal protection problem by distinguishing between persons whose rights were determined under old law vs. new law; "to hold the opposite would be either to eradicate all new statutes or to make them all retroactive" (citation omitted)); Citizens for Responsible Env'l Mgmt. v. Attleboro Mall, Inc., 400 Mass. 658, 667, 669-71 (1987) (citing cases rejecting equal protection challenges to grandfather clauses; holding that grandfather clause in agency regulation was rationally related to statute).

resulted from the enforcement system then in place.[24] The Registrar's prior steps to enforce these statutes were detailed at pp. 9-10 supra. The fact that, when §§ 11 and 12 were enacted in 1913, over half of the other states still prohibited interracial marriage (Clerks Br. at 44), does not show that any violation of §§ 11 or 12 involving an interracial couple occurred here; given the states involved, such couples would have been quite unlikely to come here to marry.[25] Similarly, the fact that New Hampshire and Maine (but not Massachusetts) prohibit first-cousin marriages (Clerks Br. at 43) does not show that any first cousins from those states actually married here in violation of §§ 11 or 12.[26] Finally, even if the Clerks were

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[24] Cf. Daddario, 56 Mass. App. Ct. at 774 ("At 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.")

[25] The closest state with such a prohibition in place in 1913 or any time since was Delaware. See Peter Wallenstein, Tell the Court I Love My Wife (2002) at fig. 8. A Delaware couple seeking to avoid that prohibition would have been more likely simply to have married in a neighboring state such as New Jersey or Pennsylvania--or perhaps New York or even Connecticut--rather than coming all the way to Massachusetts.

[26] Both Maine and New Hampshire have marriage evasion laws that would render void any attempt by their residents to evade the prohibition on marriage of cousins by marrying in Massachusetts. Maine Rev. Stat. Ann. Title 19A, § 701(1); N.H. Rev. Stat. § 457:43.

correct that, prior to Goodridge, there was substantial reason to think that opposite-sex couples would come here to evade their own states' marriage laws, then the Clerks can hardly quarrel with the Registrar's current effort to enforce §§ 11 and 12 across the board.

In sum, comparison of past to present enforcement efforts is both legally irrelevant and, as a factual matter, does not show that the Registrar ignored violations of §§ 11 and 12 until Goodridge.

C. The Registrar Is Not "Over-Enforcing" Other States' Impediments to Same-Sex Marriage.

The Registrar is properly enforcing the impediments to same-sex marriage that currently exist in all 49 other states, Puerto Rico, and the District of Columbia. Same-sex marriage is currently either void or prohibited in each of those jurisdictions. See Add. B. Thus it is barred here by § 11 (if "void" in the couple's home jurisdiction) or by § 12 (if "prohibited" in the couple's home jurisdiction). The Clerks' various claims that the Registrar is "over-enforcing" other states' impediments to same-sex marriage will be addressed and refuted seriatim.

First, the Clerks err in claiming that § 12 has no force independent of § 11, and that the Registrar is therefore "over-enforcing" § 12 against same-sex

couples. As explained in Arg. V infra, the Registrar's interpretation of § 12 as barring marriages here if "prohibited" in the couple's home jurisdiction is in accordance with § 12's plain language, its purpose, the title of the 1913 statute that enacted it, and two Opinions of the Attorney General from 1936 and 1973.

Second, there was nothing impermissibly selective about the Governor's April 2004 form letter to other states' governors and attorneys general, seeking confirmation of his understanding that same-sex marriage was currently impermissible in those states. RA 661. The letter was prompted by the national wave of litigation and legislative activity regarding same-sex marriage. The Registrar's impediments list was based on a review of other states' laws; the Governor's letter was meant to confirm the results of that review with regard to same-sex marriage, by indicating that same-sex couples from other states would not be allowed to marry here unless the other state furnished an "authoritative statement" that same-sex marriage was permitted in that state. RA 62-63 ¶¶ 19-20; RA 661. That the Governor did not send individualized letters to each state verifying each other impediment reflects the simple fact that the status of other impediments is not in question around the nation.

Third and likewise, the slide in the Registrar's training materials for Clerks indicating that same-sex couples residing in other states should not be issued marriage licenses unless the other state "affirmatively indicated that same sex marriage is permitted in that state," RA 653, did not purport to state the actual requirements of §§ 11 and 12 themselves. Other slides in the trainings for Clerks accurately stated those requirements. RA 645, 648-49. The slide cited in the Clerks' brief 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.

Fourth, 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, RA 653, is fully consistent with the plain language of §§ 11 and 12, which apply to any applicant who resides and intends to continue to reside in another state or jurisdiction, without regard to where the other applicant resides. Moreover, the instruction on its face, like the statutes, applies equally to opposite-sex couples as well as same-sex couples.

Fifth, the Registrar has not "overstate[d] the law regarding same-sex couples' right to marry in other states," such as New York. Couples Br. at 31. That the New York Attorney General's March 2004 opinion noted that there were significant constitutional questions as to the validity of New York's statutes limiting marriage to opposite-sex couples, RA 678, hardly means that the Registrar's impediments list must identify New York as a state where same-sex marriage is permitted. Indeed, the New York Attorney General stated that New York clerks should follow the statute, "not issue marriage licenses to same-sex couples," and leave such constitutional questions to the courts. RA 699. The Registrar is simply following the same approach. After that Attorney General's Opinion, several New York trial courts have issued conflicting decisions on those constitutional questions, and those decisions are on appeal. See Add. B. Once the matter is finally and authoritatively resolved by a New York appellate court, the Registrar will make any necessary changes to the New York impediments list, as he would with any state if and when that state's law changes.

Sixth, the Clerks fail in their attack on the Registrar's application of §§ 11 and 12 to applicants from other countries. Clerks Br. at 32. Sections 11

and 12 by their terms are not limited to persons from other states.[27] Moreover, what the Clerks complain of is the Registrar's statement in his Application for Direct Appellate Review that "[i]n a number of jurisdictions, same-sex marriage is legal--seven Canadian provinces, Belgium, and the Netherlands--and §§ 11 and 12 allow same-sex couples from such jurisdictions to marry here." DAR Applic. at 31.[28] Based on this statement to this Court, the Clerks complain that the Registrar is improperly asking them to enforce other countries' marriage laws, without giving them any guidance as to what other marriage impediments exist in those countries. Br. at 32. This

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[27] Section 11 applies (with emphasis added) to a party "residing and intending to continue to reside in another jurisdiction"; § 12, although referring in its first clause to a person "residing and intending to continue to reside in another state," refers in its final clause to "the laws of the jurisdiction where he or she resides." (Emphasis added.)

[28] Same-sex marriage is legal in British Columbia, Manitoba, Nova Scotia, Ontario, Quebec, Saskatchewan, Newfoundland, the Yukon Territory, Belgium, and the Netherlands. See Advances in Marriage Equality: International Marriage Rights, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=14813&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited June 23, 2005). In light of a December 2004 opinion of the Supreme Court of Canada, Parliament could legalize same-sex marriage throughout Canada. Id. In Spain, a bill legalizing same-sex marriage has passed the lower house of Parliament and is awaiting Senate action. Spain Close on Same-Sex Weds, http://www.cbsnews.com/stories/2005/04/21/world/main689929.shtml (April 21, 2005)(last visited June 23, 2005).

argument could have been, but was not, raised below; in any event it is meritless.[29]

D. The Registrar Is Equally Enforcing Other States' Impediments Applicable to Opposite-Sex Couples.

The Registrar is enforcing other states' impediments applicable to opposite-sex couples to the same extent as those states' impediments applicable to same-sex couples. The Clerks' arguments to the contrary are addressed seriatim below.

First, the Clerks argue that, as to certain atypical impediments, the Notice of Intention form itself does not contain blank fields asking for the relevant facts, such as information about whether applicants are mentally incompetent, physically impaired, under duress, or facts regarding other specific impediments that are particular to one or a few states. Clerks Br. at 33 & n.13. But this hardly establishes unequal treatment of same-sex couples. The

[29] The Registrar had made the same point about other countries in the Superior Court, and the Clerks raised no objection. Had they done so, the Registrar would have submitted an affidavit stating (1) that the Registrar has not issued any list of other countries' impediments to marriage--whether based on the parties' gender or otherwise--and (2) that when the Registrar's staff receives calls from clerks (as it has since May 2004) regarding impediments to marriage in other countries, the Registrar provides the clerk with a referral to the appropriate embassy or consulate to obtain the answer.

Notice of Intention form clearly does ask not only for facts regarding gender but also for facts relevant to the other most common impediments--age, consanguinity and affinity, and status of any prior marriage--that could apply to opposite-sex couples as well. RA 570.

Enforcement of the various less-common impediments is ensured by including them (along with the common impediments) on the Registrar's impediment lists. RA 572-627; see supra n.10. The Notice of Intention form then requires (pursuant to G.L. c. 207, § 20) that the applicant sign a sworn statement that he or she has reviewed the list of impediments from his/her home state and that none of them is applicable, to the full extent that the applicant "could have knowledge" of such matters. RA 570. Clerks have been instructed (for opposite-sex as well as same-sex couples) not only to show the relevant impediments lists to applicants but also to review the lists themselves in light of the facts stated on the Notice of Intention, so that clerks can satisfy themselves that there is no impediment to the marriage. RA 651; RA 62 ¶¶ 17, 18; RA 71. Any clerk who doubts the truth of the facts underlying a statement of the absence of any impediment should invoke G.L. c. 207, § 35, to inquire further into the

relevant facts, or to refuse to issue the license.[30]

But it would be impractical for a single Notice of Intention form to have blanks asking for all facts relevant to every possible impediment in every state and other jurisdiction. Such a form would be unworkably long, and most of it would be irrelevant (and confusing) to most applicants. Thus the slightly different and more efficient mechanism for enforcing the less-common impediments does not show differential treatment of same-sex couples or under-enforcement of any impediments applicable to opposite-sex couples.

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[30] Section 35 provides (with emphasis added):

> The clerk or registrar may refuse to issue a certificate of marriage if he has reasonable cause to believe that any of the statements made in the notice of intention are incorrect; but he may, in his discretion, accept depositions under oath, made before him, which shall be sufficient proof of the facts therein stated to authorize the issuing of a certificate. He may also dispense with the statement of any facts required by law to be given in a notice of intention of marriage, if they do not relate to or affect the identification or age of the parties, or a former marriage of either party, if he is satisfied that the same cannot with reasonable effort be obtained.

The applicability of any given impediment may, of course, also involve conclusions of law, to which the applicants cannot swear. E.g., Comm. v. Brady, 370 Mass. 630, 635 (1976); S.D. Shaw & Sons v. Joseph Rugo, Inc., 343 Mass. 635, 639 (1962); Comm. v. AmCan Enter., 47 Mass. App. Ct. 330, 337 (1999). But the applicants may swear to the facts, and if no facts indicating an impediment are present, issues of law are moot.

Second, the Clerks err in arguing that, as to impediments other than being of the same gender, the Registrar's lists of other states' impediments are incomplete. Br. at 34. The Clerks assert that for 24 jurisdictions, the Registrar's lists "state that information on impediments to different-sex couples is still '[n]ot available at this time.'" Couples Br. at 34 & n.14 (citing list on Registrar's website). This is misleading. In fact, the lists for all jurisdictions show the impediments related to age, consanguinity and affinity, status of any prior marriage, and waiting period (if any) after divorce. Each jurisdiction also has a category for "other" impediments, which includes, where they have been found to exist, any miscellaneous impediment(s) related, e.g., to physical or mental status.[31] It was only in the 24 jurisdictions with no such other miscellaneous impediments that the notation "Not available at this time" appeared--and this was simply because the Registrar has been unable to discover any other impediments in that jurisdiction. The Registrar has clarified this on the latest update to the lists, by

[31] E.g., for Alabama, the "other" category states, "Both parties must be of sound mind." See http://www.mass.gov/dph/bhsre/rvr/impediment_20050622.pdf (last visited June 22, 2005).

changing the notation to read, "None known to RVRS."[32] And the Clerks do not cite a single impediment that has been omitted from any jurisdiction's list. If and when they do so, the Registrar will add it to the list.

Third, the Clerks misleadingly suggest that the Registrar failed to furnish clerks with information about some other states' impediments to remarriage after divorce (such as a waiting period). Br. at 34-35 & n.15. In fact, information about such impediments was not included in an 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. RA 707. What is misleading is the Clerks' suggestion 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 Br. at 35. The Registrar's instruction book did not list that impediment, or any impediments from other states, for the express reason that other states' impediments might change over time. RA 710 ("Other Impediments" discussion).

Instead, the instruction book told clerks to

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[32] See http://www.mass.gov/dph/bhsre/rvr/impediment_20050622.pdf (last visited June 22, 2005).

"refer to your separate publication that lists marriage impediments for other states and jurisdictions" which would be "updated and distributed as needed." Id. (emphasis added). That is the Registrar's impediments list, RA 572-627, which was distributed in May 2004 and updated in July 2004 to include waiting periods after divorce required by some jurisdictions. RA 107.[33] If further updates are necessary, Clerks Br. at 35 n.16, the Registrar will make them.

E. Because the Clerks Have Not Shown Any Unequal Enforcement Against Same-Sex Couples, the Issue of "Motive" is Irrelevant.

Because the Clerks have failed to meet the first part of the selective-enforcement test--discrimination against a subgroup of similarly-situated persons--there is no need to reach the second part of the test, in which the Clerks claim that such discriminatory enforcement is motivated by impermissible animus against same-sex couples. Whatever the Governor's policy views on same-sex marriage, the Registrar, recognizing the greatly increased likelihood of violations of §§ 11 and 12 in the post-Goodridge period, exercised his lawful discretion (see supra

[33] Even before that update, the instruction book told clerks to ask assertedly divorced applicants about the finality of divorce decrees and, where relevant, to ask to see a copy of the decree. RA 707; RA 6 ¶ 28.

n.18) to increase enforcement of these duly-enacted and presumptively-constitutional statutes. The Registrar has made every effort to do so in a manner that treats same- and opposite-sex out-of-state marriage applicants evenhandedly.

The issue of the Governor's motives therefore need not be discussed further. Cf. Doris, 374 Mass. at 449-50 ("we would not ordinarily inquire into the motives for the even-handed enforcement of a valid statute"). This case is nothing like Town of Burlington v. Labor Relations Comm'n, 12 Mass. App. Ct. 184, 186-87 (1981), where an employer's anti-union retaliatory motive for reviving enforcement of a law was by itself sufficient to make out a violation of G.L. c. 150E, § 10, without any clear showing that the revived law was not being enforced evenhandedly.[34] Specific statutes may well prohibit various types of enforcement action based on an impermissible motivation, even if such action is evenhanded and goes beyond the individual or group that

[34] The Burlington decision actually contains no indication that the revived law was being enforced evenhandedly; if anything, its recitation of the facts and of the town's defense suggests that enforcement was targeted. Id. at 185, 187. Even if enforcement had been evenhanded, however, it appears that under G.L. c. 150E, unlike under the equal protection clause, motive alone may be a sufficient basis for liability.

is the object of the motivation.[35] But there is no such statute applicable here. Rather, the selective enforcement claim is an equal protection claim, which requires proof that, based on an impermissible motivation, some violators were selected for enforcement while other, similarly-situated violators were not. Franklin, 376 Mass. at 894; Yerardi's, 878 F.2d at 21; Daddario, 56 Mass. App. Ct. at 773. The Clerks have made no such showing here.

In sum, the selective enforcement claim fails.

II. THE REGISTRAR'S ENFORCEMENT SYSTEM DOES NOT VIOLATE EQUAL PROTECTION BASED ON A "DISCRIMINATORY PURPOSE AND EFFECT" ANALYSIS.

The Couples cannot succeed on their separate equal protection theory that, even if the Registrar's enforcement system is evenhanded rather than selective, it still violates equal protection because of its claimed "discriminatory purpose and effect." Couples Br. at 34-44; see Clerks Br. at 45-46; amici Civ. Rts.

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[35] Examples are statutes that prohibit retaliation against or coercion of employees based on union activity, G.L. c. 150E, § 10(a)(1), (4); and that prohibit retaliation against persons for asserting discrimination claims or aiding other persons who have done so. G.L. c. 151B, § 4(4A). A public entity could be liable under those laws for stepping up enforcement of a law for such retaliatory or coercive purposes, even if the enforcement evenhandedly affected everyone subject to the law, vs. only the person being retaliated against or coerced.

Org. Br. at 17-22. The short answer to this argument is that, in this context, the most such "discriminatory purpose and effect" analysis could yield the Couples is the conclusion that the Registrar's enforcement system contains a classification based on sexual orientation, which is a non-suspect class. To go on to show that the Registrar's system actually violates equal protection, the Couples would still have to prove that there is no rational basis for the system's use of such a classification. They have not made any such showing.

The Couples[36] rely on various cases--all of them strict or heightened scrutiny cases involving alleged discrimination on the basis of race or gender--where facially neutral laws or official actions were examined to determine if they nevertheless were enacted or taken for a racial or gender-discriminatory purpose and had a racial or gender-discriminatory effect.[37] The Couples

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[36] For simplicity this brief will refer to the argument as having been raised only by the Couples, except where reference to one of the other briefs is necessary. The Clerks cannot raise this claim for the same reasons they cannot raise a selective enforcement claim: the Spence doctrine and lack of standing. See Arg. VI infra. But the Couples' standing to raise it is clear; thus the Clerks' ability to raise it is moot.

[37] Hunter v. Underwood, 471 U.S. 222 (1985) (race); Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979)(gender); Village of Arlington Hts. v. Metro. Hous. Devel. Corp., 429 U.S. 252 (1977)(race); Washington v. Davis, 426 U.S. 229 (1976)(race); Fedele v. School Comm. of Westwood, 412 Mass. 110, 115-16

then wrongly suggest that any facially neutral law or other official action having a purpose and effect that could be characterized as in any way "discriminatory" is thereby per se invalid under the equal protection clause. This is incorrect.

Rather, the inquiry into whether facially neutral official action was taken with discriminatory purpose and has discriminatory effect serves merely to determine whether that facially neutral action actually creates a classification that warrants heightened scrutiny under the equal protection clause. See 3 R. Rotunda & J. Nowak, Treatise on Constit't Law § 18.4 at pp. 255-56 (3rd ed. 1999).[38] Rotunda and Nowak identify three ways in which a classification that might trigger heightened scrutiny may be established:[39] (1) the law

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(1992)(gender); see also School Comm. of Springfield v. Bd. of Educ., 366 Mass. 315, 329 n.21 (1974) (race).

[38] Rotunda and Nowak refer to "laws" in the cited passage, but elsewhere recognize that the "discriminatory purpose and effect" test may also be applied to actions such as the decision to use an employment test, id. at 283 (citing Washington v. Davis, 426 U.S. 229), or a zoning decision. Id. at 283-84 (citing Arlington Hts., 429 U.S. 252).

[39] See generally Todd v. Comm'r of Correction, 54 Mass. App. Ct. 31, 38 (2002) (citing Rotunda and Nowak's typology of equal protection claims); Coyne v. City of Somerville, 770 F. Supp. 740, 744 (D. Mass. 1991) (same), aff'd, 940 F.2d 440 (1st Cir. 1992).

may establish the classification "on its face";[40] (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;[41] 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 classification in its face." Id. at pp. 255-56 (emphasis added). It is this third type of claim that the Couples assert against the Registrar's enforcement system.

That the "discriminatory purpose and effect" test does not itself determine a law's validity, but merely

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[40] This type of claim is what the Couples apparently intend to assert against §§ 11 and 12 themselves (as distinct from how they are enforced), although the Couples ignore that here the appropriate level of scrutiny is rational-basis. Arg. III, infra.

[41] This 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 selective enforcement claim discussed in Arg. I supra. Because the Clerks and Couples have failed to make the threshold showing that enforcement is not evenhanded, the Registrar has not addressed supra the appropriate level of scrutiny if such "targeting" were shown.

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.[42] 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 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 Hts., the Court repeated that racially discriminatory impact did not in and of itself invalidate official action; the

[42] Cf. Atty. Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986) ("The logical first question to ask when presented with an equal protection claim, and the one we usually ask first, is what level of review is appropriate.") (emphasis added).

equal protection clause required only that such action not be arbitrary or irrational, unless there was also proof of a discriminatory purpose, in which case such judicial deference disappeared (i.e., strict scrutiny applied). Arlington Hts., 429 U.S. at 264-66. And in Personnel Admin. v. Feeney, 442 U.S. 256, 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 disparate 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[43] applied. Id. at 272-73; see id. at 280-81 (effectively applying rational basis review, after finding no intent to discriminate based on gender).[44]

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[43] 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 scrutiny applicable to racial classifications. Id. at 272-73.

[44] The Clerks also rely on two race-discrimination cases to argue, based on a so-called "freezing principle," that increased enforcement of §§ 11 and 12 "disproportionately affect[s] same sex couples because it perpetuates past inequities." Clerks Br. at 47-48 (citing Louisiana v. United States, 380 U.S. 145, 155 (1965); Lane v. Wilson, 307 U.S. 268, 275-77 (1939)). In those cases the Court invalidated the use of voter registration tests because of "grandfather clauses" that disproportionately (if not exclusively) benefited previously-registered white

The Couples do not cite a single case outside of the suspect class (race) or quasi-suspect class (gender) context in which "discriminatory purpose and effect" analysis has even been applied, let alone applied to invalidate a law or other official action without stopping to consider whether it has a rational basis. They cite Village of Willowbrook v. Olech, 528 U.S. 562, 563, 565 (2000) (per curiam), but there the Court held only that an allegation of "irrational and wholly arbitrary" government action against a single person stated an equal protection claim, "quite apart from the Village's subjective motivation." Id. at 565. Even if that could be characterized as a "discriminatory purpose and effect" claim, which the Court did not do, such a claim would be governed by the

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voters, by allowing them to remain registered without ever having complied with the testing requirements. Lane was a 15th, not a 14th Amendment case, see id., and so is irrelevant here. To the extent Louisiana was a "discriminatory purpose and effect" case, it is irrelevant because, unlike this case, it involved a suspect class. Neither case created any separate doctrine under which any "disproportionate effect" or "perpetuation of past inequities" is unconstitutional per se, regardless of the appropriate level of scrutiny. Even if they had, their rationale is inapplicable here, because here there is no proof that pre-Goodridge out-of-state opposite-sex couples ever actually married in Massachusetts without having complied with their home states' impediment laws as required by §§ 11 and 12. I.e., no such couples have been shown to have been "grandfathered" from the application of §§ 11 and 12.

rational basis test. Id. at 564 (relying on previous cases finding an equal protection violation where similarly-situated persons had been treated differently and "there [was] no rational basis for the difference in treatment") (emphasis added; citations omitted).

Nor does a mere allegation of "antipathy" towards a particular non-suspect group require more than rational basis review, as amici wrongly suggest. Civ. Rts. Org. Br. at 13 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979)). Vance said that rational-basis review applied "absent some reason to infer antipathy," but the "antipathy" the Court was referring to was government action that "burdens a suspect group[.]" Vance, 440 U.S. at 97; see Personnel Admin. v. Feeney, 442 U.S. at 272-73 (confirming this reading of Vance and applying it in case involving quasi-suspect gender classification). Amici also misleadingly suggest that Arlington Hts. rejects rational basis review whenever "'. . . discrimination'" is involved. Civ. Rts. Org. Br. at 46-47 (quoting Arlington Hts., 429 U.S. at 265-66). Amici's ellipses conceal that the Supreme Court was referring only to "racial discrimination[.]" Arlington Hts., 429 U.S. at 265 (emphasis added).

The Couples also misplace reliance on Town of Burlington v. Labor Relations Comm'n, 12 Mass. App. Ct.

at 186-87. As explained supra at pp. 47-48, that was not an equal protection case, but a case where a specific statute (G.L. c. 150E) made government officials' subjective retaliatory motive alone a sufficient basis for liability, regardless of whether the action they took was evenhanded or otherwise rationally justifiable. The case is irrelevant here.

In sum, assuming arguendo that the Registrar's system for enforcing §§ 11 and 12, despite being evenhanded, has the "purpose and effect" of discriminating based on sexual orientation, the result would not be automatic invalidation of that system, but would merely be the conclusion that the enforcement system contains a classification based on sexual orientation. And because that is not a suspect classification under Massachusetts or federal law,[45] the burden would still be on the Couples to show that the classification in the enforcement system has no rational basis. They do not attempt and cannot make

[45] 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, amend. art. 106, amending art. 1 of Decl. of Rts.); Lofton v. Sec'y of Dep't of Children and Family Svcs., 358 F.3d 804, 818 & n.16 (11th Cir. 2004)(agreeing with eight other federal circuits' decisions that sexual orientation is not a suspect class), cert. denied, 125 S. Ct. 869 (2005); In re Kandu, 315 B.R. 123, 143-44 (Bankr. W.D. Wash. 2004), app. pending, No. 3:04-cv-05544-FDB (W.D. Wash).

any such showing--both because the violations of §§ 11 and 12 to be expected after Goodridge would largely if not entirely involve same-sex couples, and because enforcement of §§ 11 and 12 in cases involving same-sex couples is rational for all of the reasons stated in Arg. III infra.[46] The "discriminatory purpose and effect" claim therefore fails.

III. SECTIONS 11 AND 12 HAVE AMPLE RATIONAL BASES AND THEREFORE SATISFY EQUAL PROTECTION AND DUE PROCESS REQUIREMENTS.

A. Goodridge Does Not Resolve the Question Whether §§ 11 and 12 Are Rational.

That Goodridge found no rational basis for denying same-sex couples access to civil marriage on the same terms as opposite-sex couples does not answer the very different question presented here: whether there is a rational basis for §§ 11 and 12, under which the Commonwealth declines to permit marriages of out-of-state couples (whether of the same or opposite genders) if that marriage would be void or prohibited in the

[46] This is thus not a case of a "bare desire to harm a politically unpopular group," as the Couples suggest. Br. at 43 (citing Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-47 (1985)); Br. at 36 (citing Romer v. Evans, 517 U.S. 620, 634 (1996)). Even if a law that "exhibits such a desire . . . [is subject to] a more searching form of rational basis review," Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring), this is not such a law (or such an enforcement system), and moreover it would survive that more searching form of review.

couple's home jurisdiction.

The Registrar acknowledges that non-residents, while in the Commonwealth, generally enjoy the same state constitutional guarantees as do residents. But it hardly follows that Goodridge renders §§ 11 and 12 invalid. Goodridge found no state constitutional right to marry for same-sex couples, but merely found it irrational, on equal protection/due process grounds, to bar a same-sex couple, simply because they are a same-sex couple, from marrying on whatever terms are open to opposite-sex couples. Non-residents enjoy the same equal protection/due process guarantee of rationality as do residents, but the distinction found irrational in Goodridge is entirely different from the one at issue here.

Sections 11 and 12 respect the marriage impediment laws of other jurisdictions, whatever those laws might be, with regard to both same-sex and opposite-sex couples. In a number of jurisdictions, same-sex marriage is legal: seven Canadian provinces, Belgium, and the Netherlands. See supra n.28. Sections 11 and 12 allow same-sex couples from such jurisdictions to marry here.

To the extent §§ 11 and 12 prevent many out-of state same-sex couples (as well as some out-of-state

opposite-sex couples) from marrying here, the question is simply whether there is a rational basis for doing so. Goodridge did not address that issue; it did not determine the validity of statutes making both same- and opposite-sex out-of-state couples' ability to marry here dependent on their home states' marriage laws.

Not only did the Goodridge concurrence assume that §§ 11 and 12 would remain in force after same-sex marriage was legalized here, see 440 Mass. at 348 n.4 (Greaney, J., concurring), but language used by the majority in both Goodridge and Opinions of the Justices, 440 Mass. 1201, recognizes that other states are entitled to reach their own conclusions about same-sex marriage of their residents.[47] The Registrar does

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[47] For example, the Goodridge Court stated:

> We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

440 Mass. at 340-341 (emphasis added). See also Opinions, 440 Mass. at 1209 (majority Opinion) (relegating same-sex couples to civil unions would "abrogate the fullest measure of protection to which

not claim that this language resolves the question of §§ 11 and 12's validity--only that the question remains open.[48]

The Couples miss the point in arguing that "principles of comity cannot justify imposing the law of a sister state that would violate the Massachusetts Constitution." Couples Br. at 26 (citing Comm. v. Aves, 35 Mass. 193 (1836)). The issue here is not general "principles of comity," as in Aves or in Woodworth v. Spring, 86 Mass. 321 (1862), also cited by the Couples. The issue here, instead, is whether two specific, duly-enacted statutes that expressly accord respect to other states' laws are constitutional.

In Aves, the court reasoned that "the law arising from the comity of nations"--in that case, general principles calling for respect for Louisiana's laws,

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residents of the Commonwealth are entitled under the Massachusetts Constitution" and would be "a grave disservice to every Massachusetts resident") (emphasis added).

[48] Also, contrary to the suggestion of the amici Bar Associations (MBA/BBA Br. at 25), the majority Opinion on the civil union bill, 440 Mass. at 1208, did not conclude that considering other states' laws barring same-sex marriage could never be a rational basis for any law, but only that it was not a rational basis for granting same-sex couples access to civil unions, rather than civil marriage, in Massachusetts itself. The majority did not address the very different classification in §§ 11 and 12, let alone whether the rational bases identified herein are sufficient to support it.

under which slavery was then legal--could not supersede Massachusetts constitutional and statutory provisions outlawing slavery. Id. at 217-18; see id. at 210 (Constitution of 1780 abolished slavery). There was no Massachusetts statute in Aves that expressly gave effect to other states' laws, nor was there in Woodworth.[49] Had there been any such statute, the Court would have had to determine (were the issue raised) whether those statutes were constitutional, and the result, particularly in Woodworth, would likely have been quite different.[50] Similarly, in Greenwood

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[49] In Woodworth the question was whether a child's guardian, appointed under Illinois law, was entitled to custody once the child had been brought to the Commonwealth by his aunt, who was then appointed his guardian here. Id. at 321-22. The court ruled that comity did not require the Illinois guardianship to be given dispositive effect, but that it should be considered in determining custody, using the best-interests-of-the-child standard. Id. at 323-26.

[50] In Woodworth, had there been a Massachusetts statute providing that guardians appointed under other states' laws were entitled to custody of their wards when found in the Commonwealth, the Court would have awarded custody to the Illinois guardian, not based on "principles of comity," but because the statute required it--unless the statute were found unconstitutional, on grounds difficult to envision now. Certainly such a statute would have had a rational basis. In Aves, had there been a Massachusetts statute entitling slaveholders from other states to the custody of their slaves when found in the Commonwealth, the Court would have been asked to enforce that statute, but likely would have refused, because of the statute's conflict with the Massachusetts Constitution's prohibition of slavery. A mere rational basis would have been insufficient to uphold that statute.

v. Curtis, 6 Mass. 358 (1810), cited by amici MBA/BBA (Br. at 26-27), the Court's ruling was based on general principles of comity, because there was no Massachusetts statute deferring to other jurisdictions' laws governing the type of contract at issue.[51]

The question for the Court here is whether the specific Massachusetts statutes giving effect to other states' laws, §§ 11 and 12, are consistent with the Massachusetts Constitution's equal protection and due process guarantees, i.e., whether those specific statutes have a conceivable rational basis. Goodridge did not address that issue; the distinction drawn by §§ 11 and 12 is very different from the one invalidated in Goodridge; and it thus remains the Couples' burden to go beyond Goodridge and show that no conceivable rational basis for §§ 11 and 12 exists.

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[51] What amici quote (MBA/BBA Br. at 27) as the Greenwood Court's opinion was actually the dissenting opinion of Justice Sedgwick. See 6 Mass. at 361-362 n.†. The Court itself ruled that the slave-trading contract at issue was enforceable; the Court found no applicable exception to then-prevailing principles of comity under which contracts validly made elsewhere were enforceable here even if they could not be made here. Id. at 375-80. Although that holding could be seriously questioned today, what matters for present purposes is that Greenwood is simply irrelevant because, unlike here, there was no Massachusetts statute deferring to foreign law on the subject at issue.

B. The Couples Have the Heavy Burden of Showing That There Is No Conceivable Rational Basis for §§ 11 and 12.

The Couples bear a "heavy burden." Leibovich v. Antonellis, 410 Mass. 568, 576 (1991). "A legislative enactment carries with it a presumption of constitutionality, and the challenging party must demonstrate beyond a reasonable doubt that there are no 'conceivable grounds' which could support its validity;" the Court examines "only 'whether the statute falls within the legislative power to enact, not whether it comports with a court's idea of wise or efficient legislation.'" Id. (citations omitted). "A classification will be considered rationally related to a legitimate purpose 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Mass. Fed'n of Teachers, AFT, AFL-CIO v. Bd. of Educ., 436 Mass. 763, 777 (2002) (citations and internal quotations omitted). The question is whether the Court can "visualize possible legitimate public purposes for the legislation and, in the absence of a factual record establishing the lack of any conceivable rational basis for the legislation," the Court must conclude that the statute satisfies that constitutional requirement. Opinion of the Justices, 401 Mass. 1211, 1219 (1987)

(emphasis added); see Comm. v. Henry's Drywall Co., 366 Mass. 539, 543 (1974). "The rational basis test does not require that [the Court] agree with the Legislature's classification[]," so long as there is a conceivable rational basis for it. Harlfinger v. Martin, 435 Mass. 38, 50 (2001).

Moreover, "it is irrelevant for constitutional analysis whether a reason now advanced in support of a statutory classification is one that actually motivated the Legislature." Prudential Ins. Co. v. Comm'r of Revenue, 429 Mass. 560, 568 (1999) (citing FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993)). Accordingly, the Court must consider the rationality of the law at present, not as of some prior time. Even in an extreme case where (unlike §§ 11 and 12) "a law served no legitimate state interest when passed, but a legitimate state interest served by the law has since appeared, it would be inane to require the legislature to repeal the earlier law, and re-enact it with an announcement of the appropriate, legitimate state purpose." Baltimore Gas & Elec. Co. v. Heintz, 582 F. Supp. 675, 679 (D. Md. 1984), rev'd on other grounds, 760 F.2d 1408 (4th Cir. 1985).[52]

[52] This Court has similarly recognized that changed conditions may render a statute that was rational at one time irrational at another. Owen v.

C. Sections 11 and 12 Further the Many Interests Served by Marriage Itself, by Preventing Persons from Marrying Here Where It Is Rational to Believe Their Marriage Would Be Unrecognized and Unregulated in Their Home State.

The Commonwealth has created civil marriage, and comprehensively regulates it, to protect the interests of the public, the spouses, and their children. Sections 11 and 12 serve all of those interests by preventing persons from marrying here if their marriage would be void or prohibited in their home state, thus making it rational to believe--particularly in the case of same-sex marriage, as to which at least 40 other states have enacted non-recognition laws--that the marriage would be unrecognized, unregulated, and unprotected in their home state.

Meserve, 381 Mass. 273, 276 (1980). This necessarily is a two-way street; even if a statute was irrational when enacted, or became irrational based on changed conditions, still later changes could render the statute rational once again. Cf. Harlfinger, 435 Mass. at 50 (that court had declined to adopt a particular distinction as a matter of common law did not mean it was irrational for the Legislature subsequently to adopt that distinction by statute). To the extent the Court thinks it relevant, an attempt to repeal §§ 11 and 12 passed the Senate as a budget amendment in 2004, see http://www.mass.gov/legis/05budget/senate/fy05floor13.htm (floor amend. No. 640), http://www.mass.gov/legis/05budget/senate/fy05amend.htm (showing adoption of amendment), but was rejected by the conference committee. Similar repealers have been introduced in the 2005-06 Legislature but have not passed. See 2005 H 806, S 835.

1. Sections 11 and 12 assure that no marriage occurs here unless there is "an approving State" as envisioned in Goodridge.

As Goodridge acknowledged, the marriage relationship is of critical importance to the Commonwealth, as well as to the spouses and their children, 440 Mass. at 321-25. Thus the Commonwealth has an undeniable interest in ensuring that the relationship is actually recognized and regulated, either by the Commonwealth or another state, to protect these interests.

Not only is civil marriage a creation of government, but, "[i]n a real sense, there are three partners to every civil marriage: two willing spouses and an approving State." Goodridge, 440 Mass. at 321. "[T]he terms of the marriage," including "what obligations, benefits, and liabilities attach to civil marriage--are set by the Commonwealth." Id. "Civil marriage is created and regulated through exercise of the police power," which is "the Legislature's power to enact rules to regulate conduct, to the extent that such laws are 'necessary to secure the health, safety, good order, comfort, or general welfare of the community.'" Id. at 321-22 (emphasis added; citation omitted).

> Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." . . . Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.

Goodridge, 440 Mass. at 322 (citation omitted).

Marriage also grants significant rights to the spouses, such as property rights, in exchange for the spouses' "agree[ment] to what might otherwise be a burdensome degree of government regulation of their activities." Id. at 322. And "[w]here a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage." Id. at 325.

> [M]arital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

Id. at 325. In sum, "marriage is a social institution,

or status, in which, because the foundations of the family and the domestic relations rest upon it, the commonwealth has a deep interest to see that its integrity is not put in jeopardy, but maintained." Coe v. Hill, 201 Mass. 15, 21 (1909) (emphasis added).

Accordingly, it is rational for the Commonwealth to require that in order to marry here, persons must reside either here or in some other State where their marriage is similarly assured of being readily recognized, regulated, and supported. The Couples cannot on the one hand assert that the Commonwealth is constitutionally required to confer the status, rights, and duties of marriage upon them, and yet on the other hand deny the Commonwealth's legitimate interest in ensuring that the couple's marital status will be recognized, and those marital rights and duties will be definitely and promptly enforceable, in the public interest as well as for the protection of each of the spouses and their children. Sections 11 and 12 serve this interest, by preventing persons from marrying here if they reside in a State where their marriage would be void or prohibited and thus (it is rational to believe) unrecognized and unregulated.

Sections 11 and 12 ensure that there really is "an approving State," Goodridge, 440 Mass. at 321--not

merely a State that formalizes the marriage and then bids the spouses farewell as they depart for another State where, in many cases, their marriage is treated as void. Sections 11 and 12 help ensure that the couple, in order to marry here, will reside in a State (either the Commonwealth or another jurisdiction in which the marriage is not void or prohibited) that has the power to protect, and a declared interest in protecting, the spouses--as spouses--and their children.

The Couples' suggestion that the Commonwealth can be the "approving State" for non-residents (Br. at 56, 58-59) attempts to reduce the State's critical "third partner" role, as recognized in Goodridge, to a mere formality.[53] The Couples argue that Massachusetts has no legitimate interest in whether other states would recognize marriages contracted here. But it cannot be that the Commonwealth is obligated to 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 v. Iowa, 419 U.S. 393, 407

[53] Neither law nor equity requires useless acts. Cheschi v. Boston Edison, 39 Mass. App. Ct. 133, 142 n.10 (1995) (citing cases); Levine v. Black, 312 Mass. 242, 244 (1942)(same).

(1975)(Iowa's durational residency requirement for seeking divorce had rational basis; 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 marriage's numerous benefits for children). It is rational to fear that where the marriage is not recognized, those children could suffer as a result.[54]

[54] Cf. T.F. v. B.L., 442 Mass. 522 (2004) (unmarried same-sex domestic partner could not be required to pay child support once relationship with biological mother ended, even where child was born during relationship and by couple's agreement); State ex rel. D.R.M., 34 P.3d 887 (2001) (Wash. Ct. App. 2001) (similar, where relationship ended shortly before one partner learned she was pregnant). Doubts about legal parentage could, "among other consequences, interfere with a child's medical treatment in the event of medical complications arising during or shortly

The Commonwealth's own ability to enforce the duties of out-of-state same-sex spouses to each other, and to their children, is also in serious doubt. In the event of a breakdown in the spouses' relationship, one spouse could return to the Commonwealth, attempt to meet the residency requirements, and seek a divorce. See G.L. c. 208, §§ 4, 5 (residency requirements); but see Caffyn v. Caffyn, 441 Mass. 487, 497 (2004)(noting that G.L. c. 208, § 5, does not create divorce jurisdiction if spouse "'removed into' Massachusetts solely to obtain a divorce"). But, unless the other spouse willingly returned here or there was some other basis for the Commonwealth's courts to exercise personal jurisdiction over the other spouse, the courts might well lack power to enter custody or child support

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after birth; may hinder or deprive a child of inheriting from his legal parents should a legal parent die intestate before a postbirth action could determine parentage; . . . and may result in undesirable support obligations as well as custody disputes[.]" Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 292 (2001). The Commonwealth has a "paramount concern to protect the best interests of children," Hodas v. Morin, 442 Mass. 544, 553 n.16 (2004)(citing Culliton), and that interest need not stop at the Commonwealth's borders. In Hodas, the Court recognized the Commonwealth's interest in "furnishing a measure of stability and protection to children born through . . . gestational surrogacy arrangements" (442 Mass. at 551, quoting Culliton), even though the child at issue in Hodas was to be born (in Massachusetts) to a New York gestational carrier under an agreement with a Connecticut married couple who were to be the child's legal parents. Hodas, 442 Mass. at 545-46.

orders, as well as alimony and property division orders.[55] Moreover, as explained in Arg. III.D infra, even such orders as were properly entered here might well be collaterally attacked or refused enforcement in other states.

2. It is rational to believe that, of the 49 states where same-sex marriage is void or prohibited, the vast majority will not recognize a Massachusetts marriage of a same-sex couple.

Amici wrongly argue that other states' laws making same-sex marriage void or prohibited leave wide open

[55] Cf. Rutledge v. Rutledge, 26 Mass. App. Ct. 537, 538-39 (1988) (state court could grant domiciliary spouse a divorce from non-domiciliary spouse but, absent personal jurisdiction over latter spouse, could not enter child custody, child support, alimony, or property division orders) (citing Estin v. Estin, 334 U.S. 541 (1948); Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957)). Merely coming from the state of domicile to the Commonwealth to marry, and then returning to the state of domicile, may not, without more, satisfy the due process requirement of "minimum contacts" for the Commonwealth's courts to exercise personal jurisdiction over matters relating to dissolution of the marriage. See Kulko v. Superior Ct. of Calif., 436 U.S. 84, 93 (1978) ("where two New York domiciliaries, for reasons of convenience, marry in the State of California and thereafter spend their entire married life in New York, the fact of their California marriage by itself cannot support a California court's exercise of jurisdiction over a spouse who remains a New York resident in an action relating to child support"); e.g., Windsor v. Windsor, 45 Mass. App. Ct. 650, 652-55, 656 (1998) (Massachusetts court lacked personal jurisdiction over non-resident husband, and thus could not enter property division order in wife's divorce action, even though parties had married in Massachusetts in 1959 and lived here until 1966).

the possibility that those states will still recognize same-sex marriages validly contracted in the Commonwealth. See generally Confl. & Fam. Law. Prof. Brief. To the contrary, as shown infra, 41 other states (and Puerto Rico) have constitutional provisions or laws, many of them adopted very recently, that expressly state or clearly indicate that same-sex marriages validly contracted elsewhere will not be recognized in those states. In the other 8 states and the District of Columbia, there is, at least, a rational basis for uncertainty over whether Massachusetts same-sex marriages will be recognized. The Couples thus cannot meet their burden of showing that there is no rational basis for fearing such non-recognition in any significant number of states.

Amici err in focusing on the uncertainties created by general conflicts-of-laws principles, because amici themselves acknowledge that where a specific state constitutional or statutory provision clearly addresses the issue of recognition of particular out-of-state marriages, that provision will usually control. Confl. & Fam. Law. Prof. Br. at 15 n.11, 26-27 (citing, inter alia, Comm. v. Lane, 113 Mass. 458, 464 (1873)). Amici's argument relies (at pp. 19-32) on many cases where State A recognized a marriage celebrated in State

B, even though such a marriage would have been void or prohibited if celebrated in State A. But those cases are of little relevance here, because in none of them did State A have a statute denying recognition to the particular type of out-of-state marriage at issue.

Here, in contrast, 41 other states, Puerto Rico, and the District of Columbia have statutes or constitutional provisions that most likely deny recognition to out-of-state same-sex marriages. Specifically, the Registrar counts 35 states (plus Puerto Rico) where constitutional provisions and/or laws not only declare same-sex marriage void or prohibited, but expressly state, or appear to necessarily imply, that such marriages from other jurisdictions will not be recognized. See Add. B to this brief.[56]

The Registrar counts 5 additional states where the constitution or a statute provides (with minor variations): "Only marriage between a man and a woman is valid or recognized in [this state]." (Emphasis

[56] The states are Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

added.)[57] It is rational to think that these states' use of the phrase "recognized in [this state]" will be construed as governing recognition of out-of-state marriages; otherwise the phrase would appear duplicative of the word "valid."[58] Each of these provisions was adopted within the last 5 years, see Add. B, and the historical context of each enactment will likely influence how it is interpreted. A California appellate court has already recognized that California's statute (1) means the state would "not recognize same-sex marriages even if those marriages are validly formed in other jurisdictions," and (2) "supplants the directive of [an earlier general statute recognizing out-of-state marriages if valid where celebrated] in the case of same-sex marriages." Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 691 (Cal. App. 2005). Similar conclusions have been reached in

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[57] The states are California, Montana, Nebraska, Nevada, and Oregon. See Add. B. The California and Nebraska provisions were recently held unconstitutional by trial courts; the California ruling has been stayed for one year; appeals are pending. See Add. B.

[58] In Nevada, the provision reads: "Only a marriage between a male and female person shall be recognized and given effect in this state." Nev. Const. Art. 1, § 21 (adopted 2002) (emphasis added). In Oregon, the provision reads: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Or. Const. Art. XV, § 5a (adopted 11/2/2004) (emphasis added).

Montana and Nevada.[59]

In addition to the 40 states already discussed, it is rational to think that in a 41st state, South Carolina, the relevant statute's express invocation of "public policy" will be construed as barring recognition of out-of-state same sex marriages. The statute provides: "A marriage between persons of the same sex is void ab initio and against the public policy of this State." S.C. Code Ann. Art. 1, § 20-1-15 (2004) (adopted 1996). The invocation of "public policy" could well be construed in light of prior South Carolina caselaw following the "celebration rule" and a common exception thereto: the forum state will recognize an out-of-state marriage if valid where celebrated unless such recognition is contrary to a "strong public policy" of the forum state. See Zwerling v. Zwerling, 244 S.E.2d 311 (S.C. 1978). The invocation of "public policy" could also be construed

[59] In the 2004 election at which Montana's constitutional amendment was adopted, the Secretary of State's "official ballot materials" described the amendment as providing "that only a marriage between a man and a woman may be valid if performed in Montana, or recognized in Montana if performed in another state." See Add. B (emphasis added). In Nevada, the proponents of the constitutional amendment have stated that its intent was, inter alia, to deny recognition to same-sex marriages performed in other states. See Wm. H. Stoddard & G. Mark Albright, Question 2: A Necessary Defense of Marriage, 10-NOV Nev. Law. 17 (Nov. 2002) (available on Westlaw).

in light of the rule that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 421-22 (1979).[60] The difficulties noted by amici in determining what is a state's "public policy" for purposes of the "celebration rule," Conf. & Fam. Law Prof. Br. at 17, are simply non-existent when, as in South Carolina, the marriage statute itself expressly declares what that public policy is.[61]

In the other 8 states and the District of Columbia, there is, at the least, uncertainty over whether Massachusetts same-sex marriages will be recognized. See Add. B. Only in 2 of those states

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[60] Based on these considerations, one commentator sympathetic to same-sex marriage has nevertheless concluded that "South Carolina's positive law does not bode well for recognition of same-sex marriages contracted in another state." Rodney Patton, Queerly Unconstitutional?: South Carolina Bans Same-Sex Marriage, 48 S.C. L. Rev. 685, 704 (1997).

[61] South Carolina is one of many states that expressly invoke "public policy" in their laws regarding same-sex marriage. See Add. B (Alabama, Arkansas, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Ohio, Pennsylvania, Tennessee, and Texas). Those other states, however, also have more explicit non-recognition provisions and therefore are included in the 39 states discussed above, even though their invocation of "public policy" might in itself be construed as intended to deny recognition to out-of-state same-sex marriages, on the grounds stated in the text regarding South Carolina.

(New York and Rhode Island, but not Connecticut as amici assert) has there been any affirmative suggestion that a Massachusetts same-sex marriage would be recognized, and even in those states the issue indisputably remains open at the present time. See Add. B. In 3 of those states (Connecticut, New Jersey, and Vermont) and the District of Columbia, there is some affirmative rational basis, beyond the mere prohibition on in-state same-sex marriage, to question whether such marriages from Massachusetts would currently be recognized. See Add. B. In the remaining three states (Maryland, New Mexico, and Wyoming), the caselaw recognizes a "public policy" exception to the celebration rule, see Add. B; whether courts in those states would apply that exception to deny recognition to Massachusetts same-sex marriages is unclear.

But amici's discussion of the complexities of determining general "public policy" (Conf. & Fam. Law Prof. Br. at 17-23) is irrelevant in those 40 states with specific provisions that operate to deny recognition to out-of-state same-sex marriages.[62]

[62] Thus amici's Maine example (id. at 18-19) overlooks that where, as in Maine and 39 other states (see Add. B), a statute or constitutional provision expressly or by necessary implication declares that same-sex marriages are void or prohibited and will not be recognized even if validly contracted elsewhere, the marriage recognition question is thereby settled.

Amici suggest that the "mere enactment of so-called 'Defense of Marriage' laws may not 'foreclose the sensitive balancing of relevant factors and interests characteristic of modern choice-of-law reasoning.'" Id. at 24-25 (citing Andrew Koppelman, Same-Sex Marriage and Public Policy: the Miscegenation Precedents, 16 Quinnipiac L. Rev. 105, 108 (1996)). But Koppelman himself, in the quoted sentence, focuses on "[t]hese laws [as] stat[ing] a public policy," and he goes on to acknowledge that courts depart from ordinary choice of law principles where there is "a clear legislative command that they do so." Koppelman, id. at 108 (emphasis added). In 40 states, there is such a clear legislative command: that out-of-state same-sex marriages not be recognized.[63]

There is no need to examine the state's other laws conferring benefits on domestic partners to determine what is the state's general "public policy" regarding same-sex couples. "Public policy" becomes relevant to choice of law, particularly as an exception to the "celebration rule," only if (unlike Maine and those 39 other states) the forum state lacks an enacted choice-of-law provision governing recognition of out-of-state same-sex marriages.

[63] The fact that trial courts in two of those states, Iowa and West Virginia, have recognized the existence of Vermont civil unions to the extent necessary to enter decrees dissolving them (Conf. & Fam. Law Prof. Br. at 33 & Add. E, F) does not "foretell[] the likely result should Massachusetts permit same-sex couples domiciled in other states to marry in the Commonwealth." Id. at 36. Those two decisions expressly decline to treat the civil unions

Likewise, amici's argument that some states might at least recognize Massachusetts same-sex marriages for some limited purposes, Conf. & Fam. Law Prof. Br. at 36-40, is again based on general choice-of-law principles and cases requiring a determination of "public policy." It thus appears irrelevant in the 40 states with positive laws governing the recognition issue, and likely in South Carolina as well, where the statute expressly declares public policy.

The possibility that some or even all of the remaining 8 states might recognize Massachusetts same-sex marriages, for some or all purposes, is not enough to invalidate §§ 11 and 12, even if (which is not the case, see infra) the only rational basis supporting them were the Commonwealth's interest in having such marriages recognized elsewhere. The possibility of such recognition, if it eventuated, would merely make §§ 11 and/or 12 slightly overinclusive, and that is not

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as marriages, see amici's Add. E & F, and Iowa's and West Virginia's laws expressly denying recognition to out-of-state same-sex marriages do not by their terms apply to civil unions. See Add. B hereto. The Registrar acknowledges amici's point (Br. at 35) that in New York, which has no express non-recognition law for same-sex marriages, the recognition of a Vermont civil union for purposes of bringing a wrongful death action in Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S. 2d 411 (N.Y. Super. 2003), if upheld in the pending appeal (see Add. B), would suggest that New York would recognize Massachusetts same-sex marriages for some if not all purposes.

enough to invalidate a statute under rational basis review. See Mass. Fed'n of Teachers, 436 Mass. at 778 ("Some degree of overinclusiveness or underinclusiveness is constitutionally permissible").

D. Other States' Non-Recognition of Massachusetts Same-Sex Marriages Would Result in Massachusetts Courts Rendering Judgments That Could Be Collaterally Attacked or Refused Enforcement Elsewhere, and §§ 11 and 12 Prevent Such Harms.

If same-sex couples who cannot validly marry in their home states are married here, and then disputes arise in those marriages that require divorce, separation, child custody, and support proceedings, such couples (or one member thereof) may have no choice but to return here--the only state that is sure to recognize the marriage--and resort to the courts of the Commonwealth to attempt to resolve the dispute.[64] This could become an added burden on the court system. It could also involve the Commonwealth's courts in making adjudications (particularly regarding issues such as alimony, child custody and support, and property division) that, once the couple or one member thereof

[64] This rationale is not limited to same-sex couples. If an opposite-sex couple married in the Commonwealth, but their marriage in their home state would be void based on some other impediment, that couple (or a member thereof) might have no choice but to return to the courts of the Commonwealth in the event one or both parties desired a divorce.

returned to the home state, the Commonwealth's courts might lose the power to enforce, or that might be collaterally attacked by the other member of the couple in that home state. Sections 11 and 12 rationally operate to avoid such burdens.

These sorts of concerns were sufficient to lead the Supreme Court to uphold as rational Iowa's one-year durational residency requirement for obtaining a divorce. Sosna v. Iowa, 419 U.S. 393, 407 (1975). The Commonwealth already has residency requirements for seeking a divorce, G.L. c. 208, §§ 4, 5, but the Commonwealth certainly is not limited to those requirements as a means of protecting its court system from being burdened in this fashion and from being forced into such an awkward and hazardous role in adjudicating disputes between non-residents.

The Commonwealth may legitimately seek to avoid creating in the first place a nationwide class of same-sex married couples that have no connection to the Commonwealth other than that they were married here.[65]

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[65] Cf. Caffyn, 441 Mass. at 497 & n.22 (divorce residency requirements were intended, inter alia, to "prevent potential forum shopping abuses" and "limit divorce proceedings to 'situations where the Commonwealth has some substantial connection with the dispute being adjudicated.'" (quoting Fiorentino v. Probate Court, 365 Mass. 13, 17 (1974)). Notably, although in Caffyn the parties were originally married in Massachusetts before departing for other states and

If in need of a divorce and associated judicial remedies, one or both spouses (unlike opposite-sex couples, who may obtain divorces elsewhere) would have no choice but to return here. Even if the spouse(s) could satisfy the Commonwealth's durational residency requirements for obtaining a divorce here, if one or both spouses returned to (or had remained in) the home state, aspects of the divorce judgment could still be collaterally attacked or be refused enforcement.[66] That is contrary to the Commonwealth's interests. Cf. Sosna, 419 U.S. at 407 ("Iowa's interests extend beyond its borders and include the recognition of its divorce decrees by other states") (emphasis added).

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then Italy, 441 Mass. at 488, the trial court and this Court did not rely on that fact, but instead solely on the parties' more recent activities in Massachusetts, in concluding that the Commonwealth had a "substantial connection with the dispute." Id. at 497 n.22; see id. at 488-89, 493, 496.

[66] Such a scenario is reportedly unfolding in the context of the dissolution of a Vermont civil union. A Vermont court reportedly issued an order allowing one of the former partners visitation with the child to whom the other partner gave birth during the civil union. That other partner, dissatisfied, then filed an action in her home state of Virginia (which by law does not recognize civil unions, see Add. B) and obtained a conflicting, no-visitation order from the Virginia court. The case is on appeal in Virginia, Miller-Jenkins v. Miller-Jenkins, Virginia Ct. App. No. 2654 04 4; and reportedly in Vermont as well. See "GLAD Fights for Lesbian's Parental Rights," http://www.glad.org/GLAD_Cases/Miller-Jenkins.html(last visited June 17, 2005).

Moreover, for so long as the federal so-called "Defense of Marriage Act" (DOMA) remains on the books, there is an additional rational basis (beyond that present in Sosna) to think that, in the case of same-sex marriage, the residency requirement for obtaining a divorce here is insufficient to protect against such collateral attacks or refusals to honor Massachusetts same-sex divorce judgments. DOMA expressly authorizes other states to deny full faith and credit to such judgments.[67]

In sum, §§ 11 and 12 rationally serve a legitimate interest in avoiding the creation of marriages where, in the event of a breakdown, the Commonwealth's courts would be called upon to grant divorces, yet the

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[67] In Sosna the residency requirement was found to increase the likelihood that Iowa divorce decrees would be insulated from collateral attack and thus be enforceable under the Full Faith and Credit Clause. Id. at 407-08. That Clause provides no such guarantee here, however, even for same-sex divorce decrees issued after satisfaction of the Commonwealth's residency requirement, because the federal DOMA, in 28 U.S.C. § 1738C, provides: "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." Although the constitutionality of the federal DOMA has been questioned (but to date upheld, Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); In re Kandu, 315 B.R. 123), its enactment provides an additional rational basis to believe that Massachusetts same-sex divorce decrees will not be honored elsewhere.

resulting divorce decrees might have so little force.

E. Sections 11 and 12 Rationally Serve to Promote Other States' Respect for the Marriages of Massachusetts Residents and to Minimize the Potential for Retaliatory Action by Other States.

Sections 11 and 12 also serve what the Sosna Court termed a State's valid interest "in avoiding officious intermeddling in matters in which another State has a paramount interest," Sosna, 419 U.S. at 407; that is, the existence of marriages between that other State's citizens. See id. at 407 (as to non-residents, Iowa lacked the "'nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance'" (quoting Williams v. North Carolina, 325 U.S. 226, 229 (1945)); id. at 409 (recognizing legitimate "state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State").[68]

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[68] Similarly, in an earlier decision in Williams, the Supreme Court recognized that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal." Williams v. North Carolina, 317 U.S. 287, 298 (1942). See also Williams, 325 U.S. at 230 (because marriage (like divorce) "is of concern not merely to the immediate parties" but "also touches

This rationale applies across the board to all out-of-state couples affected by §§ 11 and 12, not just same-sex couples. But such "officious intermeddling" on the particular issue of same-sex marriage could have specific implications now, both for the Commonwealth's own married same-sex couples and for the Commonwealth itself.

It is plainly in the Commonwealth's strong interest that its marriage policies, and the marriages of its residents, be respected in and by other states to the greatest extent possible. At least 40 other states have already effectively made clear their intent not to honor the Commonwealth's policy on same-sex marriage. But if the Commonwealth chooses not to honor those other states' own policies as to their own residents, interstate friction could easily result, and it is rational to think that those other states might take additional action that is not in the interests of the Commonwealth and its residents.

As discussed above, at least 40 of the other 49 states currently have laws that clearly bar recognition of out-of-state same-sex marriages, as well as treating same-sex marriages as void (§ 11) or prohibited (§ 12).

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basic interests of society," "every consideration of policy makes it desirable that the effect should be the same wherever the question arises").

In the majority of those states, however, the non-recognition provision is merely statutory, not constitutional.[69] But it is quite possible to write such a denial of recognition into a state's constitution, which makes it much more difficult to eliminate later, should attitudes about same-sex marriage change. If Massachusetts begins licensing marriages between those states' same-sex couples, who would likely return to their home states and begin to seek recognition of their marriages and challenge the laws that deny them such recognition, it is rational to believe that those states are more likely to constitutionalize their non-recognition of same-sex marriage.[70] This threatens to make virtually permanent the harm faced by Massachusetts same-sex married couples who may travel through, work or vacation in, or move to those states. Sections 11 and 12 could

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[69] Of the 40 or 41 states, 17 have enacted constitutional amendments (14 of them in 2004 or 2005) that not only ban same-sex marriage but also ban or could be construed as banning recognition of out-of-state same-sex marriages. The states are Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and Utah. See Add. B.

[70] Already in 2005, constitutional amendments banning same-sex marriage, including "recognition" provisions, have received legislative approval and are awaiting voter ratification in Alabama, South Carolina, South Dakota, Tennessee, and Texas. See Add. B.

rationally be thought to help reduce this likelihood, by avoiding marriages that are contrary to these other states' policies.

Similarly, as to those few states where same-sex marriage is prohibited but it is not already clear that same-sex marriages from Massachusetts will not be recognized, it is at least rational to think that if § 12 did not prevent Massachusetts clerks from issuing marriage licenses to same-sex couples from those states, the issuance of such licenses could create support for pending proposals to expressly ban recognition of Massachusetts same-sex marriages,[71] to the detriment of Massachusetts same-sex married couples who travel to, work in, or move to those states.

Moreover, any state whose resident same-sex couples are precluded by §§ 11 and/or 12 from marrying in Massachusetts might, if those residents were allowed to begin marrying here, be more likely to use its power in Congress to support the proposed federal constitutional amendment to ban same-sex marriage in

[71] E.g., 2005 R.I. SB 846, http://www.rilin.state.ri.us/BillText/BillText05/SenateText05/S0846.htm (last visited May 22, 2005); 2005 N.J. SB 1148, http://www.njleg.state.nj.us/ 2004/Bills/ S1500/1148_I1.PDF (last visited May 22, 2005).

every state, including the Commonwealth.[72] It is rational to think that support for the amendment could grow if same-sex couples from every other state are able to come to Massachusetts to marry and then return to their home states and begin litigation to seek recognition of their marriages. Sections 11 and 12 could rationally be thought to help limit the potential for such an amendment to pass.

Also--even if the supermajority support necessary to amend the federal constitutional proves lacking--if Massachusetts allows same-sex couples from other states to marry here, such states' citizens might use their power in Congress to take other action related to same-sex marriage that would directly harm the Commonwealth.[73] They could, for example, seek

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[72] One such proposal (2003 S.J. Res. 40) was defeated in the Senate in July 2004, but several such proposals have been reintroduced in 2005. E.g., 2005 H.J. Res. 39, S.J. Res. 1, S.J. Res. 13 (available at http://thomas.loc.gov/ (last visited May 22, 2005). The President professed his support for such an amendment in his 2005 State of the Union Address. See http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html (last visited June 22, 2005).

[73] Fears of retaliatory action by other states are hardly imaginary, and the possibility of pressure by other states affecting the interests of Massachusetts residents may constitute a rational basis for a law. Retaliatory legislation to protect in-state interests has occurred, and been upheld against constitutional challenge, in other contexts. E.g., Prudential, 429 Mass. at 567-70 (retaliatory tax laws aimed at pressuring other states to maintain low taxes

legislation (requiring only a simple majority vote in Congress) that would deny federal funding to state programs or entities that recognize or serve same-sex married couples.[74] A rational Massachusetts legislator, regardless of his or her position on same-sex marriage, could certainly view §§ 11 and 12 as a legitimate means of minimizing the likelihood of other states' citizens using their power in Congress to take such action. Other states' citizens could also use their power in Congress to enact the pending bill limiting federal courts' jurisdiction to hear challenges to the federal DOMA--a bill that could harm

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on Massachusetts insurers met rational basis test) (citing Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981) (rejecting federal equal protection and commerce clause challenges to California's retaliatory tax)).

[74] Cf. New York v. United States, 505 U.S. 144, 167, 185 (1992) (upholding federal statute conditioning federal funding on states' taking action to dispose of nuclear waste; in providing funding to states, Congress may attach conditions that bear some relationship to purposes of federal spending); South Dakota v. Dole, 483 U.S. 203, 207-209 (1987) (upholding requirement that states raise drinking age as condition to receipt of federal highway funds). Such a statute might also deny funding to non-governmental entities. See Rust v. Sullivan, 500 U.S. 173 (1991) (upholding statute denying federal funds to public and private non-profit family planning projects that provide abortion counseling, referrals, or advocacy); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983).

Massachusetts same-sex married couples.[75]

It makes no difference that this or any other Governor might not, as a policy matter, wish to discourage federal and state constitutional amendments restricting same-sex marriage. What matters is that a rational legislator could view §§ 11 and 12 as serving these interests. The Court's task in rational basis review is to determine whether there is a conceivable basis for §§ 11 and 12, and it is the defendants' duty to offer such conceivable rational bases for the Court's consideration whether the defendants or other public officials agree with them or not.

A rational legislator who supports same-sex marriage for Massachusetts residents could view §§ 11 and 12 as an important means of avoiding a national backlash that could increase barriers to the recognition of such marriages elsewhere and could even lead to the end of same-sex marriage in Massachusetts

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[75] The House passed a bill in 2004 that would eliminate federal court jurisdiction to hear challenges to the validity or interpretation of part of the federal DOMA, 28 U.S.C. § 1738C. See 2003 H.R. 3313, available at http://thomas.loc.gov; Cong. Rec. July 22, 2004, pp. 6612-13, http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H6612&dbname=2004_record (last visited May 22, 2005). A similar bill has been reintroduced as 2005 H.R. 1100. Such a bill would harm Massachusetts same-sex married couples who move to other states and wish to challenge those state's laws (authorized by the federal DOMA) barring recognition of same-sex marriages from other states.

itself. Such a legislator might think that, in the interests of ultimately bringing about other states' recognition of the marriages of Massachusetts same-sex couples, those states would be more likely to ease or at least not strengthen their policies against non-recognition, and same-sex marriage could gradually gain in other states the popular and political acceptance that will ultimately benefit Massachusetts couples, if such states considered the issue in their own due course, through their own political and judicial processes, and as Massachusetts same-sex married couples move to those other states in the ordinary course.

Understandably, the Couples may disagree with this rationale, and no doubt a rational legislator could disagree with it as well. Those who wish to see the acceptance of same-sex marriage in other states (whether for the benefit of Massachusetts same-sex married couples who go to those states, or otherwise) might think that the best means to that end is not (1) to control its spread and thus avoid forcing the issue in other states, as §§ 11 and 12 do; but instead (2) to allow couples from all over the country to marry immediately in Massachusetts and return to their home states to demonstrate to those states' citizens and

legislators what same-sex marriage is (and is not) about. Under the rational basis test, however, it is enough to uphold the statute that "the question is at least debatable[.]" Prudential, 429 Mass. at 570.[76]

There are thus ample conceivable rational bases for §§ 11 and 12. That those sections were originally envisioned as part of a uniform law to be adopted by all of the states, RA 465-513, and that such uniform adoption never occurred, does not mean that they are irrational. A rational legislator could believe that §§ 11 and 12 protect all of the interests served by the Commonwealth's creation and regulation of the marriage relationship in the first place; protect the Commonwealth's court judgments from being unenforceable and/or collaterally attacked and protect the courts themselves from being burdened; serve what the Supreme Court views as a legitimate state interest in avoiding interference in matters of greater concern to other states; advance the interests of ultimate recognition

[76] That the 2003-04 Legislature's joint session approved a proposed constitutional amendment banning same-sex marriage and creating civil unions does not mean that the effects of §§ 11 and 12 as discussed above do not meet the rational basis test. What matters is what a Legislature could rationally believe, not the actual beliefs of a majority of the preceding (let alone the current) Legislature. The defendants know of no case in which a court has attempted to count votes to see if a current legislative majority supports a particular rational basis offered to the court.

of Massachusetts' same-sex couples' marriages in other states; and protect the Commonwealth from retaliation by other states. Sections 11 and 12 pass rational basis review, and the Couples' equal protection and due process challenges cannot succeed.

IV. SECTIONS 11 AND 12 DO NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.

The Couples' claim that §§ 11 and 12 violate the Privileges and Immunities Clause (U.S. Const. Art. IV, § 2, cl. 1) contains a threshold incongruity, because that Clause "imposes a direct restraint on state action in the interests of interstate harmony." United Bldg. & Constr. Trades Council v. Mayor and Council of Camden, 465 U.S. 208, 220 (1984) (emphasis added). Sections 11 and 12 promote interstate harmony and thus advance, rather than undermine, the Clause's core concern. More particularly, for three separate reasons, the statutes do not violate the Clause.

First, §§ 11 and 12 do not differentiate between residents and non-residents per se, but rather between two types of non-residents--those whose marriages would be void or prohibited if contracted in their home jurisdictions, and those whose marriages would not be thus void or prohibited. See Arg. IV.A infra. Second, the Clause protects only those rights deemed

"fundamental" to "interstate harmony" and "the development of a single Union of the States"; the rights held to be "fundamental" consist almost exclusively of certain economic rights, and the only Supreme Court decision on point suggests that marriage-related rights are not protected by the Clause. Arg. IV.B infra. Third, even if §§ 11 and 12 were subject to scrutiny under the Clause, they would still be valid, because the Clause does not bar discrimination against non-residents if justified by a "'substantial reason for the discrimination beyond the mere fact that they are citizens of other states.'" Saenz v. Roe, 526 U.S. 489, 502 (1999) (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)). Sections 11 and 12 meet these standards. Arg. IV.C infra.

The Privileges and Immunities Clause provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.[77] Under the Clause, "a citizen of one State who travels in other

[77] This "Interstate" Clause of Art. IV should not be confused with the "National" Privileges and Immunities Clause of the Fourteenth Amendment, which protects only those privileges and immunities conferred by citizenship in the United States, rather than by citizenship in a particular state. Slaughterhouse Cases, 83 U.S. 74 (1873). The Couples make no claim under the "National" Clause.

States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." Saenz v. Roe, 526 U.S. 489, 501 (1999). The Clause "does not, however, guarantee to the temporary visitor of a state the enjoyment of all the rights enjoyed by bona fide residents of that state." Bach v. Pataki, 289 F.Supp.2d 217, 226 (N.D.N.Y. 2003); see Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 383 (1978) ("Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do"). The basic standard for what the Clause does cover is well established:

> The Supreme Court has settled upon a two-part standard for assessing challenges brought under the Clause, once [a] classification burdening out-of-staters is established. First, courts must determine whether the classification strikes at the heart of an interest so "fundamental" that its derogation would "hinder the formation, the purpose, or the development of a single Union of the States." Baldwin, 436 U.S. at 383 . . . . If the classification bears on such a "fundamental" right, the analysis proceeds to a second stage, whether the defendant can overcome the challenge by showing a "substantial reason" for the difference in treatment. [United Bldg. & Constr. v.] Camden, 465 U.S. [208], 222 [(1984)].

Utility Contractors Ass'n v. Worcester, 236 F. Supp. 2d 113, 117-18 (D. Mass. 2002) (emphasis added); accord

Matter of Jadd, 391 Mass. 227, 228-29 (1984).

The Couples' claim does not survive these tests, for three separate reasons.

A. Section 11 Distinguishes Between Those Non-Residents Whose Marriages Would and Would Not Be Void in Their Home States, Rather than Between Residents and Non-Residents, and Another Massachusetts Statute Enforces the Same Distinction Against Residents.

Section 11 does not even differentiate between residents and non-residents per se, but rather between two types of non-residents: those whose marriages would, vs. would not, be void if contracted in their home jurisdictions. Thus § 11 does not bar same-sex couples from the seven Canadian provinces, Belgium, or the Netherlands from marrying here, because they may marry in their home jurisdictions. The same is true of § 12: it does not deny couples the right to marry in Massachusetts "because they reside in another state," as the Couples erroneously argue (Br. at 45), but only if they reside in a particular other state or jurisdiction that in fact prohibits same-sex marriage.

Moreover, as to § 11 in particular, the Commonwealth has a mirror-image evasion law for its own residents, G.L. c. 207, § 10, declaring that if a Massachusetts resident "goes into another jurisdiction and there contracts a marriage prohibited and declared

void by the laws of this commonwealth, such marriage shall be null and void for all purposes in this commonwealth[.]" Thus, under §§ 10 and 11, both non-residents and residents alike are barred from going out of state to obtain the status and benefits of marriage in Massachusetts if their marriage would be void in their home state. Non-residents cannot come to Massachusetts to do so; Massachusetts residents cannot go elsewhere to do so. Massachusetts does not allow either non-residents or residents, by marrying out-of-state, to evade their home state's laws declaring particular marriages void.

Because "residents and non-residents are 'subject to the same duties, impositions, and restrictions' under the challenged statutes, [§ 11] do[es] not violate the Privileges and Immunities Clause." Ga. Ass'n of Realtors, Inc. v. Ala. Real Estate Comm'n, 748 F. Supp. 1487, 1492 (M.D. Ala. 1990) (quoting Supreme Ct. of New Hampshire v. Piper, 470 U.S. 274, 279 n.7 (1985)).[78] The Couples nowhere refute this simple threshold point, which is fatal to their Privileges and Immunities attack on § 11.

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[78] Accord Tolchin v. Supreme Ct. of N.J., 111 F.3d 1099, 1111 (3rd Cir. 1997); Lutz v. City of York, 899 F2d. 255, 262-63 (3rd Cir. 1990); Hammond v. Ill. State Bd. of Educ., 624 F. Supp. 1151, 1155 (S.D. Ill. 1986).

B. Marriage Is Not a Fundamental Right for Purposes of the Privileges and Immunities Clause.

Even if the Court were to conclude that §§ 11 and 12 did directly discriminate solely on the basis of non-residency, the Couples would still fail to state a claim under the Privileges and Immunities Clause, because the Clause does not prohibit all differential treatment by one state of citizens of other states. Rather, it applies only to those rights that "bear on the vitality of the Nation as a single entity," those that are "sufficiently basic to the livelihood of the Nation" to be termed "fundamental." Baldwin, 436 U.S. at 383, 388.[79] "As a threshold matter," only those rights that are "sufficiently 'fundamental' to the promotion of interstate harmony" fall within the purview of the Clause. United Bldg. & Constr., 465 U.S. at 218 (emphasis added). Amici are correct that the Clause protects certain individual rights, but they acknowledge that it does so as a means to achieving the "primary purpose" of national unity identified above. Con. Law Prof. Br. at 14-15 (quoting Toomer, 334 U.S.

[79] See Piper, 470 U.S. at 279; Supreme Ct. of Va. v. Friedman, 487 U.S. 59, 64 (1988); Silver v. Garcia, 760 F.2d 33, 36-37 (1st Cir. 1985); Jadd, 391 Mass. at 228-29; see also Saenz, 526 U.S. at 501 n.14 (1999) (noting Clause's protection of "fundamental" rights.)

at 398).[80] Marriage has never been held to fall within this "fundamental" category.

1. The courts have found rights to be "fundamental" under the Clause almost exclusively where those rights affect economic activity.

"[T]he Privileges and Immunities Clause was intended to create a national economic union." Piper, 470 U.S. at 279-80 (emphasis added); accord Connecticut v. Crotty, 346 F.3d 84, 94 (2nd Cir. 2003); A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d 865, 870 (3rd Cir. 1997); Silver, 760 F.2d at 37. This is because "the framers of the Constitution were concerned with avoiding 'the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" A.L. Blades, 121 F.3d at 869-70 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)). To counteract these commercially self-destructive tendencies, the Clause "encourages a national economy by allowing persons to cross states lines freely in pursuit of economic gain," Silver, 760 F.2d at 36, and by "preventing barriers to free trade and commerce between

[80] Although in this sense the Clause protects personal interests, the Couples err (Br. at 46) in citing Dunn v. Blumstein, 405 U.S. 330, 338 (1972), for that proposition. Dunn was an equal protection case and made no mention of the Clause.

the states," Salem Blue Collar Workers Ass'n v. City of Salem, 832 F. Supp. 852, 861 (D.N.J. 1993), aff'd 33 F.3d 265 (3rd Cir. 1994), cert. denied, 513 U.S. 1152 (1995).[81] See Piper, 470 U.S. at 285 n.18 (Clause "was designed primarily to prevent such economic protectionism").

Consistent with this overwhelmingly economic focus, the Supreme Court to date has recognized only four main categories of activity as "fundamental" for Privileges and Immunities purposes: (1) pursuit of a trade, business, or profession; (2) ownership and transfer of property; (3) access to the courts; and (4) payment of taxes on the same footing as state residents. Baldwin, 436 U.S. at 383; Austin v. New Hampshire, 420 U.S. 656, 661 (1975).[82] In contrast,

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[81] The Commerce Clause serves similar purposes, and the Supreme Court indeed recognizes a "mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause." Hicklin v. Orbeck, 437 U.S. 518, 531 (1978).

[82] Most recently, the Saenz Court listed some of the types of commercial-based rights already accorded protection under the Clause. 526 U.S. at 501-02. The Court also discussed the right to travel, noting that the Clause protects, as "fundamental," "the right of a citizen of one state to pass through, or to reside in any other state." Id. at 501 n.14. The centrality of such rights to economic activity is plain. Saenz did not discuss the point further, however, as the case involved a different aspect of the right to travel, one protected not by Art. IV's ("Interstate") Privileges and Immunities Clause but by the ("National") Clause of the Fourteenth Amendment. See 526 U.S. at 502-04.

"direct public employment" is not fundamental, Salem, 33 F.3d at 270; accord A.L. Blades, 121 F.3d at 871; and neither are access to refunds of a state's free revenue, Baker v. Matheson, 607 P.2d 233, 247 (Utah 1979);[83] financial assistance for professional education, Kuhn v. Vergiels, 558 F. Supp. 24, 28 (D. Nev. 1982); interscholastic sports, Alerding v. Ohio High School Athletic Ass'n, 779 F.2d 315, 317 (6th Cir. 1985); recreational boating, Hawaii Boating Ass'n v. Water Transp. Facil. Div., 651 F.2d 661, 666-67 (9th Cir. 1981); or recreational elk hunting. Baldwin, 436 U.S. at 388.[84]

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[83] To the extent the Couples mean to suggest that other decisions have found state benefits programs to be "fundamental," they are plainly wrong. The Couples (Br. at 51 n.47) cite Att'y Gen'l of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986) (civil service preference), and Zobel v. Williams, 457 U.S. 55 (1982) (cash benefits), but both Soto-Lopez (decided on right-to-travel grounds) and Zobel (decided on equal protection rational-basis grounds) invalidated restrictions on a state's own residents, not non-residents. And neither case discussed whether the right involved was "fundamental" for Privileges and Immunities purposes; Zobel expressly noted that the Clause did not apply to claimed discrimination against a state's own residents. 457 U.S. at 59-60 n.5.

[84] While the Supreme Court's actual holdings regarding Art. IV fundamental rights have all involved economic-type interests, the Court has stated in dictum that the protection of the Clause is not strictly limited to economic interests. Piper, 470 U.S. at 274 & n.11 (right to practice law was "fundamental" due not only to lawyers' role in national economy but also to their role in assisting in vindication of federal rights, thus serving maintenance or well-being of

In short, activities necessary to private economic pursuits--conducting a trade, business or profession, owning and transferring property, having access to the courts to enforce rights, and paying taxes on the same footing as state residents--are fundamental for Privileges and Immunities purposes, whereas activities that are recreational, activities that are merely preparatory to economic activity or have ancillary economic effects, and activities constituting public employment and the conferring of public benefits are not. Not surprisingly given the case law's focus on economics, the Registrar has found no case holding that marriage rights are so fundamental as to be protected by the Clause. See Couples Br. at 50 (conceding that

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Union). As support for this idea, the Piper Court cited Doe v. Bolton, 410 U.S. 179, 200 (1973), where the Court summarily found that a Georgia statutory residency requirement for women seeking abortions violated the Clause. However, Doe articulated its ruling in terms of the interstate pursuit of "medical services," id., a phrase with commercial implications that later decisions have adopted. See, e.g., Saenz, 526 U.S. at 502 (stating that Clause as interpreted in Doe protects non-residents' right "to procure medical services"); Daly, 215 F. Supp. 2d at 1110 (same); see also Baldwin, 436 U.S. at 394 (Burger, C.J., concurring) ("The Clause assures noncitizens the opportunity to purchase goods and services on the same basis as citizens"). Also, Doe was decided prior to Baldwin, and it did not employ Baldwin's fundamental rights analysis. Indeed, Justice Brennan, dissenting in Baldwin, 436 U.S. at 401-02 & n.4, suggested that Doe could not be explained under Baldwin's "fundamentality" approach.

Supreme Court has never so held).

Indeed, the Court has clearly suggested the contrary. In Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922), a widow claimed that an Oregon statute restricting the dower rights of non-resident widows violated the Clause (as well as the Fourteenth Amendment's separate privileges and immunities clause). The Court, although not using the term "fundamental," squarely held that the Clause simply did not apply:

> Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation, and it always has been deemed subject to regulation by each state as respects property within its limits. . . . Neither section 2 of article 4 nor the Fourteenth Amendment takes from the several states the power to regulate this subject; nor does either make it a privilege or immunity of citizenship.

Ferry, 258 U.S. at 318 (emphasis added; citations omitted). See Opinion of the Justices, 337 Mass. 786, 789 (1958) (quoting and relying on this passage from Ferry).

Ferry indicates that the incidents of marriage are, as a category, not protected by the Clause. It also confirms that the Clause's focus is on rights important to the national economy. Although both before and after Ferry, the Court made clear as a

general matter that "the ownership and transfer of privately held property within the State" is "fundamental," see Baldwin, 436 U.S. at 383,[85] under Ferry the Clause nevertheless does not apply when the claimed ownership or right to transfer of property arises out of marriage rather than a commercial transaction.

It simply is not "fundamental to a national economic union" (Piper, 470 U.S. at 279-80) that two residents of State A be able to cross into State B to be married on the same terms as State B's residents, when those persons intend all along to return to live in State A. It is State A's marriage and domestic relations laws, not State B's, that will have by far the greatest impact on the rights and duties of such persons vis-á-vis each other and their children, as well as on their participation in economic activity--which ordinarily would occur in State A where the couple lives, rather than State B where they traveled to get married. In any event, such ancillary effects on economic activity, in either state, do not make

[85] Baldwin cited the 1898 decision in Blake v. McClung, 172 U.S. 239 (1898) (invalidating statute limiting non-resident creditors' rights to recover against property of corporation in receivership).

marriage "fundamental" under the Clause.[86]

The Couples' requested ruling that marriage is "fundamental" would break new ground and would also undermine other states' "inherent power, so far as concerned [their] own citizens, over the marriage relation [and] its formation," Harding v. Townsend, 280 Mass. 256, 262 (1932), by facilitating legal challenges to the marriage laws of those states. This would run counter to the Supreme Court's longstanding recognition of states' historically strong interest in this area. See, e.g., Sosna, 419 U.S. at 407 (state has legitimate interest in avoiding "officious intermeddling in matters in which another State has a paramount interest," such as divorce).

The fact that §§ 11 and 12 advance rather than hinder one of the main purposes of the Clause strongly reinforces this conclusion. The Clause "appears in the so-called States' Relations Articles," Baldwin, 436

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[86] The focus is on the intrinsic nature of the asserted right itself, rather than its ancillary economic effects. Thus it likewise does not matter that the "marriage industry" might provide ancillary economic benefits to the Commonwealth, as the state where more marriages would be celebrated if the Couples prevailed. The same "ancillary economic benefits" argument could also be made for professional education, public employment, or interscholastic sports, yet none of these enjoys "fundamental" status under the Clause. Kuhn, 558 F. Supp. at 28; Salem, 33 F.3d at 270; Alerding, 779 F.2d at 317.

U.S. at 379, and it "imposes a direct restraint on state action in the interests of interstate harmony." United Bldg. & Constr., 465 U.S. at 220; see Austin, 420 U.S. at 662 ("Clause . . . implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism"); Silver, 760 F.2d at 37 ("clause acts primarily as a restraint upon state action which interferes with interstate harmony"). In particular, the Clause aims to prevent escalating retaliatory enactments by states upset with each other. Austin, 420 U.S. at 662, 667 (prevention of states retaliating against each other "was one of the chief ends to be accomplished by the adoption of the Constitution") (citation and internal quotation omitted); Toomer, 334 U.S. at 395 (Clause was aimed at avoiding need for states to retaliate against one another); cf. Int'l Org. of Masters, Mates & Pilots v. Andrews, 831 F.2d 843, 846 (9th Cir. 1987) (statute that did not "pressure[] other states to legislate or retaliate in response" did not violate Clause).[87]

[87] The Couples thus oversimplify in arguing that marriage is "fundamental" because travel to another state to marry "advances the type of national unity that animates the Clause." Couples Br. at 52. Allowing out-of-state same-sex couples to travel to the Commonwealth to marry is at least as likely to produce interstate friction, and perhaps retaliation, as it is

Sections 11 and 12 directly further these core constitutional policies. They promote interstate harmony by respecting the policy judgments of other states on a matter of intensely local concern. They similarly deter rather than incite retaliation by honoring other states' policies regarding their own residents. When every other state presently treats same-sex marriage as void or prohibited, for this Court to rule that same-sex marriage is "sufficiently basic to the livelihood of the Nation" to be termed "fundamental," Baldwin, 436 U.S. at 388, would not advance "the interests of interstate harmony" served by the Clause. United Bldg. & Constr., 465 U.S. at 220.

2. The Couples and amici mis-state the test for determining what rights are protected by the Clause.

The Couples and amici erroneously suggest that activities currently protected as "fundamental" by the Supreme Court include anything that could fall under the heading of "the enjoyment of life and liberty . . . and [the right] to pursue and obtain happiness and safety." See Couples Br. at 49-50, 52 n.48; Con. Law Prof. Br. at 9-11, 15-16. It is true that in 1825, in

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to produce national unity. Moreover, traveling to another state to engage in public employment, higher education, or recreational activities would also promote national unity, yet that has not been enough to find such activities "fundamental" under the Clause.

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 in describing rights deemed "fundamental" under the Clause, but he also included the following more specific list of rights:

> 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 . . . .

In 1985, the Supreme Court reaffirmed only the precise and specific list of rights just quoted--but 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." Piper, 470 U.S. at 281 n.10. Justice Washington's more general formulation from 1825 was apparently viewed as embodying a "natural rights" theory, one that was later expressly rejected by the Court. Id.; see Baldwin, 436 U.S. at 384 n.20.

The Registrar knows of no court that has found a right "fundamental" simply because it furthers "the enjoyment of life and liberty" or the right "to pursue

and obtain happiness and safety." If that were the standard, then the Baldwin Court would have found recreational elk-hunting to be "fundamental." Likewise, financial aid for professional education may be one person's primary means of pursuing happiness, but it is not "fundamental" under the Clause. Kuhn, 558 F. Supp. at 28.

The Couples and amici similarly err in arguing that, under Baldwin, the Clause protects any effort to "engage in an essential activity or exercise a basic right." Couples Br. at 50; Con. Law Prof. Br. at 3, 10 n.2, 11. Baldwin in no way adopted such a loose formulation as the governing standard; rather, the Baldwin Court merely observed that despite Justice Washington's general [and discredited] "natural rights" language in Coryell, Justice Washington's specific [and still valid] "list of situations, in which he believed the States would be obligated to treat each other's residents equally," included only essential activities and basic rights. Baldwin, 436 U.S. at 387. And after referring to some of these rights as found protected by the Clause in subsequent cases--"the pursuit of common callings, the ability to transfer property, . . . access to courts," and "commercial licensing"--the Court said only that "[w]ith respect to such basic and

essential activities, interference with which would frustrate the purposes of the formation of the Union," the Clause applied. Baldwin, 436 U.S. at 387 (emphasis added). Nothing in Baldwin suggests that any and every assertedly "essential activity" and "basic right" is, without more, protected by the Clause.[88]

The Couples likewise err in arguing that Doe v. Bolton, 410 U.S. 179, 200 (1973) requires recognition of marriage as "fundamental" for purposes of the Clause. The Couples say: "The Doe Court reasoned that because the Clause included the lesser right to earn a living, it must also include the greater right to secure medical treatment." Couples Br. at 51-52. But the Doe decision is completely devoid of any such

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[88] Thus the Couples' discussion (Br. at 51 n.46) of how, under Goodridge, marriage is "essential" and "basic," is beside the point. The Couples likewise err in arguing that any right protected by the Massachusetts Constitution as "integral to state citizenship" is ipso facto a fundamental right under he Clause. Couples Br. at 48; see Con. Law Prof. Br. at 13 n.3. First, Goodridge did not hold that marriage was such an integral state constitutional right; rather, Goodridge held only that under due process and equal protection, it was irrational to deny same-sex couples the ability to marry on the same terms as those statutorily available to opposite-sex couples. Second, and more important, the cases are clear that the existence of a right under state law is not dispositive of whether it is "fundamental" for purposes of the Clause. Baldwin, 436 U.S. at 383 ("Nor must a State always apply all its laws . . . equally to anyone, resident or nonresident, who may request it so to do"); see Bach, 289 F. Supp. 2d at 226.

"lesser/greater" reasoning. Doe, 410 U.S. at 200. Thus there is no basis for concluding that because the Clause protects a person's interest in "procur[ing] medical services," Saenz, 526 U.S. at 502 (characterizing Doe as protecting that interest), it must also protect the "even greater interest of two people who seek to marry." Couples Br. at 52.[89]

Amici wrongly cite Saenz for the proposition that the Clause "protect[s] non-residents who . . . wish to travel to or through . . . other states in order to take advantage of opportunities available in other parts of the country." Con. Law Prof. Br. at 17 (citing, inter alia, Saenz, 526 U.S. at 501). Neither on the cited page nor elsewhere does Saenz suggest that the Clause requires that any and all "opportunities" made available to a state's residents must also be available to non-residents. Such a broad rule would be flatly inconsistent with Baldwin and the many other cases saying the Clause protects only "fundamental rights." Indeed, Saenz was not an Art. IV Privileges and Immunities case at all, since it did not involve discrimination against non-residents. 526 U.S. at 501-

[89] The Couples' remaining arguments about how Doe supports recognition of marriage as "fundamental" for purpose of the Clause have already been addressed supra at n.84.

02.[90]

Finally, amici err in suggesting that because the Clause operates in part through the protection of individual rights, therefore the Clause protects all individual rights and forbids any state law that defers to other states' laws regarding their residents' individual rights. Con. Law Prof. Br. at 16-17. The short answer is that the Clause protects only "fundamental" rights, and marriage is not among them.[91]

3. That marriage has been held to be "fundamental" for Fourteenth Amendment purposes does not mean same-sex marriage is "fundamental" under the Privileges and Immunities Clause.

Amici err in citing to Fourteenth Amendment decisions to try to assert that marriage is a "fundamental" right for Article IV purposes. See Con. Law Prof. Br. at 11 (citing Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978)). "[T]he term 'fundamental' has been used to describe several very different concepts in

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[90] To the extent Saenz discussed which rights were protected by the Clause, it mentioned, and termed "fundamental," the rights to pass through and reside in another state, and it listed rights elsewhere described as fundamental, such as [private] employment and commercial fishing. 526 U.S. at 501 n.14, 502.

[91] Amici's related argument that the Clause bars one state from giving extra-territorial effect to another state's laws is refuted in Arg. IV.C.3. infra.

constitutional analysis." Mass. Council of Constr. Employers, Inc. v. Mayor of Boston, 384 Mass. 466, 474 (1981), rev'd on other grounds sub nom. White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983). Whether a right is fundamental for Fourteenth Amendment purposes[92] is thus not dispositive in the Privileges and Immunities context. Id. at 474-75; Daly v. Harris, 215 F. Supp. 2d 1098, 1111 n.17 (D. Hawaii 2002) ("The Court is not persuaded that all rights protected by the Fourteenth Amendment are necessarily 'fundamental' for purposes of the Privileges and Immunities Clause"); see Matter of Tocci, 413 Mass. 542, 548 n.4 (1992). Moreover, numerous courts have concluded that same-sex marriage is not a "fundamental right" even for Fourteenth Amendment purposes.[93]

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[92] For Fourteenth Amendment purposes, to qualify as "fundamental," the asserted right must be "objectively, deeply rooted in this Nation's history and tradition, ... and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 720-721, (1997) (citations and internal quotations omitted).

[93] Morrison v. Sadler, 821 N.E.2d 15, 33 (Ind. Ct. App. 2005) (citing Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993); see Morrison at 19-20 ("There is binding Unites States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution," citing Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (holding that state ban on same-sex marriage did not violate Fourteenth Amendment), app. dismissed for want of substantial federal question, 409 U.S. 810 (1972)); Seymour v.

Amici also err in asserting that "all rights protected under the Equal Protection and Due Process clauses are necessarily fundamental under the Privileges and Immunities Clause." Con. Law Prof. Br. at 12. Amici cite no case for this proposition, but only two treatises. The first treatise they cite, 1 L. Tribe, Am. Const'l Law § 6-37 at 1258-59 (3d ed. 2000), simply contains no such statement.[94] Their second

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Holcomb, 790 N.Y.S. 2d 858, 865 (N.Y. Sup. Ct. 2005) (appeal pending); Wilson, 354 F. Supp. 2d at 1305-07; In re Kandu, 315 B.R. at 138-41; Standhardt v. Superior Court, 77 P.3d 451, 455-60 (Ariz. 2003); Dean v. District of Columbia, 653 A.2d 307, 331-33 (D.C. App. 1995). See also Goodridge, 440 Mass. at 354 (Spina, J., dissenting); id. at 365-71 (Cordy, J., dissenting). Cf. Lewis v. Harris, -- A.2d. --, 2005 WL 1388578 (N.J. Super. A.D. June 14, 2005) at *4-*8 (no fundamental right to same-sex marriage under New Jersey Constitution). The Court need not reach this issue in the present case, as the Couples do not press any such Fourteenth Amendment claim. None of the Supreme Court cases suggesting that marriage had a "fundamental" character for Fourteenth Amendment purposes discussed same-sex marriage. Moreover, the courts have been extremely cautious in extending "fundamental" status to new rights. E.g., Washington v. Glucksberg, 521 U.S. at 720; see Goodridge, 440 Mass. at 356 (Spina, J., dissenting); id. at 371-73 (Cordy, J., dissenting).

[94] Prof. Tribe states that the category of fundamental equal protection rights is narrower than the category of fundamental privileges and immunities, but not that every item in the former category is necessarily in the latter. Id. He also observes that, as the equal protection clause may be used to scrutinize discrimination against non-residents (as in Baldwin, 436 U.S. at 388-91), the denial of a fundamental equal protection right on the basis of residency would ordinarily be enough to trigger strict scrutiny. Tribe, id. at 1258-59. There is thus no inherent logical reason why rights that are fundamental

treatise, 2 R. Rotunda & J. Nowak, Treatise on Const'l Law § 12.7 at 248-50, does contain such a statement at p. 250, but, curiously, supports it only with a general citation to Doe v. Bolton, 410 U.S. 179, which indisputably says no such thing.[95] These treatises thus do not advance the amici's argument.

Even if Fourteenth Amendment cases were dispositive, the Court, in recognizing the fundamental character of marriage, not only was dealing only with opposite-sex marriage, but also expressly did "not mean to suggest that every state regulation which relates in any way to the incidents or prerequisites for marriage must be subjected to rigorous scrutiny." Zablocki, 434 U.S. at 386 (emphasis added). "To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." Id.[96] In

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for equal protection purposes must also be deemed fundamental for Privileges and Immunities purposes.

[95] Doe contains no discussion at all of whether rights that are "fundamental" under the Fourteenth Amendment are necessarily fundamental under Art. IV's Privileges and Immunities Clause. Doe, 410 U.S. at 200; see Baldwin, 436 U.S. at 401 n.4 (Brennan, J., dissenting) (noting that Doe's Privileges and Immunities ruling did not rely on status of abortion as a "fundamental right" under equal protection clause).

[96] Sections 11 and 12 meet this standard, and thus do not restrict any fundamental right to marriage in violation of the Fourteenth Amendment, because §§ 11

this sense, marriage is not a classic Fourteenth Amendment fundamental right, because such a wide field has been left open to state regulation. The Court should therefore be all the more hesitant to conclude that marriage, same-sex or otherwise, is "fundamental" for Privileges and Immunities purposes.

C. Sections 11 and 12 Are Closely Related to the Commonwealth's Substantial Interests in Interstate Harmony and in the Welfare of Prospective Marital Couples and their Children.

Even assuming arguendo both that §§ 11 and 12 discriminate between residents and nonresidents and that they implicate a "fundamental" right within the meaning of the Clause, §§ 11 and 12 remain valid, because they are "closely related to the advancement of a substantial state interest." Friedman, 487 U.S. at 65. Discrimination against non-residents may be justified by a "'substantial reason for the discrimination beyond the mere fact that they are citizens of other states.'" Saenz, 526 U.S. at 502. Sections 11 and 12 meet these standards.

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and 12 allow couples (same-sex or otherwise) who cannot marry in their home state to marry in Massachusetts, if they establish residency here. While establishing residency here is no doubt a significant step, it is a reasonable requirement in these circumstances, because otherwise, as explained supra, the enforcement of marital rights and duties would be so difficult.

1. Sections 11 and 12 serve numerous substantial state interests.

Here, §§ 11 and 12 directly advance numerous substantial state interests. Most of these are direct interests of the Commonwealth itself and its citizens; the remaining interest, in the welfare of out-of-state couples and particularly their children, both is very substantial and is a proper consideration in evaluating the validity of §§ 11 and 12 under the Clause.

First, §§ 11 and 12 serve the interest of interstate harmony, which is unquestionably a "substantial state interest" under the Clause, since establishing interstate harmony is part of the Clause's own core purpose. See, e.g., United Bldg. & Const., 465 U.S. at 220; see generally Arg. IV.B supra. In particular, the statutes "further[] the [Commonwealth]'s parallel interests in both avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce [and other marriage-related] decrees to collateral attack," as well as other burdens on the Commonwealth's courts. Cf. Sosna, 419 U.S. at 407 (discussing divorce).[97] The statutes

[97] Although amici claim that Sosna is irrelevant here, they fail to explain how the Commonwealth's particular interest in avoiding such "officious intermeddling" is any less strong in the marriage

additionally reduce the risk that the Commonwealth may face retaliatory action by other states, as described in Arg. III.E supra, and this is unquestionably a substantial state interest under the Clause. Cf. Austin, 420 U.S. at 662; Toomer, 334 U.S. at 395.

Sections 11 and 12 are also justified by the Commonwealth's substantial interest in refusing to create a marriage relationship here unless the couple's home state is "an approving State" (Goodridge, 440 Mass. at 321), one that stands at the ready to enforce marital rights and duties for the benefit of the spouses and particularly their children. See Args. III.C & D supra. The notion that the Commonwealth can serve as the "approving State" for couples that come here solely to marry and then return to their home states, Couples Br. at 56, ignores what Goodridge meant in requiring an "approving State," as explained above.

Although the Couples suggest that "paternalistic" concerns for the financial well-being of prospective marital households, while concededly "legitimate,"

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context than in the divorce context. Con. Law Prof. Br. at 25-26. Also, as explained supra pp. 83-84, and particularly in light of the federal DOMA allowing other states to deny full faith and credit to Massachusetts same-sex divorce judgments, amici err in arguing (at p. 24) that the Commonwealth's durational residency requirements for divorce (like the one upheld in Sosna) are sufficient to avoid collateral attacks on Massachusetts same-sex divorce judgments.

cannot "justify the absolute deprivation of the benefits of a legal marriage," Couples Br. at 57 (quoting Zablocki v. Redhail, 434 U.S. at 393-94), they overstate the relevance of Zablocki. The quoted passage actually comes from Justice Stewart's concurrence, in which he expressly recognized that the state's general concerns were legitimate and rational, but that, as the statute at issue applied to particular groups, it either operated irrationally or struck the wrong balance under the Fourteenth Amendment's due process clause. Id. at 394.[98] Neither his concurrence nor the Court's opinion suggested any general principle that concern for the financial welfare of a prospective marital household can never justify a denial of marriage rights.

The Couples and amici also argue that the interests of other states and their citizens are per se

[98] Zablocki involved a state statute that barred persons from marrying absent proof that they owed no child-support arrearage and that any children of a prior marriage were unlikely to become "public charges" in the future. Id. at 375. Justice Stewart's concurrence concluded only that the statute (1) operated irrationally as it applied to the indigent (because it penalized them for failing to do what they could not possibly do); and (2) unjustifiably invaded a liberty interest, in violation of the Fourteenth Amendment's due process clause, insofar as it assumed that both the currently indigent and those currently delinquent in their child support payments would necessarily be unable to provide financially for children of the prospective marriage. Id. at 394-95.

an impermissible consideration under the Clause, but, although the cases they cite happen to have focused on in-state harms, neither those cases nor any other case rules out the consideration of out-of-state harms as well. Couples Br. at 55 (citing Toomer, 334 U.S. at 398; United Bldg. & Constr., 465 U.S. at 222; Piper, 470 U.S. at 281); Con. Law Prof. Br. at 23.[99] Moreover, in the choice-of-law context, consideration of other states' interests is perfectly permissible under the full-faith-and-credit and due process clauses, and this Court routinely gives substantial weight to the interests of other states in determining what law governs a particular relationship. Indeed, this Court has specifically done so in the marriage and family-law area. See Arg. IV.C.3 infra. The Couples' argument that such considerations are unconstitutional in the Privileges and Immunities context is untenable.

[99] Likewise, the Couples and amici are wrong in suggesting that Doe v. Bolton invalidated a Georgia restriction on abortion services to non-residents "because [making such services available] did not harm Georgia residents." Couples Br. at 56 (citing Doe, 410 U.S. at 200; emphasis added); see Con. Law Prof. Br. at 24-25. The Court merely observed that there was no harm to Georgia residents; it did not intimate that harm to other states' policies or residents would have been an impermissible consideration. Georgia had not offered any such rationale for its law, so the Court said nothing about the issue.

2. Sections 11 and 12 are like other choice-of-law "borrowing" statutes that have been upheld under the Clause.

Cases upholding choice-of-law "borrowing" statutes against Privileges and Immunities challenges directly support the validity of §§ 11 and 12. E.g., Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 562 (1920). Under one common type of borrowing statute, a state will utilize another state's statute of limitations if (1) the cause of action arose in that other state, (2) the other state's limitations period is shorter (i.e., more restrictive) than the forum state's, and (3) the plaintiff is a non-resident. See, e.g., N.Y. C.P.L.R. § 202 (McKinney 2004).[100] Even though these borrowing statutes look to another state's law to preclude a cause of action, and even though they explicitly discriminate between residents and nonresidents in doing so, the courts have repeatedly upheld them against Privileges and Immunities claims,[101] citing

[100] If, in contrast, the plaintiff is a resident of the forum state, then this type of borrowing statute will not adopt the shorter limitations period of the other state, even though the cause of action arose there. Id. The Commonwealth's own borrowing statute borrows the other state's limitations period without regard to the current residence of the plaintiff. G.L c. 260, § 9.

[101] See also Flowers v. Carville, 310 F.3d 1118, 1125 (9th Cir. 2002) ("The Supreme Court has held that states can apply their borrowing statutes to foreigners

Canadian Northern, which the Supreme Court still recognizes as good law.[102]

The parallels with §§ 11 and 12 are clear. Under the borrowing statutes, a non-resident's lawsuit cannot proceed in the forum state if it would be barred in the other state, just as under §§ 11 and 12 a non-resident's marriage is barred in Massachusetts if it would be void or prohibited in that person's home state. Thus §§ 11 and 12 "borrow" the other state's marriage laws to the same extent that a borrowing statute borrows the other state's limitations period.

The Canadian Northern Court recognized that "'the right of a citizen of one state . . . to institute and maintain actions of any kind in the courts of' another [state]" was "fundamental" for purposes of the Clause.

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while exempting their own citizens"); Bennett v. Hannelore Enter., 296 F. Supp. 2d 406, 413 (E.D.N.Y. 2003) ("it is well settled that New York's borrowing statute is not unconstitutional merely because it provides non-residents with a different statute of limitations than residents"); Helinski v. Appleton Papers, 952 F. Supp. 266, 274 (D. Md. 1997). These rulings also extend to the accrual and tolling of a limitations period, Owens Corning v. Carter, 997 S.W.2d 560, 575-76 (Tex.), cert. denied, 528 U.S. 1005 (1999); and to a choice-of-law rule that incorporates another state's damages cap. Skahill v. Capital Airlines, Inc., 234 F. Supp. 906, 908-09 (S.D.N.Y. 1964).

[102] This is shown by the Baldwin Court's citation of Canadian Northern for the proposition that "[n]or must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do." 436 U.S. at 383.

252 U.S. at 560 (quoting Corfield). Nevertheless, so long as a state allows non-citizens "reasonable and adequate" access to its courts, such access need not be identical to the access afforded residents. Id. at 562. While the Clause would not allow "an arbitrary or vexatious discrimination against nonresidents," id. at 559, neither does the Clause require that, if a non-resident's right to sue is time-barred by "the laws under which [the plaintiff] chose to live and work," that right be "revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit," even if residents of the forum state enjoyed a longer limitations period. Id. at 563 (emphasis added).

Thus, even where a right is "fundamental" under the Clause, Canadian Northern indicates that a state's interest in discouraging forum-shopping, as embodied in that state's choice-of-law rule, can be sufficient to justify reasonable differences in how that right is made available to non-residents. That is just how §§ 11 and 12 operate.[103]

[103] Thus, assuming arguendo that marriage were a "fundamental" right under the Clause, a state might not be able to entirely deny non-residents the opportunity to marry in the state. But the state could impose reasonable regulations aimed at discouraging forum-shopping, by deferring (as §§ 11 and 12 do) to the marriage-impediment laws of the couple's home state.

3. Consideration of other states' laws and interests through choice-of-law rules is a itself a "substantial state interest" under the Clause.

Consideration of the laws and interests of other states, through choice-of-law rules, is itself a constitutionally substantial and legitimate state interest. Under the federal full-faith-and-credit and due process clauses, it is permissible to apply a particular state's law if that state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Franchise Tax Bd. of Calif. v. Hyatt, 538 U.S. 488, 494-95 (2003)(citations and internal quotations omitted).[104] In some circumstances, where a forum state lacks such sufficient state interests, the forum state (even if it has jurisdiction of the parties) may not constitutionally apply its own law, where such law conflicts with the law of another state with greater interests. Phillips Petroleum, 472 U.S. at 818-23.[105]

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[104] Franchise Tax Board, a full-faith-and-credit case, relied on Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (due process and full-faith-and-credit) and Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-313 (1981) (plurality opinion) (same).

[105] The Registrar makes this point only to illustrate that the constitution sometimes requires the forum state to apply another state's law, not to assert

As a choice-of-law matter, in Bushkin Assoc., Inc. v. Raytheon Co., 393 Mass. 622, 631 (1985), this Court stated that the Commonwealth follows "a functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole." The Court cited, as "[o]ne obvious source of guidance[,] the Restatement (Second) of Conflict of Laws (1971)," under which the parties' "rights 'are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties[.]'"[106] Id. at 631 (quoting Restatement [Second] § 188(1)). In determining which state that is, one factor is "'the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue[.]'" Id. (quoting Restatement § 6(2)(c)).

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that the Commonwealth is constitutionally required to apply other states' marriage laws when those states' residents come here to marry.

[106] Different principles apply when the parties themselves have made a choice of law, id. (and see discussion infra of Hodas v. Morin, 442 Mass. 544 (2004)), but of course the parties' attempted choice of law, such as an out-of-state couple's travel to Massachusetts in an attempt to marry here, cannot be given effect where a specific choice-of-law statute such as §§ 11 or 12 prescribes a different result. In any event, the point here is that choice-of-law principles recognize that other states' interests are a legitimate concern of the forum state.

This Court applied some of these considerations in Hodas v. Morin, 442 Mass. 544 (2004). There, a gestational carrier agreement "implicate[d] the policies of multiple States in important questions of individual safety, health, and general welfare," yet the laws of the three most interested states (Massachusetts, Connecticut, and New York) were not in accord, so the Court "look[ed] to our established 'functional' choice of law principles and to the Restatement" to determine which state's law applied. Id. at 548-49. Although the out-of-state parties (the married Connecticut couple who were the genetic parents, and the New York gestational mother) had agreed that Massachusetts law would govern their contract, the Court declined to give effect to that provision without first deciding whether, inter alia, "'application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state[.]'" Id. at 550 (quoting Restatement § 187(2)). Although the Court ultimately determined that Massachusetts law applied on the facts of the case, the Court acknowledged that the interests of both Connecticut and New York, including in particular New York's "fundamental policy" as established by a statute

prohibiting gestational carrier agreements, were "material and significant." Id. at 550-51.

In light of Hodas, it cannot seriously be argued that a state cannot consider the interests of other states--particularly in marriage and family-law matters--when adopting choice-of-law rules such as those embodied in §§ 11 and 12.[107] Hodas also recognizes that choice-of-law rules serve a legitimate interest in avoiding "forum shopping" and "the misuse of our courts and our laws." Id. at 553. Here, to paraphrase Hodas, §§ 11 and 12 represent legitimate choice-of-law determinations by the Legislature (1) that "application of the law of the [out-of-state couples'] chosen state [Massachusetts] would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state," see Hodas, 442 Mass. at 550 (internal quotations omitted), as well as (2) that application of out-of-state couples' home-state laws will help avoid forum-shopping and burdens on Massachusetts courts. Id. at 553.

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[107] See also Rudow v. Fogel, 12 Mass. App. Ct. 430, 436-37 (1981) ("Massachusetts is interested in establishing for its domiciliaries the obligations of family members to one another. New York has a similar interest for its domiciliaries. Here, New York has the dominant contacts and the superior claim for application of its law.") (citation and internal quotation omitted).

Nothing in Saenz suggests that choice-of-law statutes are invalid under the Clause. Saenz declined to accept what the Solicitor General claimed was a "specialized choice-of-law" argument for a California law that tied the level of welfare benefits for newly arrived California residents to the level they had received in their prior state of residence. Saenz, 526 U.S. at 509; see Couples Br. at 61. However, the Court did so only in the context of the Fourteenth Amendment's Privileges and Immunities Clause. Id. This case, in contrast, concerns the Article IV Clause, governing treatment of non-residents, and the relevant Supreme Court case is accordingly Canadian Northern, 252 U.S. at 562, which specifically upholds a choice-of-law statute against an Article IV challenge.

Moreover, §§ 11 and 12 far more closely resemble a traditional choice-of-law provision than did the level-of-benefits legislation at issue in Saenz. Both §§ 11 and 12 and Canadian Northern's borrowing statute preclude a specific legal status for non-residents (in one instance, marriage; in the other, a viable cause of action) based on the law of the state with more significant interests (in one instance, the state of residence; in the other, the state where the claim arose). This is a quintessential exercise of choice of

law. Saenz, in contrast, involved a law that made the level of benefits paid to California's own residents depend on the laws of the states in which they formerly resided, and California made no attempt to justify it as a matter of deference to the greater interests of other states. The Court viewed the California law as burdening one aspect of the Fourteenth Amendment Clause's right to travel: the right of the newly arrived resident to be treated the same as the state's other residents. 526 U.S. at 502-04. No such right is at issue here; if the Couples moved to the Commonwealth, they would immediately enjoy the same marriage rights as other residents.[108]

Amici and the Couples may well be right that a state may not require its own laws governing its own residents to be given extra-territorial effect (Con. Law Prof. Br. at 16; see Couples Br. at 62), but this hardly means the Clause prohibits other states from granting such effect as a matter of comity. Amici and

[108] The Couples also rely on Prof. Tribe's argument that, in order to fully realize a "more perfect Union," the Clause (combined with the Fourteenth Amendment's Clause) forbids a state from treating visitors differently depending on the laws of their home states. Couples Br. at 61 n.55 (quoting Tribe, Am. Const'l Law § 6-37 at 1268). Prof. Tribe bases his argument on Saenz, see id., yet Saenz did not deal with the treatment of visitors, but only newly arrived residents, and only under the Fourteenth Amendment's Clause.

the Couples cite no case for this proposition. Amici's incomplete quotation of Prof. Tribe's treatise for such a proposition is misleading.[109] And the Couples' and amici's argument that Massachusetts may not "help [other states] do indirectly what they may not do directly" (Couples Br. at 62; see Con. Law Prof. Br. at 5, 17), while it has surface appeal, is fundamentally at odds with the entire idea of comity.

Finally, the Couples and amici place too much weight on the idea, applied by the Supreme Court only in evaluating tax statutes challenged under the Privileges and Immunities Clause of Art. IV, that "'the constitutionality of one State's statutes affecting non-residents [cannot] depend upon the present configuration of the statutes of another State.'"

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[109] They quote Prof. Tribe as arguing that "legislation that essentially forces citizens to carry wherever they travel a cage consisting of their home state's restrictive laws [is] deeply inconsistent with the nature of our federal Union [and] such legislation should be declared unconstitutional." Con. Law Prof. Br. at 17, quoting Tribe, Am. Const'l Law § 6-36 at 1250 n.3. But in the quoted passage, Prof. Tribe was explicitly referring only to "Federal legislation" that forced such a rule on all states. See id. at 1250 n.3 (emphasis added). While also adding that a state could not effectively "imprison" its own citizens by requiring that its laws be given extra-territorial effect, id., Prof. Tribe, in the cited passage, says nothing about a forum state's voluntary choice to respect the laws of other states regarding those other states' citizens. Id. Prof. Tribe's views on that latter issue are discussed supra n.108.

Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 314 (1998) (quoting Austin, 420 U.S. at 668; also citing Travis v. Yale & Towne Mfg., 252 U.S. 60, 81-82 (1920)). In all of those cases, a state's discriminatory tax treatment of non-residents was sought to be justified on the ground that other states could enact their own tax laws either (1) to offset the effect of the discrimination (Lunding, 522 U.S. at 313-14); or else (2) to grant or deny corresponding tax credits so as to negate entirely the applicability of the challenged state tax, i.e., to "retaliate against" the taxing state. Austin, 420 U.S. at 667; Travis, 252 U.S. at 82. The Court rejected this justification not only on the ground that the Clause was intended to prevent such retaliation in response to discrimination, e.g. Austin, 420 U.S. 667 (citing Travis), but also that "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State." Id. at 668; Lunding, 522 U.S. at 314.

But neither the Supreme Court nor any other court has ever applied this idea outside of the discriminatory tax context; most important for present purposes, it has never been applied to state choice-of-law provisions. A choice-of-law statute is by

definition not justified by "the present configuration of the statutes of another State," Austin, 420 U.S. at 668 (emphasis added), but rather by the very fact that other states have different statutes--whatever they may be now and however they may change over time--that govern those states' residents (or claims that arose there), and to which the state enacting the choice-of-law statute wishes to defer in cases involving those other states' residents (or claims arising there). Unlike discriminatory tax laws, which may invite other states to adopt retaliatory legislation, choice-of-law provisions by their nature reflect a policy of respectful accommodation of other states' laws. Nothing in the language or reasoning of Lunding, Austin, or Travis suggests that choice-of-law provisions are invalid.[110] Rather, such provisions serve a substantial state interest in preserving interstate harmony.

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[110] Indeed, the Austin Court stressed that "neither Travis nor the present case should be taken in any way to denigrate the value of reciprocity"; rather, "[t]he evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents," and not "reciprocally favorable treatment of nonresidents by States that coordinate their tax laws." 420 U.S. at 667 n.12 (emphasis added). Sections 11 and 12 do not involve any "unilateral imposition of a disadvantage on nonresidents," but merely give effect to whatever marriage impediments are imposed in the first instance by non-residents' home jurisdictions.

4. Sections 11 and 12 are closely related to the state interests they serve.

Sections 11 and 12 are closely related to the substantial state interests identified above. As to the Commonwealth's interests in preserving interstate harmony, avoiding "officious intermeddling" in matters of paramount interest to other states, and avoiding retaliation against the Commonwealth and its citizens, the fit is near-perfect: §§ 11 and 12 ensure that the Commonwealth respects other states' laws regarding the marriage of those states' own residents, instead of assisting such persons in evading their state laws, which would create friction with and invite retaliation by those states.

Sections 11 and 12 certainly are not overinclusive in this regard, as they defer to other states' marriage impediment laws whatever those laws may be. Nor are §§ 11 and 12 underinclusive, assuming arguendo that is relevant under the Clause.[111] The Couples and amici implausibly argue underinclusivity on the basis that "[r]esident same sex couples are not required to relinquish their marriage licenses when leaving the

[111] The only authority cited by Couples and amici for the proposition that underinclusiveness is relevant in this context is dictum in a footnote in Piper, 470 U.S. at 285 n.19 (invalidating New Hampshire's residency requirement for membership in the bar).

Commonwealth's borders[.]" Couples Br. at 68; see Con. Law Prof. Br. at 32. But decisions by individual Massachusetts same-sex married couples to travel through or move to other states are far less likely to engender interstate friction and resentment of "officious intermeddling" than would an official practice of the Commonwealth allowing all other states' same-sex couples to marry here despite the home states' laws declaring such marriages void or prohibited. That is the practice that §§ 11 and 12 prevent.

Sections 11 and 12 also are closely related to the Commonwealth's substantial interests in (1) ensuring that, for every couple married in the Commonwealth, there is an "approving State" that is willing, able, and readily available to enforce the rights and duties of the spouses and their children; (2) ensuring that the Commonwealth's courts are not asked to adjudicate the rights and duties of out-of-state same-sex married couples and their children, when those judgments may well be ignored or collaterally attacked in other states; and (3) avoiding burdens on the Commonwealth's courts. All of these interests would be jeopardized if the Commonwealth allowed marriages here of same-sex couples from states whose laws do not recognize same-sex marriage. And, as shown above, whether another

state will recognize a same-sex marriage contracted in the Commonwealth is closely correlated with whether such a marriage is "void" (§ 11) or "prohibited" (§ 12) in that other state. (The suggestion of the Couples and amici that the Attorney General has previously taken a contrary position is mistaken.[112])

The speculative possibility that a very few such states might recognize such marriages, see supra Arg. III.C.2, is not enough to make §§ 11 and 12 so

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[112] The Couples and amici point to letters from an Assistant Attorney General to local officials stating:

> For purposes of G.L. c. 207, §§ 11 and 12, it is irrelevant whether another state would recognize a same-sex marriage if validly performed in the Commonwealth. General Laws c. 207, §§ 11 and 12, make the permissibility and validity of a marriage in the Commonwealth turn on whether the marriage could be validly contracted in the couple's home state–not whether it would be recognized there after being contracted in the Commonwealth.

RA 632 (emphasis in original); see Couples Br. at 65; Con. Law Prof. Br. at 29. But it is plain that the Assistant Attorney General was addressing only the question of how §§ 11 and 12 operated, not what their constitutional justification might be. See RA 632 (AAG's letter declining to address any doubts local officials might have about constitutionality of §§ 11 and 12); see also RA 71-72 (same language in separate letter from AAG, addressing local official's question, RA 69, about how to proceed if a couple came from a state that had indicated it would honor Massachusetts same-sex marriages). Although §§ 11 and 12 do operate using the respective criteria of voidness and prohibition (not non-recognition), those criteria are, at least in this context, closely correlated with the issue of non-recognition, which is at the heart of one (but not the only) set of state interests supporting the constitutionality of §§ 11 and 12.

overinclusive (insofar as they serve the three recognition-related interests identified above) as to fail the Clause's requirement that challenged statutes bear a "close relationship" to the state interests they serve. Nor are §§ 11 and 12 unconstitutionally overinclusive merely because they deny marriage rights to out-of-state same-sex couples during whatever time those couples may happen to be physically present in the Commonwealth. Couples Br. at 58; Con. Law Prof. Br. at 22; MBA/BBA Br. at 31. Only one plaintiff Couple asserts that they are regularly present in the Commonwealth, RA 102-05, and it is plainly reasonable to anticipate that, but for §§ 11 and 12, many non-resident same-sex couples would come here primarily (if not solely) to marry, with no intention of returning here in the future.[113]

The Couples and amici assert without support that "less restrictive alternatives" are available. Couples Br. at 69, Con. Law Prof. Br. at 32-33. They fail to

[113] Not only is the asserted overinclusivity small in degree, but it goes only to the recognition-related interests served by §§ 11 and 12, not the interstate harmony interests. Where a state has made plain that it does not wish its residents to enter same-sex marriages, for the Commonwealth to nevertheless allow those residents to enter such marriages here is likely to produce friction with that state, even if the Commonwealth attempted somehow to make the resulting marriage valid only at times when the couple was physically present here.

identify any alternative approach, let alone one that would serve all of the Commonwealth's interests (both those related to interstate harmony and those related to recognition) and serve them as well as do §§ 11 and 12. See id.

For all of these reasons, the Privileges and Immunities claim fails.

V. THE REGISTRAR PROPERLY READS § 12, IN ACCORDANCE WITH ITS EXPRESS WORDS, AS BARRING 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 different from that of § 11; the Couples's position that § 12 merely exists to enforce § 11 is untenable. Couples Br. at 69-78. Sections 11, 12 and 50 (the last of which serves to enforce § 11, but not § 12) 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, rationally explainable by the fact that treating a marriage as "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 where those laws do not treat particular marriages as "void," which would trigger § 11.[114]

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

[114] While most states treat same-sex marriage as "void" or the equivalent (e.g. "invalid"), see Add. B, the laws of some states (e.g., Connecticut, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, and Wyoming) merely prohibit same-sex marriage (expressly or by necessary implication), without declaring it "void." See Add. B.

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.[115]

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 generally agrees with the Couples (Br. at 71 n.62) that to treat a marriage as "void" is a serious step that should not be taken unless a

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[115] Contrary to the Couples' claim (Br. at 74-76), the use of the word "prohibited" in § 50 does not suggest that § 12 merely implements § 11. Section 50 refers to parties "prohibited by section eleven from intermarrying" (emphasis added). That does not change (1) the plain language of the prohibition in § 11 against 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 intermarrying by the laws of the jurisdiction where he or she resides." (Emphasis added.)

statute requires it.[116] 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 nevertheless marries without such an order, no statute says the marriage is "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 § 19:2 at 738, § 19:3 at 739-40 (3rd ed. 2002). In contrast, incestuous and polygamous marriages are expressly declared void by G.L. c. 207, § 8.

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[116] Notably, several other states have found same-sex marriages "void" even without any statute expressly so declaring. The California Supreme Court recently concluded that under a California law intended to "prohibit" same-sex marriage, "we believe it plainly follows that all same-sex marriages authorized, solemnized, or registered by city officials must be considered void and of no legal effect from their inception. . . . [E]very court that has considered the question has determined that when state law limits marriage to a union between a man and a woman, a same sex marriage performed in violation of state law is void and of no legal effect." Lockyer v. City and County of San Francisco, 95 P.3d 459, 495 (Cal. 2004) (emphasis added) (citing cases from 4 other states); see id. at 496-97. See also Li v. State of Oregon, 110 P.3d 91, 99, 102 (Ore. 2005) (even prior to adoption of constitutional amendment limiting marriage to opposite-sex couples, marriage licenses issued to same-sex couples were not legally valid, but were issued without authority and were therefore "void ab initio").

The distinction is significant.[117] A void marriage is subject to collateral as well as direct attack; a voidable marriage, in contrast, is subject only to direct attack in a declaratory judgment action, an annulment proceeding, or its equivalent. Id. § 19:2 at 736, § 19:3 at 738-39. 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.

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 § 12 but also to that section's obvious purpose of respecting the marriage laws of other states and preventing their evasion in the Commonwealth. Notably, the 1913 statute was entitled "An Act to Make Uniform the Law Relating to Marriages in Another State or Country in Evasion or Violation of the Laws of the State of Domicile." St. 1913, c. 360 (emphasis added). This title confirms that the law reaches marriages that are "prohibited" by another state (i.e., that would be in "Violation of the Laws of the State of Domicile"), not merely those that

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

are "void" in another state. The title is part of the act and may be considered in interpreting it. E.g., Kerins v. Lima, 425 Mass. 108, 114 (1997).[118]

The Couples err in claiming that this interpretation of § 12 is a recent invention of the Registrar, aimed solely at same-sex couples. Two Opinions of the Attorney General, from 1936 and 1973, confirm that § 12 has force independent of § 11. In 1935-36 Op. Att'y Gen. at 20 (Jan. 13, 1936), the Secretary of the Commonwealth specifically asked on behalf of the Registrar[119] whether § 12 (but not § 11) required that residents of Connecticut who sought to marry in Massachusetts were required to file records of blood tests before a marriage license could issue, as was then required under Connecticut (but not Massachusetts) law. Id. at 21, 22. The Attorney General, after quoting both § 11 and § 12, answered in the negative, on the ground that the Connecticut statute "does not in terms prohibit a person who has

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[118] The Couples' reliance on the legislative history of § 10 (Br. at 72 n.63), which applies only to Massachusetts residents, not only sheds no light on § 12, but need not be considered 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).

[119] The Registrar served under the Secretary until being transferred to DPH by St. 1976, c. 486.

not filed such records from marrying, nor does said statute or other law of Connecticut declare that a marriage so contracted shall be void. Since that is so, the provisions of sections 11 and 12 are not applicable[.]" Id. at 21 (emphasis added). Thus the Attorney General's 1936 Opinion expressly recognized the precise distinction between §§ 11 and 12 relied on by the Registrar today.[120]

Similarly, in 1973-74 Op. Att'y Gen. No. 4 at 48 (July 26, 1973), the Attorney General was asked about the applicability of other states' marriage laws to males between the ages of 18-21 who sought to marry here even though their parents resided in another state. Id. The Opinion began by noting that "[a] person, domiciled in another state, who comes to Massachusetts to marry is subject to the marriage laws of his domiciliary state. G.L. c. 207, §§ 11 and 12." This citation alone suggests that generally it is not only § 11, but also § 12, that makes such persons

[120] The Attorney General's conclusion that, for purposes of § 12, another state's procedural prerequisite to issuance of a marriage license did not create a "prohibition" against marriage, is being followed by the Registrar today; only substantive impediments to marriage are treated as triggering § 12 (or for that matter § 11). See RA 572-627 (Registrar's list of other states' impediments for purposes of §§ 11 and 12); RA 648-49 (Registrar's 2004 training materials for local clerks discussing § 12).

effectively subject to their home states' marriage laws. But the Opinion went on to state more specifically that, unless a male between the ages of 18 and 21 established a new domicile in Massachusetts before marrying, he "would be restricted to marrying in conformity with the laws of the state of his father's domicile. See G.L. c. 207, § 12." Id. at 49. The Opinion thus recognized that § 12 itself made other states' age-related marriage impediment laws applicable to those states' residents who come here to marry. This reference to § 12, but not § 11, is not surprising, because marriages by a person under the statutory age for consenting to marriage are ordinarily "prohibited," but not "void."[121] Although the Opinion ultimately found it unnecessary to answer the question regarding §§ 11 and 12, id. at 50, it clearly recognized, contrary to the Couples' argument, that § 12 has force independent of § 11.[122] Thus the

[121] The "general rule" has long been that a marriage by a statutorily underage person is not "void," but merely voidable. 55 C.J.S. Marriage § 14 at p. 565, 566 & nn.21-28 (1998) (relying primarily on cases from 1920s-1940s). That is the rule in Massachusetts. 1 Family Law and Practice § 19:2 at 738, § 19:3 at 739-40.

[122] The 1973 Opinion also noted in passing, and without citing the 1936 Opinion, that the statutes required "adhere[nce] to the laws of the domiciliary state, G.L. c. 207, § 12, or the marriage is void, G.L. c. 207, § 11." Id. at 49. To the extent this suggests

Registrar's interpretation of § 12 was recognized twice, in 1936 and 1973, long before Goodridge was decided.[123]

There is nothing to the contrary in the decisions of other states' courts involving questions under § 11's voidness provision. The Couples cite Mazzolini v. Mazzolini, 155 N.E.2d 206, 208 (Ohio 1958), but there the question was whether a Massachusetts marriage of Ohio residents was valid (vs. "void") in Massachusetts; the court, in concluding that § 11 did not render the Massachusetts marriage "void," had no occasion to discuss § 12 (marriages in violation of which are not thereby made "void") and did not discuss § 12 in any way. Id. at 208-09. Similarly, in the New York cases cited by the Couples, the courts concluded that claimed Massachusetts marriages of New York residents were "void" under § 11, and thus those courts

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that marriages performed in violation of § 12 are necessarily void under § 11, it goes further than the Registrar's view. Although some marriages that are prohibited by other states' laws are also made void by those laws and thus would be made void by § 11, that is not true in all cases of prohibited marriages.

[123] The Couples accurately note (Br. at 76) that the impediments poster distributed by the Registrar (RA 569) cites only § 11, but the Registrar's May 2004 letter to clerks advising continued use of that poster also cites § 12 (RA 628), and the training materials for clerks also instructed them on the meaning and application of § 12. RA 648-49.

had no reason to discuss, and did not discuss, § 12.[124]

The Registrar's reading of § 12 is neither "incongruous"[125] nor renders § 11 "meaningless." Couples Br. at 77-78. 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)[126], and

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[124] See Beaudoin v. Beaudoin, 62 N.Y.S. 2d 920, 923 (N.Y. App. Div. 1946); Canwright v. Canwright, 76 N.Y.S. 2d 10, 12 (N.Y. App. Div. 1947) (relying on Beaudoin, but mis-citing to Mass. G.L. c. 207, § 9); Seagriff v. Seagriff, 195 N.Y.S.2d 718, 720 (N.Y. Fam. Ct. 1960).

[125] The Couples' claim that it is "incongruous" that "a non-resident can be properly eligible to marry in the Commonwealth under § 11 but then lose that eligibility by operation of § 12" is merely a semantic argument; that § 11 may not bar a marriage does not create eligibility to marry. Cf. King v. Comm., 428 Mass. 684, 696-97 (1999) (that tort claim might be within exception to one of immunities in c. 258, § 10, did not mean claim was not barred by another of those immunities; immunities "operate in the alternative").

[126] Contrary to the Couples' claim, Br. at 77-78, the Registrar has not asserted that marriages in violation of § 12 are "void," a reading that would render § 11 superfluous. The Registrar's Application for Direct Appellate Review at 2 n.2, on which the Couples rely for this argument, asserted only that marriages contracted in violation of § 12 were entered into illegally; such marriages might be voidable, which is quite different than being void under § 11.

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.[127]

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

VI. THE CLERKS MAY NOT ASSERT A SELECTIVE ENFORCEMENT CLAIM IN THIS CASE.

If the Court finds it necessary to reach the question, the Clerks may not assert an equal-protection selective enforcement claim, either (A) in their official capacities, (B) in their individual capacities, or (C) on behalf of out-of-state couples.

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[127] The Couples (Br. at 74) note amici's citation to two treatises mentioning the Uniform Marriage Evasion Act; amici say these treatises conclude that the act applies only to "void" marriages. Conf. & Fam. Law Prof. Br. at 12 n.7 (citing Mary E. Richmond & Fred Hall, Marriage and the State 196 (1929); 1 Chester G. Vernier, American Family Laws 210-11 (1931)). To the contrary, Marriage and the State refers only to the Act's equivalent of § 11 as applying only to void marriages, id. at 196; on the next page it interprets the Act's equivalent of § 12 as preventing marriages that are "forbidden" in the couple's home state (although the authors state that, in practice at that time, a couple could evade this provision by swearing that their marriage was not thus "forbidden"). Id. at 197. American Family Laws briefly discusses only the Act's equivalents of §§ 10 and 11, which it says (without explanation) are the "two main sections of th[e] act," id. at 210; it entirely ignores the equivalent of § 12, and thus is no authority for how § 12 is to be construed.

A. The Clerks in Their Official Capacities Do Not Assert that Their Own Equal Protection Rights Have Been Violated, Nor Do They Have Such Rights, Under the Spence Doctrine.

The Clerks in their official capacities cannot assert a selective enforcement claim, for two reasons. First and most obviously, the alleged selective enforcement is not directed against the Clerks themselves, but against private third parties.

Second, even if the alleged selective enforcement were directed against the Clerks, the Clerks in their official capacities cannot assert any equal protection claims against the Commonwealth or its officials, because the Clerks in their official capacities have no equal protection rights. In Spence v. Boston Edison Co., 390 Mass. 604, 610 (1983), this Court recognized a "long-standing and far-reaching prohibition on constitutional challenges by governmental entities to acts of their creator State." This includes challenges to the constitutionality of state statutes and "the constitutionality of the acts of another of the State's agencies." Id. The prohibition applies where the constitutional protection sought to be invoked applies to individuals; thus in Spence, the BHA, because it was not a "citizen" or "person," was not allowed to raise equal protection and due process challenges to the

rate-setting procedures of the state DPU. Id. at 607-10.[128] Local governmental entities simply do not have equal protection rights against the Commonwealth. Id. at 608. "In 1923, the United States Supreme Court held that a 'City cannot invoke the protection of the Fourteenth Amendment against the State.' Newark v. New Jersey, 262 U.S. 192, 193, 196 (1923). This principle has often been reiterated." Spence, 390 Mass. at 609 (citing cases). The Court has "since applied the Spence doctrine in a wide range of cases." MBTA v. Auditor of the Comm, 430 Mass. 783, 792 (2000) (citing cases).[129] The Clerks therefore may not challenge on

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[128] "The constitutional provisions invoked by the BHA give rights to the citizens which may not be infringed by the government. The words used to describe those entitled to these protections are 'people' (Mass. Declaration of Rights, art. 1), 'individual' (Mass. Declaration of Rights, art. 10), 'subject' (Mass. Declaration of Rights, art. 12), 'citizens' or 'persons' (U.S. Const. amend. XIV). The BHA does not have these rights." Spence, 390 Mass. at 608 (emphasis in original).

[129] One post-MBTA case is also noteworthy, because it barred government officials from asserting an equal protection claim: Comm. v. Gonsalves, 432 Mass. 613, 618 n.7 (2000) (prosecutors could not assert equal protection challenge to court rule; equal protection clause only protected 'persons'). Spence is subject to certain limited exceptions, none of which apply here. The first involves certain art. 30 claims, brought by the affected branch, Gonsalves, 432 Mass. at 619; or on behalf of the judiciary. LaGrant v. BHA, 403 Mass. 328, 331 (1988). The second involves claims under the Home Rule Amendment, Mass. Const. amend. art. 89, see Clean Harbors of Braintree, Inc. v. Bd. of Health of Braintree, 415 Mass. 876, 880-881 (1993), apparently

equal protection grounds the enforcement of §§ 11 and 12.

The Clerks' various attempts to avoid the Spence doctrine are unsuccessful. First, G.L. c. 231A does not create an exception. This Court has applied Spence to bar declaratory judgment actions, and it has made clear that Spence applies regardless of the form of the action.[130] If local officials could evade Spence's "long-standing and far-reaching prohibition," "applied . . . in a wide range of cases," MBTA, 430 Mass. at 792, simply by pleading a declaratory judgment claim, Spence would be reduced to a nullity. Even if local officials believe that state action affecting those

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because that amendment (unlike the equal protection clause) explicitly confers constitutional protections on municipalities.

[130] In Trustees of Worcester State Hosp. v. The Governor, 395 Mass. 377, 380 (1985), in 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." Trustees of Worcester State Hosp., 395 Mass. at 380-81 (citing and quoting Spence; emphasis added). See also City of Boston v. Bd. 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).

officials' performance of their duties violates the equal protection clause--i.e., even if there is an "actual controversy"--Spence still bars the challenge, because local officials in their official capacities simply do not have equal protection rights against state government. Spence, 390 Mass. at 607-10.

Nor are the Clerks aided in this regard by District Attorney for the Suffolk District v. Watson, 381 Mass. 648 (1980). There, a district attorney sought a declaration that a death penalty statute was constitutional, and four 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 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 allegedly unconstitutional 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.

A public official's duty is to enforce duly-enacted and presumptively-constitutional statutes,[131] not to sue to establish that those statutes, or state officials' actions to enforce them, 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.

To the extent the Clerks assert uncertainty over

[131] See Tsongas v. Sec'y of the Comm., 362 Mass. 708, 713 (1972) (officials "had no authority to depart from the statutes on the ground that the statutes were unconstitutional"); Assessors of Haverhill v. New Eng. Tel. & Tel. Co., 332 Mass. 357, 362 (1955) (same).

"their right to, and how to, exercise the discretion conferred upon them by statute," Clerks Br. at 12 (emphasis added), the Registrar has never disputed the Clerks' ability to assert any statutory claims. But the Clerks failed to preserve those issues for this appeal, see supra pp. 5, 22-23, and in any event those issues are quite distinct from the equal protection selective enforcement claim the Clerks do seek to press. Thus their claim that their "discretionary authority under G.L. c. 207, §§ 12, 35, to rely on couples' affidavits has been usurped" (Clerks Br. at 14) is not properly before this Court and, to the extent they assert that such "usurpation" and the changed duties of their offices are injuries sufficient to confer standing (Clerks Br. at 14-15), that could be true only as to their statutory claim, not as to their attempt to assert equal protection rights they do not have.

B. The Clerks in Their Individual Capacities Lack Standing, Because They Fail to Allege Sufficient Actual or Imminent Harm to Themselves from the Defendants' Actions.

The Clerks in their individual capacities lack standing to assert an equal protection claim, because they fail to allege that the claimed selective enforcement is directly causing or will cause any

concrete harm to them personally. Standing is "an issue of subject matter jurisdiction" and is "of critical significance." Ginther v. Comm'r of Ins., 427 Mass. 319, 322 (1998). "[O]nly persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of government." Id. (citations and internal quotations omitted).[132]

> Alleging [i]njury alone is not enough; a plaintiff must allege a breach of duty owed to it by the public defendant. . . . Injuries that are speculative, remote, and indirect are insufficient to confer standing. . . . Not every person whose interests might conceivably be adversely affected is entitled to [judicial] review. . . . Moreover, the complained of injury must be a direct consequence of the complained of action.

Ginther, 427 Mass. at 323 (citations and internal quotations omitted).

Here, once again, the Clerks encounter the problem that the alleged selective enforcement is not directed against them, even as individuals, but only against out-of-state couples. Whatever the scope of the duty

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[132] The fact that this is a declaratory judgment does not make the Clerks' standing any less critical to the Court's jurisdiction; G.L. c. 231A itself does not provide an independent basis for jurisdiction. Enos v. Sec'y of Env'l Aff., 432 Mass. 132, 134-35 (2002); see Pratt v. City of Boston, 396 Mass. 37, 42-43 (1985).

the Registrar owes to the Clerks individually to ensure that his enforcement efforts against them are even-handed, the Clerks allege no breach of any such duty here. They do not allege that the Registrar is enforcing §§ 11 and 12 against only some clerks who are violating those sections, but not other clerks, based on some invidious or arbitrary classification of clerks. In short, the Clerks do not "allege a breach of duty owed to [them] by the public defendant[s]." Ginther, 427 Mass. at 323 (emphasis added).

Moreover, the Clerks' allegations of actual or threatened harm to them as individuals are "speculative, remote, and indirect [and thus] insufficient to confer standing." Ginther, id. The theoretical possibility that they could be prosecuted under G.L. c. 207, § 50, for failure to enforce § 11 as directed by the Registrar is insufficient. Although a "credible threat of prosecution" is enough to confer standing, "imaginary or speculative" fears of prosecution are insufficient. Babbitt v. United Farm Workers, 442 U.S. 289, 299 (1979).[133] Here, the

[133] It may be that where there is a credible threat of prosecution of a public official for failure to implement a statute, that official, who faces such loss of personal liberty or property in his or her individual capacity, has standing to challenge the constitutionality of the statute or of its implementation. That issue need not be reached here.

Attorney General's cease-and-desist letter alluded briefly to G.L. c. 207, § 50, only to obviate any question that might be raised about whether clerks are responsible for enforcing § 11 (which does not itself mention clerks). RA 630. The Attorney General's letter did not in any way threaten prosecution or refer to criminal sanctions. No prosecution has occurred.[134]

The Clerks' other claims of harm are likewise insufficient to give them standing individually. The claim that the duties of their offices have been usurped or altered (Br. at 14-15) is a claim of injury to their offices, not to them individually. The bare allegations that, if they enforce §§ 11 and 12, they risk their reputations and their ability to be re-elected (Br. at 15-16), are simply too remote, speculative, and indirect. The Clerks' voluminous affidavits do not cite a single instance in which any one of them was subjected to the slightest public criticism for enforcing §§ 11 and 12. RA 171-283. Moreover, the public may be expected to know that the

[134] The Clerks (Br. at 14) cite Doe v. Bolton, 410 U.S. 179, 188 (1973) for the proposition that "neither actual nor imminent prosecution is a prerequisite for standing to challenge the statute." But the fear must still be real. In Doe, unlike here, physicians had actually been prosecuted under a prior version of the challenged statute, id. at 188-89, making the fear of prosecution far more concrete than it is here.

Clerks' duty is to enforce the law, even if they personally disagree with it or believe it to be unconstitutional. E.g., Tsongas, 362 Mass. at 713; Assessors of Haverhill, 332 Mass. at 362.

The Clerks' purported fear of personal liability in suits by couples denied marriage licenses is also insufficient. Br. at 15-16. The Clerks merely recite that such suits are possible, without identifying any out-of-state couple or anyone else who has hinted at or threatened, let alone filed, such a suit. E.g., RA 179 (Johnstone Aff. ¶ 24). Indeed, more than half of the Clerks do not even claim to have received any inquiries, let alone marriage license applications, from any out-of-state same-sex couples. Those Clerks' professed fears of litigation are particularly weak.[135] Even for the other Clerks, the purported fear of personal liability is highly speculative.[136] It is far more likely that any such couples wishing to litigate

[135] RA 205-06 ¶¶ 16-21; RA 230-31 ¶¶ 16-21; RA 238-40 ¶¶ 16-22; RA 255-56 ¶¶ 16-22; RA 263-65 ¶¶ 16-22; RA 272-74 ¶¶ 16-22; RA 281-83 ¶¶ 22-27.

[136] The Clerks cannot explain (1) why any plaintiff would seek monetary as opposed to injunctive relief (after all, same-sex couples' interest is in getting married, not in money damages, as the Couples' suit shows); (2) why they would not be protected by qualified immunity (as it is not "clearly established" that their implementation of §§ 11 and 12 violates anyone's rights); or (3) why, if somehow found liable, they would not be indemnified under G.L. c. 258, § 9.

would sue the Registrar, just as the Couples have done. In short, the remote possibility of litigation against the Clerks is insufficient to confer standing.

Finally, to the extent the Clerks argue that standing can be based solely on a belief that complying with the Registrar's enforcement directives would force them to violate their oaths of office, they are wrong. In all of the cases the Clerks cite, officials were found to have standing not simply because they felt pressured to violate their oaths of office but because they faced concrete threats of individual harm (and in some cases harm to their official functions as well) if they did not comply with the assertedly unconstitutional law. Bd. of Educ. v. Allen, 392 U.S. 236, 241 n.5 (1968) (expulsion from office and loss of funding for school districts); Printz v. United States, 854 F. Supp. 1503, 1508 (D. Mont. 1994) (contempt proceedings); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994) (criminal sanctions);[137] Clarke v.

[137] The Clerks fail to note the relevant subsequent history of Mack and Printz. They argue (Br. at 18-19) that standing to challenge a federal statute was found in Mack even though the Department of Justice had indicated it would not enforce the criminal penalty provisions of the statute against law enforcement officers, but they omit that the Ninth Circuit held in a consolidated appeal that neither Mack nor Printz faced any "credible threat of prosecution" and accordingly that there was no ripe "case or controversy" concerning Mack and Printz's claim that

United States, 705 F. Supp. 605, 607, 608 (D.D.C. 1998) (loss of salaries and staff, as well as harm to officials in their capacity as taxpayers), aff'd on other grounds, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990); School Comm. of York v. York, 626 A.2d 935, 943 (Me. 1993) (expulsion from office).[138] As one of these courts stated, "In

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the criminally enforceable provisions of the statute were unconstitutionally vague. Mack v. United States, 66 F.3d 1025, 1033 (9th Cir. 1995). The Ninth Circuit did not disturb the District Court's holding that Mack had standing to pursue his separate Tenth Amendment challenge to the statute "because of his position as the state official to whom Congress has delegated the obligation to enforce federal law." 856 F. Supp. at 1378. That ruling that a state official could challenge a federal statute as violating a state's Tenth Amendment rights is unremarkable and does not help the Clerks' claim to standing here. For completeness, the Registrar notes that the Ninth Circuit's decision on the merits of the Tenth Amendment claim was later reversed in Printz v. United States, 521 U.S. 898 (1997), with no discussion of standing.

[138] Notably, none of these cases involved the type of claim that would necessarily be barred by Spence, i.e., a claim under a constitutional provision conferring rights only on private "persons" or "citizens". Allen involved a claim under the Establishment Clause, 392 U.S. at 241-42, the protection of which is not thus limited; and the school board members' separate attempt to assert a Free Exercise Clause claim was rejected on the ground that they alleged no interference with their own free exercise rights. 392 U.S. at 248-29. Mack and Printz were suits against the federal (not state) government, and, as explained in the preceding footnote, the only claim that was actually allowed to proceed sought to vindicate states' and state officials' Tenth Amendment rights against the federal government. Clarke involved local officials' assertion of what the court viewed as the officials' own First Amendment right to vote as

Allen, the Court found that legislators who had taken an oath to uphold the Constitution had standing to challenge the constitutionality of a law when they risked a concrete injury by refusing to enforce the law." Clarke, 705 F. Supp. at 608 (emphasis added).[139] The Clerks do not sufficiently allege any such "concrete injury" here.

C. The Clerks Have No Standing to Assert the Rights of Couples, Where There is No Significant Barrier to the Couples Asserting Their Own Rights, as The Couples Have In Fact Done Here.

Finally, the Clerks have no standing to assert the equal protection rights of out-of-state couples, because there is no significant barrier to those

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they pleased on local legislative matters. 705 F. Supp. at 607-08. School Comm. of York involved a Maine Home Rule Amendment claim; because such an amendment expressly confers rights on municipalities, Spence does not apply. Cf. Clean Harbors, 415 Mass. at 880-881.

[139] The Clerks note that in Akron Bd. of Educ. v. State Bd. of Educ., 490 F.2d 1285, 1290-91 (6th Cir. 1974), Allen was relied upon to find standing even where it was "less clear that public officials would suffer personal consequences if they refused to comply with the allegedly unconstitutional state law." Clerks Br. at 20 n.3. In that 2-1 decision, however, the Allen theory of standing was but one of three alternative theories relied upon by the majority, 490 F.2d at 1290, and in doing so the majority relied in part upon the possibility of suits against the plaintiffs, officially and individually, if they complied with the allegedly unconstitutional law. Id. The majority concluded by finding standing "in the unique facts of this case," id. at 1291, and over a vigorous dissent, id. at 1293. The decision leaves the exact basis for finding standing unclear.

couples asserting their own rights, as the Couples' own suit shows. This Court has consistently held that standing to assert the rights of third persons ("representational" or "jus tertii" standing) "is infrequently granted" and requires, inter alia, that "there must be some genuine obstacle that renders the third party unable to assert the allegedly affected right on his or her own behalf." Planned Parenthood League of Mass. v. Bell, 424 Mass. 573, 578 (1997) (citation and internal quotations omitted). See also Gay and Lesbian Advocates and Defenders v. Atty. Gen., 436 Mass. 132, 134 n.4 (2002) ("'Representative standing is generally limited to cases in which it is difficult or impossible for the actual rightholders to assert their claims,'" quoting Slama v. Atty. Gen., 384 Mass. 620, 624 (1981)); Barbara F. v. Bristol Div. of Juvenile Ct. Dept., 432 Mass. 1024, 1025 (2000) (rescript) (same).[140]

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[140] In Barbara F., the Court rejected a pregnant woman's claim of standing to assert the constitutional rights of another pregnant woman, where that latter woman could have, bu chose not to, appeal an order issued against her. 432 Mass. at 1025. In Slama, the Court rejected a city's claim of standing to assert its voters' constitutional rights, where "it is neither difficult nor impossible for qualified voters to assert their claims"; there was "no reason to depart from the general rule that [o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." 384 Mass. at 624 (citation and internal quotations omitted). See also

The Clerks incorrectly suggest (Br. at 23 n.5) that this principle--despite having been stated by this Court three times in the last eight years--is erroneous in light of the Supreme Court's sixteen-year-old decision in Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623-24 n.3 (1989). Although that case did treat the lack of any hindrance to the third party's assertion of its own rights as merely one factor that could be outweighed by others in determining jus tertii standing, subsequent Supreme Court decisions have made clear that the existence of such an obstacle is in fact one of three "preconditions" to jus tertii standing (the others being an injury-in-fact to the plaintiff, and some form of "close relationship" to the third parties). E.g., Campbell v. Louisiana, 523 U.S. 392, 397-98, 400 (1998) (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)).[141]

Spence, 390 Mass. at 610-11 (BHA not allowed to assert equal protection claims on behalf of its tenants against state agency, where BHA made no argument that it was "a statutorily authorized surrogate for tenants' rights," and tenants had intervened and were actively asserting their claims).

[141] See American Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1362 n.15 (D.C. Cir. 2000)("Caplin & Drysdale, . . . which upheld third party standing even though the hindrance requirement 'counsel[ed] against review,' appears inconsistent with the Court's current approach," citing Powers); Eulitt v. Maine Dep't of Educ., 386 F.3d 344, 351-52 (1st Cir. 2004) (enforcing Powers requirement that existence of some

The Clerks cite Wright and Miller to support their claim to standing (Br. at 21), but Wright and Miller recognize that Campbell and other recent cases "increasingly lead to the view that third-party standing requires three elements: an injury-in-fact to a party, a close relationship to the non-party whose rights are asserted, and some significant obstacle that impedes the nonparty's assertion of his own rights." 13 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 3531.9 (2005 Supp.) at 1150 & n.79.6, 1155 (emphasis added).

Because there is no significant obstacle to out-of-state couples' assertion of their own rights, the Clerks cannot assert those rights.[142] Thus the Clerks lack any standing to assert any equal protection selective enforcement claim.

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obstacle to third party's assertion of own rights is a prerequisite to jus tertii standing; denying standing to assert third party's equal protection claim).

[142] It is therefore unnecessary to reach the question whether the Clerks have a sufficiently "close relationship" with out-of-state couples, as is also required for jus tertii standing. The Registrar notes that the Clerks are neutral public officials who have no professional relationship with, or statutory responsibility or incentive to advocate for, particular non-Massachusetts couples who wish to marry.

CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's denial of (1) the Couples' motion for a preliminary injunction and (2) the Clerks' motion for reconsideration.

Respectfully submitted,

THOMAS F. REILLY
ATTORNEY GENERAL

_____
Peter Sacks, BBO# 548548
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108-1698
(617) 727-2200, ext. 2064

Dated: June 24, 2005

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Addendum A

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G.L. c. 207

§ 10. Foreign marriages; validity

If any person residing and intending to continue to reside in this commonwealth is disabled or prohibited from contracting marriage under the laws of this commonwealth and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void for all purposes in this commonwealth with the same effect as though such prohibited marriage had been entered into in this commonwealth.

§ 11. Non-residents; marriages contrary to laws of domiciled state

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. Legal ability of non-residents to marry; duty of licensing officer to ascertain

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.

§ 13. Construction

The three preceding sections shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact like legislation.

§ 50. Knowingly issuing certificate or performing marriage in evasion of laws of foreign state

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.

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Addendum B

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Same-Sex Marriage Voidness, Prohibition, and Recognition Law in Other Jurisdictions[1]

State	Relevant Law
Alabama	Ala. Code § 30-1-19 (2004) (adopted 1998) (a) This section shall be known and may be cited as the "Alabama Marriage Protection Act." (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state. (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract. (d) No marriage license shall be issued in the State of Alabama to parties of the same sex. (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued. Note: the following proposed constitutional amendment was given final approval by the Legislature and will be submitted to the voters for ratification at the next election (see 2005 AL S.B. 109 (SN), adopted March 10, 2005, available on Westlaw): (a) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment. (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state. (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract. (d) No marriage license shall be issued in the State of Alabama to parties of the same sex. (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued. (f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex. (g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

[1] The Registrar has prepared this chart to assist the Court in understanding what appear to the Registrar to be the relevant constitutional and statutory provisions and other authorities in each other state, the District of Columbia, and Puerto Rico. The chart is up to date as of June 23, 2005, to the extent feasible. For constitutional and statutory provisions, the year of adoption, or the year of the most recent relevant amendment, is given where feasible; in some instances, the exact year of adoption could not be determined, and therefore the year of recodification, or an indication of the year by which the provision had been adopted, is given instead.

Alaska	Alaska Const. Art. 1, § 25 (2004) (adopted 1998) To be valid or recognized in this State, a marriage may exist only between one man and one woman. Alaska Stat. § 25.05.013 (2004) (adopted 1996) (a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state. (b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.
Arizona	Ariz. Rev. Stat. § 25-101(2004) (amended 1996) ... C. Marriage between persons of the same sex is void and prohibited. Ariz. Rev. Stat. § 25-112 (2004) (amended 1996) A. Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by section 25-101. B. Marriages solemnized in another state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state, except marriages that are void and prohibited by section 25-101. C. Parties residing in this state may not evade the laws of this state relating to marriage by going to another state or country for solemnization of the marriage.
Arkansas	Ark. Const. Amend. 83 (adopted 11/2/2004) § 1. Marriage consists only of the union of one man and one woman. § 2. Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman. § 3. The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage. Ark. Code Ann. § 9-11-107 (amended 1997) (a) All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts in this state. (b) This section shall not apply to a marriage between persons of the same sex. Ark. Code Ann.§ 9-11-109 (adopted 1997) Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void. Ark. Code Ann.§ 9-11-208 (amended 1997) . . . (b) It shall be the declared public policy of the State of Arkansas to recognize the marital union only of man and woman. No license shall be issued to persons to marry another person of the same sex and no same-sex marriage shall be recognized as entitled to the benefits of marriage. (c) Marriages between persons of the same sex are prohibited in this state. Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts. . . .

California	Cal. Fam. Code § 300 (2004) (recodified 1992). Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. . . . Cal. Fam. Code § 308.5 (2004) (adopted 2000). Only marriage between a man and a woman is valid or recognized in California. Cal. Fam. Code § 308 (adopted 1992) A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state. See Lockyer v. City and County of San Francisco, 95 P.3d 459, 495 (Cal. 2004) (concluding, in case where § 300 was intended to "prohibit" same-sex marriage, "we believe it plainly follows that all same-sex marriages authorized, solemnized, or registered by city officials must be considered void and of no legal effect from their inception. . . . [E]very court that has considered the question has determined that when state law limits marriage to a union between a man and a woman, a same sex marriage performed in violation of state law is void and of no legal effect") (emphasis added) (citing cases decided under laws of Kentucky, New York, Minnesota, and Colorado); see id. at 496-97 ("we view Family Code § 300 itself as an explicit statutory provision establishing that existing same sex marriages are void and invalid"). See Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 691 (Cal. App. 2005) ("In March 2000, the California electorate passed its own defense of marriage initiative, which states: 'Only marriage between a man and a woman is valid or recognized in California.' (§ 308.5, added by Initiative Measure, Prop. 22, § 2, eff. March 8, 2000.) Pursuant to section 308.5, California will not recognize same-sex marriages even if those marriages are validly formed in other jurisdictions. In other words, section 308.5 supplants the directive of section 308 in the case of same-sex marriages.") See Coordination Proceeding, Special Title [Rule 1550(c)], Marriage Cases, Tentative Decision on Applications for Writ of Mandamus and Motions for Summary Judgment (San Francisco Superior Court No. 4365 (Mar. 14, 2005)), 2005 WL 583129 (holding §§ 300 and 308.5 violated California Constitution's equal protection clause); id. at *6 (recognizing § 308.5's "purpose as articulated to the voters was to preclude the recognition in California of same-sex marriages consummated outside of this state"). This decision was reportedly stayed for one year on March 30, 2005, and the state has announced it will appeal. See Human Rights Campaign website, "Recent Developments in California," http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=21654&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited June 23, 2005)
Colorado	Colo. Rev. Stat. § 14-2-104 (2003) (amended 2000) (1) Except as otherwise provided in subsection (3) of this section, a marriage is valid in this state if: (a) It is licensed, solemnized, and registered as provided in this part 1; and (b) It is only between one man and one woman. (2) Notwithstanding the provisions of section 14-2-112, any marriage contracted within or outside this state that does not satisfy paragraph (b) of subsection (1) of this section shall not be recognized as valid in this state. (3) Nothing in this section shall be deemed to repeal or render invalid any otherwise valid common law marriage between one man and one woman. Colo. Rev. Stat. § 14-2-112 (2003) (amended 1973) All marriages contracted within this state prior to January 1, 1974, or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state.

Connecticut	See Op. Ct. Att'y Gen'l (May 17, 2004), R.A. 664-671, available at http://www.cslib.org/attygenl/opinions/2004/2004-006.htm: "[T]he Connecticut Legislature has not authorized the issuance of a Connecticut marriage license to a same sex couple, or the performance of a marriage ceremony for a same-sex couple, in Connecticut." Id. at 2, R.A. 665. "Thus, I am aware of no statute or legislative history authorizing the issuance of a marriage license to a same sex couple, or the performance of a marriage ceremony for a same sex couple in this state. To the contrary, the Connecticut Appellate Court has stated that Connecticut has a "strong legislative policy against permitting same sex marriages." Rosengarten v. Downes, 71 Conn. App. 372, 384, [802 A.2d 170,] cert. granted and dismissed, 261 Conn. 936 [806 A.2d 1066] (2002). Hence, local officials cannot legally issue marriage licenses to or perform ceremonies for same sex couples under current law." Id. at 5 (R.A. 668). See Rosengarten v. Downes, 802 A.2d 170, 175 (Conn. App.) (holding that probate court lacked subject matter jurisdiction of action to dissolve Vermont civil union; "[c]learly this civil union is not a marriage recognized under § 46b-1 [Connecticut statute governing dissolution of marriage] because it was not entered into between a man and a woman"), cert. granted and app. dismissed as moot, 806 A.2d 1066 (Ct. 2002). In an opinion dated Aug. 2, 2004 (see Conflicts and Family Law Prof. Amicus, Add. B), the Connecticut Attorney General concluded that "same-sex couples, who have been married legally in Massachusetts pursuant to Massachusetts law, could use the Massachusetts marriage license as evidence of identity to support a change of name on their Connecticut drivers' licenses and auto registrations." Id. at 1. "An original or certified copy of an official marriage license valid in the state of issuance provides evidence of identity sufficient to satisfy the purpose of the regulation [to ensure that applicant for license is who he or she claims to be]. Acceptance of such a document for this purpose does not require a determination of whether the underlying marriage would be recognized as valid in this state." Id. at 2 (emphasis added). See "An Act Concerning Civil Unions," approved 4/20/05, available at http://www.cga.ct.gov/2005/fc/2005SB-00963-R000379-FC.htm (last visited May 15, 2005) "Section 14. Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman." (emphasis added)
Delaware	Del. Code tit. 13, § 101 (2004) (amended 1996) (a) A marriage is prohibited and void between a person and his or her ancestor, descendant, brother, sister, uncle, aunt, niece, nephew, first cousin or between persons of the same gender. . . . (d) A marriage obtained or recognized outside the State between persons prohibited by subsection (a) of this section shall not constitute a legal or valid marriage within the State.

District of Columbia	See Dean v. District of Columbia, 653 A.2d 307, 310 (D.C. 1995) (rejecting contention that "the marriage statute is gender-neutral and does not expressly prohibit same-sex marriages. We cannot agree. The language and legislative history of the marriage statute demonstrate that neither Congress nor the Council of the District of Columbia has ever intended to define 'marriage' to include same-sex unions"); id. at 313 (relying on D.C. Code § 46-401, declaring consanguinous marriages void ab initio in gender-specific terms;) id. at 315 (finding "a consistent legislative understanding and intent that 'marriage' means--and thus is limited to--unions between persons of opposite sexes"). D.C. Code § 46-405 (2004) (adopted 1901) If any marriage declared illegal by the aforegoing sections shall be entered into in another jurisdiction by persons having and retaining their domicile in the District of Columbia, such marriage shall be deemed illegal, and may be decreed to be void in said District in the same manner as if it had been celebrated therein. See OTR Tax Ruling 2005-01 (D.C. Office of Tax and Revenue, May 3, 2005) (available at http://app.cfo.dc.gov/CFORUI/news/release.asp?id=129 (last visited June 23, 2005) (concluding that same-sex couple married under the laws of another state and now residing in D.C. could not file joint return for D.C. income tax purposes, because due to section of federal Defense of Marriage Act, 1 U.S.C. § 7 (2003) defining marriage for federal-law purposes as union of one man and one woman, same-sex couple could not file joint return under federal Internal Revenue Code, and D.C. income tax law was required to conform to federal tax law; this would be true even if D.C. recognized validity of out-of-state same-sex marriage).
Florida	Fla. Stat. Ann. § 741.04 (2004) (amended prior to 1997) (1) No county court judge or clerk of the circuit court in this state shall issue a license for the marriage of any person . . . unless one party is a male and the other party is a female. Fla. Stat. Ann. § 741.212 (2004) (adopted 1997) (1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state. (2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship. (3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

Georgia	Ga. Const. Art. 1, § 4, ¶ I (adopted 11/2/2004) (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship. Ga. Code Ann. § 19-3-3.1(2004) (adopted 1996) (a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage. Ga. Code Ann. § 19-3-30 (2004) . . . (b)(1) No marriage license shall be issued to persons of the same sex. . . . Ga. Code Ann. § 19-3-43 (2004) (adopted prior to 1934) All marriages solemnized in another state by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state. Parties residing in this state may not evade any of the laws of this state as to marriage by going into another state for the solemnization of the marriage ceremony.
Hawaii	Haw. Rev. Stat. Const. Art. I, § 23 (adopted 2003) The legislature shall have the power to reserve marriage to opposite-sex couples. Haw. Rev. Stat. § 572-1 (amended 1994) In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that: [stating other impediments and procedural requirements] Haw. Rev. Stat. § 572-3 (amended 1994) Marriages between a man and a woman legal in the country where contracted shall be held legal in the courts of this State.
Idaho	Idaho Code § 32-201 (2004) (amended 1995) (1) Marriage is a personal relation arising out of a civil contract between a man and a woman . . . Idaho Code § 32-209 (2004) (amended 1996) All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

Illinois	750 Ill. Comp. Stat. § 5/212 (2004) (amended 1996) (a) The following marriages are prohibited: . . . (5) a marriage between 2 individuals of the same sex. 750 Ill. Comp. Stat. § 5/213 (2004) (adopted 1977) All marriages contracted within this State, prior to the effective date of this Act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State, except where contrary to the public policy of this State. 750 Ill. Comp. Stat. § 5/213.1 (2004) (adopted 1996) A marriage between 2 individuals of the same sex is contrary to the public policy of this State. 750 Ill. Comp. Stat. § 5/216 (2004) (adopted 1915) Prohibited marriages void if contracted in another state. That if any person residing and intending to continue to reside in this state and who is disabled or prohibited from contracting marriage under the laws of this state, shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state. See Stevens v. Stevens, 136 N.E. 785, 786-87 (Ill. 1922) (" The status of citizens of a state in respect to the marriage relation is fixed and determined by the law of that state, but marriages of citizens of one state celebrated in another state, which would be valid there, are generally recognized as fixing the status in the state of the domicile with certain exceptions, such as marriages which are incestuous, . . . polygamous, or which are declared by positive law to have no validity in the state of the domicile. Such marriages contracted between the citizens of a state in other states in disregard of the statutes of the state of their domicile will not be recognized in the courts of the latter state though valid where celebrated.")
Indiana	Ind. Code § 31-11-1-1 (2004) (adopted 1997) (a) Only a female may marry a male. Only a male may marry a female. (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.
Iowa	Iowa Code § 595.2 (2003) (amended 1998) 1. Only a marriage between a male and a female is valid. . . . Iowa Code § 595.20 (2003) (amended 1998) A marriage which is solemnized in any other state, territory, country, or any foreign jurisdiction which is valid in that state, territory, country, or other foreign jurisdiction, is valid in this state if the parties meet the requirements for validity pursuant to section 595.2, subsection 1, and if the marriage would not otherwise be declared void.

Kansas	Kan. Const. Art. 15, § 16:(adopted 4/5/2005) (a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void. (b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage. Kan. Stat. Ann. § 23-101 (2004) (amended 1996) (a) The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. . . . Kan. Stat. Ann. § 23-115 (2004) (amended 1996) All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.
Kentucky	Ky. Const. § 233A (Baldwin 2004) (adopted 11/2/2004) Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. Ky. Rev. Stat. § 402.005 (Baldwin 2004) (adopted 1998) As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex. Ky. Rev. Stat. § 402.020 (Baldwin 2004) (amended 1998) (1) Marriage is prohibited and void: . . . (d) Between members of the same sex; Ky. Rev. Stat. § 402.040 (Baldwin 2004) (amended 1998) (1) If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized, unless the marriage is against Kentucky public policy. (2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045. Ky. Rev. Stat. § 402.045 (Baldwin 2004) (amended 1998) (1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. (2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.

Louisiana	La. Const. Art. 12, § 15 (2005) (adopted 9/18/2004): Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman. See Forum for Equality PAC v. McKeithen, 893 So.2d 715 (La. 2005) (reversing lower court ruling that amendment violated constitutional requirement that a proposed amendment be confined to one object). La. Civ. Code Art. 86 (2004) (adopted 1999) Marriage is a legal relationship between a man and a woman that is created by civil contract. The relationship and the contract are subject to special rules prescribed by law. La. Civ. Code Art. 89 (2004) (amended 1999) Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code. [note: Art. 89 was entitled "Impediment of the same sex" by 1987 La. Sess. Law 886.] La. Civ. Code Book IV, Title II, § 3520 (2004) (amended 1999) A. A marriage that is valid in the state where contracted, or in the state where the parties were first domiciled as husband and wife, shall be treated as a valid marriage unless to do so would violate a strong public policy of the state whose law is applicable to the particular issue under Article 3519. B. A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage. La. Civ. Code. Art. 94 (2004) (recodified 1987) A marriage is absolutely null when contracted without a marriage ceremony, by procuration, or in violation of an impediment. A judicial declaration of nullity is not required, but an action to recognize the nullity may be brought by any interested person. La. Civ. Code. Art. 96 (2004) (recodified 1987) An absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith. . . . A purported marriage between parties of the same sex does not produce any civil effects.

Maine	Me. Rev. Stat. Ann. tit. 19A ,§ 701 (2003) (amended 1997) 1. Marriage out of State to Evade Law. When residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State. 1-A. Certain Marriages Performed in Another State Not Recognized in this State. Any marriage performed in another state that would violate any provisions of subsections 2 to 5 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State. . . . 5. Same Sex Marriage Prohibited. Persons of the same sex may not contract marriage. Me. Rev. Stat. Ann. tit, 19A ,§ 751 (2003) (adopted 1995) The following marriages are void and dissolved without legal process: 1. Solemnized in State. A marriage prohibited in section 701, if solemnized in this State; . . .
Maryland	Md. Code Fam. Law § 2-201 (2003) (adopted 1973) Only a marriage between a man and a woman is valid in this State. See Henderson v. Henderson, 87 A.2d 403, 408 (1952) (Maryland accepts "the general rule that a marriage valid where contracted or solemnized is valid everywhere, unless it is contrary to the public policy of the forum").
Massachusetts	[omitted]

Michigan	Mich. Const. Art. 1, § 25 (adopted 11/2/2004) To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose. Mich. Comp. Laws § 551.1 (2004) (amended 1996) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state. Mich. Comp. Laws § 551.2 (2004) (amended 1996) So far as its validity in law is concerned, marriage is a civil contract between a man and a woman, . . . Mich. Comp. Laws § 551.3 (2004) (amended 1996) A man shall not marry . . . another man. Mich. Comp. Laws § 551.4 (2004) (amended 1996) A woman shall not marry . . . another woman. Mich. Comp. Laws § 551.271 (2004) (amended 1996) (1) Except as otherwise provided in this act, a marriage contracted between a man and a woman who are residents of this state and who were, at the time of the marriage, legally competent to contract marriage according to the laws of this state, which marriage is solemnized in another state within the United States by a clergyman, magistrate, or other person legally authorized to solemnize marriages within that state, is a valid and binding marriage under the laws of this state to the same effect and extent as if solemnized within this state and according to its laws. (2) This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state under section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws. Mich. Comp. Laws § 551.272 (2004) (adopted 1996) This state recognizes marriage as inherently a unique relationship between a man and a woman, as prescribed by section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws, and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction.

Minnesota	Minn. Stat. Ann. § 517.01 (2005 Supp.) (amended 1997) Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only between persons of the opposite sex and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void. Minn. Stat. Ann. § 517.03 (2005 Supp.) (amended 1997) (a) The following marriages are prohibited: . . . (4) a marriage between persons of the same sex. (b) A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state. . . .
Mississippi	Miss. Const. Art. 14, § 263A (2005 Supp.) (adopted 11/2/2004) Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state. Miss. Code §§ 93-1-1 (2004) (amended 1997) . . . (2) Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi. Miss. Code §§ 93-1-3 (2004) (adopted 1930) Any attempt to evade section 93-1-1 by marrying out of this state and returning to it shall be within the prohibitions of said section.
Missouri	Mo. Const. Art. 1, § 33 (2005 Supp.) (adopted 8/3/2004) That to be valid and recognized in this state, a marriage shall exist only between a man and a woman. Mo. Ann. Stat. § 451.022 (2004) (adopted 1996) 1. It is the public policy of this state to recognize marriage only between a man and a woman. 2. Any purported marriage not between a man and a woman is invalid. 3. No recorder shall issue a marriage license, except to a man and a woman. 4. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.

Montana	Mont. Const. Art. XIII, § 7 (adopted 11/2/2004) Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. The "official ballot language" for this amendment described it as providing "that only a marriage between a man and a woman may be valid if performed in Montana, or recognized in Montana if performed in another state." See Montana Secretary of State's 2004 Voter Information Pamphlet, http://sos.state.mt.us/Assets/elections/voterinfopamphlet2004.pdf at p. 22 (last visited June 23, 2005) Mont. Rev. Code Ann. §§ 40-1-103 (2003) (adopted 1975) Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential. A marriage licensed, solemnized, and registered as provided in this chapter is valid in this state. A marriage may be contracted, maintained, invalidated, or dissolved only as provided by the law of this state. Mont. Rev. Code Ann. §§ 40-1-401 (2003) (amended 1997) (1) The following marriages are prohibited: . . . (d) a marriage between persons of the same sex. . . . (4) A contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) is void as against public policy.
Nebraska	Neb. Const. Art. 1 § 29 (2003) (adopted 2000) Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska. See Citizens for Equal Protection, Inc. v. Attorney General, No. 4:03CV3155 (U.S.D.C. Neb. May 12, 2005), slip op. at 2, 24 n.14, 43 (holding that second sentence of § 29 violated federal constitution's First Amendment and Equal Protection and Bill of attainder clauses; as parties had not argued that second sentence could be severed from first sentence, enjoining enforcement of § 29 in its entirety). The defendants filed a notice of appeal on June 9, 2005. Neb. Rev. Stat. § 42-117 (2003) (adopted 1866) All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. See Neb. Op. Atty. Gen. No. 96025, 1996 WL 132907 (Neb. A.G. Mar. 25, 1996). The Attorney General concluded, prior to the adoption in 2000 of Neb. Const. Art. 1, § 29, that although Nebraska marriage statutes did not specifically prohibit same-sex marriage, the gender-specific references in such statutes meant that "a marriage license could not be issued to two persons of the same-sex due to the 'inability of two persons of the same-sex to come within the definition of marriage.'" Id. at *1 (quoting prior Opinion of the Attorney General). "We would argue that Nebraska law implicitly prohibits recognition of same-sex marriages from other states, based on the commonly understood meaning of the word 'marriages' and the use of gender specific terms in Nebraska statutes . . . . Nonetheless, there is a very real possibility the Nebraska Supreme Court could hold otherwise" based on Neb. Rev. Stat. § 42-117. Id. at *2-*3. The Legislature could prevent this result by "adopt[ing] legislation to specifically prohibit recognition of same-sex marriages[.]" Id. at *4.

Nevada	Nev. Const. Art. 1, § 21 (2004) (adopted 2002) Only a marriage between a male and female person shall be recognized and given effect in this state. Nev. Rev. Stat. § 122.020 (2004) (adopted 1867) 1. A male and a female person, at least 18 years of age, not nearer of kin than second cousins or cousins of the half blood, and not having a husband or wife living, may be joined in marriage. . . .
New Hampshire	N.H. Rev. Stat. Ann. § 457:1 (2004) (amended prior to 1988) No man shall marry . . . any other man. N.H. Rev. Stat. Ann. § 457:2 (2004) (amended prior to 1988) No woman shall marry . . . any other woman. N.H. Rev. Stat. Ann. § 457:3 (2005 Supp.) (amended 2004) Every marriage legally contracted outside the state of New Hampshire, which would not be prohibited under RSA 457:1 or RSA 457:2 if contracted in New Hampshire, shall be recognized as valid in this state for all purposes if or once the contracting parties are or become permanent residents of this state subsequent to such marriage, and the issue of any such marriage shall be legitimate. Marriages legally contracted outside the state of New Hampshire which would be prohibited under RSA 457:1 or RSA 457:2 if contracted in New Hampshire shall not be legally recognized in this state. . . . N.H. Rev. Stat. § 457:43 (2004) (adopted 1979) If any person residing and intending to continue to reside in this state is prohibited from contracting marriage under the laws of this state and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state, with the same effect as though such prohibited marriage had been entered into in this state.

New Jersey	"[I]t seems clear the Legislature intended marriage certificates to be granted only to couples of the opposite sex." Lewis v. Harris, 2003 WL 23191114,*2, *3 (N.J. Super. Law Div. Nov. 5, 2003), aff'd on other grounds, 2005 WL 1388578 (N.J. Super. A.D. June 14, 2005). Although the trial court recognized that New Jersey statutes contained no express prohibition against same-sex marriage, id. at *3, the court treated the lack of legislative authorization, in an area defined entirely by statute, id., as a "prohibition." Id. at *13, *23, * 28. On appeal, the Appellate Division recognized the "statutory limitation of the institution of marriage to members of the opposite sex" and noted that plaintiffs did not challenge this interpretation of the statutes. 2005 WL 1388578 at p. *1. The Appellate Division upheld the constitutionality of that limitation; an appeal to the New Jersey Supreme Court is expected. "The pertinent statutes relating to marriages and married persons do not contain any explicit references to a requirement that marriage must be between a man and a woman. N.J.S.A. 37:1--1 et seq.; N.J.S.A. 2A:34--1 et seq. Nevertheless that statutory condition must be extrapolated. It is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed." M.T. v. J.T., 355 A.2d 204, 207, 140 N.J. Super. 77, 84-85 (Super. Ct. App. Div.), certif. den., 71 N.J. 345, 364 A.2d 1076 (1976). "[S]ame-sex marriages are not lawful in New Jersey." In re Application for Change of Name by Bacharach, 344 N.J.Super. 126, 135, 780 A.2d 579, 584 (N.J. Super. 2001) (citing Rutgers Council of AAUP v. Rutgers, The State University, 298 N.J.Super. 442, 455-62, 689 A.2d 828 (App.Div.1997), certif. denied, 153 N.J. 48, 707 A.2d 151 (1998)). See Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958) (New Jersey recognizes marriages validly contracted elsewhere unless contrary to New Jersey public policy; finding strong public policy against under-age marriages; overruling Appellate Division's contrary conclusion (which was based inter alia on fact that no New Jersey statute expressly declared under-age marriages "void," unlike other prohibited marriages, 129 A.2d 459, 461-62 (N.J. Super. A.D. 1957)); holding plaintiff entitled to annulment of under-age marriage contracted in Indiana); id. at 67-68 ("[I]f New Jersey's public policy is to remain at all meaningful it must be considered equally applicable though their marriage took place in Indiana. While that State was interested in the formal ceremonial requirements of the marriage it had no interest whatever in that marital status of the parties. Indeed, New Jersey was the only State having any interest in that status, for both parties were domiciled in New Jersey before and after the marriage and their matrimonial domicile was established here. The purpose in having the ceremony take place in Indiana was to evade New Jersey's marriage policy and we see no just or compelling reason for permitting it to succeed").

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

North Carolina	N.C. Gen. Stat. Ann. § 51-1.2 (2004) (adopted 1995) Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina. N.C. Gen. Stat. Ann. § 51-1 (2004) A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other . . . See Op. N.C. Att'y Gen'l, 2004 WL 871437 (N.C.A.G.) (3/29/04) (register of deeds would violate North Carolina law in issuing a marriage license to persons of the same gender).
North Dakota	N.D. Const. Art. XI, § 28 (adopted 11/2/2004) Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect. (See http://www.state.nd.us/lr/constitution/const.pdf at p. 28 (last visited June 23, 2005.) N.D. Cent. Code § 14-03-01 (2003) (amended 1997) 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. N.D. Cent. Code § 14-03-08 (2003) (amended 1997) Except when residents of this state contract a marriage in another state which is prohibited under the laws of this state, all marriages contracted outside this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section applies only to a marriage contracted in another state or country which is between one man and one woman as husband and wife.

Ohio	Ohio Const. Art. XV, § 11 (Supp. 2005) (adopted 11/2/2004) Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage. Ohio Rev. Code Ann. § 3101.1 (Supp. 2005) (amended 2004) (A) Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A marriage may only be entered into by one man and one woman. . . . . . . (C) (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state. (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state. (3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (C)(3) of this section shall be construed to do either of the following: (a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117. of the Revised Code; (b) Affect the validity of private agreements that are otherwise valid under the laws of this state. (4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

Oklahoma	Okla. Const. Art. 2, § 35 (Supp. 2005) (adopted 11/2/2004) A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups. B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage. C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor. Okla. Stat. Ann. tit. 43, § 3.1 (2004) (adopted 1996) A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage. Okla. Stat. Ann. tit. 43, § 1(2004) (adopted 1910) Marriage is a personal relation arising out of a civil contract to which the consent of parties legally competent of contracting and of entering into it is necessary, and the marriage relation shall only be entered into, maintained or abrogated as provided by law. Okla. Stat. Ann. tit. 43, § 3 (2004) (adopted prior to 1989) Any unmarried person of the age of eighteen (18) years or upwards and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex . . .
Oregon	Or. Const. Art. XV, § 5a (2005 Supp.) (adopted 11/2/2004) It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage. Or. Rev. Stat. Ann. § 106.010 (2004) (adopted prior to 1965) Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150. See Li v. State of Oregon, 110 P.3d 91, 96 (2005) (concluding, based on gender-specific language in § 106.010 and other state marriage laws, that marriage in Oregon was statutorily "limited to opposite-sex couples," even before adopted of 2004 constitutional amendment). See id. at 99 (acknowledging Oregon rule "marriages deemed valid in the states where they are performed generally will be recognized in Oregon as well," with "exceptions to the general rule where the policy of this state dictates a different result than would be reached by the state where the marriage was performed") (citation, internal quotations, and emphasis omitted). See id. at 99, 102 (even prior to adoption of constitutional amendment, marriage licenses issued to same-sex couples were not legally valid, but were issued without authority and were therefore "void ab initio").
Pennsylvania	Pa. Consol. Stat. tit. 23, § 1704 (2004) (adopted 1996) It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth. Pa. Consol. Stat. tit. 23, § 1102 (2004) (adopted 1996) The following words and phrases when used in this part [Title 23 (Domestic Relations), Part II (Marriage)] shall have the meanings given to them in this section unless the context clearly indicates otherwise: . . . "Marriage." A civil contract by which one man and one woman take each other for husband and wife.

Puerto Rico	P.R. Laws Ann. tit. 31, § 221 (2004) (amended 1999) Marriage is a civil institution, originating in a civil contract whereby a man and a woman mutually agree to become husband and wife and to discharge toward each other the duties imposed by law. It is valid only when contracted and solemnized in accordance with the provisions of law, and it may be dissolved before the death of either spouse only in the cases expressly provided for in this title. Any marriage between persons of the same sex or transsexuals contracted in other jurisdictions shall not be valid or given juridical recognition in Puerto Rico.
Rhode Island	See Statement of Rhode Island Attorney General, May 17, 2004, R.A. 317, declining to opine whether same-sex marriage would be void if contracted in Rhode Island, declaring: "No Rhode Island court has addressed or interpreted whether or not Rhode Island's marriage laws permit same-sex couples to marry or whether same-sex marriages, if performed in Rhode Island, would be void." Rhode Island's marriage laws use (1) gender-specific terms in its consanguinity statutes (prohibiting a man from marrying specified female relatives and a woman from marrying specified male relatives, but say nothing about consanguinity of same-sex marriage license applicants), R.I. G.L. §§ 15-1-1, 15-1-2; as well as (2) terms such as "husband" and "wife," id. §§ 15-1-5, 15-1-6; and (3) other phrases clearly indicating that marriage is between a man and a woman. R.I. G.L. § 15-2-1 ("female party;" "male party"); id. § 15-2-7("both the bride and groom"). Cf. Goodridge, 440 Mass. at 318-19 (concluding, based on the common meaning of "marriage" and similar provisions in Massachusetts statutes, that those statutes did not allow same-sex couples to marry; rejecting plaintiffs' argument that because nothing in Mass. G.L. c. 207 "specifically prohibits marriages between persons of the same sex," the statute could be interpreted to permit such marriages); id. at 319 ("[t]he intended scope of G. L. c. 207 is also evident in its consanguinity provisions. . . . Sections 1 and 2 of G. L. c. 207 prohibit marriages between a man and certain female relatives and a woman and certain male relatives, but are silent as to the consanguinity of male-male or female-female marriage applicants. . . . The only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry"). The Rhode Island Attorney General's May 2004 statement also recognized that: "A different legal issue is whether same-sex marriages legally performed in Massachusetts would be recognized as marriages under Rhode Island law. If a same-sex couple were to marry in Massachusetts, where such marriages are legal, Rhode Island would decide whether to recognize that marriage under principles of comity. This Office's review of Rhode Island law suggests that Rhode Island would recognize any marriage validly performed in another state unless doing so would run contrary to the strong public policy of this State. Public policy can be determined by statute, legal precedent, and common law." R.A. 317. The Attorney General did not offer any opinion regarding whether such recognition would occur or any prediction on how Rhode Island courts might rule on such a question. See id. In a separate opinion dated Oct. 19, 2004 (see Conflicts and Family Law Prof. Amicus, Add. D), the Rhode Island Attorney General concluded that where a teachers retirement benefit statute defined "spouse" as "the surviving person who was married to a deceased member" and met other requirements, "[t]his gender-neutral provision does not specifically define the term 'marriage' or otherwise restrict its application to marriages between members of the opposite sex." Id. at 2-3 (emphasis in original). "In short, while it is impossible to predict how a Rhode Island court might ultimately interpret the scope of [the teachers retirement spousal benefit statute], the plain language used in that Section (read in conjunction with [the definitional section]) suggests that a Massachusetts resident who is a party to a same-sex marriage validly performed in Massachusetts would be eligible to receive Spouse's benefits so long as he or she met the other statutory requirements set forth in [the spousal benefit statute]." Id. at 3.

South Carolina	S.C. Code Ann. Art. 1, § 20-1-10 (2004) (amended 1996) (A) All persons, except mentally incompetent persons and persons whose marriage is prohibited by this section, may lawfully contract matrimony. (B) No man shall marry . . . another man. (C) No woman shall marry . . . another woman. S.C. Code Ann. Art. 1, § 20-1-15 (2004) (adopted 1996) A marriage between persons of the same sex is void ab initio and against the public policy of this State. See Zwerling v. Zwerling, 244 S.E.2d 311 (S.C. 1978) (following rule that validity of a marriage is determined by the law of the place where it is contracted, and will be recognized in another state unless such recognition is contrary to a strong public policy of that state). See Rodney Patton, "Queerly Unconstitutional?: South Carolina Bans Same-Sex Marriage," 48 S.C. L. Rev. 685, 700-704 & n. 86 (1997) (criticizing South Carolina's law, but noting that its "public policy" declaration triggers "public policy" exception recognized in Zwerling, as well as "public policy" exception to Full Faith and Credit Clause; concluding that "South Carolina's positive law does not bode well for recognition of same-sex marriages contracted in another state"). Note: the following proposed constitutional amendment was given final approval by the Legislature and will be submitted to the voters for ratification at the next election (see S.C. Act No. 45, approved April 28, 2005, available at http://www.scstatehouse.net/sess116_2005-2006/bills/3133.htm (last visited June 23, 2005)): A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments.
South Dakota	S.D. Codified Laws § 25-1-1 (2004) (amended 1996) Marriage is a personal relation, between a man and a woman, arising out of a civil contract to which the consent of parties capable of making it is necessary. Consent alone does not constitute a marriage; it must be followed by a solemnization. S.D. Codified Laws § 25-1-38 (2004) (amended 2000) Any marriage contracted outside the jurisdiction of this state, except a marriage contracted between two persons of the same gender, which is valid by the laws of the jurisdiction in which such marriage was contracted, is valid in this state. Note: the following proposed constitutional amendment was given final approval by the Legislature and will be submitted to the voters for ratification at the next election (see 2005 SD H.J.R. 1001 (SN), adopted Feb. 28, 2005, available on Westlaw): Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.

Tennessee	Tenn. Code Ann. § 36-3-113 (2004) (adopted 1996) (a) Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage. (b) The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state. (c) Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee. (d) If another state or foreign jurisdiction issues a license for persons to marry which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state. Note: The following proposed amendment to art. XI of the Tennessee Constitution, having been approved by two successive legislatures, is scheduled to appear on the November 2006 ballot (see 2005 Tenn. S.J.R. 31, approved March 24, 2005): The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

Texas	Tex. Fam. Code tit. 1, § 2.001 (1998) (adopted 1997) (a) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state. (b) A license may not be issued for the marriage of persons of the same sex. Tex. Fam. Code tit. 1, § 6.204 (2005 Supp.) (adopted 2003) (a) In this section, "civil union" means any relationship status other than marriage that: (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage. (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state. (c) The state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction. Note: The following proposed amendment to art. I of the Texas Constitution has been approved by the Legislature and is scheduled to appear on the November 2005 ballot (see 2005 Texas H.J.R. 6 (N.S.) (approved May 25, 2005): Sec. 32. (a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.
Utah	Utah Const. Art. 1, § 29 (Supp. 2005) (adopted 11/2/2004) (1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect. Utah Code Ann., § 30-1-2 (2004) (amended prior to 1991) The following marriages are prohibited and declared void: . . . (5) between persons of the same sex. Utah Code Ann., § 30-1-4 (2004) (adopted 1995) A marriage solemnized in any other country, state, or territory, if valid where solemnized, is valid here, unless it is a marriage: (1) that would be prohibited and declared void in this state, under Subsection 30-1-2(1), (3), or (5); . . . Utah Code Ann. § 30-1-4.1 (2004) (adopted 2004) (1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter. (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married. (2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section.

Vermont	Vt. Stat. Ann. tit. 15, § 8 (2004) (adopted 2000) Marriage is the legally recognized union of one man and one woman. Vt. Stat. Ann. tit. 15, § 1201 (2004) (adopted 2000) As used in this chapter [governing civil unions]: . . . (4) "Marriage" means the legally recognized union of one man and one woman. Vt. Stat. Ann. tit. 15, § 1202 (2004) (adopted 2000) For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria: . . . (2) Be of the same sex and therefore excluded from the marriage laws of this state. . . . Vt. Stat. Ann. tit. 15, § 5 (2004) (adopted 1912) If a person residing and intending to continue to reside in this state is prohibited from contracting marriage under the laws of this state and such person goes into another state or country and there contracts a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state. See Poulos v. Poulos, 737 A.2d 885, 886 (Vt. 1999) ("A marriage contract will be interpreted here according to the law of the state of its making, so long as to do so will not violate the public policy of the State of Vermont").
Virginia	Va. Code Ann. § 20-45.2 (2004) (amended 1997) 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. Va. Code Ann. § 20-45.3 (2005 Supp.) (adopted 2004)) A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement 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 thereby shall be void and unenforceable.

Washington	Wash. Rev. Code § 26.04.010 (2004) (amended 1998) (1) Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable. . . . Wash. Rev. Code § 26.04.020 (2004) (amended 1998) (1) Marriages in the following cases are prohibited: . . . (c) When the parties are persons other than a male and a female. . . . (3) A marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection (1)(a), (1)(c), or (2) of this section. Sections 26.04.010 and 26.040.020, insofar as they prohibit same-sex marriage, were held to violate the state constitution in Castle v. State, 2004 WL 1985215 (Wash. Sup. No. 04-2-00614-4, Sept. 7, 2004) and Anderson v. King County, 2004 WL 1738447 (Wash. Sup. No. 04-2-04964-4-SEA, Aug. 4, 2004). The Supreme Court of Washington heard argument in the appeals of these decisions on March 8, 2005. See "Supreme Court Calendar," http://www.courts.wa.gov/appellate%5Ftrial%5Fcourts/supreme/calendar/index.cfm?fa=atc_supreme_calendar.display&year=2005&file=20050308 (last visited June 23, 2005)
West Virginia	W. Va. Code § 48-2-104 (2003) (adopted prior to 2001) (a) The application for a marriage license must contain a statement of the full names of both female and male parties . . . . (c) Every application for a marriage license must contain the following statement: "Marriage is designed to be a loving and lifelong union between a woman and a man. . . . W. Va. Code § 48-2-101 (2003) (adopted prior to 2001) Every marriage in this state must be solemnized under a marriage license issued by a clerk of the county commission in accordance with the provisions of this article. If a ceremony of marriage is performed without a license, the attempted marriage is void, and the parties do not attain the legal status of husband and wife. W. Va. Code § 48-2-603 (2003) (adopted prior to 2001) A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state.

Wisconsin	Wis. Stat. Ann. § 765.001 (2001) (adopted 1959) . . . (2) INTENT. It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. . . . Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. . . . Wis. Stat. Ann. § 765.01 (2001) (adopted prior to 1977) Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife. Wis. Stat. Ann. §765.16 (2001) (adopted prior to 1991) Marriage may be validly solemnized and contracted in this state only after a marriage license has been issued therefor, and only by the mutual declarations of the 2 parties to be joined in marriage that they take each other as husband and wife, made before an authorized officiating person . . . . Wis. Stat. Ann. § 765.04 (2001) (adopted 1915) (1) If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state. (2) Proof that a person contracting a marriage in another jurisdiction was (a) domiciled in this state within 12 months prior to the marriage, and resumed residence in this state within 18 months after the date of departure therefrom, or (b) at all times after departure from this state, and until returning maintained a place of residence within this state, shall be prima facie evidence that at the time such marriage was contracted the person resided and intended to continue to reside in this state. (3) No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void. See In the Interest of Angel Lace M., 516 N.W. 2d 678, 680 n.1 (Wis. 1994) ("Wisconsin does not recognize same-sex marriages," citing, inter alia, § 765.001(2)).
Wyoming	Wyo. Stat. Ann. § 20-1-101 (2004) (adopted prior to 1978) Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential. Wyo. Stat. Ann. § 20-1-111 (2004) (adopted 1876) All marriage contracts which are valid by the laws of the country in which contracted are valid in this state. See Hoagland v. Hoagland, 193 P. 843, 843-44 (1920) (recognizing that essentially identical predecessor statute of § 20-1-111 was subject to exception for marriages "which the Legislature of the state has declared shall not be allowed any validity, because contrary to the policy of its laws").