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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-09436

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

PLAINTIFFS-APPELLANTS,

v.

DEPARTMENT OF PUBLIC HEALTH, CHRISTINE C. FERGUSON, in  
in her official capacity as COMMISSIONER OF DEPARTMENT OF  
PUBLIC HEALTH, REGISTRY OF VITAL RECORDS AND STATISTICS,  
and STANLEY NYBERG, in his official capacity REGISTRAR OF  
VITAL RECORDS AND STATISTICS,

DEFENDANTS-APPELLEES.

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On Appeal From an Interlocutory Order  
from the Superior Court, Suffolk County

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**Reply Brief of Plaintiffs-Appellants**

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Michele E. Granda, BBO # 564413  
Mary L. Bonauto, BBO # 549967  
Gary D. Buseck, BBO #067540  
Karen L. Loewy, BBO # 647447  
Gay & Lesbian Advocates & Defenders  
30 Winter Street, Suite 800  
Boston, MA 02108  
617-426-1350

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**I. THE PURPOSEFUL USE OF §§11-12 TO DISCRIMINATE AGAINST SAME-SEX COUPLES VIOLATES EQUAL PROTECTION.**

The Couples have never disputed the Commonwealth's claim (p.24) that proof of disparate impact resulting from purposeful discrimination does not create an automatic equal protection violation. However, discriminatory impact alone is sometimes sufficient when the pattern of impact is "stark" or where the impact "could not be plausibly explained on a neutral ground." Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) (relying on Washington v. Davis, 426 U.S. 229, 242 (1976) and Vill. of Arlington Heights v. Metro. Hous. Devel. Corp., 429 U.S. 252, 266 (1977)); see also Davis, 426 U.S. at 254 (Stevens, J., concurring). In addition, if a plaintiff demonstrates disparate impact and that purposeful discrimination was the "but-for" motivation for the government's action, an equal protection violation is established. See, e.g., Hunter v. Underwood, 471 U.S. 222, 232-33 (1985). Here, the record of intent and impact meets this equal protection standard.<sup>1</sup>

Contrary to the Commonwealth's position (pp.48-57), proof of impact and purposeful discrimination vis-à-

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<sup>1</sup> The Commonwealth concedes for argument's sake (p.56) that the Couples have demonstrated the requisite "purpose and effect" for their equal protection claim.

vis a neutral law evenhandedly applied do more than establish a mere classification. If the contrary were true, conclusive proof of improper motive would have no affect on the scrutiny applied to government actions,<sup>2</sup> even though it is the bedrock of equal protection that "purposeful discrimination is the 'condition that offends the Constitution'." Fedeles v. Sch. Comm. of Westwood, 412 Mass. 110, 116 (1992) (quoting Feeney, 442 U.S. at 274). A classification based on prejudice or bias is not rational as a matter of law. Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984). Consequently, once a claimant shows purposeful disadvantaging of a group, deferential review no longer applies.<sup>3</sup> Moreover, where purposeful discrimination is the "but-for" motivation for the government's actions, the actions are invalid. See

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<sup>2</sup> Mere proof of disparate impact against any group triggers rational basis review in the absence of an inference of purposeful discrimination. See Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982)(relying on Davis).

<sup>3</sup> See, e.g., Fedeles, 412 Mass. at 116 (applying Arlington Heights and Feeney); Haverty v. Dubois, 11 Mass.L.Rptr. 252, 1999 WL 1487591 at \*9 (Super.Ct. 1999); Castaneda v. Partida, 430 U.S. 482, 492-495 (1977); Miller-El v. Dretke, \_\_ U.S. \_\_, 125 S.Ct. 2317, 2324-2325 (2005); see also 3 R. Rotunda & J. Novak, Treatise on Constitutional Law, §18.4, pp. 285-287 (3d ed. 1999) (analyzing burden-shifting in cases of disparate impact and purposeful discrimination).

Hunter, 471 U.S. at 232. Any contention that the Arlington Heights' "discriminatory purpose and effect" theory of equal protection does not apply beyond suspect or quasi-suspect classes is simply wrong.<sup>4</sup>

**II. THE APPLICATION OF §§11-12 TO SAME-SEX COUPLES CANNOT SURVIVE INDEPENDENT CONSTITUTIONAL SCRUTINY.**

Even were this Court to examine §§11-12 independently of Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003)<sup>5</sup> and the Arlington Heights' "purpose and effect" jurisprudence, §§11-12's application to same-sex couples still fails constitutional review. Strict judicial scrutiny is an appropriate standard of review here because the Couples are being denied the fundamental right to

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<sup>4</sup> See, e.g., Nat'l Gas Distribs. v. Sevier County Util. Dist., 7 S.W.3d 41, 46 (Tenn. App. Ct. 1999); Castaneda, 430 U.S. at 494 n.13; People v. Zuniga, No. H022931, 2002 WL 31054113 at \*2 (Cal.App. 6 Dist. Sept. 16, 2002)(Not Officially Published); Snowden v. Hughes, 321 U.S. 1, 15-16 (1944)(Frankfurter, J., concurring); Dobbins v. City of Los Angeles, 195 U.S. 223, 237 (1904); Bauza v. Morales Carrion, 578 F.2d 447, 451-452 (1<sup>st</sup> Cir. 1978); Cochran v. Kansas, 316 U.S. 255, 257-258 (1942); Hook v. Dubois, No.946337, 1999 WL 1353321 \*3 (Mass.Super.Ct. June 5, 1996) (Cowin, J.). Despite the Commonwealth's contention (p. 55), Vance v. Bradley, 440 U.S. 93, 96-97 (1979), does not render "antipathy" constitutionally meaningless in the absence of a suspect class or fundamental interest. See, e.g., Lawrence v. Texas, 539 U.S. 558, 579-580 (2003)(O'Connor, J., concurring); Cleburne, 473 U.S. at 440; Romer, 517 U.S. at 632; Feeney, 442 U.S. at 272.

<sup>5</sup> The Couples rely on their original brief (pp.21-33) in reply to the Commonwealth's argument (pp.57-63) that Goodridge has no effect here.

marry.<sup>6</sup> Yet, given the importance of the right at stake and the unmistakable presence of antipathy, §§11-12 are rendered invalid even by rational basis review. See Marcoux v. Att’y Gen., 375 Mass. 63, 65 n.4 (1978) (noting continuum of constitutional review “determined at every point by the competing values involved.”). To survive rational basis review, the Court must “look carefully at the purpose to be served” and “the degree of harm to the affected class,” and find that “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to members of the disadvantaged class.” English v. New England Med. Ctr., 405 Mass. 423, 428-29 (1989).

The Commonwealth urges this Court to review §§11-12 under the most deferential standard of rational basis review possible under Massachusetts law. AG Br. 63-64. This is wrong for two reasons. First, extreme

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<sup>6</sup> Though the Goodridge court did not decide whether the marriage ban merited strict scrutiny, see Goodridge, 440 Mass. at 331; In re Opinions of the Justices to the Senate, 440 Mass. 1201, 1206 n.3 (2004), Goodridge offers strong support for the fundamentality of this right. 440 Mass. at 345 (Greaney, J., concurring). The majority unmistakably situated Goodridge in the context of the fundamental rights cases. Id. at 326-28. See also id. at 339 (referring to marriage as “a right of fundamental importance.”); id. at 333 (marriage is one of “fundamentally private areas of life”).

deference is appropriate for economic legislation but not for statutes affecting important rights.<sup>7</sup> When a statute implicates important rights like access to marriage or intimate relationships, it is subject to searching scrutiny. Goodridge, 440 Mass. at 330; Lawrence, 539 U.S. at 580 (O'Connor, J., concurring). Second, where, as here, there are reasons to infer antipathy against a disfavored group, judicial review is certainly more searching than the most deferential rational basis.<sup>8</sup> See Romer, 517 U.S. at 633; Lawrence, 539 U.S. at 580; Cleburne, 473 U.S. at 446; Plyer v. Doe, 457 U.S. 202, 228-29 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973).

Searching review requires this Court to apply rational basis review with skepticism as to whether rationales offered in support of the classification credibly could be thought to underlie it. See Cleburne, 473 U.S. at 449-50; Moreno, 413 U.S. at 536-

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<sup>7</sup> See Commonwealth v. Henry's Drywall Co., Inc., 366 Mass. 539, 545 (1974); Shell Oil Co. v. City of Revere, 383 Mass. 682, 686 (1981); Town of Holbrook v. Town of Randolph, 374 Mass. 437, 442 (1978).

<sup>8</sup> This is because the rationale for institutional deference to the state's lawmaking process goes away when there is "reason to infer antipathy." See Murphy v. Dep't of Corr., 429 Mass. 736, 741 (1999); FCC v. Beach Communications, 508 U.S. 307, 314 (1993); Feeney, 442 U.S. at 272. The Commonwealth concedes (p.57 n.46) that more searching review is appropriate when there has been "a bare desire to harm."

37. Searching review (i) takes “underinclusiveness” into account,<sup>9</sup> and (ii) precludes the government from justifying the law with post-hoc rationales, no matter how conceivable. See Opinions of the Justices, 440 Mass. at 1208 (rejecting asserted rationale as “post hoc, imaginative theory”); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) (citing Moreno).

The Commonwealth advances four justifications for excluding non-resident same-sex couples from marrying:

- (1) assuring that Massachusetts marriages are recognized and regulated by an approving state;
- (2) assuring that Massachusetts judgments relating to its marriages are properly enforced and not collaterally attacked;
- (3) avoiding meddling in other states’ affairs; and
- (4) avoiding interstate friction and potential retaliation that could harm the Commonwealth and its same-sex couples.<sup>10</sup>

AG Br. 25-26, 65-94. The asserted interests are not

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<sup>9</sup> See, e.g., Cleburne, 473 U.S. at 449-50. “[U]nderinclusiveness may be a sign that [a governmental body] is moved by a purpose to hurt a particular class of persons rather than to accomplish its stated purpose.” Opinion of the Justices to the Senate, 423 Mass. 1201, 1233 (1996).

<sup>10</sup> Interests (3) and (4) reflect a single interest: avoiding conflict and retaliation that could be triggered by “meddling.” Allowing a non-resident couple to marry in accordance with forum law cannot be deemed meddling given that at least 44 other states do the same. The only possible exception may be the 5 states with “reverse evasion” laws ((Couples’ Br. 5 n.10) and Wyoming (Wy. St. §20-1-103)), and then, only to the extent they are enforced. Thus, concern about “meddling” cannot be a cognizable state interest.



legitimate here because they fail to transcend the harm that will befall the Couples on account of the denial of marriage rights. See Goodridge, 440 Mass. at 330; Opinions of the Justices, 440 Mass. at 1209.<sup>11</sup>

Assuming, arguendo, that the Commonwealth can show legitimate objectives, the Commonwealth cannot demonstrate an adequate fit between the discriminatory means employed and its asserted interests. As to interest (1), it is difficult to see how non-resident, same-sex couples and their children would be harmed by marrying here even if their marriage were not recognized at home.<sup>12</sup> Many marriages go a lifetime

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<sup>11</sup> Given the record, it is ludicrous to suggest that the actual motivation for resurrecting §§11-12 was to protect the excluded non-resident same-sex couples and their children or Massachusetts resident same-sex couples. Moreover, the facts show no such actual purpose to protect future court judgments or ensure interstate relations. See Opinions of the Justices, 440 Mass. at 1208. Rather, the record shows that the actual purpose was to thwart, as much as possible, the implementation of Goodridge, turning to non-resident couples once the battle to deny marriage to resident couples was lost.

<sup>12</sup> Non-recognition is not avoided by §§11-12. Sections 11-12, by their actual terms, look to the prohibitory laws governing marriages contracted outside Massachusetts, and thus, are not sufficiently connected to whether another state would recognize a marriage contracted within Massachusetts after the fact. See generally Brief of Amici Curiae of Professors of Conflict of Laws and Family Law ("Amicus on Conflict of Laws"). The existence of non-recognition statutes in many (but not all states) is unavailing to the Commonwealth. Sections 11-12 simply do not turn on the terms of sister states' non-recognition statutes. See AG Br. 136 n.112. The mere

without interaction with the legal system and yet the marriage maintains social and cultural significance - something the Commonwealth simply ignores. Viewing both interests (1) and (2) together,<sup>13</sup> §§11-12 are underinclusive given the marriages of resident couples who move or travel out-of-state. In our very mobile society, married Massachusetts same-sex couples are already living throughout the country. As a result, there is not a close enough fit between the new enforcement system and this asserted purpose.<sup>14</sup>

Viewing interest (2) on its own and considering existing legal protections, the concern for judgments is insubstantial when weighed against the important right of marriage.<sup>15</sup> Where judicial enforcement issues

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fortuity that many states currently have some type of non-recognition statute (see AG Br. 72-81, 86) does not cure the problem that §§11-12, as written, do not actually serve the Commonwealth's asserted purpose.

<sup>13</sup> These two interests are closely related: it is the asserted failure of recognition (interest 1) that leads to the asserted potential vulnerability of Massachusetts marriage-related judgments (interest 2).

<sup>14</sup> The Commonwealth suggests (p.92) that the marriages of its same-sex couples who move or travel out-of-state are less disruptive to its interests. Although the legal contours of marriage recognition might vary as between a home state couple married here and a Massachusetts couple moving to this new home state, it is difficult to comprehend how the Commonwealth's asserted interest in having its marriages recognized and regulated would be assessed differently.

<sup>15</sup> Proper enforcement of, and collateral attacks on, marriage-related judgments have been a thorny issue in American family law, especially around matters of child custody, long before same-sex couples were

are likely to arise in a limited number of marriages and where it cannot be predicted in advance which marriages might be affected, the proper means of dealing with this state interest cannot be a blanket ban on an entire class of marriages.

As to interests (3) and (4), it is important to note that resistance or prejudice in other states cannot curtail extending "to their fullest extent" the rights guaranteed by the Massachusetts Constitution. Opinions of the Justices, 440 Mass. at 1209; Goodridge, 440 Mass. at 340-341. In addition, the Commonwealth seemingly ignores the fact that the vast majority of state DOMA laws preceded the Goodridge decision, and that states have taken additional steps to address legal recognition of same-sex relationships post-Goodridge even though the Romney Administration has barred non-resident same-sex couples from marrying in Massachusetts.<sup>16</sup> It is therefore impossible to

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allowed to marry in Massachusetts, and the legal system is continually working to find mechanisms to create interstate harmony in this area of the law. See, e.g., G.L. c. 209B (Massachusetts's version of the Uniform Child Custody Jurisdiction Act).

<sup>16</sup> The Commonwealth's denial of marriage to non-resident same-sex couples is not linked in any way to a guarantee from any other state that it, in turn, will respect the marriages of Massachusetts resident same-sex couples. Cf. Prudential Ins. Co. of America v. Comm'r of Revenue, 429 Mass. 560, 570 (1999) (undeniably linking the treatment of residents to non-

credit the Commonwealth's assertion of a plausible connection between §§11-12 and the prevention of interstate conflict. Notably, if the Commonwealth is correct that all, or nearly all, of the states will refuse to recognize a marriage of their resident same-sex couples performed in Massachusetts, then no purpose is actually served by the new enforcement system (other than to deny marriage to a class of same-sex couples). Conversely, if other states do recognize the marriages celebrated by their residents here, there is no possible interstate conflict with those states. In sum, §§11-12 do not rationally advance the asserted interests.

### **III. SECTIONS 11-12 VIOLATE ARTICLE IV, §2.**

#### **A. Marriage is Fundamental Under the Clause.<sup>17</sup>**

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residents). It is fanciful to believe that the enforcement of §§11-12 against same-sex couples will alleviate the extra-territorial recognition issues faced by married, resident same-sex couples. To the contrary, when Massachusetts places its own stamp of approval on the discriminatory marriage laws of the other states, it perpetuates the idea that the marriages of same-sex couples, including those of Massachusetts residents, are inferior or unworthy. By indirectly giving life to these stigmatizing laws, the Commonwealth effectively blesses the sister states' direct use of these discriminatory marriage laws to deny the validity of the marriages of resident same-sex couples when they travel beyond our own border.

<sup>17</sup> The Commonwealth erroneously contends (pp.97-98) that the Couples cannot invoke the Clause's protections because §§11-12 create two classes of non-residents. The Clause is implicated when even a

The Commonwealth argues (pp.99, 108, 113-17) that "same-sex marriage" is disruptive to interstate harmony, and thus cannot be fundamental.<sup>18</sup> The Couples, however, do not seek a right to "same-sex marriage"; rather, as in Goodridge, they seek to exercise the same right to marry that has long been available to different-sex couples without disruption across state lines.<sup>19</sup> The hypothesis that a finding of

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single non-resident is disadvantaged vis-à-vis Massachusetts residents. See In re Jadd, 391 Mass. 227, 234 n.12 (1984); Sup. Court of Va. v. Friedman, 487 U.S. 59, 66 (1988); Toomer v. Witsell, 334 U.S. 385, 396-97 (1948); Ward v. Maryland, 79 U.S. 418, 425-26 (1870); Spencer v. S.C. Tax Comm'n, 316 S.E.2d 386, 387-88 (S.C. 1984), aff'd on other grounds, 471 U.S. 82 (1985); Baker v. Maclay Prop. Co., 648 So.2d 888, 893-95 (La. 1995). It is enough that some non-residents cannot marry here because they are non-residents.

<sup>18</sup> The Commonwealth concedes (p. 102 n.84) that the Supreme Court has expressly refused to limit the Clause's reach to economic interests. See also Lee v. Minner, 369 F. Supp. 2d 527, 534 (D. Del. 2005). Moreover, the Clause's antecedent in the Articles of Confederation evidences that its purpose extends beyond economic activity. See Austin v. New Hampshire, 420 U.S. 656, 660 (1975).

<sup>19</sup> The assertion that the Clause cannot encompass the "enjoyment of life and liberty" and the right "to pursue and obtain happiness and safety" because recreational elk hunting is not within the Clause's protections (p. 110) both conflicts with the Supreme Court's express refusal to decide the full range of activities protected by the Clause, see Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 388 (1978), and fails to recognize that the interests at stake with marriage are a far cry from recreational elk hunting. See generally Goodridge, 440 Mass. 309. Though the "pursuit of happiness" does not indelibly fix the extent of the conferred privilege, marriage falls within it. Cf. Goodridge, 440 Mass. at 316 n.7; Loving v. Virginia, 388 U.S. 1, 12 (1967); Gould v.

fundamentality would trigger interstate disharmony or undermine state sovereignty over marriage (pp.106-08) is unsound in light of history. See Amicus on Conflict of Laws at 4-7, 13 n.9.

The Commonwealth cannot rely upon Ferry v. Spokane, P & S Ry. Co., 258 U.S. 314 (1922), for the proposition that "the incidents of marriage are, as a category, not protected by the Clause." AG Br. 104-05. First, Ferry rests upon the conclusion that "[dower] is not a natural right."<sup>20</sup> 258 U.S. at 320 (citing Randall v. Kreiger, 90 U.S. 137, 148 (1874)). Second, even were the dower statute viewed under modern formulations of the Clause, see Toomer, 334 U.S. at 395, it would withstand scrutiny because substantial justifications for the discrimination existed.<sup>21</sup> See, e.g., Ferry, 268 F. at 119. In any

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Gould, 61 A. 604 (Conn. 1905). Despite the Commonwealth's contentions (pp. 108-111), Judge Washington's list of privileges, including the "enjoyment of life and liberty" and the right "to pursue and obtain happiness and safety," remain vital and applicable here. See Baldwin, 436 U.S. at 386; Paul v. Virginia, 75 U.S. 168, 180 (1868); Sup. Court of N.H. v. Piper, 470 U.S. 274, 281 n.10 (1985).

<sup>20</sup> See Ferry, 258 U.S. at 319-20 (discussing legislature's unfettered authority to eliminate this inchoate right); Ferry v. Spokane, P & S Ry. Co., 268 F. 117, 119 (9<sup>th</sup> Cir. 1920) (relying on Corfield's explanation that what is fundamental must be offered as of right), aff'd, 258 U.S. 314 (1922).

<sup>21</sup> Just like residents, the Ferry non-resident still received dower rights at the time of her husband's

event, the conclusion that dower - one of a bundle of tangible benefits provided to married persons - is not protected by the Clause, signals nothing about the status of marriage itself.<sup>22</sup> Ferry simply does not support the notion that marriage (or even all of the incidents of marriage) would fall outside the Clause's protections.<sup>23</sup>

**B. Sections 11-12 Cannot be Justified As Appropriate Choice of Law Provisions.<sup>24</sup>**

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death, though her dower was diminished to the extent she had not been present in the forum at time of conveyance. See, e.g., Buffington v. Grosvenor, 27 P. 137, 139 (1891) (relied upon in Ferry, 268 F. at 119). Cf. Paul, 75 U.S. at 180 (Clause does not secure privilege outside state).

<sup>22</sup> Cf. Randall, 90 U.S. at 147-48 (contrasting dower with entry into marriage itself); Goodridge, 440 Mass. at 954 (marriage is more than the sum of its parts). That property rights were effectively diminished by Ferry is not due to the absence of a commercial transaction - as the Commonwealth contends (pp.104-05) - but rather to the judgment that dower is an inchoate right, the abolishment of which would not affect a protected property right. Randall, 90 U.S. at 148.

<sup>23</sup> This Court is not bound by the dicta in Opinion of the Justices, 337 Mass. 786, 790 (1958) concerning Ferry or the Clause. Moreover, it would be a mistake to read Conner v. Elliot, 59 U.S. 591, 593-94 (1855), cited therein, as foreclosing the incidents of marriage from the Clause's protections. The statute in Conner extended community property rights to all marriages contracted in Louisiana, whether by residents or non-residents, and thus did not, on its face, trigger the Clause. Id.

<sup>24</sup> The Commonwealth's argument (pp.121, 125-33) that "consideration of other states' interests is perfectly permissible under the full-faith-and credit and due process clauses" is a red herring. Though these provisions may regulate territorial discrimination in a general sense, the Clause's inquiry is not sufficiently analogous to these provisions to provide dispositive - or even meaningful - insight here. See, e.g., Philips Petroleum Co. v. Shutts, 472 U.S. 797,

The Commonwealth's contention that §§11-12 are appropriate choice of law provisions (AG Br. 121, 122-33) is incorrect for the basic reason that no state may, in the name of interstate harmony, completely foreclose visiting non-residents from accessing a privilege extended to residents under the Clause based on the laws of the non-residents' home state.<sup>25</sup> See Spencer, 316 S.E.2d at 387-88, aff'd on other grounds,

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818 (1985) (establishing an "arbitrariness" or "fundamental unfairness" standard under due process and full faith and credit clauses, which places only the minimal obstacle of having to show that the chosen law has some relation to the transaction); Lunding v. N.Y. Tax App. Trib., 522 U.S. 287, 298-99 (1998) (establishing "substantial justification" and "close fit" test under Clause). Even if the Commonwealth could recast its internal marriage licensing law as a "choice of law," that recharacterization does not mean that the "choice" withstands constitutional scrutiny.<sup>25</sup> The Commonwealth errs in claiming (pp.112, 129, 130 n.108) that Professor Tribe's "legal box" analogy is inapplicable to visiting non-residents. First, the "legal box" analogy is based, in large measure, on the anti-discrimination principle which has been at the core of the Clause "at least since Paul v. Virginia." See Laurence Tribe, American Constitutional Law, §6-37, p. 1268 (3<sup>d</sup> ed. 2000). Second, Saenz v. Roe, 526 U.S. 489, 500-02 (1999), expressly recognizes that the right to travel in Art. IV, §2 includes the right to move from state to state and be treated as a welcome visitor while there. Moreover, Saenz's relevance transcends the factual limitation imposed by the Commonwealth because the right to travel provisions, including the 14<sup>th</sup> Amendment on which Saenz ultimately turned, share a common origin. 526 U.S. at 502 n.15. The principles articulated in Saenz regarding interstate mobility and national cohesion animate the Clause as well. See Laurence Tribe, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future - or Reveal the Structure of the Present, 113 Harv. L. Rev. 110 (1999).



471 U.S. 82 (1985); Baker, 648 So.2d at 893-95;  
Hawkins v. Moss, 503 F.2d 1171, 1179-80 (4<sup>th</sup> Cir. 1974).

The Commonwealth's emphasis (pp. 122-24) on "borrowing" statutes is misplaced.<sup>26</sup> Statutes of limitations may only be "borrowed" if non-residents receive access to the non-domicile court "upon terms which in themselves are reasonable and adequate." Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 562 (1920). Contrary to the Commonwealth's contention (p.124 n.103), §§11-12 do not "impose reasonable regulations" because they effectively shut the door on access to a state privilege for all non-residents from non-complying states. See, e.g., Spencer, 316 S.E.2d at 387-88; Baker, 648 So.2d at 893-95. Moreover, any semblance of reasonableness in relying on the law of a non-resident's home state is removed when deference would violate a state's own constitutional mandates. Cf. In re Lebbos, 423 Mass. 753, 755 (1996).

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<sup>26</sup> Borrowing statutes turn upon the law of the state where the cause of action arises, not the non-resident's home state. Thus, these statutes do not speak to a state's ability to imprison non-residents in the "legal box" of their home state's laws. Moreover, these cases concern access to the courts with the primary justification being one of harm to the non-domicile state (e.g., prevention of court congestion arising from "forum shopping"), not comity. See, e.g., Owens Corning v. Carter, 997 S.W.2d 560, 582 (Tx. 1999).

**C. The Commonwealth Has Not Borne its Burden of Showing No Less Restrictive Alternative.**

Assuming arguendo that a sufficient justification exists, the Commonwealth has still failed to carry its burden of showing the absence of a less restrictive alternative than discriminating against all non-resident couples who cannot marry in their home state.<sup>27</sup> See Lunding, 522 U.S. at 298.

**IV. THE COUPLES' INTERPRETATION OF THE STATUTORY SCHEME PROVIDES GREATER UNIFORMITY AND SENSE.**

The Couples' interpretation of §§11-12 is more consistent with their purpose, title and statutory scheme. See Commonwealth v. Welch, 444 Mass. 80, 85-87 (2005). First, viewed in the context of the Uniform Marriage Evasion Act as a whole (G.L. c. 207, §§10-13, 50), §12's "obvious purpose" points in the

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<sup>27</sup> For example, the Commonwealth could (1) apply §§11-12 only to states that maintain a reverse evasion law themselves, thereby obtaining the sister states' assent to operate by the same principles; (2) demand from each state an express legislative act that requests Massachusetts's enforcement of that state's marriage laws when that state's residents travel here, rather than simply guessing as to the intentions of the sister states; (3) deny licenses to non-residents prohibited from marrying at home only when the non-resident's home state offers an express recognition guarantee for Massachusetts residents; (4) deny licenses to non-residents only when the sister states express their highest level of disdain for the prohibited marriage by declaring it "void," rather than enforcing §§11-12 to all unauthorized marriages; (5) regulate marriages based solely on whether the laws of the other states prohibit the marriages expressly, rather than by mere implication.

Couples' favor, despite the Commonwealth's charge to the contrary (p. 142). Under the envisioned uniform scheme,<sup>28</sup> §§10-11 work in harmony to ensure that every state's particular policy on what marriages are declared void will be enforced uniformly throughout the country.<sup>29</sup> To read §12 more broadly to bar a different set of marriages, i.e., non-void marriages, would go beyond the uniformity and respect envisioned by the overall statutory scheme and actually show disrespect for other states' ability to properly determine for themselves how they will treat foreign marriages. For example, it would preclude foreign marriages that State A itself had not expressly declared that it would not allow.

Second, the title supports the Couples.<sup>30</sup> Rather

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<sup>28</sup> As evidenced by §13 and the reports of the Commissioners on Uniform State Laws (RA 480-84, 507-512), it was anticipated that every state would have comparable provisions to §10 (the evasion statute) and §11 (the reverse evasion statute).

<sup>29</sup> State A's evasion statute forbids its citizens from coming to Massachusetts to marry if their marriage is "prohibited and declared void" in State A. To respect and reinforce that evasion provision, Massachusetts, in turn, employs its "reverse evasion" provision (§11), which forbids the residents of State A from marrying here because their marriage would be "prohibited and declared void" in State A, their home.

<sup>30</sup> Both the history and text of the title show that c.360 was directed toward evasive marriages, i.e., it was only intended to reach those marriages that the domiciliary state expressly included within its evasion law. The title's actual text speaks to

than expanding §12 to reach non-void marriages as the Commonwealth claims (p. 142), the term "violation" in the title ensures that §§10-11 capture all void marriages, regardless of whether the participants had any intent to evade the laws of their home state.<sup>31</sup>

See RA 509 (cmt. 3); see also RA 482, 486.3, 507-11.

The Commonwealth concedes at the outset (pp.10, 146 n.123) that, prior to Goodridge, it never took steps to bar persons who could not marry in their home state from marrying in Massachusetts unless the marriage was

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"marriages in another state or country" rather than to marriages that would occur in Massachusetts and, thus, has no apparent relevance to Massachusetts clerks' obligations under §12. Compare title of c. 360 with RA 511 (title of the final uniform law approved by the Commissioners) and RA 508 (original title of uniform law when it concerned only evasive marriages).

<sup>31</sup> The Commonwealth is wrong to suggest (p.139 n.114) that the words "invalid" and "void" are equivalent. "Invalid" marriages fall into two categories: void and voidable. See generally 1 Charles P. Kindregan, Jr. and Monroe L. Inker, Massachusetts Practice, §19.2, at 738, §19.3 at 739-80 (3<sup>rd</sup> ed. 2002); 55 C.J.S. Marriage §43 et seq. (1998); Estate of DePasse, 97 Cal. App. 4<sup>th</sup> 92, 106 (Cal. Ct. App. 2002). When a state declares a marriage "invalid", without distinguishing whether the marriage is void or voidable, Massachusetts cannot deem that marriage to be void for purposes of §11. See, e.g., Goloff v. Schweiker, No. 80C5166, 1982 WL 21045, \*1 (N.D.Ill. Aug. 23, 1982). In addition, when a statute does not expressly state that a marriage is void when contracted, a court's declaration at the end of litigation that a marriage is void does not, by itself, indicate whether that marriage was void, or simply voidable, at its inception. See, e.g., Callow v. Thomas, 322 Mass. 550, 555 (1948). Thus, Lockyer v. City and County of San Francisco, 95 P.3d 459 (Cal. 2004) and Li v. Oregon, 110 P.3d 91 (Ore. 2005), which the Commonwealth cites (p. 141 n.116), do not depart from the long-standing rule that marriages must be declared void by statute to be void.

void under §11. That the Commonwealth unearths two Attorney General Opinions from 1936 and 1973 to “confirm that §12 has force independent of §11” (p. 143) changes nothing.<sup>32</sup> See Manser v. Sec’y of the Commonwealth, 301 Mass. 264, 271 (1938); Heublein v. Capital Distrib. Co., 434 Mass. 698, 707 (2001). Neither Opinion establishes the “precise distinction” claimed here, i.e., that §12 creates a broader marriage ban than §11.<sup>33</sup>

Also incongruous is the Commonwealth’s position on marriages that occur in Massachusetts despite the ban in §§11-12. If marriages are void in the home state, §11 declares them “null and void” under Massachusetts law if they somehow occur here. If those marriages are non-void in the home state, however, they are equally

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<sup>32</sup> The Attorney General’s historical perspective is irrelevant to whether the Registrar’s current view of §12 is a new interpretation. Although the question underlying the 1936 Opinion arguably supports the notion that §12 has independent significance or force, the Couples have never disagreed with that notion: §11 prohibits evasive marriages declared void while §12 imposes obligations on the clerks.

<sup>33</sup> Exposing their dubious relevance, the Commonwealth concedes (p. 144 n.120, 145) that the 1936 Opinion concerns procedural prerequisites to marriage in other states, and the 1973 Opinion ultimately does not answer any question relating to §§11-12. Although the 1973 Opinion twice notes that a non-resident is subject to the marriage laws of his home state, citing §11 and/or §12, that general proposition is not in dispute here. Arguably, the 1973 Opinion actually undermines the Commonwealth’s position by equating marriages prohibited under §12 with marriages voided by §11.

as illegal here (according to the Commonwealth); but no penalties are imposed on the clerk for allowing the marriage and the marriage is not voided - the seeming goal of the statutory scheme.<sup>34</sup> In short, there is no mechanism to deal with this illegality.<sup>35</sup>

Respectfully submitted,

THE PLAINTIFF COUPLES

By their Counsel,

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Michele E. Granda, BBO # 564413  
Mary L. Bonauto, BBO # 549967  
Gary D. Buseck, BBO #067540  
Karen L. Loewy, BBO # 647447  
GAY & LESBIAN ADVOCATES & DEFENDERS  
30 Winter Street, Suite 800  
Boston, MA 02108  
617-426-1350

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<sup>34</sup> See, e.g., RA 508 (cmt. 1) ("void" declaration designed to thwart reliance on rule of recognition).

<sup>35</sup> The Commonwealth cannot cure this inherent problem by refusing to record the "improper" marriage licenses. AG Br. 4 n.2, 17 n.12. The Registrar must bind and index marriage records once municipal clerks have issued the licenses. See G.L. c. 111, § 2; Grant v. Aldermen of Northampton, 316 Mass. 432, 433 (1944). In any event, the failure to bind the records at the Registry would have no legal significance: that the marriages are recorded at the municipal level is sufficient to ensure the validity of the marriage. See G.L. c. 46, §§ 2, 17A, 19.