COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 04-2656-H

SANDRA AND ROBERTA COTE-WHITACRE, et al.,

Plaintiffs,

v.

DEPARTMENT OF PUBLIC HEALTH, et al.,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW
REGARDING RHODE ISLAND LAW

The defendants Registrar of Vital Records and Statistics (RVRS) et al.[1] submit this memorandum to address the question posed by the Supreme Judicial Court in its remand order to this Court: whether same-sex marriage is currently "prohibited" in Rhode Island within the meaning of G.L. c. 207, § 12.[2] See Cote-Whitacre v. Department of Public Health, 446 Mass.

[1] This memo will use the term "Registrar" to refer to all defendants in the Cote-Whitacre action, including the Commissioner and Registrar in their official capacities, as well as the Department of Public Health and the Registry of Vital Records and Statistics (RVRS). The companion case of Johnstone v. Attorney General, No. 04-2655, brought by city and town clerks, has been dismissed by stipulation without prejudice.

[2] As jointly proposed by the parties at the May 15, 2005 status conference in this matter, and with this Court's approval, resolution of the similar question regarding New York law, also posed by the Supreme Judicial Court's decision, will await a decision by the New York Court of Appeals in Hernandez v. Robles and three other cases, to be argued on May 31, 2006, concerning the constitutionality of New York statutes that the lower courts have interpreted as not permitting sane-sex marriage. See New York Court of Appeals website, "Same Sex Marriage Appeals to be Webcast Live," http://www.courts.state.ny.us/ctapps/ (last visited May 30, 2006). "The Court normally decides cases within thirty to sixty days after the oral argument date." See http://www.courts.state.ny.us/ctapps/counsguide.htm (last visited May 30, 2006).

350, 352 (2006). The Registrar sets forth herein the basis for his conclusion that same-sex marriage is prohibited by Rhode Island statutory and common law.

FACTUAL AND LEGAL BACKGROUND

The Registrar will assume familiarity with the Supreme Judicial Court's decisions in Cote-Whitacre and in Goodridge v. Department of Public Health, 440 Mass. 309 (2003), and will set forth herein only the factual and legal background necessary to resolution of the specific issue now before this Court.

General Laws c. 207, § 12 (referred to herein as "§ 12"), provides (with emphasis added): "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." Before Goodridge took effect on May 17, 2004, the Registrar sent to each city and town clerk in the Commonwealth, pursuant to G.L. c. 207, § 37, a guide to legal impediments to marriage in all 50 states and other jurisdictions. See Affidavit of Stanley E. Nyberg (July 8, 2004), ¶ 19. The guide stated, as to Rhode Island, that "[m]arriage between persons of the same sex is not permitted under the law of Rhode Island." See Clerks' Affidavits Ex. K (filed June 2004). The Registrar's letter accompanying the guide stated that, based on the contents of the guide and G.L. c. 207, §§ 11 and 12, "unless circumstances change, no person who resides and intends to continue to reside in such a state or jurisdiction other than Massachusetts should be issued a certificate of marriage." See Clerks' Affidavits Ex. L (filed June 2004). The Registrar thus interpreted the legal impermissibility of same-sex marriage in Rhode Island (and various other states) as the equivalent of a "prohibition" for § 12 purposes. As

set forth infra, the basis for the Registrar's doing so was language in Goodridge itself.

Later in May, 2004, plaintiffs Wendy Becker and Mary Norton, who reside and intend to continue to reside in Rhode Island, filed a Notice of Intention to Marry (seeking what is commonly known as a "marriage license," but is statutorily termed a "certificate," see G.L. c. 207, § 28) from the Attleboro City Clerk's office. They were informed that none could be issued them. See Couples' Second Amended Complaint, ¶¶ 43-49. This action followed; the Couples sought a preliminary injunction against enforcement of, inter alia, § 12; and the Superior Court's denial of such relief was upheld in Cote-Whitacre, 446 Mass. 350. The Supreme Judicial Court remanded, however, for an expedited determination whether Rhode Island law "prohibited" same sex marriage within the meaning of § 12. Id. at 352.[3]

The Supreme Judicial Court was divided as to what standard to use in determining whether another state's laws "prohibited" a marriage for § 12 purposes. Six Justices agreed that

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[3] The Cote-Whitacre court's March 30, 2006 order for an expedited determination on remand, coupled with the 28-day delay in issuance of the court's rescript, see Mass. R. App. P. 23, had the effect of creating a brief period during which the legislatures of other states, including Rhode Island, could take any action they deemed desirable in response to the decision. The Cote-Whitacre decision was immediately and widely publicized. E.g., Pam Belluck and Katie Zezima, Massachusetts Court Limits Gay Unions, N.Y. Times, March 31, 2006, at A10 (SJC's "ruling left open the possibility that gay couples from states like New York and Rhode Island that do not explicitly ban same-sex marriage might be able to marry in Massachusetts") (available on Westlaw at 2006 WLNR 5382815); Court Unsure If R.I. Gays Can Wed in Mass., Providence (R.I.) Journal, March 31, 2006, at A1 (SJC's ruling "left the door open for same-sex couples in Rhode Island looking to cross the state line to marry"; Rhode Island Attorney General's spokesman "said that the General Assembly or state courts are the proper forums in which to decide the issue") (available on Westlaw at 2006 WLNR 5657887). On May 9, the Rhode Island Senate's Judiciary Committee held a hearing on two bills, S. 2310 (expressly prohibiting same-sex marriage) and S. 2149 (expressly authorizing same-sex marriage). That same day the Committee recommended that both bills be "held for further study." See Rhode Island General Assembly Bill Status System, available at http://dirac.rilin.state.ri.us/BillStatus/WebClass1.ASP?WCI=Index&WCE=callBillStatus&WCU& (last visited May 30, 2006) (giving bill's status once its number is entered into "Bills" field).

an explicit state constitutional or statutory prohibition of same-sex marriage would constitute a "prohibition" for § 12 purposes. See 446 Mass. at 363-64 n.12 (Spina, J., concurring, joined by Cowin and Sosman, JJ.); 446 Mass. at 393 (Marshall, C.J., concurring, joined by Cordy, J. and in part by Greaney, J.).[4] Those six Justices also agreed that a state appellate court decision could establish such a prohibition, although Chief Justice Marshall's concurrence required a "controlling" appellate decision (e.g., a decision by a state's highest court), 446 Mass. at 383 n.1, 393; whereas Justice Spina's concurrence imposed no such requirement. 446 Mass. at 364 n.12. Where the two opinions differed was that in Chief Justice Marshall's view, absent an express prohibition in a constitutional or statutory provision or "controlling" appellate decision, there was no prohibition for § 12 purposes. 446 Mass. at 392, 393 (Marshall, C.J., concurring); see id. at 385-87 (relying on legislative history of § 12) . In Justice Spina's view, in the absence of such authority,

> it is necessary to look at the home State's general body of common law and ascertain whether that common law has interpreted the term "marriage" as the legal union of one man and one woman as husband and wife. See Goodridge v. Department of Pub. Health, 440 Mass. 309, 319 (2003). If it has, then same-sex marriage would be "prohibited" in that State[.]

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[4] The seventh Justice, Ireland, J., dissented from the judgment on a variety of grounds, 446 Mass. at 395 (Ireland, J., dissenting), but stated:

> As Chief Justice Marshall points out, under Justice Spina's broad interpretation of the marriage licensing statute, the executive branch would be permitted "to act as the final arbiter of the penumbras of another State's 'continually evolving' common law on same-sex marriage, and only same-sex marriage, see ante at 361 (Spina, J., concurring)," and the Commonwealth would be able to "cherry-pick the pronouncements as to same-sex marriage to which it will give credence." Ante at 384 (Marshall, C.J., concurring).

446 Mass. at 406 (Ireland., J., dissenting).

446 Mass. at 364 n.12 (Spina, J., concurring). Justice Spina also appeared to take a broader view of what could constitute a state statutory "prohibition"; in his opinion, "State statutory language to the effect that such marriage is not permitted, not recognized, not valid, or the like," would qualify. 446 Mass. at 363. (Spina, J., concurring).

Justice Spina's citation to Goodridge referred to the core of the following passage, which is set forth in its entirety so that this Court may see its context. In discussing "G.L. c. 207, the marriage licensing statute, which controls entry into civil marriage," 440 Mass. at 317 (also referring to c. 207 as a "gatekeeping" statute), Goodridge stated (with emphasis added):

> In short, for all the joy and solemnity that normally attend a marriage, G.L. c. 207, governing entrance to marriage, is a licensing law. The plaintiffs argue that because nothing in that licensing law specifically prohibits marriages between persons of the same sex, we may interpret the statute to permit "qualified same sex couples" to obtain marriage licenses, thereby avoiding the question whether the law is constitutional. . . . This claim lacks merit.
>
> We interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to "the ordinary and approved usage of the language." . . . The everyday meaning of "marriage" is "[t]he legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed.1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law. See, e.g., Milford v. Worcester, 7 Mass. 48, 52 (1810) (marriage "is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife"). This definition of marriage, as both the department and the Superior Court judge point out, derives from the common law. See Commonwealth v. Knowlton, 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by Massachusetts statutes and Constitution). See also Commonwealth v. Lane, 113 Mass. 458, 462-463 (1873) ("when the statutes are silent, questions of the validity of marriages are to be determined by the jus gentium, the common law of nations"); C.P. Kindregan, Jr., & M.L. Inker, Family Law and Practice § 1.2 (3d ed.2002). Far from being ambiguous, the undefined word "marriage," as used in G.L. c. 207, confirms the General Court's intent to hew to the term's common-law and quotidian meaning concerning the genders of the marriage partners.

> The intended scope of G.L. c. 207 is also evident in its consanguinity provisions. See Chandler v. County Comm'rs of Nantucket County, 437 Mass. 430, 435 (2002) (statute's various provisions may offer insight into legislative intent). 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. See G.L. c. 207, §§ 1-2. The only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry. We conclude, as did the judge, that G.L. c. 207 may not be construed to permit same-sex couples to marry.

Goodridge, 440 Mass. at 318-20 (citations omitted).

Similarly, despite the fact that the Commonwealth had no express constitutional or statutory prohibition against same-sex marriage, the Goodridge Court referred to the Commonwealth as having a "prohibition" against same-sex marriage, the constitutionality of which was, of course, the principal question before the court.[5] "The department posits three legislative rationales for prohibiting same-sex couples from marrying: . . . We consider each in turn." Goodridge, 440 Mass. at 331 (emphasis added); see id. at 337, 341 (referring to other rationales offered by DPH or amici for Commonwealth's "prohibiting" same-sex marriage).

It was based on this language in Goodridge regarding what constituted a "prohibition" that the Registrar concluded that Rhode Island "prohibited" same-sex marriage, based on the Rhode Island statutes and case-law set forth below. Now that the Cote-Whitacre court has focused more specifically on the meaning of "prohibit" as that term appears in § 12 (an issue not before the court in Goodridge), this Court must resolve whether the Rhode Island statutes and case-law are sufficient to establish such a "prohibition."

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[5] In Adoption of Tammy, 416 Mass. 205, 207-08 (1993), the court noted the recognition by a committed same-sex couple "that the laws of the Commonwealth do not permit them to enter into a legally cognizable marriage[.]"

ARGUMENT

RHODE ISLAND LAW PROHIBITS SAME-SEX MARRIAGE.

Rhode Island's marriage licensing law requires as follows:

> Persons intending to be joined together in marriage in this state must first obtain a license from the clerk of the town or city in which:
>
> > (1) The female party to the proposed marriage resides; or in the city or town in which
> > (2) The male party resides, if the female party is a nonresident of this state; or in the city or town in which
> > (3) The proposed marriage is to be performed, if both parties are nonresidents of this state.

R.I. G.L. § 15-2-1(a) (emphasis added; copy included in Ex. A.). "Both the bride and groom shall subscribe to the truth of data in the application" for a marriage license. Id. § 15-2-7 (emphasis added; copy included in Ex. A). These statutes clearly indicate the Rhode Island General Assembly's intent that marriage be between a man and a woman.

By way of comparison, Chief Justice Marshall's Cote-Whitacre concurrence concluded that Vermont "prohibited" same-sex marriage, based on a Vermont statute providing as follows: "Marriage is the legally recognized union of one man and one woman." Cote-Whitacre, 446 Mass. at 392 n.11 (Marshall, C.J., concurring) (quoting Vt. Stat. Ann. tit. 15, § 8 (2002)). The Vermont statute does not use the word "only" before the phrase "one man and one woman," nor does it use the term "prohibit" in connection with same-sex marriages; indeed, it does not use the word "prohibit" or expressly refer to same-sex marriages at all. Yet Chief Justice Marshall concluded that Vermont was among those "States where same-sex marriage is expressly prohibited by statute[.]" Id.; see Cote-Whitacre, 446 Mass. at 352 (per curiam) ("A majority of the Justices also agree that, as to the plaintiffs who reside in Connecticut, Maine, New

Hampshire, and Vermont, . . . same-sex marriage is prohibited in those States.")

Rhode Island's statutes, which require that "[p]ersons intending to be joined together in marriage" include "[t]he female party" and "[t]he male party," and that "[b]oth the bride and groom" subscribe to the truth of the license application, are as clear as the Vermont statute in their intent that marriage be between a man and a woman.

Moreover, Rhode Island's consanguinity laws use gender-specific terms, i.e., prohibiting a man from marrying specified female relatives and a woman from marrying specified male relatives. R.I. G.L. §§ 15-1-1, 15-1-2 (copies included in Ex. A). The plain meaning of these statutes,[6] including their use of the commonly understood term "marry," is that only a man and a woman may marry in Rhode Island. This is precisely the same reasoning used in Goodridge to conclude, based on the common meaning of "marriage" and similar gender-specific consanguinity provisions in Massachusetts statutes, that those statutes did not allow--and actually prohibited--same-sex marriage. See supra. These and the previously-cited Rhode Island statutes necessarily indicate that same-sex marriage is prohibited in Rhode Island.

Apart from Rhode Island statutes, "[a]lthough common-law marriages have long been recognized as valid in [Rhode Island], . . . the existence of a common-law marriage must be established by clear and convincing evidence that the parties seriously intended to enter into the

[6] Rhode Island follows the familiar rules of statutory construction that "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings; [w]hen confronted with statutory provisions that are unclear and ambiguous, however, we examine statutes in their entirety in order to glean the intent and purpose of the Legislature[; and] [i]n so doing, we consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." Providence & Worcester Railroad Co. v. Pine, 729 A.2d 202 (R.I. 1999) (citations and internal quotations omitted).

husband-wife relationship." DeMelo v. Zompa, 844 A.2d 174, 177 (R.I. 2004) (citations and internal quotations omitted; emphasis added; copy included in Ex. B). Thus, to the extent that persons may marry outside of the statutory framework discussed above, plainly the Rhode Island courts envision that only opposite-sex couples may do so. "'Marriage' is a status which determines the relations between husband and wife." State v. Downing, 175 A. 248, 249 (R.I. 1935) (copy included in Ex. B). Therefore, as a matter of common law, Rhode Island defines marriage as between a man and a woman. See Cote-Whitacre, 446 Mass. at 364 n.12 (Spina, J., concurring) (concluding that another state's common law is relevant to whether that state "prohibits" same-sex marriage).

CONCLUSION

For the foregoing reasons, the Court should rule that Rhode Island law "prohibits" same-sex marriage within the meaning of § 12 and should enter an order declining to issue a preliminary injunction barring the Registrar from enforcing § 12 with respect to plaintiffs Wendy Becker and Mary Norton.[7]

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[7] The Supreme Judicial Court's remand order for an expedited ruling is most logically interpreted as directing this Court to reconsider whether to issue a preliminary injunction as requested by the Rhode Island and New York plaintiffs. Issuance of an order denying such an injunction as to the Rhode Island plaintiffs would allow for an appeal under G.L. c. 231, § 118, ¶ 2.

If the Court nevertheless concludes that Rhode Island law does not "prohibit" same-sex marriage within the meaning of § 12, at most it should enter a preliminary injunction. Ordinarily injunctive relief would be unnecessary; it would be sufficient for the Court to declare the law, and the Registrar, as a public official, would be presumed to be prepared to act in accordance with the Court's declaration. However, a court is not authorized to issue a "preliminary declaration," MBTA Advisory Board v. MBTA, 382 Mass. 569, 574 (1981); and this case is not yet in a posture where a final judgment is possible, given the pendency of claims regarding New York law and regarding the Registrar's duties under G.L. c. 111, § 2.

Respectfully submitted,

THOMAS F. REILLY
ATTORNEY GENERAL

Peter Sacks, BBO No. 548548
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108-1698
(617) 727-2200, ext. 2064
Peter.Sacks@ago.state.ma.us

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