COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. Superior Court
Civil Action No. 04-2656-G

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

v.

DEPARTMENT OF PUBLIC HEALTH,
CHRISTINE C. FERGUSON, in her official capacity as Commissioner of the Department of Public Health,
REGISTRY OF VITAL RECORDS AND STATISTICS, and
STANLEY E. NYBERG, in his official capacity as Registrar of Vital Records and Statistics,
Defendants

PLAINTIFFS' MEMORANDUM OF LAW REGARDING RHODE ISLAND LAW IN SUPPORT OF RHODE ISLAND PLAINTIFFS' ABILITY TO MARRY IN MASSACHUSETTS

Rhode Island Plaintiffs Wendy Becker and Mary Norton submit that they are not expressly prohibited by G.L. c. 207, §§ 11 and 12 from marrying in Massachusetts under the legal standards advanced by four of the seven justices of the Supreme Judicial Court ("SJC") in Cote-Whitacre v. Dept. of Pub. Health, 446 Mass. 350 (2006), and, thus, should be able to marry in Massachusetts without delay. The Defendants' asserted justifications for barring Plaintiffs Becker and Norton from marriage under Section 12 are insufficient as a matter of law in light of the stated opinions of Chief Justice Marshall and Justices Greaney, Cordy and Ireland, all of which plainly reject the standard articulated by Justice Spina who would mine the whole of Rhode Island law to divine a prohibition

where none has been expressly stated. See id. at 383-88 (Marshall, C.J. concurring); id. at 395 (Greaney, J., concurring); id. at 406-07 (Ireland, J., dissenting).

In order to justify the denial of marriage under Section 12, this SJC majority would require, at a minimum,[1] evidence that marriage for same-sex couples is "prohibited" by an express pronouncement in Rhode Island's positive law (i.e., by constitutional amendment, statute, or controlling appellate decision). See id. at 384-85 (Marshall, C.J., concurring). Yet, instead of identifying any express prohibition in Rhode Island law that would satisfy Justices Marshall, Greaney, Cordy and Ireland, the Defendants advance an interpretive analysis of Rhode Island common law and statutes -- based on the gendered terms in some of Rhode Island's marriage statutes and two judicial decisions describing marriage in gendered terms -- which analysis is designed to fill the gap created by the glaring absence of any express prohibitory statement in Rhode Island's positive law. Whether this interpretative analysis would be sufficient for Justice Spina is beside the point because Justices Marshall, Greaney, Cordy and Ireland would all hold for the Plaintiffs on the "evidence" presented.

In Defendants' Memorandum of Law Regarding Rhode Island Law ("Defendants' Memo"), the Defendants acknowledge the divergent statutory analyses of the justices but avoid the question of what standard should control here. They never once argue that Justice Spina's approach to Section 12 should trump the views of the four Justices who expressly rejected it, and they also never assert that the "evidence" they have advanced would satisfy Justices Marshall, Greaney, Cordy, or Ireland's requirements. See generally Defendants' Memo, pp. 3-9.

[1] Justice Ireland, one member of this functional majority, would allow Rhode Island same-sex couples to marry, without requiring anything more, because Rhode Island is not one of the "five States that have enacted 'like legislation.'" Id. at 404 n.14 (Ireland, J., dissenting). See also infra, pp. 8, 9-10. Thus, a Rhode Island couple who is eligible to marry under Chief Justice Marshall's standard would automatically receive the support of Justice Ireland without having to satisfy any additional criteria.

As four of the Justices of the Supreme Judicial Court would find for Plaintiffs Becker and Norton notwithstanding the Defendants' asserted "evidence," this Court should enter preliminary and permanent relief for these Rhode Island Plaintiffs in the form of a judgment on their Second Amended Verified Complaint Seeking Declaratory and Injunctive Relief and Mandamus ("Second Amended Complaint"),[2] thus removing G.L. c. 207, §§ 11 and 12 as a barrier to Plaintiffs Becker and Norton's marriage in Massachusetts.

FACTUAL AND LEGAL BACKGROUND

In 1913, the Legislature enacted G.L. c. 207 §§ 11 and 12 as part of a (now withdrawn) uniform law called the Uniform Marriage Evasion Act. Section 11 precludes and renders void the marriages of non-resident couples whose home State would expressly declare the marriage "void" if entered there. G.L. c. 207, §11; Cote-Whitacre, 446 Mass. at 359, 387-88 (recognizing that "the narrow and specific language of §11" is triggered when "the relevant statutory language of the applicant's home State explicitly provides that particular marriages are 'void.'") Section 12 governs the marriage licensing responsibilities of municipal clerks and 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*.

[2] Given that the SJC has already considered the legal issues underlying Plaintiffs' Motion for Preliminary Injunction and directed this Court to take immediate action in response, this Court is well-positioned to enter a judgment in favor of Rhode Island Plaintiffs Becker and Norton. Contrary to Defendants' position (see Defendants' Memo, p. 9 n.7), the Rhode Island Plaintiffs' claims are ripe for entry of judgment, notwithstanding the pendency of claims asserted by the New York Plaintiffs and the outstanding issues, if any, regarding the Registar's duty to record the licenses of already married couples (i.e., Count IV of Plaintiffs' Second Amended Complaint as it pertains to the Plaintiff Couples from Connecticut, Maine, New Hampshire and Vermont). See Cote-Whitacre, 446 Mass. at 352 (per curiam) (directing entry of judgment against some but not all of the Plaintiff Couples). See also id. at 361 n. 10 and 362 n. 11 (Spina, J., concurring) (clarifying that the already-entered marriages of couples from non-void states are "presumptively valid" and should "for all legal purposes be treated as a valid marriage"). Having been prevented from marrying in the first place, the license recording issue, which the parties are presently working to resolve, does not affect Plaintiffs Becker and Norton. (Even with respect to other already-married couples from Rhode Island, if this Court were to conclude that Rhode Island law does not "prohibit" the marriage of same-sex couples within the meaning of §12, the Commonwealth would have no basis to contest the recording or indexing of licenses already-issued to such Rhode Island couples.) Simply put, there is no just reason to delay the entry of judgment here. Defendants will still be able to appeal the judgment of this Court, should they so choose.

G.L. c. 207, §12 (emphasis added).

Prior to the expiration of the stay in Goodridge on May 17, 2004, the Commonwealth never barred non-resident couples from marrying under Sections 11 and 12, regardless of whether the marriage would be technically "void" or merely prohibited if contracted in the home state. See Affidavits of Town and City Clerks (filed June 21, 2004 in the then-consolidated case, Johnstone v. Reilly, C.A. No. 04-02655-G, the "Clerks' Affidavits"), e.g., Affidavit of Douglas Johnstone, ¶¶4-6. So long as the applicants executed the Notice of Intention to Marry, the Commonwealth did not prevent clerks from issuing marriage licenses to non-residents. Id.

Starting May 17, 2004 and continuing to present day, the Commonwealth has instructed municipal clerks to deny marriage licenses to all out-of-state same-sex couples, no matter their State of residence. Id. With respect to Rhode Island, the Commonwealth expressed its reason for barring marriage to all Rhode Island same-sex couples in its 57-page guide listing the marriage laws of other U.S. states and territories, which provides, in relevant part: "Marriage between same-sex persons in Rhode Island is not permitted in Rhode Island." See Appendix to Clerks' Affidavits, Exhibit K; see also Commonwealth's current Guide (dated June 21, 2005) at http://www.mass.gov/Eeohhs2/docs/dph/vital_records/impediment.pdf.

Plaintiffs Wendy Becker and Mary Norton of Providence, Rhode Island, filed their Notice of Intention of Marriage in Attleboro, Massachusetts on May 21, 2004 but were informed by the Attleboro clerk that they would not be eligible to marry solely because they live in Rhode Island. Plaintiffs Becker and Norton, committed to each other for eighteen years, are raising two young children -- a six-year-old daughter and a three-year-old son -- both of whom they jointly adopted through Rhode Island's foster care system. Second Amended Complaint, ¶¶43-49. When they were denied the opportunity to marry, they joined in bringing this lawsuit with other

same-sex couples who had been adversely affected by the enforcement scheme the Commonwealth devised following Goodridge.

In addition to other claims, Plaintiffs Becker and Norton alleged that the Commonwealth's test of marriage eligibility (i.e., whether couples are able to marry in their home state) was inconsistent with the requirements of Sections 11 and 12. Moreover, they alleged that the Commonwealth purposely resurrected Sections 11 and 12 after years of disuse and interpreted them to new extremes in order to bar 100% of same-sex couples from across the United States from marrying here – extending Sections 11 and 12's reach beyond "void" or "prohibited" marriages to all marriages that could not have been celebrated in the home state – thus depriving non-resident same-sex couples of the equal protection of the laws.

The Plaintiffs filed a Motion for Preliminary Injunction, seeking to enjoin the Defendants from administering Sections 11 and 12 to bar otherwise qualified non-resident same-sex couples from obtaining marriage licenses and directing the Defendants to process and index marriage applications and licenses from non-resident same-sex couples in the ordinary course. In August, 2004, the Superior Court (Ball, J.) denied the Couples' Motion, and the Plaintiffs appealed.

On March 30, 2006, the Supreme Judicial Court issued its decision on the Plaintiffs' Motion for Preliminary Injunction. See Cote-Whitacre, 446 Mass. at 350. Though affirming in large part this Court's denial of their motion, the SJC ruled that the Commonwealth had erred in its interpretation of Section 12 and directed that the cases of the Rhode Island and New York Plaintiffs proceed in this Court on an expedited basis for a determination of whether couples from those states were outside the reach of Section 12 as now authoritatively construed for the first time by the SJC.

Although the SJC's decision consisted of four separate opinions with various rationales asserted, on the question of the interpretation of Section 12, a majority of the Justices concluded that the Commonwealth's interpretation of this statutory scheme was overly broad and implicated the selective enforcement doctrine.

Chief Justice Marshall's Opinion

In her separate opinion, Chief Justice Marshall (with whom Justices Greaney and Cordy joined) found the Commonwealth's interpretation of Section 12 to be overly broad and selective:

> [T]he record leaves no question that the Commonwealth has applied G.L. c. 207, §12, in a manner purposely intended to deny any non-resident same-sex couple the opportunity to marry in Massachusetts. … This is a classic case of unequal enforcement. See Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L.Ed. 220 (1886) (unequal enforcement of laws regulating laundries to disadvantage Chinese business owners).
>
> In my view, both the requirements of G.L. c. 207, §12, and the requirements of equal protection demand that nonresident same-sex couples who wish to marry in Massachusetts, and who reside in States where they are *not expressly prohibited from marrying by statute, constitutional amendment, or controlling appellate court decision,* be permitted, at the very least, to present evidence to rebut the Commonwealth's claim that their home State would prohibit their marriage.

Cote-Whitacre, 446 Mass. at 391-92 (Marshall, C.J., concurring) (emphasis added).

In reaching this conclusion, Chief Justice Marshall soundly rejected the Commonwealth's and Justice Spina's interpretation on Section 12 - namely, that "any marriage that is not expressly *permitted* by the law of the couple's home State must be deemed 'prohibited' by that State." Id. at 383. In Chief Justice Marshall's view, whether Rhode Island itself would issue marriage licenses to same-sex couples is not relevant; rather, what is relevant is whether the express requirements of Section 12 have been met. Id. at 384. Chief Justice Marshall emphasized that Section 12 "lays out clear, objective criteria," id. at 384, and that, to bar marriage under Section

12, the home state must affirmatively and positively "put itself on record through a positive statement of the law that the nuptials are 'prohibited.'" Id. at 387; see also id. at 385 ("That the reach of §12 extends only to express, controlling prohibitions on a particular marriage is evident from its history.")

Though it would be "appropriate for a court to resort to the common law of its own jurisdiction to fill in the gaps and interstices of statutes," Chief Justice Marshall made clear that a Massachusetts court should not resort to such interpretative processes when examining another State's laws pursuant to Section 12. See, e.g., id. at 387 n.4. This is because Section 12 "directs our courts to employ a specific set of criteria for determining the law of another State." Id. In the absence of a direct statement on the question, to allow the Commonwealth to roam the law of another state to predict or divine the meaning of that state's laws, would be, in Justices Marshall's words, to invite the Commonwealth "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," id. at 384; "to cherry-pick the pronouncements as to same-sex marriage to which it will give credence," id.; to do "serious damage to the principle of limited government," id.; and to go beyond the intent of Section's 12 enactors whose choice of words "urge [] restraint when determining which marriages the Legislature intends to declare 'prohibited.'" Id. at 388.

In sum, according to Chief Justice Marshall (speaking for herself and Justices Greaney and Cordy),

> G.L. c. 207, §12, plainly requires the Commonwealth to refrain from issuing marriage licenses to any out-of-State couple whose nuptials would be directly prohibited in their home State and, conversely, to issue marriage licenses and solemnize marriages *in all other cases*.

Id. at 385 (emphasis added).

Justice Ireland's Opinion

Justice Ireland advances an even more narrow interpretation of Section 12. Justice Ireland would read Section 12's "prohibition" requirement as applying, at best, only to the five States who have adopted "like legislation."[3] Id. at 404 n.14. Rhode Island has never adopted the Uniform Marriage Evasion Act, in form or substance, and as such, Plaintiffs Becker and Norton would not be precluded from marrying here under Justice Ireland's interpretation of Section 12.

Notably, Justice Ireland follows Chief Justice Marshall's opinion in repudiating the Commonwealth's and Justice Spina's approach to Section 12. On this exact point, Justice Ireland states:

> 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, 844 N.E.2d at 637 (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, 844 N.E.2d at 653 (Marshall, C.J., concurring).

Id. at 406. Simply put, Justice Spina's approach to the statute is, quite obviously, one that Justice Ireland rejects.

[3] Only five states (including Massachusetts) ever enacted, in full or in substance, the Uniform Marriage Evasion Act: Illinois, Louisiana, Vermont, and Wisconsin. See 1915 Ill. Laws 496; 1914 La. Acts 151; 1912 Vt. Acts & Resolves 110; 1915 Wisc. Stat. 270. The Commissioners on Uniform State Laws withdrew the Uniform Marriage Evasion Act in 1943 after concluding that, in the absence of its widespread adoption, "it merely tend[ed] to confuse the law." Cote-Whitacre, 446 Mass. at 404 n.14 (Ireland, J., dissenting) (citations omitted). Massachusetts is one of now only four states to maintain a version of the Uniform Marriage Evasion Act on its books. The three states that maintain this uniform law in addition to Massachusetts are Illinois, Wisconsin, and Vermont. See 750 Ill. Comp. Stat. 5/217; Wis. Stat. Ann. §765.04; Vt. Stat. Ann. Tit. 15, §6. Louisiana repealed its law in the wake of Loving v. Virginia, 388 U.S. 1 (1967). See 1972 La. Acts 171. New Hampshire and Wyoming enacted reverse evasion statutes of their own, though theirs were not directly associated with the Uniform Marriage Evasion Act itself. See N.H. Rev. Stat. §457:44; Wy. St. §20-1-103.

Justice Spina's Opinion

Because Justice Spina's approach to Section 12 has been expressly rejected by Justices Marshall, Greaney, Cordy, and Ireland, id. at 383-88, 395, 406-07, Justice Spina's position on whether a Rhode Island same-sex couple is precluded from obtaining a marriage license by Section 12 cannot control these proceedings and, thus, is irrelevant here.[4]

ARGUMENT

I. RHODE ISLAND LAW DOES NOT "PROHIBIT" MARRIAGE FOR SAME-SEX COUPLES WITHIN THE SJC'S INTERPRETATION OF SECTION 12.

Plaintiffs Becker and Norton now have the opportunity "to present evidence to rebut the Commonwealth's claim" that Rhode Island would "prohibit" their marriage within the meaning of Section 12. See Cote-Whitacre, 446 Mass. at 352 (per curiam) and 392 (Marshall, C.J., concurring). Whether under the standard set by Chief Justice Marshall or that set by Justice Ireland, the Plaintiffs are not precluded from marriage eligibility by Section 12[5] and, therefore, are entitled to a judgment allowing them to marry immediately.

A. Plaintiffs Satisfy Justice Ireland's Criteria For Marriage Under Section 12.

The fact that Rhode Island never enacted the Uniform Marriage Evasion Act, in form or substance, conclusively demonstrates that Rhode Island same-sex couples are not "prohibited" from marrying under Justice Ireland's interpretation of Section 12. See id. at 404 n.14 ("[A] plain reading of the statute suggests that §§11 and 12 should only apply to the five States that

[4] The difference between Justice Spina's and Chief Justice Marshall's interpretation is Justice Spina's willingness to "look at the home State's general body of common law [to] ascertain whether that common law has interpreted the term "marriage" as the legal union of one man and one woman as husband and wife." Id. at 363 n.12 (Spina, J., concurring); see also id. at 383-84, 387 n.4, 388-89 (Marshall, C.J., concurring).

[5] Plaintiffs Becker and Norton are otherwise qualified to marry in Massachusetts, a point the Defendants have never contested.

have enacted 'like legislation.'") (Ireland, J., dissenting). For this reason, Justice Ireland would allow Plaintiffs Becker and Norton to marry.[6]

B. Plaintiffs Satisfy Justices Marshall, Greaney, and Cordy's Criteria for Marriage Under Section 12.

In Chief Justice Marshall's view, Section 12 is a limited purpose statute. It is designed to balance two competing interests: facilitating the marriages of non-residents while simultaneously policing within Massachusetts only the marriages of non-residents that are forbidden at home. See id. at 386-87 (Marshall, C.J., concurring) (discussing the uniform law's dual legislative goals: "[to] give full effect to the *prohibitory laws* of each state" and to support all marriages that do not offend the home state's public policy "as *declared* by [the home state's] laws") (citations omitted). Rather than create a guessing game as to what another state expects the Commonwealth to do when confronted with a marriage application from one of its non-residents, Section 12 requires other states to speak clearly against the marriage if they want the Commonwealth to prevent it. Id. at 387. When the home state unequivocally "put[s] itself on record through a positive statement of the law that the nuptials [in the home state] are 'prohibited,'" the Commonwealth's municipal clerks must bar that marriage here under Section 12. Id. In marriage parlance, Section 12 is the statutory equivalent of "speak now or forever hold your peace." Failure of another state to speak clearly against the marriage means the marriage will go forward. Id. at 385.

Thus, according to Chief Justice Marshall's opinion, "the word 'prohibited' in §12 refers only to marriages that are expressly forbidden by another's State's positive law - that is, by constitutional amendment, statute, or controlling appellate decision." Id. at 384-85 (Marshall, C.J., concurring). Despite a thorough canvassing of Rhode Island law, Plaintiffs Becker and

[6] The Defendants would seemingly concede that the Plaintiffs can marry under Justice Ireland's reading of Section 12.

Norton have found no statement expressly forbidding the marriage of same-sex couples in Rhode Island's positive law (i.e., by constitutional amendment, statute, or controlling appellate decision).

Moreover, despite having had an opportunity to bring forward any law in Rhode Island to the contrary, the Defendants themselves have not identified any Rhode Island statute, constitutional provision, or controlling appellate decision that "expressly forbids" the marriage of same-sex couples in Rhode Island. In fact, nowhere in Defendants' brief do they claim to have met the test set by Justices Marshall, Greaney or Cordy.[7] Therefore, for this simple reason, under the governing opinion on this issue in Cote-Whitacre, Plaintiffs Becker and Norton are entitled to marry in Massachusetts immediately.

In an effort to avoid this result, the Defendants argue that two facets of Rhode Island law should be dispositive here: (1) the marriage statutes in Rhode Island include gender-specific terms (e.g., male/female, bride/groom) and consanguinity restrictions that track along gender lines (see Defendants' Memo, p. 7-8); and (2) Rhode Island case law states that parties to Rhode Island common-law marriages must show that they "intend[] to enter into the husband-wife relationship" and that "'[m]arriage' is a status which determines the relations between husband and wife." (see Defendants' Memo, p. 8-9 (omitting emphasis not present in authority excerpted by Defendants)).

Whatever relevance these aspects of Rhode Island law might have had were Justice Spina's opinion controlling, they clearly cannot be dispositive without gutting the controlling interpretations of Justices Marshall, Greaney, Cordy, and Ireland that expressly disavowed

[7] Compare Defendants' Memo, p. 9 ("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).")

Justice Spina's views. See Cote-Whitacre, 446 Mass. at 383-88 (Marshall, C.J. concurring); id. at 395 (Greaney, J., concurring); id. at 406-07 (Ireland, J., dissenting).

1. Gendered-Statutes Are Not the Same As Statutes that Expressly "Prohibit" Marriage for Same-Sex Couples.

Notwithstanding the presence of gendered terms in some of Rhode Island's marriage laws, and notwithstanding that these laws were previously brought to the attention of the SJC,[8] Chief Justice Marshall's opinion makes clear that Rhode Island is not a state "where same-sex marriage is expressly prohibited by statute." Id. at 392 and 392 n.11 (identifying the statutes in Maine, New Hampshire, Connecticut, Vermont, and Maine that expressly forbid same-sex couples from marriage and noting that Rhode Island and New York couples should be able to pursue selective enforcement claims because their marriages are not expressly prohibited by statute). Notably, even Justice Spina's opinion places Rhode Island in the category of states that do not expressly forbid marriage for same-sex couples by statute.[9]

[8] In Addendum B of their appellate brief to the SJC, the Defendants provided a chart purporting to summarize the marriage laws in other jurisdictions, including Rhode Island. A copy of the relevant page from Addendum B on Rhode Island law (the "Rhode Island Chart") is attached hereto as Exhibit 1. This summary chart did not address Rhode Island's judicial decisions, but it did provide the Defendants' view of Rhode Island's marriage statutes.

[9] This conclusion is evident from the notable absence of "sex" from Justice Spina's exacting list of legal impediments to marriage in Rhode Island. Id. at 360 n.9 (Spina, J., concurring) ("In Rhode Island, the legal impediments to marriage include (1) consanguinity or affinity (except as specifically provided); (2) bigamy; (3) lack of mental competence; and (4) age (except as specifically provided). See R.I. Gen. Laws § § 15-1-1, 15-1-2, 15-1-4, 15-1-5, 15-2-11 (LexisNexis 2003)."). In addition, in footnote 12 of his opinion, Justice Spina makes clear his view that Rhode Island is one of those "very few States" where "there has been no constitutional or statutory pronouncement on the matter [of marriage for same-sex couples]." Id. at 363 n.12. Though Justice Spina does not demand talismanic statutory language to anchor an express statutory prohibition and is willing to credit a wide range of prohibitory terms (e.g., "not permitted, not recognized, not valid, or the like") (see Defendants' Memo, p. 5), Rhode Island's statutes do not contain any such prohibitory language. Thus, to the extent Justice Spina's minority position is instructive, it must be noted that Rhode Island's gendered marriage statutes, standing alone and without the gloss of common law, would not even satisfy Justice Spina's conception of a statutory prohibition. Cote-Whitacre, 446 Mass. at 361, 363-64 (Spina, J., concurring).

a. Goodridge's interpretative approach has no relevance here.

In the face of this reality, the Defendants urge this Court to decide this case by a different "interpretative" standard. Artfully, the Defendants invite this Court to interpret Rhode Island marriage statutes as this Court and the SJC interpreted G.L. c. 207 in Goodridge. See Defendants' Memo, pp. 5-6, 8. This Court should reject that invitation for three reasons. First, when deciding Cote-Whitacre, the SJC had this very argument before them,[10] and it apparently did not lead any of the Justices to conclude that Rhode Island statutes themselves contained an express prohibition against marriage for same-sex couples within the meaning of Section 12. See Section I(B)(1) of this Memorandum, supra. Second, the Defendants' interpretive gloss on Rhode Island's statutes engages in exactly the "plumbing" of Rhode Island law rejected by four justices of the SJC. Third, this argument overreaches in reliance on the use of the word "prohibit" in the text of Goodridge,[11] which has no bearing on the very specific meaning a majority of the SJC more recently ascribed in Cote-Whitacre to the term "prohibit" in Section 12.

Section 12 "directs our courts to employ a specific set of criteria for determining the law of another State." Id. at 387 n.4 (Marshall, C.J., concurring). Those criteria require an express statement of prohibition in the State's positive law. Those same criteria necessarily forbid a Massachusetts court from "plumbing" the law of another state "to fill in the gaps and interstices of statutes." Id. Pursuant to Section 12's directive, statutory silence or ambiguity in a home state's law ends the Section 12 inquiry in the

[10] Defendants' Rhode Island Chart (in Addendum B to their appellate brief) noted the gendered-nature of some of Rhode Island's marriage statutes and essentially argued that these Rhode Island statues should be construed in the same manner that Goodridge construed G.L. c. 207. See Defendants' Rhode Island Chart, Exhibit 1 attached hereto.

[11] When citing the "core" statutory analysis from Goodridge on page 5 of their Memorandum, the Defendants fail to note that they altered the text by underscoring the word "prohibit." Significantly, the original Goodridge text does not underline that word or imbue it with unique meaning.

non-resident couple's favor; it does not trigger a secondary, more-searching review.[12] In contrast, Goodridge employed a multi-layered statutory interpretation that looked beyond the absence of a clear statement on marriage for same-sex couples: it included a top-to-bottom review of the licensing and record-keeping provisions of G.L. c. 207; an analysis of the ordinary and common law meaning of the word "marriage;" and an assessment of legislative intent to employ that meaning. See Goodridge, 440 Mass. at 317-20; see also Goodridge, 14 Mass. L. Rptr. 591, 2002 WL 1299135 *2-5 (Super. Ct. 2002) (Connolly, J.). Although willing to employ this wide-ranging inquiry in Goodridge where no exacting criteria were provided by statute, this investigative approach is exactly what Justices Marshall, Greaney, Cordy, and Ireland said should not be done when analyzing another State's law pursuant to Section 12. See Cote-Whitacre, 446 Mass. at 387 n.4; (Marshall, C.J., concurring); id. at 404 n.14 (Ireland, J., dissenting).

Further, Defendants' attempt to stretch the meaning of the word "prohibit" in Goodridge to coincide with the requisite inquiry under Section 12 is plainly specious. The SJC in Goodridge was in no way addressing the strictures of Section 12 and, further,

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[12] Section 12's constrained inquiry (i.e., searching for an express prohibitory statement and no more) properly results in non-resident couples being able to marry in Massachusetts even though they are not presently able to marry at home. The Justices readily acknowledged this possibility. Cote-Whitacre, 446 Mass. at 384 ("[T]he relevant question in this case is not what another State might do when confronted with two of its citizens of the same sex who wish to marry.") (Marshall, J. concurring).

If Section 12 does not bar Rhode Island couples from marrying here, the couples would still be subject to their home state's laws when they return home. Rhode Whether Rhode Island's law (including statutes, constitutional principles, and case law) would accord respect to these marriages in whole or in part is a question for another day. See id. at 363 ("It is not the province of this court to dictate to other States how to construe their own specific statutes and public policy when confronted with the issue whether to recognize a same-sex marriage performed in Massachusetts.") (Spina, J. concurring); id at 364 n.13 ("I need not analyze how the Defense of Marriage Act … would affect the eight couples when they return to their home States.") (Spina, J., concurring); id. at 362 n.11 (discussing "voidable" marriages: "it is the province of the applicants' home State to decide whether and how to recognize the erroneously contracted marriage once the couple returns to their home State.") (Spina, J., concurring); id. at 389 n.7 ("[M]odern-day choice-of-law analysis calls for the weighing of a multitude of considerations, and that [] is difficult to predict in general terms how a court will resolve a matter implicating the choice of law.") (Marshall, C.J., concurring). Though the question of extra-territorial recognition is not before this Court, notably, Rhode Island does follow the celebration rule of marriage, recognizing marriages that are valid where celebrated even if the marriages could not have been entered directly in Rhode Island. See, e.g., Ex Parte Chace, 58 A. 978 (R.I. 1904).

in no way found there to be an explicit prohibition in G.L. c. 207. Rather, the Court's opinion recognized the lack of an explicit prohibition in G.L. c. 207, but concluded, based on the aforementioned analysis, that these laws "could not be *construed* to permit same-sex couples to marry." Goodridge, 440 Mass. at 320 (emphasis added). This misreading of the SJC's opinion in Goodridge should have no influence on this Court's consideration of Rhode Island law.

b. Rhode Island's marriage statutes are not comparable to Vermont's.

Defendants also err in equating Rhode Island's use of gendered-terms in some of its marriage-related statutes with Vermont's express statutory prohibition. See Defendants' Memo, p. 7. In referencing only the precise statutory citation provided in footnote 11 of Chief Justice Marshall's opinion, Cote-Whitacre, 446 Mass. at 392 n.11, the Defendants distort how clearly the Vermont Legislature spoke in the wake of Baker v. Vermont, 744 A.2d 864 (Vt. 1999), the case where the Vermont Supreme Court found a constitutional violation in the exclusion of same-sex couples from the protections of marriage, but left the remedy initially with the Legislature.

Squarely faced with the obligation to rectify the constitutional offense in Vermont's discriminatory marriage laws, in the Spring of 2000, the Vermont Legislature enacted Vermont's civil union law. See 1999 Vt. Acts & Resolves 91 (the "Civil Union Law") (attached as Exhibit 2). This law created a separate legal institution for same-sex couples and amended Vermont's marriage statutes to make clear that the Legislature contemplated marriage as the union of one man and one woman. Id. at Section 3 (codifying Vt. Stat. Ann. Tit. 15 §1201(4) ("'Marriage' means the legally recognized union of one man and one woman.")); and Section 24 (codifying

Vt. Stat. Ann. Tit. 15 §8) ("Marriage is the legally recognized union of one man and one woman.").

When it created civil unions, the Legislature expressly codified the Vermont Supreme Court's holding that Vermont marriage statutes did not authorize marriages of same-sex couples, and that therefore, same-sex couples were barred from marrying under Vermont marriage statutes. Contrary to the Defendants' depiction of Vermont marriage law, the legislative findings and provisions of the Civil Union Law make clear that same-sex couples are expressly excluded from marriage under Vermont's marriage statutes. In Section 3 of the Civil Union Law, the Vermont Legislature sets the requisites of a civil union and expressly requires the parties to the civil union to *"[b]e of the same sex and therefore excluded from the marriage laws of this state*." Id. (codified as Vt. Stat. Ann. Tit. 15, §1202(2) (emphasis added)); see also id. at Section 1 (Legislative Findings (1) and (10)). Thus, the history of the Civil Union Law's enactment, as well as its specific language, conveys that the Vermont Legislature squarely considered the eligibility of same-sex couples to marry and spoke against it.

In contrast, Rhode Island's marriage statutes, at most, only use gendered terms.[13] Nowhere do Rhode Island's marriage statutes expressly say that same-sex couples may not marry or even that marriage is a legal union between a man and a woman. Defendants only urge this Court to divine that conclusion. Simply put, no comparison between Rhode Island's and Vermont's statutes could yield the conclusion that they are similarly situated for purposes of Section 12.

[13] But see Rhode Island's statute governing the gender of words in statutes, R.I. Gen. Laws §43-3-3 ("Every word importing the masculine gender only may be construed to extend to and to include females as well as males.")

2. Judicial Decisions That Describe Marriage in Gendered-Terms Are Not the Same As Decisions that Expressly "Prohibit" Marriage for Same-Sex Couples.

Defendants cite DeMelo v. Zompa, 844 A.2d 174, 177 (R.I. 2004), for the proposition that only different-sex couples may marry outside Rhode Island's statutory framework for marriage, i.e., enter into a common-law marriage. See Defendants' Memo., pp. 8-9. However, DeMelo, simply cannot be read to carry that weight. The DeMelo court never considered the question of who is eligible for common-law marriage or otherwise used the term "husband and wife" in an exclusive way. Although the DeMelo court placed great emphasis on whether the couple at issue, which happened to be a man and a woman, had joint bank accounts or designated each other as beneficiaries of their retirement accounts, which incidentally Plaintiffs Becker and Norton do, the sexes of the parties in DeMelo were not an issue in the case.

Defendants also cite State v. Downing, 175 A. 248, 249 (R.I. 1935), as proof that the common law of Rhode Island defines marriage as between a man and a woman. Yet, much like DeMelo, this case does not address a same-sex couple or otherwise use the term "husband and wife" in an exclusive way. If the term "spouses" were substituted for "husband and wife," the decision would not be altered in any way.

As Defendants implicitly concede, neither of these Rhode Island cases "expressly prohibit" marriage for same-sex couples. As such, Justices Marshall, Greaney, and Cordy and would not rely upon them to bar Plaintiffs Becker and Norton from marriage in Massachusetts under Section 12.

CONCLUSION

For the foregoing reasons, Plaintiffs Wendy Becker and Mary Norton respectfully request that this Court direct the entry of judgment in their favor -- declaring that G.L. c. 207, §§11 and 12 do not prevent Plaintiffs Becker and Norton and any other Rhode Island same-sex couples from obtaining a marriage license in Massachusetts if they are otherwise qualified for a license and enjoining the Defendants from applying G.L. c. 207, §§11 and 12 to the contrary -- pursuant to Plaintiffs' Motion for Preliminary Injunction and their Second Amended Complaint.

Respectfully submitted,

THE PLAINTIFF COUPLES

Sandra and Roberta Cote-Whitacre
Amy Zimmerman and Tanya Wexler
Mark Pearsall and Paul Trubey
Katrina and Kristin Gossman
Wendy Becker and Mary Norton
Michael Thorne and James Theberge
Edward Butler and Leslie Schoof

By their Counsel,

GAY & LESBIAN ADVOCATES & DEFENDERS

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

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