COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court Department
of the Trial 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,
JUDITH and LEE MCNEIL-BECKWITH,
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.

MEMORANDUM IN SUPPORT OF PLAINTIFF COUPLES' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs are eight loving and committed same-sex couples who live outside Massachusetts and whose constitutional rights to marry in Massachusetts are being violated by the Defendants'[1] enforcement of the discriminatory laws of other States, under the guise of Massachusetts General Laws, Chapter 207, Section 11. This law is unconstitutional as applied to

[1] Hereinafter, the term "Department" will refer collectively to the Defendants.

same-sex couples because the Massachusetts Supreme Judicial Court ("SJC") has unequivocally declared that, under the liberty and equality provisions of the Massachusetts Constitution, the Commonwealth lacks any rational basis to deny same-sex couples the right to marry on the same terms as opposite-sex couples. *See Goodridge v. Dep't. of Pub. Health*, 440 Mass. 309 (2003) and *Opinions of the Justices to the Senate,* 440 Mass. 1201 (2004). It is only by ignoring the import of *Goodridge* that the Department asserts a right to bar all nonresident same-sex couples from civil marriage in Massachusetts. It relies upon Section 11's incorporation of the discriminatory marriage laws of sister States, despite the same defects of rationality evident in the marriage ban considered in *Goodridge*. The Department's selective enforcement of this law to bar only same-sex marriages, and the racial animus associated with Section 11's enactment combine to raise further questions about the law's legitimacy in the aftermath of *Goodridge*.

Even if the Commonwealth were to somehow concoct a rational basis for the Department's enforcement of the discriminatory marriage bans of other States – which it cannot do – Section 11's distinction between the marital rights of residents and nonresidents runs afoul of the Privileges and Immunities Clause of the United States Constitution (U.S. Const. art. IV, § 2). Consequently, the Commonwealth must satisfy the heightened scrutiny requirements triggered by the Clause. *See Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298-99 (1998). Yet, the Commonwealth lacks a substantial justification for its discrimination between nonresident same-sex couples and resident same-sex couples and cannot demonstrate a substantial relationship between its discrimination and its purported justifications for Section 11's application here.

For all of these reasons,[2] Plaintiffs are being irreparably harmed by the denial of their rights under the Massachusetts and United States Constitutions and seek a declaration that

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[2] While this Court need consider no other argument than those above in order to grant the requested relief, Section 11 should also be enjoined for the other reasons stated herein including its unreasonable interference with the equal right to marry.

Section 11 is unconstitutional as applied to them; a preliminary order barring the Department from enforcing Section 11 with respect to same-sex couples and directing it to process and index marriage applications and licenses from non-resident same-sex couples in the ordinary course; and such other relief as this Court deems just and proper.

FACTUAL BACKGROUND

The Plaintiff Couples in this case have sought to marry for all of the same mix of reasons that other couples do. Sandra and Roberta Cote-Whitacre of Essex Junction, Vermont, a committed couple for nearly four decades, want to secure their financial well being in the event of one of their deaths. They have long taken steps to secure their relationship through documents and a civil union, but have repeatedly experienced how marriage alone can provide them full security. *See* Verified Complaint, ¶¶ 15-21.

A committed couple for over twelve years, Amy Zimmerman and Tanya Wexler of New York, New York married to ensure that they and their three young children will be protected in all circumstances – financial, medical, and social. Being able to marry in Massachusetts was a true homecoming for Amy, who was born and raised in the Commonwealth, and they were able to celebrate their marriage at her father's home in Andover surrounded by friends and family. *Id*. at ¶¶ 22-29.

Mark Pearsall and Paul Trubey of Lebanon, Connecticut, both Massachusetts natives, have been a committed couple for fifteen years, and sought marriage as a reflection of the mutual responsibility that characterizes their relationship. Having been denied the right to be by each other's side after Paul's car was struck by a drunk driver, Mark and Paul have learned that only marriage will guarantee their automatic right to be together at such vulnerable times. *Id*. at ¶¶ 30-36.

Together for five years, Katrina and Kristin Gossman of Meriden, Connecticut wanted to marry to assume the fullest extent of legal responsibility for one another. Given Katrina's job

with the Federal Bureau of Investigation, they have long worried that Kristin will not be allowed to be by Katrina's side if she is injured, or that Kristin would not have access to the benefits otherwise available to spouses of agents killed in the line of duty. *Id*. at ¶¶ 37-43.

Both registered nurses, Judith and Lee McNeil-Beckwith of Providence, Rhode Island have seen first-hand the ways in which, without marriage, same-sex couples have been denied access to each other, access to information about each other's condition, and the ability to make decisions around end-of-life issues. Both born and raised in Massachusetts, they met and fell in love over six years ago, while working in Worcester, and wanted to marry to erase any ambiguity about the permanence of their commitment to one another. *Id*. at ¶¶ 44-51.

Wendy Becker and Mary Norton of Providence, Rhode Island, committed to each other for sixteen years, want to marry to demonstrate to their two young children that their family is as loving as all of the married families that they know, and to provide their children with the legal and social protections afforded only by marriage. They have been working to put in place all of the documentary protections they can for their family, but have experienced disrespect for their family even with such documentation. *Id*. at ¶¶ 52-58.

Michael Thorne and James Theberge of Cape Elizabeth, Maine moved from Massachusetts to Maine a year ago after twenty-one years together in the Commonwealth. Marriage to them is a matter of protecting their future as a couple and their two-year-old son, as they have struggled to find health insurance for Michael as a stay-at-home parent, and to plan for their financial security as they get older. *Id*. at ¶¶ 59-64.

Edward Butler and Leslie Schoof of Hart's Location, New Hampshire know that marriage would most appropriately reflect their loving partnership of twenty-six years. Having been barred access to one another during a medical crisis, they want to marry to make certain that they are never kept apart during such vulnerable and critical circumstances again. *Id*. at ¶¶ 65-71.

Massachusetts' Marriage-licensing Scheme

General Laws chapter 207 governs the issuance of marriage licenses. A couple must first file a Notice of Intention of Marriage form at any city or town hall in the Commonwealth. G.L. c. 207, § 19. Once the Notice of Intention has been filed, along with the results of the requisite blood tests and a fee, the clerks will issue a Certificate of Marriage on or after the third day from the filing of the Notice. G.L. c. 207, §§ 19, 28, 28A. Applicants may obtain a waiver of the three-day waiting period by applying to any district or probate court for a Marriage Without Delay. G.L. c. 207, § 30.

Upon receiving the Certificate of Marriage, the couple must have their marriage solemnized by a person authorized to do so in the Commonwealth. G.L. c. 207, §§ 38, 39. After solemnization, the officiant fills out the portion of the Certificate regarding the time and place of the ceremony, signs it, and returns it to the city or town clerk who issued it. G.L. c. 207, § 40. The clerk then records the marriage in the municipal registry, G.L. c. 46, §§ 1, 2, retains a certified copy of the Certificate, and sends the original to the state Registrar of Vital Records and Statistics. G.L. c. 46, § 17A. The Commissioner of Public Health then binds the original records of marriage, along with an index, and retains their custody. G.L. c. 111, § 2.

Marriage Policy Changes After *Goodridge*

After the *Goodridge* decision, the Department conducted trainings for city and town clerks regarding changes in the enforcement of the marriage-licensing laws. *See Instructions to City and Town Clerks* ("*DPH Instructions*"), Power Point presentation, attached as Appendix 17 (hereinafter App.). Among the changes the Department made were amendments to the Notice of Intention of Marriage form "to help clerks implement the laws of the Commonwealth, including the SJC's *Goodridge* ruling." *See DPH Instructions*, frame 8, App. 17. The amendments alter the substance and location of some previously requested information, such as information on age, and the designation of applicants (formerly bride and groom, now parties A and B), and

additionally require the following information: whether the applicant has ever been a party to a domestic partnership or civil union; applicant's sex; whether the applicants are related by blood and if so, how; and "where an applicant resides and intends to reside." *Id*., frame 12; *see also* Notice of Intention of Marriage, Form R-202 m 05/04, App. 26. Although the form previously asked for each applicant's residence, the new form asks non-Massachusetts residents where they intend to reside. *DPH Instructions*, frame 21, App. 17. The DPH Instructions explain that although a person does not have to be a Massachusetts resident in order to marry here, the forms ask for residence and intended residence because of Section 11. *Id*., frame 23, App. 17.

Section 11 provides:

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

G.L. c. 207, § 11. This statute was enacted as part of St. 1913, c. 360, which also amended G.L. c. 207, § 10,[3] and enacted G.L. c. 207 §§ 12,[4] 13,[5] and 50.[6] Section 11 (along with §§ 10 and 12) was adopted verbatim from the 1912 recommendations of the Commissioners on Uniform Laws. *See* St. 1913, c. 360, §§ 1-3 and *Proceedings of the Twenty-Second Annual*

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[3] Section 10 applies to residents who leave Massachusetts to marry in evasion of local law. It provides:

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

[4] Section 12 governs the 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.

[5] Section 13 provides, "The three preceding sections shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact like legislation."

[6] Section 50 provides:

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

Conference of the Commissioners on Uniform State Laws, Report of the Committee on Marriage and Divorce, p. 125 and text of Act at pp. 129-30, App. 29.

With respect to implementing Section 11, the DPH Instructions explain to clerks that this provision "means that if a person lives and intends to continue to live in another state or jurisdiction and cannot legally get married in that state or jurisdiction, her marriage 'shall be null and void.'" *DPH Instructions*, frame 24, App. 17.[7] The DPH Instructions note that applicants have long had to swear under penalties of perjury that no impediment existed to their marriage, but recognize that the *Goodridge* decision and the ability of same-sex couples to marry in Massachusetts caused the newfound enforcement of Section 11. *DPH Instructions*, frame 26, App. 17.[8]

To enable the clerks to enforce this law, the Department provided to the clerks a list of impediments to marriage in every State based on age, consanguinity and affinity, and sex prior to May 17. *See* Department of Public Health, Registry of Vital Records and Statistics, *Guide to Legal Impediments to Marriage for 57 Registration Jurisdictions*, (May 11, 2004), *available at* http://www.mass.gov/dph/bhsre/rvr/impediments.pdf, App. 25. According to this list, marriage between persons of the same-sex is either "void and prohibited" or "not permitted" in each of the other forty-nine states and all of the territories. *Id*. The Department told the clerks both to show this list of impediments to the applicants and to review them him or herself to ensure that no impediments exist to the couple's marriage. *DPH Instructions*, frame 35, App. 17; *see also* Department of Public Health, Registry of Vital Records and Statistics, *Marriage Certificate*

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[7] The amended Notice of Intention of Marriage form also adds a notice at the bottom of the form stating, "Please note that if you are not a Massachusetts resident and you enter into a marriage in Massachusetts that would be void if contracted in the state where you reside and intend to continue to reside, your marriage 'shall be null and void.' (G.L. c.207 § 11)." *See* Apps. 26 and 27.

[8] Further, the DPH Instructions focus on G.L. c. 207, § 12, requiring a clerk to satisfy him or herself that the applicants are not prohibited from marrying in their home state. *DPH Instructions*, frame 30, App. 17. This means that the clerk must be satisfied regarding where the applicants reside, where they intend to continue to reside, and "whether there is a legal impediment to the applicant's marriage in the place where the applicant resides or intends to reside." *Id*., frame 31.

Update, at 3, App. 16. Specifically with regard to same-sex couples, the Department explicitly told the clerks that they may not issue licenses to applicants who reside and intend to continue residing in other states unless that state "has affirmatively indicated that same sex marriage is permitted in that state." *DPH Instructions*, frame 39, App. 17. Thus, the Department contends that Section 11 requires clerks and registrars to deny marriage-licensing forms to all nonresident gay and lesbian couples because no other state presently authorizes marriages of same-sex couples.

Despite this directive, a small number of municipal clerks allowed nonresident same-sex couples to file Notices of Intention of Marriage and receive Certificates of Marriage, and recorded such marriages after they were solemnized. *See* Pam Belluck, *Governor Seeks to Invalidate Some Same-Sex Marriages*, N.Y. Times, May 21, 2004, at A14, App. 45. Plaintiffs Cote-Whitacre, Zimmerman and Wexler, Pearsall and Trubey, the Gossmans, and the McNeil-Beckwiths were all able to complete the marriage-licensing process in Provincetown, Somerville or Worcester. *See* Verified Complaint, ¶¶ 21, 28, 35, 43, and 50. *See also* Notices of Intention of Plaintiff Couples, App. 27.[9]

Having been notified by the Governor's office that these cities and towns were issuing marriage licenses to nonresident gay and lesbian couples, the Attorney General's Office sent a letter to the lawyers for Provincetown, Somerville, Worcester and Springfield demanding that they cease and desist the issuance of such licenses. *See* Letter from Attorney General Thomas Reilly to Gretchen Van Ness et al., May 21, 2004, App. 21. Governor Romney has stated that the Department will not register any marriages between nonresident same-sex couples, claiming the marriages to be void under Section 11.[10] In response to this letter and similar directives,

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[9] In addition, Plaintiffs Cote-Whitacre and Zimmerman and Wexler obtained waivers of the three-day waiting period from Barnstable and Middlesex Probate Courts, respectively. *See* Verified Complaint ¶¶ 20, 27-28.

[10] *See* Yvonne Abraham & Raphael Lewis, *Romney Turns to AG for Halt to Licensing, Targets Marriage by Gay Outsiders*, Boston Globe, May 21, 2004, at A1 ("The state registrar, [Romney] said, would refuse to record the marriages of the 10 out-of-state residents he identified and all those others who state on their applications that they

cities and towns that had been granting licenses to out-of-state gay and lesbian couples suspended their issuance. *See* Jennifer Peter, *Provincetown Backs Down for Now, But Vows Continued Fight*, AP, May 26, 2004, App. 52. For example, Plaintiffs Becker and Norton, who had filed their Notice of Intention in Attleboro before the city was contacted by the Attorney General, were told that they could not receive their Certificate of Marriage because of their nonresidence in Massachusetts. *See* Verified Complaint, ¶ 58. Plaintiffs Thorne and Theberge and Butler and Schoof tried to file Notices of Intention in Somerville, but their paperwork was rejected because of their States of residence. *Id.* at ¶¶ 64 and 71.

ARGUMENT

A party seeking a preliminary injunction must show "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction." *Royal Order of Moose, Inc., v. Bd. of Pub. Health*, 439 Mass. 597, 601 (2003) (quoting *Tri-Nel Mgmt., Inc. v. Bd. of Health*, 433 Mass. 217, 219 (2001)) (alteration in original); *see also T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 580 (1996). "When a party seeks to enjoin governmental action, a judge is also required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Royal Order of Moose*, 439 Mass. at 601 (internal quotation marks and citation omitted).

I. THERE IS A REASONABLE LIKELIHOOD THAT PLAINTIFFS WILL SUCCEED ON THE MERITS OF THEIR CLAIMS

In light of the constitutional principles articulated in *Goodridge* and its progeny, the Commonwealth has no rational basis for relying upon Section 11 to bar all nonresident same-sex

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have no intention of moving here. That step, he said, renders their marriages automatically invalid under a 1913 law that voids Massachusetts marriages if they would be void in the state in which a couple resides."), App. 44. *See also*

couples from marrying. While this Court need consider no further argument, the discriminatory animus against gays and lesbians that has fueled the Department's enforcement of this law for the first time in decades and the racial animus that forms part of Section 11's history further erode any claims that the law is valid as applied here. Secondly, Section 11's distinction between nonresident same-sex couples and resident same-sex couples is blatantly in violation of the Privileges and Immunities Clause of the United States Constitution (U.S. Const. art. 4, § 2). Finally, other factors further weigh in favor of the Plaintiff Couples' reasonable likelihood of success on the merits, including the Department's interference with the right to marry of same-sex couples disqualified under Section 11.

A. THE MASSACHUSETTS CONSTITUTION VITIATES ANY ATTEMPT TO USE SECTION 11 TO BAR OTHERWISE QUALIFIED SAME-SEX COUPLES FROM MARRIAGE.

Goodridge prevents the Commonwealth from applying a Massachusetts statute to bar same-sex couples from obtaining Massachusetts marriage licenses. That is, Section 11 cannot provide a legitimate basis for the Department's discrimination against nonresident same-sex couples because the statute is unconstitutional as applied to same-sex couples after the SJC's rulings in *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309 (2003) and the *Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004). The liberty and equality principles announced in those decisions control this case. As the SJC stated in *Goodridge*, "[T]he marriage ban does not meet the rational basis test for either due process or equal protection." *Goodridge*, 440 Mass. at 331. *See also id*. at 330 ("Any law failing to satisfy the basic standards of rationality is void."). In *Goodridge*, the SJC held that the Commonwealth "failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex." *Id*. at 341. Denying "the right to choose to marry" also denies an individual

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Footnote 24, *infra.*

"the full range of human experience and . . . full protection of the laws…" in an area "at the core of individual privacy and autonomy." *Id*. at 326 & 326 n.15. Given that "the right to marry means little if it does not include the right to marry the person of one's choice," *id*. at 327-28, the *Goodridge* Court ended the government's denial of marriage rights to same-sex couples. The Court explained that in "civil marriage as in any other area of civil rights," *id*. at 340, our history is one of extending "constitutional rights and protections to people once ignored or excluded," *id*. (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)).[11]

Goodridge and its progeny establish that the Commonwealth's marriage-licensing statute was unconstitutional in so far as it barred qualified same-sex couples from marrying. It is just as irrational, if not more so, for the Commonwealth to apply its own law, which incorporates the anti-gay marriage-licensing statutes of the sister States (or the silence of States on the topic), to once again deny marriage licenses to same-sex couples seeking to marry in Massachusetts. Section 11 fails rationality review because, as applied to same-sex couples, it advances the very discrimination just condemned (twice) by the SJC.[12] *Goodridge*, 440 Mass. at 330 (standards for rationality review under equal protection and due process). Nor does Section 11 have any rational connection to any of the public purposes of marriage identified by the SJC in *Goodridge.*

[11] Similarly, in rejecting a proposed civil unions measure that would have conferred the state law rights of marriage on same-sex couples, the Justices opined that "[t]he very nature and purpose of civil marriage…renders unconstitutional any attempt to ban all same-sex couples, *as* same-sex couples, from entering into civil marriage." *Opinions of the Justices*, 440 Mass. at 1205 (emphasis in original). The advisory opinion reiterated that the *Goodridge* Court ruled on "the lawfulness under the Massachusetts Constitution of the bar to civil marriage itself," *id*. at 1204, citing *Goodridge*, 440 Mass. at 313, and that "group classifications based on unsupportable distinctions…are invalid under the Massachusetts Constitution." *Id.* at 1206.

[12] Nor does footnote 5 of Justice Greaney's *Goodridge* concurrence support the constitutionality of Section 11. *Goodridge*, 440 Mass. at 348, n. 5 (Greaney, J., concurring). Justice Greaney stated that "[t]he argument, made by some in the case, that legalization of same-sex marriage in Massachusetts will be used by persons in other States as a tool to obtain recognition of a marriage in their State that is otherwise unlawful, is precluded by the provisions of G.L. c. 207, §§ 11, 12, and 13." *Id*. Notably, however, none of the parties or amici in *Goodridge* briefed the SJC on the constitutionality of Section 11. *See Commonwealth v. Stasiun*, 349 Mass. 38, 49 (1965) (case cannot be regarded as authority for proposition not considered by court). Moreover, Justice Greaney's footnote has no application here as it only spoke to the recognition of Massachusetts marriages in other States, not the propriety of issuing a Massachusetts marriage license in the first instance. As discussed in Part I.B.2.f., *infra,* sister States maintain the right to establish marriage policy in their own States regardless of the terms governing the issuance of Massachusetts marriage licenses.

Id. at 322. Simply put, it is a violation of the Massachusetts Constitution to bar a same-sex couple from marrying because they are a same-sex couple, and Section 11 presents no rational basis for deviating from that clear constitutional principle.

1. The Massachusetts Constitution Protects Nonresidents in the Areas of Equality and Liberty.

The equality and liberty principles of the Massachusetts Constitution, upon which *Goodridge* and *Opinions of the Justices* rest, apply to all persons within the Commonwealth, not just to residents. *See*, *e.g.*, Mass. Const. Part 1, art. 1 ("All people are born free and equal . . ." (emphasis added)); *Goodridge*, 440 Mass. at 312 ("The Massachusetts Constitution affirms the dignity and equality of all individuals."); *Woodworth v. Spring*, 86 Mass. 321, 323 (1862) (One who is "lawfully within the territory and under the jurisdiction of this commonwealth, has a right to claim the protection and security which our laws afford to all persons coming within its limits, irrespective of their origin or of the place where they may be legally domiciled"). *See also Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 320-21 (1933) (noting that equality guarantees of Massachusetts Constitution are at least as broad as under the Federal Constitution, and that under federal equal protection and due process, whether one is "an alien or citizen, a corporation or an individual, [one] may invoke the rights established by this part of the Constitution"); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544, 550 (1923) (Wisconsin could not deny equal protection to a nonresident corporation because "no state shall deny to any person within its jurisdiction the equal protection of the laws." (quoting U.S. Const. amend. 14)).[13]

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[13] While the Commonwealth is sure to point to the title of the Declaration of Rights as one of the "Inhabitants" of Massachusetts, the substantive provisions of the Declaration of Rights refer variously to "individuals," "persons," "citizens," and not only "inhabitants." It would be absurd to suggest the due process rights of criminal defendants, for example, differ for residents and nonresidents. *See, e.g., Commonwealth v. Cast*, 407 Mass. 891, 895 (1990) (analyzing constitutionality of automobile search of Connecticut resident under Mass. Const. Pt. 1, art. 14); *Commonwealth v. Caceres*, 413 Mass. 749, 752-54 (analyzing unlawful seizure claim under art. 14 despite express finding that defendant's Massachusetts residency could not be established). Significantly, *Goodridge* is based on article I and that provision uses the term "all individuals." *Compare*, *e.g.*, Mass. Const. art. 9 (addressing voting rights of "inhabitants"). Moreover, articles VI, VII, and X upon which Plaintiff couples also rely, use the term "no

Commonwealth v. Aves, 35 Mass. 193 (1836), illustrates that the Massachusetts Constitution's equality and due process guarantees apply to all within the jurisdiction of Massachusetts. Critically, the SJC also held that other States' laws abridging constitutional freedoms are given no effect in the Commonwealth. In *Aves*, the SJC refused to send a 6-year old girl who had been brought to Massachusetts by her "owner" back to slavery in Louisiana. The SJC noted that "by the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground that it is contrary to natural right and the plain principles of justice." *Id*. at 210. Thus, while in Massachusetts, the "slave girl" (a nonresident) enjoyed the full equality protections of the Declaration of Rights: "[A]ll persons coming within the limits of a state, become subject to all its … laws … and entitled to the privileges which those laws confer; that this rule applies as well to blacks as whites. . . ." *Id*. at 217.

In reaching this conclusion, the *Aves* court considered whether the girl's status was affected by the law of Louisiana, her State of domicile. Chief Justice Shaw acknowledged that other States were free to permit slavery, just as Massachusetts was free to forbid it. However, he made clear that once in Massachusetts, "by the operation of our laws, there is no authority on the part of the master, either to restrain the slave of his liberty whilst here, or forcibly to take him into custody in order to [effectuate] his removal." *Id*. at 207-08. Under this rationale, a "slave holders' rights" statute in Massachusetts would have been unconstitutional under *Aves*. The Court rejected comity as a basis for respecting Louisiana's law because doing so would be to allow slavery to exist to some extent in Massachusetts. *Id*. at 217-18 ("[T]he law arising from the comity of nations cannot apply; because if it did . . . [it] would be wholly repugnant to our laws, entirely inconsistent with our policy and our fundamental principles, and is therefore inadmissible.").

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man," "the people," and "each individual," respectively. Together with article I, as amended, these are the core equality principles of the constitution. *Lavelle v. MCAD*, 426 Mass. 332, 336 n. 6 (1997).

2. There is No Rational Basis for Section 11's Discrimination Against Same-Sex Couples in Marriage Rights.

a. Any desire to respect the laws of sister States over the Commonwealth's Constitution is not a legitimate reason to apply Section 11 to bar Massachusetts marriage rights for same-sex couples.

Comity is not a rational basis for this application of the law because constitutional guarantees trump comity interests. As noted in *Aves* above, the SJC plainly held that principles of comity cannot justify imposing the law of a sister state that would violate the Massachusetts constitution. Similarly, in *Woodworth v. Spring*, 86 Mass. 321, 323 (1862), the SJC held that "[t]he comity of a state will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those who are within its jurisdiction." *See also Pacific Wool Growers v. Comm'r of Corps. & Tax*, 305 Mass. 197, 209 (1940) (comity is "subject to the restriction that in giving effect to foreign statutes the State is careful to see that . . . the policy of its own law is in no way contravened or impaired); *Faulkner v. Hyman*, 142 Mass. 53, 54 (1886) (same); *Hutchins v. New England Coal Mining*, 86 Mass. 580, 581 (1862) (same). In short, "[t]o [the Constitution's] provisions the conduct of all governmental affairs must conform." *Goodridge*, 440 Mass. at 349 (Greaney, J., concurring) (quoting *Loring v. Young*, 239 Mass. 349, 376-77 (1921)).

It is "clear that a provision in a statute cannot have any force as law if it conflicts with any provision contained in the higher law of the Constitution." *Bowe v. Sec'y of the Commonwealth*, 320 Mass. 230, 244 (1946). A State's recognition of a sister State's laws are akin to the United States' recognition of a foreign nation's laws through treaty, and the United States Supreme Court has ruled that "no agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957). A State's application of a sister State's law must "observe[] constitutional prohibitions;" to allow otherwise would be "alien to our entire

constitutional history and tradition." *Id*. at 17; *see also Restatement (Second) of Conflict of Laws* § 6 (1971) ("A court, *subject to constitutional restrictions*, will follow a statutory directive of its own state on choice of law.") (emphasis added).

Furthermore, rank speculation about how other States or the federal government might act if "comity" were not fully accorded (*i.e.*, deference to the sister States' laws without regard to Massachusetts' constitutional principles) also cannot constitute a rational basis for Section 11. *See Goodridge*, 440 Mass. at 340-41. This case is about Massachusetts officials acting under Massachusetts law; other States are free to address any questions about the marriages solemnized here in accord with their own laws and constitutional guarantees.

b. The racial origins of Section 11 taint the Commonwealth's claim of a neutral, non-discriminatory purpose for Section 11.

The history and context surrounding the adoption and implementation of Section 11 demonstrate that race was a substantial or motivating factor in its enactment, and call into question the Commonwealth's assertion that Section 11 has any rational basis.

The race-based component of Section 11 was laid bare by those who crafted it and is part of the provision's official legislative history. Although the text of Section 11 can still be found in the Massachusetts General Laws, Section 11 is part of a (now withdrawn) uniform law called the Uniform Marriage Evasion Act.[14] The final report of the Committee on Marriage and Divorce baldly stated that the law, if adopted by states, would give effect to the prohibitory laws of States, including those barring marriage between "a white person and a colored person." *See Proceedings of the Twenty-Second Annual Conference of Commissioners on Uniform State Laws* held at Milwaukee, Wisconsin, August 21, 22, 23, 24, and 26, 1912, Report of the Committee of Marriage and Divorce, Comment 4, pp. 127-28, App. 29.[15] The Committee did not say that the

[14] The Marriage Evasion Act is presently codified by G.L. c. 207, §§ 10-13, 50.

[15] *See Minister State Bank v. Bauerband*, No. 9135, 1992 WL 64774, at *2 (Mass. App. Div. Mar. 26, 1992) (relying on Reporter's Comments to the UCC for meaning of term used in statute); *Banque Worms v. Bankamerica Int'l*, 77

uniform law would promote white supremacy, but it did not need to. With historical hindsight, we now recognize that interracial marriage bans had exactly that impermissible purpose. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967); *Goodridge*, 440 Mass. at 376 (Cordy, J., dissenting).

Although Section 11 is ostensibly neutral as to race, it gives effect to laws of other States that make a marriage void if contracted in that state. In 1913, when Massachusetts adopted Section 11, thirty out of forty-eight states forbade or made void interracial marriage. *See* Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law – An American History,* (2002), Figure 8, App. 40. Assuming, *arguendo*, the law was enforced by Massachusetts officials, Section 11 had an obvious and disproportionate effect along racial lines – mixed-race couples from 63% of the sister States were barred from marrying in Massachusetts, whereas before 1913 all were free to marry here. *Cf. Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (requiring an examination of laws having a disproportionate effect based on race).

Also significant is that with the adoption of Section 11 in 1913, Massachusetts added the concept of "reverse evasion" to its laws for the first time. Long before Massachusetts adopted the Uniform Marriage Evasion law, Massachusetts marriage-licensing laws addressed vexing issues, like migratory divorce, through "evasion" statutes targeting Massachusetts domiciliaries who left the state to enter into a marriage prohibited here at home. R.S. 1836, c. 75, § 6 (voiding marriages of residents conducted outside the state for purposes of evading Massachusetts' express statutory prohibitions). Evasion concepts were re-codified in 1913 in what is now G.L. c. 207, § 10. But by refusing to license marriages of nonresidents on grounds forbidden by the nonresidents' home states, Massachusetts did not advance its own policies on marriage. Instead,

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N.Y.S.2d 362, 371 (NY 1991) (noting that the "history of article 4A of the Uniform Commercial Code . . . can appropriately inform our decision and serve as persuasive authority"), App. 1; *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 288 n.24 (Alaska 1976) (holding that Official Comments to Uniform Commercial Code, although not enacted by the Alaska Legislature, nevertheless "are of persuasive assistance" in construction and application of Alaska's version of the UCC), App. 9.

it incorporated the restrictions of other states into its licensing system, most notably, restrictions on interracial marriage.

The historical context also shows that changes in Massachusetts' marriage laws were part of a racist reaction to intermarriage between blacks and whites. This movement swept the Nation in 1912 following the high-profile transgression of the marital color barrier by Jack Johnson, the first black heavyweight prizefighter. In September, 1912, Jack Johnson's first white wife, Etta Johnson, committed suicide, leaving a note behind blaming her misfortune upon the fact that she married a black man. Within weeks, Jack Johnson began a relationship with nineteen year-old white woman, Lucille Cameron. Based upon allegations asserted by Ms. Cameron's mother, federal prosecutors charged Johnson with violating the Mann Act, a federal statute that criminalized the transportation of women across state lines for immoral purposes. In late November, 1912, Johnson was acquitted of the charge after Ms. Cameron refused to testify against Johnson, and on December 4, 1912, Johnson married Ms. Cameron in Illinois (where interracial marriage was not prohibited), openly defying the intense anti-black sentiment that had risen in the Nation in response to his previous wife's suicide and his initial acquittal.[16] *See generally* Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity and Adoption* 79-83 (2003), App. 36; Al-Tony Gilmore, *Jack Johnson and White Women: The National Impact*, 58 The Journal of Negro History 18 (1973), App. 32; Thomas R. Hietala, *The Fight of the Century: Jack Johnson, Joe Louis, and the Struggle for Racial Equality* 48-86 (2002), App. 34.

Within one week of Jack Johnson's marriage to Lucille Cameron, a federal constitutional amendment to ban interracial marriage was proposed in Washington, D.C. *See* Kennedy, *supra*, at 83 (citing *Congressional Record* 49 (1912): 502) App. 36. The nationwide concern about black-white marriages was also reflected in the rash of "Jack Johnson" bills prohibiting black-

[16] Undeterred by their initial failure to sustain a Mann Act conviction with respect to Ms. Cameron, federal prosecutors constructed a second Mann Act prosecution based upon Johnson's relationship with another previous

white marriages proposed to state legislatures in 1913, including bills in California, Colorado, Connecticut, Illinois, Iowa, Kansas, Michigan, Minnesota, New York, Ohio, Pennsylvania, Washington, Wisconsin, and Wyoming. *See* Joseph Washington, *Marriage in Black and White* pp. 74-84 (1970), App. 41.

Even though Massachusetts had repealed its anti-miscegenation law in 1843, Massachusetts was not immune to the sentiment sweeping the nation.[17] Upon hearing of Jack Johnson's December 1912 marriage to Ms. Cameron, Massachusetts Governor Foss is reported to have said: "Massachusetts, I'm sorry to say, has not such [anti-miscegenation] law, but I am in favor of placing such law on her books." *Marriage of Whites and Blacks*, The New York Age, Dec. 19, 1912, at 4, App. 39. *See also Jack Johnson Again,* The New York Age, Dec. 12, 1912, at 4, App. 38.

The Uniform Marriage Evasion Act was first considered by the Massachusetts Legislature in January of 1913. Following the bill's report out of committee on March 11, 1913, the bill passed through both chambers of the Legislature and was signed by Governor Foss on March 26, 1913. *Massachusetts Legislature, Bulletin of Committee Work: 1912-1915*, at 169. Given its meteoric race through the Massachusetts Legislature during the height of the Jack Johnson-Lucile Cameron affair, historians have concluded that the 1913 law "was a defense mechanism against being subjected to the type of situation and attendant criticism which Illinois

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white girlfriend who moved to Chicago to be with Johnson. In May, 1913, Johnson was convicted and sentenced to a year in jail and a $1,000 fine.

[17] To provide some perspective upon that general time period, it is noteworthy that the Massachusetts Supreme Judicial Court was asked to opine on the constitutionality of a law that would have made it a criminal offense for a woman under the age of 21 to enter a hotel or restaurant conducted by Chinese persons or for the Chinese proprietor to allow the woman's admission, *see In re Opinion of the Justices,* 207 Mass. 601, 603-604 (1911); *see also* Kennedy, *Interracial Intimacies*, at 28-36 (detailing discriminatory state laws aimed at Asian immigrants in the early 1900s); that certain members of the Massachusetts delegation to Congress supported laws criminalizing interracial marriage for the District of Columbia in 1914, *see The Crisis*, 9 (1914):22, App. 31, and that an anti-miscegenation bill was introduced into the Massachusetts Legislature in January, 1927, *see* House Bill No. 712 1927 (Bill to prohibit intermarriage) (1927).

suffered as a result of the Jack Johnson fiasco."[18] *See* Byron Curti Martyn, *Racism in the United States: A History of Anti-Miscegenation Legislation and Litigation*, (Ph.D. Diss., Univ. of S. CA., 1979), 909, 1387-93, App. 37; *see also* Kennedy, *supra*, at 232, 256, App. 36. Contemporary legal commentators saw it the same way. *See Intermarriage with Negroes – A Survey of State Statutes*, 36 Yale L. J. 858, 865 (1927) (describing G.L. c. 207, § 11 as a variant of an anti-miscegenation law), App. 30.

In light of this racially discriminatory history and Section 11's effect upon the rights of same-sex couples who apply for marriage licenses in Massachusetts, Section 11 is irrational and cannot withstand even minimal constitutional scrutiny.

c. The Commonwealth's eleventh-hour effort to resuscitate and apply Section 11 to deny marriage to same-sex couples is further proof of an illegitimate purpose.

The Department has revived Section 11 for the express purpose of denying marriage to gay and lesbian couples. *See*, *e.g.*, *Goodridge*, 440 Mass. at 330 (under the Massachusetts Constitution, "the exercise of the State's regulatory authority may not be 'arbitrary or capricious'"); *Buchanan v. Dir. of Div. of Employment Security*, 393 Mass. 329, 335 (1984) ("Statutes may be found to deny equality under law if they are applied in a discriminatory fashion."),[19] *id*. (no factual basis for concluding that base earnings requirement in eligibility for unemployment had disparate impact on women).[20]

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[18] Notably, Louisiana, one of the states that adopted the Uniform Marriage Evasion Act, repealed its reverse evasion statute -- its statutory equivalent to Section 11 -- in 1972 in connection with its repeal of other anti-miscegenation taboos in the wake of *Loving v. Virginia,* 388 U.S. 1 (1967). *See* Byron Curti Martyn, *Racism in the United States: A History of Anti-Miscegenation Legislation and Litigation*, (Ph.D. Diss., Univ. of S. CA., 1979), 1329-31, App. 37. Massachusetts got rid of "color" on its marriage forms in 1971. *See* St. 1971, c. 254.

[19] This claim is separate from, although consistent with, one of selective enforcement. *See Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978) (claimant must show (1) that a broader class of persons than those prosecuted has violated the law); (2) that failure to prosecute was either consistent or deliberate; and (3) the decision not to prosecute was based on an impermissible classification such as race, religion or sex.).

[20] Desuetude operates to estop a state from brushing off an outdated, forgotten, and misconceived statute. This doctrine works to guard against the use of out-dated statutes to penalize otherwise legal conduct based on moral prejudice. Typically, courts will declare a statute void for desuetude when the law relates to social and moral conduct and when open, notorious, and pervasive violations are met with general non-enforcement. *See Committee on Legal Ethics of the W. Va. State Bar v. Printz*, 416 S.E.2d 720, 726 (W. Va. 1992), App. 5. *See also Poe v.*

The factual predicate for this claim is simple. States have always had somewhat different marriage eligibility rules, with respect to characteristics such as age and consanguinity. *See*, *e.g.*, *State Policies to Promote Marriage: Final Report*, Submitted to the U.S. Department of Health and Human Services (Sept. 2002), *available at* http://aspe.hhs.gov/hsp/marriage02f/report.htm#I, App. 60. *Compare*, *e.g.*, G.L. c. 207, §§1-2 (permitting first-cousin marriages) *with* N.H. Rev. Stat. Ann. § 457:1-2 (precluding first cousin marriages) App. 13; 19-A Me. Rev. Stat. Ann. § 701 (2) (precluding first cousin marriages without "certificate of genetic counseling") App. 12, and Pa. Cons. Stat. Ann. § 1304 (e) (precluding first cousin marriages), App. 14. Since 1913, when Section 11 was adopted, states have had dramatically different laws based on race and ethnicity, remarriage after divorce, and competency. *See*, *e.g.*, Paul H. Jacobson, Ph.D., *American Marriage and Divorce* (1959), p. 45, App. 35. Although Section 11 purportedly requires local officials to deny marriage licenses to nonresidents if their marriage would be "void if contracted" in their home state, there is no doubt that, *at a minimum*, the Department has not enforced it since at least 1977, despite these interstate differences in marriage law. A public records request from the Department of Public Health reveals that from 1977 until the week of May 10, 2004, there had been no state-specific analysis of state marriage laws provided to clerks or registrars prior to May of this year.[21] Instead, the list of impediments for many years has consisted of nothing more than a bare recitation of the impediments to marriage for

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Ullman, 367 U.S. 497, 501 (1974). The desuetude doctrine protects individuals, such as the Plaintiffs, from government attempts to enforce discriminatory laws. *See Potter v. Murray City*, 760 F.2d 1065, 1071 (10th Cir. 1985) (discriminatory enforcement of a law constitutes an equal protection violation if the enforcement is "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification"). *Cf. Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (finding a law regulating the operation of laundries unconstitutional as applied to Chinese-Americans, as it was "applied and administered by public authority with an evil eye and an unequal hand"). The desuetude doctrine also protects individuals, and society as a whole, from the state's arbitrary enforcement of a law based on prevailing moral and social views of a different time. *See Franklin v. Hill,* 264 Ga. 302, 306 (1994) (a law based on fathers' property interest in their daughters was "woefully out of step with current legal and societal standards") (Sears-Collins, J., concurring on desuetude grounds to invalidate law) App. 7.

[21] The public records request reveals, among other things, that Clerks have been instructed by the Registrar not to inquire about residency of marriage license applicants. App. 22. In other words, the substantive law of other States regarding marriage eligibility has been a moot point in Massachusetts for decades.

Massachusetts residents, along with a partial quotation of Section 11. *See*, *e.g.*, App. 24 (lists of impediments from 1977 to May 16, 2004). Municipal clerks have had no role in enforcing Section 11 until now. *See* Affidavits of Town and City Clerks, filed in *Johnstone v. Reilly,* Civil Action No. 04-2655G (Suffolk Cnty. Super. Ct., filed June 18, 2004).

After *at least* 30 years of refusing to enforce the law despite significant differences in states' marriage laws, the executive branch abruptly changed course in anticipation of the marriages of same-sex couples. The Department has created new notice of intention forms, requiring the clerks to state that they have reviewed the list of impediments with the marriage applicants and certify that there is no impediment. *See* App. 17 (*DPH Instructions*). Moreover, the list of legal impediments as of May 17, 2004 is state-specific. App. 25. For each state or territory identified, the list provides that marriage for same-sex couples is either not authorized, or is prohibited, effectively barring all same-sex couples from marriage by operation of Section 11. *Id*. Notably, the language of Section 11 only applies where a couple's marriage would be "void," not merely prohibited, if contracted in the couple's home state. *See* G.L. c. 207 § 11.[22] The Department has disregarded the statutory language and improperly instructed clerks to apply Section 11 beyond its scope by denying licenses to same-sex couples who reside in states where marriage by same-sex couples is simply prohibited, but not void, and those who reside in states where the law is silent.[23] Lest there be any doubt, a "discriminatory intent may

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[22] It is well settled, as well as clear from the text of c. 207, that a marriage is not void unless expressly declared so by statute. *See*, *e.g.*, *Christensen v. Christensen*, 14 N.W.2d 613, 613 (Neb. 1944) ("A marriage is not void unless the statues expressly declare, and courts should not so construe unless the legislative intent to such effect is clear and unequivocal.") App. 4; *Seeley v. Erringer*, 57 N.W.2d 628, 633 (Minn. 1953) ("the far-reaching ramifications of treating a marriage as a nullity forbid that it should be held invalid without a decree of dissolution unless it is expressly declared void by statute."), App. 11.

[23] Based solely upon Section 11, Governor Romney has also said that he will order the Registrar of Vital Records and Statistics not to register the Plaintiff Couples' marriages at the state level. *See* Footnote 10, *supra*. Yet, the Registrar cannot ignore the duty to bind and index the records of marriages once the municipal clerks have issued the licenses. G.L. c. 111, § 2 states, "[The Commissioner] shall, as soon as is reasonably practicable, cause the birth, marriage and death records to be bound with indexes thereto and shall retain their custody." This obligation is not discretionary. *See Grant v. Aldermen of Northampton*, 316 Mass. 432, 433 (1944) ("The word 'shall' is a word of command and leaves no discretion … to refuse to carry out the statutory mandate."); *Elmer v. Comm'r of Ins.*, 304 Mass. 194, 196 (1939) ("'Shall' in a statute is commonly a word of imperative obligation. It is inconsistent with the

be gathered from evidence regarding the actual administration of a facially neutral law." *New York Times Co. v. Comm'r of Revenue*, 427 Mass. 399, 406 (1998).

These external changes to the marriage-licensing process are born of the Governor's unrelenting opposition to marriage for same-sex couples, an opposition that is effectuated by the Department here.[24] The Governor has stated that "Massachusetts should not become the Las Vegas of same-sex marriage…. We do not intend to export our marriage confusion to the entire nation." Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, New York Times, April 25, 2004 at § 1, p. 1 App. 46. His chief spokesperson has vilified clerks who announced their refusal to be agents of discrimination and their intent to marry nonresident same-sex couples: "What next, is Provincetown going to start marrying 10-year-olds in violation of the law. . . . Are they going to refuse to enforce the drug laws? Will they ignore the gun laws, too?", as though holding gay and lesbian couples equally under the law is equivalent to criminal

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idea of discretion."). As the Department itself has recognized, it is not in the business of determining the validity of a marriage. *See* Department of Public Health, Registry of Vital Records and Statistics, *Marriage Certificate Update*, at 13 (May, 2004), App. 16. Bald assertions by the Governor about the invalidity of the marriages reflected in the records he has pulled do not relieve the Department of this obligation.

[24] The Governor is well known as an opponent of marriage for same-sex couples. *See*, *e.g.*, Mitt Romney, *Commentary, One Man, One Woman: A Citizen's Guide To Protecting Marriage*, Wall Street Journal, February 5, 2004, available at www.opinionjournal.com/forms/printThis.html?id=110004647 (among other things, comparing Supreme Judicial Court's *Goodridge* decision to U.S. Supreme Court decision in *Dred Scott*) App. 54. The Governor controls executive agencies, including the Department of Public Health which controls marriage licensing. G.L. c. 17, § 4. The Governor's office has controlled decisions made about marriage eligibility and the application of Section 11. *See*, *e.g.*, Raphael Lewis & Stephanie Ebbert, *Wedding Day*, Boston Globe, May 18, 2004, at A1 (Romney spokesperson states that opinions of Connecticut and Rhode Island attorneys general will "not alter Romney's position that nonresidents cannot legally marry in Massachusetts. . ."), App. 50; Frank Phillips & Yvonne Abraham, *Defiance, Rebuke on Gay Marriage*, Boston Globe, May 12, 2004, at A1 (Governor threatened legal action against clerks who marry nonresident gay couples; "If they choose to break the law, we will take appropriate enforcement action, refuse to recognize those marriages, and inform the parties that the marriage is null and void."), App. 53; Scott S. Greenberger & Yvonne Abraham, *Gay-Marriage Rule Eased: Romney Aid Says Clerks Have Discretion on Residency Proof*, Boston Globe, May 5, 2004, at A1 (Governor's general counsel conducted training for clerks on new rules applicable to marriage-licensing starting on May 17, 2004), App. 47; Raphael Lewis, *Law Curbing Out-Of-State Couples Faces A Challenge*, Boston Globe, April 22, 2004, at B1 (in connection with implementing the marriage ruling, "Romney said that his legal staff is compiling a catalog of rules for the clerks to follow and that each will receive a list of states and the laws and court rulings related to gay marriage."), App. 49; Raphael Lewis, *Clerks Ask Ruling on Marriage Law*, Boston Globe, March 7, 2004, at B1 ("The Romney statement said: 'The issue of gay marriage is now pending before the Legislative branch. It would be premature for the Executive to provide guidance to city and town clerks until we know whether there will be changes to the statutory framework. At the appropriate time, the Administration will have instructions on how municipal clerks should proceed."), App. 48.

conduct. Frank Phillips and Yvonne Abraham, *Defiance, Rebuke on Gay Marriage: Romney Aide Rips Provincetown*, Boston Globe, May 12, 2004 at A1, App. 53. While the Governor insists he is simply enforcing the law, he is determined to keep this law on the books and has threatened a veto if the legislature repeals it. *See* Associated Press, *Romney Threatens Veto of Repeal Effort*, Boston Globe, May 7, 2004, at B2, App. 42.[25]

There is simply no escaping the conclusion that the sole trigger for reviving this moribund law is the now constitutionally protected marriages of same-sex couples in Massachusetts. Reviving an unenforced (and unenforceable) law for the sake of denying gay and lesbian couples marriage rights fails basic equal protection guarantees. As *Goodridge* made plain, under our state liberty and equality guarantees, regulatory authority must serve a legitimate purpose in a rational way. *Goodridge*, 440 Mass. at 329-30. But where the Governor himself concedes that marriages of nonresident gay couples "'do no harm to the Commonwealth,'"[26] and there is no rational basis for the law as applied (*see* Part I.A.2.a. *supra*), the Department's actions amount to a naked and impermissible desire to deny legal protections to gay people. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (state constitutional amendment denying gay people protection from discrimination "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.") (cited in *Goodridge*, 440 Mass. at 333); *Lawrence v. Texas*, 539 U.S. 58, __, 123 S.Ct. 2472, 2485 (2003) ("We have consistently held . . . that some objectives, such as a bare … desire to harm a politically unpopular group, are not

[25] The Attorney General, on behalf of the Governor, has also admitted that the reason for the sudden enforcement of Section 11 is that "as of May 17, 2004, Massachusetts marriage laws differ significantly from those of other states." Letter of David R. Kerrigan, Chief of Government Bureau, to Gretchen Van Ness et al., May 21, 2004, at 3, App. 21.

[26] Yvonne Abraham & Raphael Lewis, *Romney Turns to AG For Halt To Licensing*, Boston Globe, May 21, 2004, at A1, App. 44.

legitimate state interests.") (O'Connor, J., concurring on equal protection grounds to Supreme Court's invalidation of sodomy statutes) (citations omitted).[27]

By its choice to revive Section 11, the timing of that decision, its extreme interpretation of Section 11 (and other States' marriage laws), and its disregard for the changed constitutional landscape after *Goodridge*, the Department is acting arbitrarily and discriminatorily in violation of the Massachusetts Constitution and should be enjoined from continuing to do so.

B. SECTION 11 BLATANTLY VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION.

The Department, under color of state law, is unconstitutionally instructing municipal clerks to deny Massachusetts marriage licenses to all nonresident same-sex couples while permitting clerks to grant marriage licenses to qualified resident same-sex couples. Section 11's application in this fashion blatantly violates the Privileges and Immunities Clause of the United States Constitution (U.S. Const. art. IV, § 2) (the "Clause"). Even if the Commonwealth were able to assert a rational basis for enforcing Section 11 in contradiction to *Goodridge*, which it cannot do, the Commonwealth cannot survive the heightened scrutiny applied under the Clause.

The Clause provides, in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Constitution, Article IV, § 2. To deny otherwise qualified out-of-state couples the right to marry in Massachusetts because they reside, or intend to reside, in another state, impermissibly interferes with a couple's

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[27] This is not a case where the plaintiffs object to the law's application to them with a background of lax or haphazard enforcement generally, but of non-enforcement for decades, all upon the direction of the Department. *See* App. 22 (DPH Public Records response). *Compare Zayre v. Att'y Gen.*, 372 Mass. 423, 437-38 (1977) (rejecting retail store's challenge to Sunday closing laws because lack of uniform enforcement did not demonstrate impossibility of enforcement and statutory exemptions were not so broad as to render arbitrary any application of statute). The fact that each State's age and consanguinity laws are also summarized on the list – thereby lending a patina of even handedness – cannot obscure that it is only same-sex couples who the Department bars from marrying across the board. *School Comm. of Springfield v. Bd. of Educ.,* 366 Mass. 315, 327-28 (1974), *cert. denied*, 421 U.S. 947 (1975) (regardless of school committee's intent, the effect of enforcing its new plan would be to reverse or impede progress toward racial balance in schools and therefore would violate state and federal constitutions). *Compare Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (where officials allowed non-Chinese laundries to operate, but used statute to deny operation to Chinese laundries, "the facts shown establish an administration directed . . . against a particular class of persons" in violation of the 14th Amendment).

individual constitutional rights afforded under the Clause. S*ee Toomer v. Witsell*, 334 U.S. 385, 396 (1948) ("[The Privileges and Immunities Clause] was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.").

Because Section 11 discriminates between residents and nonresidents of the Commonwealth, Section 11 triggers a constitutional assessment under the Clause, and in turn the Clause subjects Section 11 to heightened scrutiny. For this heightened assessment, the United States Supreme Court has formulated a two-part test. First, a court must examine whether the disparate treatment between residents and nonresidents concerns a "privilege" or "immunity" for which the Clause extends protection. Second, if the statute does distinguish between residents and nonresidents with respect to such a privilege or immunity, the court must examine whether the State has a substantial reason for the difference in treatment. *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298-99 (1998); *United Bldg. & Constr. Trades Council of Camden v. Mayor & Council of the City of Camden,* 465 U.S. 208, 218-22 (1984). The discriminatory treatment can only survive if the State demonstrates that nonresidents are a "peculiar source of evil" to the State, and that the discrimination imposed "bears a close relation" to the State's purpose in treating residents and nonresidents unequally. *Toomer*, 334 U.S. at 396, 398. Because there is no rational basis for the Department's discrimination against nonresident same-sex couples, *a fortiori*, the Department cannot satisfy the heightened scrutiny analysis required by the Clause.

1. The Clause Protects Plaintiff Couples' Fundamental Personal Rights.

Plaintiff Couples' right to equal treatment under the laws and right to marry are personal rights protected by the Privileges and Immunities Clause. *See Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (noting that the Clause protects not only national unity but also personal interests). By virtue of the Clause, "a citizen of one State who travels in other States, [even though] intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and

Immunities of the Citizens in the several States' that he visits." *Saenz v. Roe*, 526 U.S. 489, 500-01 (1999).[28] Thus, the right not to be discriminated against by the state one is visiting and to enjoy the same privileges that citizens of that State enjoy are personal rights protected by the Clause.[29] *See Burnham v. Superior Court of California*, 495 U.S. 604, 637-38 (1990) (linking personal jurisdiction over transient defendants to the fact that those same defendants are entitled to enjoy the privileges offered by the state when traveling).

a. The Clause guarantees state constitutional protection to visitors.

One of the rights of state citizenship that falls within the scope of the Clause is the right to state constitutional protection. "[T]he Privileges and Immunities Clause of Article IV *prevents a state government from discrimination against [a visitor] by denying him the protections of its laws* . . ." *Burnham*, 495 U.S. at 637-38 (emphasis added). The *Goodridge* Court found that the disparate treatment that prevented same-sex couples from marrying in Massachusetts violated the liberty and equality protections of the Massachusetts Constitution.

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[28] Because the Clause bars each State from denying any citizen of the United States the privileges and immunities of state citizenship, the Clause also includes a right to travel. *Saenz*, 526 U.S. at 500 (the right "to enter and to leave another State" and "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State.") A third component of this federal right to travel, found under the Fourteenth Amendment to the federal Constitution, protects a citizen of one State who terminates his or her travel by electing to become a permanent resident of a new and different State. *Id.* This aspect of the right to travel is not relevant here because all the Plaintiff Couples intend to reside outside the Commonwealth.

[29] As Professor Laurence Tribe aptly explains,

> No state may enclose its citizens in a legal cage that keeps them subject to the state's rules of primary conduct (at least vis-á-vis the world in general)…as they travel to other states in order to satisfy their needs or preferences or simply to sample what the rest of the nation may have to offer. The conclusion that a state's legal system must not hobble a citizen as she travels from state to state follows from a conception of interstate mobility that entails something more than just a change of scenery. If each state could decide for itself, possibly with some measure of congressional authorization, how much of its legal system its citizens would have to carry around on their backs while seeking to take advantage of the legal environments of other states, then the right to choose which state to enter for any purpose lawful in that state would amount to nothing more than the right to have the physical environment of the states of one's choosing pass before one's eyes in a kind of virtual reality arcade while one remained strapped at all times in a legally fixed and closed environment. Surely, however, more than that is involved in the right of interstate mobility that follows from the basic structure of our federal Union.

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, 151-52 (1999).

Goodridge, 440 Mass. at 342 ("Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violate[s] the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."). Because Section 11 discriminates against nonresidents by denying them the protection of the Massachusetts Constitution, this provision violates the Privileges and Immunities Clause of the United States Constitution.

b. The Clause protects the right to marry.

Even if, *arguendo*, this case did not involve state constitutional protections, the Clause also protects rights integral to state citizenship. As to specific aspects of state citizenship that are protected privileges under the Clause, the Supreme Court has expressed a number of interlocking formulations that articulate a constitutional concern for those important rights integral to state citizenship and to the formation of a single nation. *See Baldwin v. Fish and Game Comm'n of Montana,* 436 U.S. 371, 380-83 (1978) (reviewing three general formulations of the Privileges and Immunities Clause).

The foundations of the Clause are the privileges enumerated in "Washington's List" from Justice Washington's opinion in *Corfield v. Coryell,* 6 F. Cas. 546 (No. 3,230) (CC ED Pa. 1825).

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign . . . They may, however, be all comprehended under the following general heads: Protection by the government; *the enjoyment of life and liberty*, with the right to acquire and possess property of every kind, and *to pursue and obtain happiness and safety*; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; … to institute and maintain actions of any kind in the courts of the state; [and] to take, hold and dispose of property, either real or personal … may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental[.]

Corfield, 6 F. Cas. at 552 (emphasis added). Though the "natural rights" aspect of Washington List's has been substituted by more modern formulations over time, the privileges enumerated in

that list remain those deserving protection by the Clause. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 n.10 (1985) (holding that the privileges protected under Washington's List are protected under modern formulations of the Clause).

Though the Supreme Court has not had the occasion to rule directly on whether marriage is a "privilege" of state citizenship for the purposes of the Clause, Washington's List and other court rulings lead to that inescapable conclusion. The Supreme Court has held that the Clause protects a nonresident when he or she seeks to "engage in an essential activity or exercise a basic right." *Baldwin*, 436 U.S. at 386. Marriage is an essential, basic right under the Clause as it has been in other constitutional contexts.[30] The Supreme Court has recognized other protected privileges similar to the right to marry. In *Doe v. Bolton*, 410 U.S. 179 (1973), the Supreme Court protected nonresidents' access to healthcare. *Id.* at 200. The *Doe* Court reasoned that because the Clause included the lesser right to earn a living, it must also include the greater right to secure medical treatment. *Id*. By the same logic, because the Clause protects an individual's endeavors to apply for certain jobs, surely it protects the more fundamental interest of two people who seek to marry. *See Goodridge*, 440 Mass. at 326 (equating exclusion from marriage with exclusion from the full range of human experience).[31]

National citizenship includes the right to travel in order to marry in the State of one's choice (consistent with that State's laws and constitution).[32] Every weekend, happy couples travel

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[30] The Supreme Judicial Court held in *Goodridge* that marriage is an essential activity and basic right. *Goodridge*, 440 Mass at 325 ("Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion….It is considered a "civil right"). The U.S. Supreme Court has also noted on many occasions the importance of marriage to both the individual and society. *See*, *e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") (citations omitted). The Supreme Court reiterated again that the constitution protects same-sex couples with respect to their personal decisions concerning marriage, family relationships, and child rearing. *See Lawrence v. Texas*, 1235 S. Ct. 2472, 2481-482 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

[31] The Supreme Court has expressly held that the Clause is in no way limited to economic concerns. *Piper,* 470 U.S. at 282 n.11. *See also Corfield*, 6 F. Cas. at 552 (holding that the "enjoyment of life and liberty" and "the pursuit and [attainment] of happiness and security" are privileges under the Clause).

[32] Citizens of the several States have consistently and repeatedly crossed state borders to marry. *Mazzolini v. Mazzolini*, 155 N.E.2d 206 (Ohio 1958) (first-cousins barred from marrying in Ohio did so in Massachusetts and

from their State of residence in order to marry in the state of the bride's childhood, the place where an elderly grandparent can best be accommodated, or the site of a dream destination wedding. In this respect, across the Nation, couples are regularly selecting, planning, and celebrating their marriage in destinations away from their home state.[33] Hawaii, for example, would stand as an affront to national unity if it could reserve its picturesque shores for Hawaiian residents only. *See*, *e.g.*, *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902-03 (1986) (recognizing the presumption that individuals are not only citizens of their home state, but protected guests of the States they visit – members of a single unified nation). Allowing the Commonwealth to apply its marriage laws only to residents is contrary to the goal of national unity.

In the instant case, Section 11 excludes only nonresident same-sex couples from obtaining a Massachusetts marriage license even though Massachusetts protects the rights of resident same-sex couples to marry. Such disparate treatment with respect to a privilege protected by the Clause triggers the Commonwealth's obligation to demonstrate a substantial reason for the discrimination.

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returned home), App. 8; *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157 (1819) (Massachusetts residents traveling to Rhode Island to marry to avoid Commonwealth's anti-miscegenation restriction); *Ex Parte Kinney*, 14 F. Cas. 602, 604 (Cir. Ct. E.D. Va. 1879) (Virginia citizen imprisoned under Virginia's anti-miscegenation statute following his marriage in the District of Columbia). A significant part of this marriage-related travel has been driven by the fact that each of the several States has independent constitutional authority to establish its own requirements for marriage. *In re Burrus*, 136 U.S. 586, 593-94 (1890) ("[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.")

[33] Travel is a fundamental and virtually inescapable part of marriage. Several major airlines provide discounts off of published rates for the intended couple and their guests. *See The Destination Wedding and Eloping "Delphi Forum" FAQ* at §2.2 (whollymatrimony.com), App. 57. The destination wedding market is one of today's top marriage trends. *See Modern Bride Magazine*, "Destination I DO's," June/July 2004, pp. 350-53, 374-76, App. 51. *See also Wedding Pages: Boston*, "Long Distance Planning – Organizing from afar creates its own list of obstacles. Here's how to Navigate," Spring/Summer 2004, pp. 90-94, App. 55. Bookstores are replete with books instructing couples how to plan weddings away from home. *See*, *e.g.*, http://www.cluelessbooks.com/weddings/destbooks.html, (book reviews), App. 56. Websites are dedicated to destination selection. *See*, *e.g.*, http://www.theknot.com/keywords/sc_147_527.shtml. Between 5% and 7% of all marriages take place away from home. *See* Aleksandra Todorova, *7 Tips on Destinations Weddings*, (smartmoney.com), App. 61. Notably, even though economic interests are not required to trigger the protections of the Privileges & Immunities Clause, the right to marry has implications for the development of the Nation as a whole.

2. The Commonwealth Cannot Justify Its Discrimination Against Out-of-State, Same-Sex Couples.

Because Section 11 discriminates between residents and nonresidents with respect to a protected privilege, the Constitution requires that the Commonwealth provide a "substantial reason" for denying nonresident same-sex couples the right to marry in Massachusetts. *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298-99 (1998) (requiring offending State to demonstrate that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.").[34] To meet this test, the Commonwealth must demonstrate that nonresidents are the "peculiar source of the evil" that Section 11 seeks to remedy. *See Camden*, 465 U.S. at 222; *Toomer*, 334 U.S. at 398. The Commonwealth, however, cannot articulate such a reason for discrimination against nonresident same-sex couples.

a. Nonresidents are not a peculiar source of evil.

Massachusetts' own marriage-licensing laws belie any assertion that nonresidents are the "peculiar source of evil" that Section 11 seeks to remedy. The expectation that citizens from other states can marry in the Commonwealth (or that Massachusetts citizens can marry elsewhere when traveling through the several States) is encouraged by Massachusetts' own licensing statutes.[35] Governor Romney himself has conceded that marriages of nonresident gay couples

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[34] Notably, if there is no substantial relationship between the purported justification (*i.e.,* uniformity or comity, *infra*) and the discrimination against nonresidents, the discrimination violates the Clause. This is true even if the State could provide a substantial justification for this law, which the Commonwealth cannot do here.

[35] *See* G.L. c. 207 (imposing no residency requirement). *See also id.* at §§ 28A (authorizing medical certificates originating from other states), 30 (authorizing nonresidents to access Massachusetts courts to waive 3 day waiting period), 36 (allowing residents of Massachusetts to marry elsewhere); 39 (authorizing solemnization by designated nonresidents); 43 (concerning solemnization in a foreign country); 46 (allowing reliance on records of consul or diplomatic agent).

"'do no harm to the Commonwealth.'"[36] The Department does not even keep records distinguishing between resident and nonresident marriage licenses.[37] Certainly, the Commonwealth cannot legitimately contend that the marriage of nonresidents poses a social or economic "evil."[38] *See In re Matter of Jadd*, 391 Mass. 227, 236-37 (1984) (striking residency requirement for bar admission under Privileges and Immunities Clause because nonresident attorneys were not the source of any problem being addressed).

b. Protecting residents and State resources is neither a substantial reason, nor does it bear a substantial relationship to denying gay and lesbian nonresidents the right to marry.

Massachusetts has never asserted a protective interest on behalf of its resources or residents with respect to the distribution of marriage licenses.[39] The absence of an express residency requirement signals that Massachusetts asserts no commercial or protective interest of its own in the granting of marriage licenses.

The Commonwealth cannot now assert a substantial reason to justify its denial of marriage license to nonresidents. Marriage licenses do not fall within the category of things deserving preservation for citizens only. The Supreme Court has held that restrictions on nonresidents may be appropriate in some instances: for example, where the consumed good such as education benefits, welfare benefits, or local employment opportunities is in finite supply and could be transported and enjoyed out-of-state to the detriment of the States' residents, s*ee*

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[36] Yvonne Abraham & Raphael Lewis, *Romney Turns to AG For Halt To Licensing*, Boston Globe, May 21, 2004, at A1 (quoting Governor Romney), App. 44.

[37] *See* Letter of Karin Barrett, Assistant Registrar dated June 14, 2004 (responding to public records request), App. 18.

[38] The Commonwealth also cannot argue that same-sex couples are a particular source of mischief. *See Goodridge,* 440 Mass. at 342 (citing Massachusetts statutes protecting gays and lesbians from discrimination); s*ee also Lawrence v. Texas*, 539 U.S. 508, 520 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[39] For purposes of obtaining divorces, annulments, or affirmations, Massachusetts has preconditioned access to its courts, but it has never done so for marriage. *Compare* G.L. c. 207, § 30 (allowing nonresidents to apply for waiver of marriage waiting period) with c. 208, §§ 4-5 (establishing domicile requirements for divorce).

Martinez v. Bynum, 461 U.S. 321, 325-26 (1983) (upholding bona fide residence requirement for attendance at Texas public school). Yet, such is not the case regarding marriage licenses. Marriage licenses are not a consumable good needing preservation against the risk that they will be destroyed or rendered impractical by excessive demand. *Cf. Baldwin,* 436 U.S. at 378 (holding that nonresidents' access to recreational hunting in Montana was not protected by the Clause because, among other things, the elk supply "by its very nature [could] be enjoyed by only a portion of those who would enjoy it"). Unlike elk hunting, there is no cap on the number of marriage licenses Massachusetts can issue in a year.

Even if the Commonwealth's interest in conserving resources for its own citizens were somehow deemed appropriate with respect to marriage licenses, as applied here, there is no substantial relationship between that purported interest and the denial of licenses to same-sex couples.[40] Nonresidents marrying in Massachusetts pose no threat to the Commonwealth's financial resources.[41] To the contrary, weddings are big business and could provide revenue to the State, municipalities, and other wedding industry participants.[42]

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[40] In contrast, the interests of the Commonwealth in divorce are distinctly different. A state may have an interest in preventing the state from becoming a "divorce mill." *See Sosna v. Iowa*, 419 U.S. 393, 406-07 (1975) (recognizing that state has interest in protecting its decrees from collateral attack thus justifying one year residency requirement for divorce); *Cf. Fiorentino v. Probate Court*, 365 Mass. 13, 17 (1974) (invalidating Massachusetts' two year residency requirement for divorce under the Equal Protection Clause though acknowledging that Massachusetts has an interest in protecting its courts from fraudulent invocations of their jurisdiction). In contrast to marriage, the state has an undeniable interest in ensuring jurisdiction over the parties, and overseeing the custody and visitation of any children and the distribution of the marital property pursuant to any decree.

[41] However, even if, *arguendo*, there were significant costs associated with issuing marriage licenses to nonresidents, cost alone will not absolve Massachusetts of its constitutional obligations. *See Plyer v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification [to exclude nonresidents from school enrollment]. The State must do more than justify its classification with a concise expression of an intention to discriminate."). *See also Goodridge*, 440 Mass. at 335 (dismissing the Commonwealth's argument that it was denying marriage licenses to same-sex residents in an attempt to protect financial resources).

[42] In fact, there is reason to believe that a state's issuance of marriage licenses to nonresident couples would provide an economic boon to the state and its economy. Out-of-state applicants pay a fee for the marriage license, pay to solemnize their wedding, and may purchase other goods and services from private vendors in connection with their marriage ceremony. *See*, *e.g.*, Aude Lagorce, *The Gay-Marriage Windfall: $16.8 Billion*, April 5, 2004, at http://www.forbes.com/2004/04/05/cx_al_0405gaymarriage_print.html, App. 59.

Moreover, the Commonwealth cannot plausibly claim that it has a substantial interest in protecting Massachusetts residents against marriages by nonresident same-sex couples. Massachusetts residents are not harmed by marriages taking place around them, nor by the presence of nonresidents getting married.

c. The Commonwealth has no justifiable interest in limiting gay and lesbian nonresidents from coming to the Commonwealth to marry.

The Commonwealth certainly allows heterosexual nonresidents to marry, and it can have no substantial interest in preventing gays and lesbians from traveling here for that same purpose, even if it does not want to be a marriage haven for gays and lesbians. Simply put, the desire to deter nonresident same-sex couples from traveling here to marry does not drape Section 11 with the veneer of constitutionality. To the contrary, it smacks of the most basic of equal protection violations. *See Goodridge*, 440 Mass. at 34 (marriage ban a result of "persistent prejudices"); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating amendment unlawfully imposing disabilities on gay people across the board).

Yet, even if characterized as an attempt "to take care of its own," states are forbidden from exactly that approach under the Privileges and Immunities Clause. *Saenz*, 526 U.S. at 499 n. 11 ("We do not doubt that the one-year waiting-period device is well-suited to discourage the influx of poor families in need of assistance…but the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." (alteration in original)); *Soto-Lopez*, 476 U.S. at 908-09 (preventing States from reserving opportunities or protections for its current citizens, even if it truly prefers to take care of its own). While a State may opt not to offer its own residents a benefit in order to preserve resources, it may not undertake preservation by fencing out undesirable groups. *See Edwards*, 314 U.S. at 173.

d. The purported "uniformity" achieved by Section 11 does not provide a constitutionally sufficient reason for, or substantial relationship with, Section 11.

The Massachusetts Legislature expressly stated that it enacted Section 11 to achieve the purpose of "uniformity with those states that enact similar legislation." G.L. c. 207, § 13.[43] Yet, rather than establishing true national uniformity, Section 11 only serves to enforce – extraterritorially – the prohibitory laws of other States. If adopted by all the sister States, Alabama law, for example, would govern the rights of Alabama citizens to marry no matter how far they traveled away from Alabama. Alabama could not extend its laws extra-territorially in this fashion without the cooperation of other States. *See BMW of North America v. Gore*, 517 U.S. 559 (1996) (recognizing that States cannot extend their laws beyond their own jurisdiction). States, however, cannot huddle together and agree to waive the constitutionally protected rights of their respective citizens to take advantage of the local privileges and immunities available when they visit neighboring states. *See Travis*, 252 U.S. at 82 ("A State may not barter away the right … to enjoy the privileges and immunities of citizens when they go into other States."). In this sense, the only "uniformity" actually advanced by Section 11 is a constitutionally impermissible one.

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[43] Yet the actual effect of the law, had it been ratified by more than the five states which adopted it, would have been to entrench inconsistency between each State's marriage laws, not to make them uniform vis-à-vis each other. Ernst Freund, one of the Commissioners to the Conference of Commissioners on Uniform State Laws, predicted the result of this legislative scheme:

> Up to this time we have confined ourselves to the work of uniformity, and this law would not tend to produce uniformity, but would produce diversity. As the law stands at present, if people go outside the state and are married, they are married anywhere in the land. If you adopt this law, the consequence would be to force upon the country a diversified law, because these people will be married in any state where they are, and they would not be married in any other state. In other words, the very purpose of the Conference to produce uniformity would not be effected, but the contrary result would obtain.

See Proceedings of the Twenty-Second Conference of Commissioners on Uniform State Laws, held at Milwaukee, Wisconsin, August 21, 22, 23, 24 and 26, 1912, at 41, App. 29. Thus, there is no substantial relationship between Section 11's discrimination and the purported objective of uniformity. The proposed law was withdrawn in 1943. *See Handbook of the National Conference of Commissioners on Uniform State Laws: Proceedings of the Fifty-Third Annual Conference*, at 64 (1943), App. 28.

e. The Commonwealth cannot claim that comity justifies Section 11 or that Section 11 bears a substantial relationship to the goal of comity.

Beyond what has already been argued in Part I.A.2.a. (*e.g.,* constitutional guarantees override comity interests), *supra*, Massachusetts is disingenuous in relying upon the laws of the other States to deny nonresidents marriage rights given the insubstantial relationship between the Commonwealth's asserted interest and its discrimination against nonresident couples. For example, since the Attorneys General from New York and Rhode Island have indicated that their states would fully recognize the marriages of any same-sex couples from their state marrying in Massachusetts,[44] Section 11 actually disserves comity interests.

Moreover, the "comity" erected by Section 11 is only one-sided. Instead of encouraging other states to respect marriages solemnized here, the mere existence of Section 11 has led other courts to invalidate Massachusetts marriage licenses – a result directly at odds with the Commonwealth's purported goal of engendering respect for its own licenses. *See Canwright v. Canwright*, 76 N.Y.S.2d 10, 12 (N.Y. App. Div. 1947) (relying on Section 11 to hold that marriages void in New York would also be void in Massachusetts) App. 3; *Beaudoin v. Beaudoin*, 62 N.Y.S.2d 920, 923 (N.Y. App. Div. 1946) (same) App. 2; *Seagriff v. Seagriff*, 195 N.Y.S.2d 718 (N.Y. Fam. Ct. 1960) (same) App. 10.

f. Disguising Section 11 as a "Choice of Law" provision does not make it valid as applied here.

Although "choice of law" rules can be valid interests of a State in some circumstances, simply calling Section 11 a "choice of law" rule does not vitiate its discriminatory impact or immunize it from constitutional review under the Clause. Simply put, the discriminatory impact of the Clause is not abated by attempting to characterize it as a "choice of law" rule. *See Saenz*,

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[44] See Rhode Island Attorney General Patrick Lynch's Statement Concerning Same-Sex Marriage, May 17, 2004, App. 15; Letter from Caitlin Halligan, Solicitor General of New York, to Darrin Derosia and Peter Graham, March 3, 2004, available at http://www.oag.state.ny.us/press/ 2004/mar/mar3a_04_attach2.pdf, App 20. *See also* Footnote 52, *infra.*

526 U.S. at 509 (rejecting notion that welfare payments tied to law of recipient's home states was merely a choice of law rule); *Howlett v. Rose*, 496 U.S. 356, 381-82 (1990) (recognizing that States may not evade the strictures of the Privileges and Immunities Clause by declining jurisdiction).

Even if Section 11 were re-characterized as a "quasi" choice of law rule and survived *Goodridge,* there is no substantial relationship between this purported rule and the discrimination imposed against non-residents here. "Choice of law" in this context requires a balancing of three separate concerns: (1) the Commonwealth's interest in having its own laws govern the issuance of Massachusetts marriage licenses by Massachusetts clerks within Massachusetts territory; (2) the interest, if any, of the home State in having its marriage-licensing laws extended extra-territorially; and (3) the interests of citizens wishing to marry in any State where they are qualified to marry, even if that is not their home State. Significantly, in this case, the interests of the Plaintiff Couples are superior to those of the Commonwealth or their home States. Under these circumstances, even if Section 11 were properly termed a "choice of law" rule, no choice of law theory can justify Section 11's denial of the Plaintiff Couples' rights under the Clause.

Except for Section 11, Massachusetts' marriage-licensing scheme operates according to Massachusetts' own rules for eligibility and solemnization. Until May of this year, the list of impediments to marriage was merely a rote recitation of the Commonwealth's rules for marrying, and did not enumerate, let alone incorporate, eligibility restrictions from other States. This longstanding practice simply confirms longstanding choice of law principles holding that the laws of the State of solemnization apply. *See, e.g., Commonwealth v. Graham*, 157 Mass. 73, 75 (1892) ("The general rule of law is that marriage contracted elsewhere, if valid where it is contracted, is held valid here…"); *Commonwealth v. Lane*, 113 Mass. 458, 463 (1873) ("By [common] law, the validity of a marriage depends upon the question whether it was valid where it was contracted; if valid there, it is valid everywhere."). After all, the Plaintiff Couples came to

the Commonwealth seeking Massachusetts marriage licenses, not licenses from New York, Rhode Island, or Connecticut; and accordingly, Massachusetts law should govern the issuance of its own licenses.[45]

Nor does any other State have a superior interest in imposing its own licensing rules upon Massachusetts. States have always had different rules in one way or another, whether concerning marriages "of a white and a colored person," or with a divorced person, or with an "epileptic or imbecile," or with certain relatives, or even with blood tests and waiting periods. *See, e.g.,* Fred S. Hall and Elizabeth W. Brooke, *American Marriage Laws in their Social Aspects: A Digest*, at 51-132 (1919), App. 33. The issuance of a Massachusetts marriage license, presents no harm to any other State. Subject to statutory and constitutional constraints,[46] the other forty-nine states maintain the right to establish marriage policy in their own States. *See, e.g., Restatement (Second) of Conflict of Laws* §283 (1971). States can protect their own interests and marriage policies regardless of whether Massachusetts goes so far as to incorporate other states' licensing laws into its own.[47]

For privileges and immunities, the Plaintiff Couples intending to marry possess the overriding interest. Though certainly not a prerequisite for being able to access state privileges under the Clause, many of the Plaintiff Couples have deep roots in Massachusetts: they currently

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[45] This is not the first time that nonresidents have sought out Massachusetts' more hospitablefavorable marriage laws. *See* Paul H. Jacobson, *supra*, at 48 (noting that, by 1943, non-resident marriages in Massachusetts climbed to 22% because neighboring states adopted premarital examination requirements); *id.* , non-resident marriages climbed in Massachusetts despite its compulsory five-day waiting period. In fact, nonresident grooms increased to 22 percent of the total by the time the state's own blood-test law became effective in 1943."at 48-54 (describing how non-resident marriages in any state fluctuate depending upon the termsseverity or laxness of the marriage requirements in the neighboring states) App. 35 ; *Dillon County v. Maryland Cas. Co.,* 59 S.E.2d 640, 642 (S.C. 1950), App. 6 ("The requirements in South Carolina concerning marriage are generally regarded as much less exacting than those of our sister state of North Carolina. This has resulted in an unusual number of marriage licenses being issued to non-residents … in counties along the northern border.").

[46] The Plaintiff Couples need not, and do not, take a position on the constitutionality of the other state and federal laws denying marriage rights to same-sex couples.

[47] The reaction of sister States, whatever that might be, should not be a factor in how Massachusetts implements its own laws. *See Opinion of the Justices*, 440 Mass. at 1208-09 (establishing that the protection of Massachusetts law should not depend upon the prejudice of others).

work here (*see* Verified Complaint, ¶ 45); they have worked here (*id.* at ¶¶ 45, 51, 61); they attended school here (*id.* at ¶¶ 30-31, 39, 67); they fell in love here (*id.* at ¶¶ 30, 51, 62, 67), they adopted their children here (i*d.* at ¶¶ 60); they frequently travel here to visit their hometown friends and family (*id.* at ¶¶ 26, 36); they were born here (*id.* at ¶¶ 26, 36, 51, 62); they were raised here (*id.* at ¶¶ 26, 36, 39); and they have retirement benefits due them from Massachusetts employers (*id.* at ¶¶ 47). Two couples even live within approximately 10 miles of the Massachusetts border. *Id.* at ¶¶ 44 and 52.

Yet, even if they had no prior connection with the Commonwealth, these citizens from other States now seek (and have sought) to visit Massachusetts to invoke their civil right to marry. They wish to participate in an "institution of fundamental legal, personal and social significance." *Goodridge*, 440 Mass. at 328. It is at once "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family," *id*. at 322, while also being legally ubiquitous, *id*. at 323 ("the benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death"). *See also Turner v. Safeley*, 482 U.S. 78, 95 (1987) (stating that "marriages . . . are expressions of emotional support and public commitment" and that "the commitment of marriage may be . . . an expression of personal dedication"). The Commonwealth's denial of marriage licenses to these nonresident same-sex couples necessarily also forecloses their ability to engage in a profound act of "self-definition," to associate and express themselves as married persons, and to gain access to any or all of the legal, tangible protections of marriage.[48] *Goodridge*, 440 Mass. at 322. The Commonwealth cannot simply

[48] The right to interstate travel allows citizens "to experiment with other modes of living other than those sanctioned at home and to return with the potentially transformative knowledge gained." *See Seth Kreimer*, "'But Whoever Treasures Freedom …?': The Right to Travel and Extra-Territorial Abortions," 91 Mich. L. Rev. 907, 915 (1993). By not forcing travelers to become actual residents of another state in order to "escape from the force of [the home] state's laws," the nation guards against "increasing moral homogeneity in the state," which is one of the aims of the Clause. *Id.*

choose to apply another State's law where that choice would deprive the citizens of the several States of their individual rights under the Clause. Stated differently, the Clause provides a backstop for citizens seeking to exercise their rights of state citizenship under the Clause, despite the existence of rules based upon "choice of law."

For these reasons, Section 11 runs afoul of the Privileges and Immunities Clause by subjecting non-residents to discrimination, solely because they live outside the Commonwealth, and cannot stand.

C. THE DEPARTMENT'S APPLICATION OF SECTION 11 VIOLATES CONSTITUTIONAL GUARANTEES OF AN EQUAL RIGHT TO MARRY

The Department's application of Section 11 should also be enjoined because it tramples on the fundamental right to marry of same-sex couples. Because *Goodridge* held that "the marriage ban does not meet the rational basis test for either due process or equal protection," *Goodridge*, 440 Mass. at 331, that Court "did not consider the plaintiffs' arguments that this case merits strict judicial scrutiny." *Id*. *See also Opinions of the Justices*, 440 Mass. at 1206 n. 3. Yet, if this Court reaches the arguments that were not technically addressed by the *Goodridge* majority, it will find strong support in the analysis in *Goodridge*, as well as in Justice Greaney's concurrence.[49] According to Justice Greaney, "The right to marry . . . is a fundamental right that is protected against unwarranted state interference." *Goodridge*, 440 Mass. at 345 (Greaney, J., concurring). The majority, too, situated *Goodridge* in the context of the fundamental rights cases, *id*. at 326-28, and referred to marriage as "a right of fundamental importance." *Id*. at 339.

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[49] Section 11 also constitutes impermissible discrimination on the suspect bases of sex and sexual orientation. These issues were not reached by the *Goodridge* majority. Nonetheless, the Massachusetts Constitution expressly forbids discrimination based on sex, Mass. Const. Pt. 1, art. 1, and the Department could not be clearer that the reason it is applying Section 11 is to prevent Massachusetts from "export[ing]" marriages of same-sex couples to other States. With respect to sexual orientation, there are reasons to believe the SJC would find sexual orientation to be a suspect or quasi-suspect class. *See Goodridge*, 440 Mass. at 333 (condemning "the destructive stereotype that same-sex relationships are inherently unstable and are not worthy of respect."), *id*. at 341 (recognizing that the "marriage ban" as working "a deep and scarring hardship on a very real segment of the community for no rational reason."), *id*. at 341-42 (citing *Palmore v. Sidoti*: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). *See also Opinions of the Justices*, 440 Mass. at 1209 ("That there

See also id. at 333 (marriage is one of "fundamentally private areas of life"); *id*. at 328 ("In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance – the institution of marriage…"). Thus, the Department should be enjoined from any and all steps they have taken to deny marriage to gay and lesbian couples.

II. PLAINTIFF COUPLES WILL SUFFER IRREPARABLE HARM IF THIS COURT DOES NOT ISSUE A PRELIMINARY INJUNCTION.

Every day the Commonwealth denies marriage rights and the validity of completed marriages under the auspices of Section 11 is a day that violates the Plaintiff Couples' rights under the Massachusetts Constitution and the Privileges and Immunities Clause of the United States Constitution.

Without the requested preliminary injunction, Plaintiff Couples will suffer ongoing violations of their constitutional rights and irreparable harm. "When alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 at 161 (1995). In particular, the SJC has held that the violation of a constitutional right inherently constitutes irreparable harm. *T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 582 (1996) (holding that plaintiffs necessarily demonstrated irreparable harm because they showed a substantial likelihood that their First Amendment rights had been infringed).[50]

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may remain personal residual prejudice against same-sex couples is a proposition all too familiar to other disadvantaged groups.")

[50] This principle is not limited to First Amendment cases. *See, e.g. Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) (authorizing injunctive relief against racially-segregated waiting rooms because trial court "has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right."). *See also Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (finding irreparable injury where abortion ordinance interfered with the exercise of its constitutional rights).

Here, the Department denies the right to marry itself, and all of its legal and social, tangible and intangible protections. Within this, as with First Amendment violations, the denial of marriage licenses to nonresident same-sex couples harms them because it denies the couples' ability to associate and express themselves through marriage. (*See* discussion at Part I.B.2.f., *supra*, discussing marriage as having personal, social and legal significance.) The SJC has made clear that, in light of the inherently expressive quality of marriage, a law prohibiting same-sex couples from marrying would violate the Massachusetts Constitution regardless of whether such couples were afforded all of the more tangible benefits accompanying civil marriage. *Opinions of the Justices*, 440 Mass. 1201 (2004).

Certainly, one of the many reasons the Plaintiff Couples desire to marry is to partake in these self-affirming, intangible benefits of marriage. They wish to celebrate their relationships with their family and friends. In their communities, they want the fact of their marriage to communicate the mutual responsibility that characterizes their relationships. They want to marry to erase any ambiguity about the nature of their commitment to one another. They do not want their children to feel diminished by the fact that their parents seemingly could not -- or as viewed from a child's perspective, would not -- commit themselves to the rights and responsibilities that go along with marriage. Given the fact that the very act of getting married has clear expressive value, a denial of the Plaintiff Couples' constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *See T & D Video, Inc.*, 423 Mass. at 582 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).[51]

[51] Finally, even absent a deprivation of a *constitutional* right, "when the right the plaintiff is allegedly deprived of constitutes an important aspect of a person's identity . . . no additional injury need be shown." *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1045 (9th Cir. 1988) (finding irreparable harm to be inherent in Title VII claim that challenged employer's policy of requiring employees to speak English at work). Because plaintiffs' are being deprived of the ability to define "an important aspect of [their] identity" through marriage, they will necessarily be irreparably harmed absent a preliminary injunction. *Id.* *See also Goodridge*, 440 Mass. at 322 ("[T]he decision whether and whom to marry is among life's momentous acts of self-definition.").

Moreover, by relying on Section 11, the Commonwealth also denies any opportunity for couples to access the tangible benefits of marriage. Because marriages are generally respected everywhere when they are validly entered in the place of celebration, *see, e.g., Graham*, 157 Mass. at 75, there is reason to believe that many sister States, as well as local governments and private businesses, will accord marital rights to these couples (*e.g.,* access to the hospital for spousal visitation, family discounts, access to joint insurance policies, and bereavement leave). Even though some sister States and third parties may choose to discriminate against these couples,[52] some people and States may choose to accord these marriages full weight. For example, if Massachusetts respected the marriage it solemnized of Judi and Lee, Lee could have survivor rights to the pension Judi earned after twenty hardworking years as a nurse at the University of Massachusetts Medical Center. *See* Verified Complaint, ¶¶ 44-51. Many of the Plaintiff Couples regularly travel to Massachusetts, visiting their hometowns and their families and friends. *See* Part I.B.2.f., *supra* (delineating Plaintiff Couples' substantial contacts with the Commonwealth). Should Massachusetts stand in the way of their entitlement to visit their spouse in the hospital, claim their spouse's remains, or bring a wrongful death lawsuit should a tragic or unforeseen event occur in Massachusetts or elsewhere?

In sum, Plaintiff Couples are irreparably harmed not only by the denial of these tangible benefits, but also by the denial of their constitutional rights in-and-of itself.

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[52] Because the Commonwealth is prohibiting the issuance of marriage licenses to nonresident same-sex couples, Plaintiff Couples are presently unable to seek a determination in their home states as to whether their Massachusetts marriage license would be respected. Though some state governments will not presently accord respect, *see, e.g.,* New Hampshire (NH Rev. Stat. Ann. § 457:1-3, App. 13) and Maine (19-A Me. Rev. Stat. Ann., tit. 19-A, §§ 650, 701, App. 12), others have stated their intent to respect the relationships, *see*, *e.g.*, New York: Letter of Caitlin Halligan, New York Solicitor General dated March 3, 2004 (App. 20) and Rhode Island: Statement of Patrick Lynch, Attorney General of Rhode Island dated May 17, 2004 (App. 15), and others are less clear, *see, e.g.*, Connecticut: Letter of Connecticut Attorney General Richard Blumenthal dated May 17, 2004 (App. 19) and Vermont: Letter of Susanne R. Young, Esq., Counsel to Governor James Davis dated May 14, 2004 (App. 23).

III. The Irreparable Injury that Plaintiff Couples Will Suffer Absent and Injunction Outweighs Any Possible Harm to the department

The Department will not be harmed in any way if a preliminary injunction is granted. Municipal clerks regularly issue notices of intent to marry and marriage licenses to same-sex couples intending to reside in Massachusetts—as well as to nonresident different-sex couples—and the Registrar of Vital Statistics regularly records such marriage licenses. The extension of these administrative functions to nonresident same-sex couples would impose no substantial burden on the Department. Indeed, if anything, a preliminary injunction in this case would make the Department's job easier because they would not have to expend resources identifying applications filed by nonresident same-sex couples. Moreover, because every couple pays a fee to cover the administrative costs of issuing their marriage license, a preliminary injunction would not place any financial burden on the Department.

Just as the Governor asserted speculative claims of "chaos" or "confusion" in advance of May 17, the Department may do so again now. Yet, any such speculation about chaos is insufficient proof of any harm to the Commonwealth or to the public-at-large. The Court's ruling in *Goodridge* is neither the first significant change in civil marriage, nor does it mark the first time marriage laws have differed dramatically from state to state.[53] *See*, *e.g.*, *Goodridge*, 440 Mass. at 327-28 (noting divergence in state laws regarding eligibility to marry based on race). Over time, the law has adjusted to a changing society, as courts and lawmakers throughout the United States reformed marriage laws, at times radically, to reflect contemporary views of racial and gender equality, privacy, and fundamental fairness. Simply put, speculative claims of chaos and confusion do not balance the equities in the Department's favor.

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[53] Notably, this lawsuit only seeks to invalidate Section 11. It will not repeal or invalidate any of the laws of the sister States or the federal government. The limited reach of this legal action will not affect any federal or state laws denying marriage rights to gays and lesbians or the marriage evasion statutes of the limited number of sister States that have them.

To the extent the Department attempts to assert a patronizing concern about the general welfare of the Plaintiff Couples (or any similarly situated couples) who have chosen (or may choose) to bear the risk of any legal uncertainty in Massachusetts or elsewhere, that risk is a risk borne by the Plaintiff Couples alone. The risk of disrespect of the Plaintiff Couples' licenses (to the extent any such Plaintiff Couples have been allowed to marry at all) outside of Massachusetts does not harm the Commonwealth, particularly since all of these couples are nonresidents.

Finally, even if the Department could conjure some theoretical harm it might suffer by the issuance of a preliminary injunction, denying Plaintiff Couples' constitutional rights—even for a day—necessarily outweighs any such harm. *See T & D Video,* 423 Mass. at 582 ("On balance, any harm that [defendant] will suffer as a result of the granting of this preliminary injunction does not exceed that which [plaintiff] will suffer by being denied its constitutionally protected rights.").

IV. THE PUBLIC INTEREST FAVORS ISSUANCE OF A PRELIMINARY INJUNCTION IN THIS CASE.

In this case, "equitable relief will not adversely affect the public." *Royal Order of Moose*, 439 Mass. at 601 (internal quotation marks and citation omitted).[54] In fact, the public interest is *served* by protecting and enforcing constitutional rights. *See*, *e.g.*, *Frawley v. Watson,* No. Civ. A. 01-4486, 14 Mass. L. Rptr. 141, 2001 WL 1631719, at *5 (Mass. Super. Dec. 12, 2001) (granting preliminary injunction because, among other things, "the public interest will be served by ensuring that that [plaintiff] is afforded his proper constitutional rights"); *Jaykay-Boston v. City of Boston*, No. Civ. A. 99-0252B, 9 Mass. L. Rptr. 551, 1999 WL 65655, at *4 (Mass. Super. Feb. 3, 1999) ("Issuance of [preliminary] injunctive relief will [] further the strong

[54] While the Department may argue that allowing nonresident same-sex couples to marry would harm the public interest by imposing their marriages upon the Plaintiff Couples' home States, this argument is neither factually nor legally sound. The argument fails as a matter of fact because other states have ample opportunity to decide their own policy, and the argument fails as a matter of law because purely speculative, theoretical harm *to another state* is not relevant to a determination of whether an injunction promotes the interests of the Massachusetts' public. *See also* Footnote 52, *supra*.

public interest in protecting constitutional rights."); *see also A & A Window Prods., Inc. v. City of Worcester*, No. 030199BLS, 15 Mass. L. Rptr. 633, 2003 WL 369675, at *3 (Mass. Super. Jan. 22, 2003) (granting preliminary injunction because, among other things, "the public interest requires a deep concern for the Constitution").

CONCLUSION

For the foregoing reasons, the Plaintiff Couples respectfully request that this Court grant their Motion for a Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party by hand on June 23, 2004.

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