
COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-09436

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

PLAINTIFFS-APPELLANTS,

v.

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

DEFENDANTS-APPELLEES.

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

Brief of Plaintiffs-Appellants

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TABLE OF CONTENTS

Statement of Issues 1

Statement of the Case 1

 1. Prior Proceedings 1

 2. Statement of Facts 2

Summary of the Argument 18

Argument 19

I. APPLICABLE STANDARD OF REVIEW 20

II. GOODRIDGE AND OPINIONS OF THE JUSTICES
 RENDER UNCONSTITUTIONAL ANY ATTEMPT TO
 DENY MARRIAGE RIGHTS TO SAME-SEX COUPLES
 AS SAME-SEX COUPLES 21

 A. Non-Residents Are Entitled to the
 Constitutional Protections That Form
 the Basis of Goodridge..... 22

 B. The Commonwealth Cannot Impose Laws
 Banning Equal Marriage Rights, Even If
 Such Laws Come From the Sister States..... 26

 C. The Commonwealth Contorts the Meaning of
 Goodridge..... 29

III. BY USING §§11-12 AS A WEAPON TO PURPOSEFULLY
 DENY THE COUPLES’ EQUAL MARRIAGE RIGHTS, THE
 COMMONWEALTH DENIES THE COUPLES THE EQUAL PROTECTION
 OF THE LAWS 33

 A. The Romney Administration’s Purposeful
 Resurrection of §§11-12 Following Goodridge
 Constitutes a Denial of Equal Protection of
 the Laws 34

 1. Purposeful Discrimination and Disparate
 Impact Combine to Establish a Classic
 Equal Protection Violation 36

 2. The Commonwealth Was (and Remains)
 Motivated by a Discriminatory Purpose .. 40

 B. The Defendants’ Selective Pursuit of Only
 Same-Sex Couples Under §§11-12 Denies the
 Couples the Equal Protection of the Laws 44

| | | |
|-----|--|----|
| IV. | SECTIONS 11-12 VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION | 45 |
| | A. Sections 11-12 Discriminate Against Non-Residents with Respect to a "Privilege" or "Immunity" of State Citizenship | 48 |
| | B. The Commonwealth Cannot Justify Its Discrimination Against Non-Resident, Same-Sex Couples..... | 53 |
| | 1. The Commonwealth Cannot Carry Its Burden Demonstrating a Substantial Reason for Discriminating Against Non-Resident Same-Sex Couples | 54 |
| | 2. Even if the Commonwealth Could Articulate a Substantial Reason, It Cannot Demonstrate a Close Relationship Between the Discrimination and the Commonwealth's Ends | 63 |
| V. | PROPERLY CONSTRUED, §§11-12 DO NOT REACH ALL STATES & TERRITORIES OF THE UNITED STATES | 69 |
| | A. The Commonwealth's Application of §§11-12 and Its Impact on Non-Resident Couples | 70 |
| | B. Within the Statutory Framework, §11 Is the Substantive "Reverse Evasion" Provision and §12 Is Part of Its Enforcement..... | 72 |
| | 1. The Substantive Provisions of the Statutory Scheme Are Directed Only To "Void" Marriages | 72 |
| | 2. Sections 12 and 50 Serve To Reinforce and Administer the Statute's Substantive Concern for "Void" Marriages | 74 |
| | 3. The Commonwealth's Historical Practices Demonstrate that this Statutory Scheme Reaches "Void" Marriages Only | 76 |
| | C. The Commonwealth Cannot Expand the Reach of the Reverse Evasion Law by Attempting to Give Substantive Force to §12 | 77 |
| | Conclusion | 78 |
| | Addendum | A1 |
| | Statutory Appendix | 1 |

TABLE OF AUTHORITIES

CASES

American Grain Products Processing Institute v.
Dept. of Public Health,
392 Mass. 309 (1984) 21

Anthony v. Sundlun,
952 F. 2d 603 (1st Cir. 1991) 42

Attorney General of N.Y. v. Soto-Lopez,
476 U.S. 898 (1986) 52, 55

Austin v. New Hampshire,
420 U.S. 656 (1975) 61

Bachrach v. Sec'y of the Comm.,
382 Mass. 268 (1981) 35

| | |
|--|----------|
| <u>Baldwin v. Fish and Game Comm'n of Montana,</u> 436 U.S. 371 (1978) | 49,50,59 |
| <u>Beaudoin v. Beaudoin,</u> 62 N.Y.S. 2d 920 (N.Y. App. Div. 1946) | 73 |
| <u>Bowe v. Sec'y of the Commonwealth,</u> 320 Mass. 230 (1946) | 28 |
| <u>Burnham v. Superior Court of California,</u> 495 U.S. 604 (1990) | 46 |
| <u>Caffyn v. Caffyn,</u> 441 Mass. 487 (2004) | 20 |
| <u>United Bldg. and Const. Trades Council of Camden County v. City of Camden,</u> 465 U.S. 208 (1984) | 54,55 |
| <u>Canwright v. Canwright,</u> 76 N.Y.S. 2d 10 (N.Y. App. Div. 1947) | 73 |
| <u>Cleburne v. Cleburne Living Center,</u> 473 U.S. 432 (1985) | 43 |
| <u>Commonwealth v. Aves,</u> 35 Mass. 193 (1836) | passim |
| <u>Commonwealth v. Caceres,</u> 413 Mass. 749 (1992) | 25 |
| <u>Commonwealth v. Cast,</u> 407 Mass. 891 (1990) | 25 |
| <u>Commonwealth v. Novo,</u> 442 Mass. 262 (2004) | 21 |
| <u>Commonwealth v. Stasiun,</u> 349 Mass. 38 (1965) | 32 |
| <u>Corfield v. Coryell,</u> 6 F. Cas. 546 (No. 3,230 CC ED Pa. 1825) | 49,50,52 |
| <u>Coyne v. City of Somerville,</u> 770 F. Supp. 740 (1991) | 33,34 |
| <u>Department of Agriculture v. Moreno,</u> 413 U.S. 528 (1973) | 43 |
| <u>Doe v. Bolton,</u> 410 U.S. 179 (1973) | 51,56 |

| | |
|--|------------|
| <u>C. Joseph Doyle v. Supreme Judicial Court,</u> SJ-2004-0169 (May 3, 2004) | 57 |
| <u>Dunn v. Blumstein,</u> 405 U.S. 330 (1972) | 46 |
| <u>Edwin R. Sage Co. v. Foley,</u> 12 Mass. App. Ct. 20 (1981) | 20 |
| <u>Faulkner v. Hyman,</u> 142 Mass. 53 (1886) | 27 |
| <u>Fedele v. Sch. Comm. Of Westwood,</u> 412 Mass. 110 (1992) | 37 |
| <u>Goodridge v. Department of Public Health,</u> 440 Mass. 309 (2003) | passim |
| <u>Hicklin v. Orbeck,</u> 437 U.S. 518 (1978) | passim |
| <u>Hunter v. Underwood,</u> 471 U.S. 222 (1985) | 38, 43 |
| <u>Hutchins v. New England Coal Mining,</u> 86 Mass. 580 (1862) | 27 |
| <u>In re Jadd,</u> 391 Mass. 227 (1984) | 47, 54, 64 |
| <u>Labor Relations Commission v. Board of Selectmen of Dracut,</u> 374 Mass. 619 (1978) | 70 |
| <u>Loving v. Virginia,</u> 388 U.S. 1 (1967) | 5 |
| <u>Lunding v. New York Tax Appeals Tribunal,</u> 522 U.S. 287 (1998) | passim |
| <u>Martinez v. Bynum,</u> 461 U.S. 321 (1983) | 59 |
| <u>Mazzolini v. Mazzolini,</u> 155 N.E. 2d 206 (Oh. 1958) | 71, 73 |
| <u>Olech v. Village of Willowbrook,</u> 160 F. 3d 386 (7 th cir. 1998) | 40 |
| <u>Opinions of the Justices to the Senate,</u> 440 Mass. 1201 (2004) | passim |

| | |
|--|------------|
| <u>Pacific Wool Growers v. Comm’r of Corps. & Tax,</u> 305 Mass. 197 (1940) | 27 |
| <u>Packaging Industries Group, Inc. v. Cheney,</u> 380 Mass. 609 (1980) | 20 |
| <u>Paul v. Virginia,</u> 8 Wall. 168 (1869) | 47, 53 |
| <u>Personnel Administrator of Massachusetts v. Feeney,</u> 442 U.S. 256 (1979) | passim |
| <u>Reitman v. Mulkey,</u> 387 U.S. 369 (1967) | 43 |
| <u>Romer v. Evans,</u> 517 U.S. 620 (1996) | 36 |
| <u>Saenz v. Roe,</u> 526 U.S. 489 (1999) | 46, 59, 61 |
| <u>School Cte. of Springfield v. Bd. of Educ.,</u> 366 Mass. 315 (1974) | 44 |
| <u>Seagriff v. Seagriff,</u> 195 N.Y.S. 2d 718 (N.Y. Fam. Ct. 1960) | 74 |
| <u>Sosna v. Iowa,</u> 419 U.S. 393 (1975) | 63 |
| <u>Supreme Court of N.H. v. Piper,</u> 470 U.S. 274 (1985) | passim |
| <u>T & D Video, Inc. v. City of Revere,</u> 423 Mass. 577 (1996) | 21 |
| <u>Toomer v. Witsell,</u> 334 U.S. 385 (1948) | passim |
| <u>Town of Burlington v. Labor Relations Commission,</u> 12 Mass. App. Ct. 184 (1981) | 34, 39 |
| <u>Travis v. Yale & Towne Mfg. Co.,</u> 252 U.S. 82 (1920) | 62, 63 |
| <u>Universal Adjustment Corp. v. Midland Bank,</u> 281 Mass. 303 (1933) | 24 |
| <u>Upshaw v. Katherine Gibbs School of Boston,</u> __ Mass. App. Ct. __, 2005 WL 502812 | |

| | |
|---|--------|
| (2005) | 76,78 |
| <u>Vigeant v. Postal Telegraph Cable Co.</u> , 260 Mass. 335 (1927) | 29 |
| <u>Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.</u> , 429 U.S. 252 (1977) | passim |
| <u>Village of Willowbrook v. Olech</u> , 528 U.S. 562 (2000) | 39 |
| <u>Washington v. Davis</u> , 426 U.S. 229 (1976) | 39 |
| <u>Woodworth v. Spring</u> , 86 Mass. 321 (1862) | 24,27 |
| <u>Yick Wo v. Hopkins</u> , 118 U.S. 356 (1886) | 34,45 |
| <u>Zablocki v. Redhail</u> , 434 U.S. 374 (1978) | 57 |
| <u>Zobel v. Williams</u> , 457 U.S. 55 (1982) | 51 |

STATUTES

| | |
|-------------------------------------|--------|
| U.S. Const., Art. IV, § 2 | passim |
| Mass. Const., Pt. 1, Art. I | 25 |
| Mass. Const., Pt. 1, Art. VI | 25 |
| Mass. Const., Pt. 1, Art. VII | 25 |
| Mass. Const., Pt. 1, Art. IX | 25 |
| Mass. Const., Pt. 1, Art. X | 25 |
| Mass. Const., Pt. 1, Art. XIV | 25 |
| Mass. Const., Pt. 2, Art. CVI | 25 |
| Mass. R.S. 1836, c. 75, § 6 | 4 |
| St. 1913, c. 360, §§ 1-5 | passim |
| Mass. G.L. c. 17, § 4 | 42 |
| Mass. G.L. c. 46, §§ 1-2 | 3 |
| Mass. G.L. c. 46, § 17A | 3 |

| | |
|---|-----------|
| Mass. G.L. c. 111, § 2 | 3 |
| Mass. G.L. c. 207, § 10 | passim |
| Mass. G.L. c. 207, § 11 | passim |
| Mass. G.L. c. 207, § 12 | passim |
| Mass. G.L. c. 207, § 13 | passim |
| Mass. G.L. c. 207, § 19 | 2, 3 |
| Mass. G.L. c. 207, § 28 | 3 |
| Mass. G.L. c. 207, § 30 | 3, 17, 59 |
| Mass. G.L. c. 207, § 37 | 6 |
| Mass. G.L. c. 207, § 38 | 3 |
| Mass. G.L. c. 207, § 39 | 3, 59 |
| Mass. G.L. c. 207, § 40 | 3 |
| Mass. G.L. c. 207, § 50 | passim |
| Mass. G.L. c. 208, § 4 | 59 |
| Mass. G.L. c. 208, § 5 | 59 |
| Mass. G.L. c. 231, § 118 | 2 |
| Fla. Stat. Ann. § 741.212 | 68 |
| Ga. Code Ann., § 19-3-3.1 | 68 |
| 750 Ill. Comp. Stat. 5/217 | 5 |
| 1915 Ill. Laws 496 | 5 |
| 1914 La. Acts 151 | 5 |
| 1972 La. Acts 171 | 5 |
| Me. Rev. Stat. Ann., tit. 19-A, § 650 | 68 |
| Me. Rev. Stat. Ann., tit. 19-A, § 701 | 68, 71 |
| Me. Rev. Stat. Ann., tit. 19-A, § 751 | 71 |
| N.H. Rev. Stat. Ann. § 457:1-3 | 68, 71 |
| N.H. Rev. Stat. Ann. § 457:44 | 5 |

| | |
|------------------------------------|----|
| Va. Code Ann. § 20-45.2 | 68 |
| 1912 Vt. Acts & Resolves 110 | 5 |
| Vt. Ann. Stat. T. 15, § 6 | 5 |
| Vt. Ann. Stat. T. 15, § 1201 | 71 |
| 1915 Wis. Stat. 270 | 5 |
| Wis. Stat. Ann. § 765.04 | 5 |

MISCELLANEOUS

| | |
|---|--------|
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| Elisabeth J. Beardsley, <u>Same-Sex Marriage Debate; Chaos Reigns as Wedding Ban OK'd</u> , Boston Herald, Mar. 30, 2004, at 6 | 8 |
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| Frank Phillips & Rick Klein, <u>Lawmakers are Divided on Response</u> , Boston Globe, Nov. 19, 2003, at A1 | 8 |
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(3rd ed. 2000) 61

Laurence Tribe, Saenz Sans Prophecy: Does the
Privileges or Immunities Revival Portend
the Future - or Reveal the Structure of
the Present, 113 Harv. L. Rev. 110 (1999) 62

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Race, Marriage, and Law - An American History
(2002) 4

STATEMENT OF ISSUE

Whether the trial court erred in denying the Plaintiffs-Appellants' request for preliminary injunctive relief?

STATEMENT OF THE CASE

1. Prior Proceedings

On June 18, 2004, eight non-resident same-sex couples (the "Couples"), instituted this action against the Department of Public Health ("DPH"); Christine C. Ferguson, in her capacity as Commissioner of DPH; and Stanley E. Nyberg, in his capacity as Registrar of Vital Records and Statistics (collectively the "Defendants"), seeking, along with injunctive relief, a declaration that the administration of G.L. c. 207, §§ 11-12 to deny them marriage licenses violates Massachusetts law and the Privileges and Immunities Clause of the United States Constitution (art. IV, §2). Record Appendix (R.A.) 24.¹

¹ On June 22, 2004, upon the submission of an assented-to motion, the trial court consolidated this action with another lawsuit brought by thirteen municipal clerks from cities and towns across the Commonwealth (the "Clerks"), Johnstone et al. v. Reilly et al., Civil Action No. 04-2655-G, which sought a declaration that the Commonwealth's alleged selective enforcement of these statutes violated Massachusetts law. R.A. 24, 166-67.

The Couples filed a motion for preliminary injunctive relief, seeking to enjoin the Defendants from administering G.L. c. 207, §§ 11-12 to bar otherwise qualified non-resident same-sex couples from obtaining marriage licenses and directing the Defendants to process and index marriage applications and licenses from non-resident same-sex couples in the ordinary course. R.A. 24, 55-57. By Memorandum and Order dated August 18, 2004, the Superior Court (Ball, J.) denied the Couples' motion. R.A. 24, 108, 137.

The Couples filed a timely notice of appeal of the denial of their Motion pursuant to G. L. c. 231 §118 (¶2), which appeal was first docketed in the Appeals Court on December 7, 2004, and later in this Court on February 8, 2005, following the Court's grant of direct appellate review. R.A. 130, 132, 133-34.

2. Statement of Facts

Massachusetts Marriage Licensing Scheme

General Laws chapter 207 governs the issuance of marriage licenses and the associated public records.²

² To start, marriage license applicants file a "Notice of Intention of Marriage" form at any city or town hall in the Commonwealth. G.L. c. 207, §19. Thereafter, the municipal clerk issues the applicant couple a Certificate of Marriage on or after the third day from the filing of the Notice (unless a court

See generally Goodridge v. Department of Public Health, 440 Mass. 309, 317-318 (2003).

Massachusetts Marriage Evasion Statutes

In 1913, the Legislature enacted G.L. c. 207 §§ 11 and 12 as part of a (now withdrawn) uniform law called the Uniform Marriage Evasion Act. Pursuant to St. 1913, c. 360, this uniform law amended G.L. c. 207, § 10,³ and enacted G.L. c. 207 §§ 11, 12,⁴ 13,⁵

waives the 3 day waiting period). G.L. c. 207, §§19, 28, 30. With the Certificate of Marriage in hand, an authorized officiant may solemnize the marriage. 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.

³ Section 10 is an "evasion" statute that operates to void the marriages of Massachusetts residents who leave the Commonwealth to marry in evasion of Massachusetts law.

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.

and 50.⁶ Section 11 is a "reverse evasion" statute, providing:

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

G.L. c. 207, §11.

The Massachusetts Legislature adopted §11 (along with §§10⁷ and 12) verbatim from the 1912 recommendations of the Commissioners on Uniform Laws.⁸

⁵ Section 13, entitled "Construction," provides that §§10-12 should be "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 criminal penalties for officials knowingly issuing a certificate of marriage, or solemnizing a marriage, that is prohibited by §11.

⁷ Long before Massachusetts adopted the Uniform Marriage Evasion law, Massachusetts marriage-licensing laws already contained an "evasion" statute. See R.S. 1836, c. 75, § 6 (voiding marriages of residents conducted outside the state for purposes of evading Massachusetts's express statutory prohibitions).

⁸ The final report of the Committee on Marriage and Divorce bluntly acknowledged 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." R.A. 509-10. Anti-miscegenation laws barring whites from marrying non-whites existed in 30 of 48 states by the end of 1913. See Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law - An American History, (2002), Figure 8.

Compare St. 1913, c. 360, §§1-3 and Committee Report to Commissioners, R.A. 507, 511-12.

Only five states (including Massachusetts) ever enacted, in full or in substance, the Uniform Marriage Evasion Act,⁹ and the Commissioners on Uniform State Laws withdrew it in 1943 after concluding that, in the absence of its widespread adoption, "it merely tend[ed] to confuse the law." Handbook of the Commissioners (1943), R.A. 464. Massachusetts is one of now only four states to maintain a version of the Uniform Marriage Evasion Act on its books.¹⁰

"Legal Impediments" To Marriage in Massachusetts

To marry in Massachusetts, all license applicants, whether resident or non-resident, must certify, through a statement of affidavit that is embedded in the Notice of Intention, that no "legal impediment" to their marriage is known to exist. See, e.g. Notices of Intention (Pre-May 17, 2004), R.A.

⁹ See 1915 Ill. Laws 496; 1914 La. Acts 151; 1912 Vt. Acts & Resolves 110; 1915 Wisc. Stat. 270.

¹⁰ The three states that maintain this uniform law in addition to Massachusetts include Illinois, Wisconsin, and Vermont. 750 Ill. Comp. Stat. 5/217; Wis. Stat. Ann. §765.04; Vt. Stat. Ann. Tit. 15, §6. Louisiana repealed its law in the wake of Loving v. Virginia, 388 U.S. 1 (1967). 1972 La. Acts 171. In 1979, New Hampshire enacted a reverse evasion statute of its own. N.H. Rev. Stat. §457:44.

546, 547; Registration of Marriages Vital Records 104, R.A. 549-51. For guidance on what constitutes a "legal impediment", municipal clerks display a "Notice of Legal Impediments to Marriage" in a location visible to marriage applicants. Id.

The Notice of Legal Impediments identifies all legal impediments to marriage in Massachusetts. See Notices of Legal Impediments from 1977 to present, R.A. 566-69; G.L. c. 207, §37 (authorizing DPH list of legal impediments). Though applicable to residents and non-residents, the record shows that the Notice of Legal Impediments itself has never identified any impediment to marriage existing in the laws of any other state, country, or territory. Id.; see also Long Aff., ¶11, R.A. 184. The only reference to the law of any other state, country, or jurisdiction on the Notice of Legal Impediments is the bare recitation of §11 itself. R.A. 566-69.

Application of §§11-12 Prior to Goodridge

Aside from incorporating §11's text into the Notice of Legal Impediments, there is no evidence that, prior to the expiration of the stay in Goodridge on May 17, 2004, the Commonwealth ever took any action to bar non-residents from marrying, regardless of

whether the marriage would be technically "void" or merely prohibited if contracted in the home state. See Commonwealth's response to public records request seeking enforcement records since 1913, R.A. 343-454; see also Johnstone Aff., ¶13, R.A. 175; Long Aff., ¶4, R.A. 182. Similarly, the Commonwealth did not prevent clerks from issuing marriage licenses to such non-residents so long as the applicants executed the Notice of Intention with its incorporated affidavit. Id.; see also Registrar's Letter to Somerville Clerk dated April 7, 1995, R.A. 560-61. If an applicant met Massachusetts's own marriage requirements (without reference to the law of any other state, country or territory) and executed the Notice of Intention, clerks could issue a license to the applicant. See, e.g., Johnstone Aff., ¶¶4,7,13, R.A. 172-175.

Governor Romney's Reaction to Goodridge

On November 18, 2003, Goodridge, 440 Mass. 309, authorized the issuance of marriage licenses to same-sex couples beginning May 17, 2004. Immediately following that decision and continuing well past its implementation date, Governor Romney assigned himself a lead role in fighting against marriage rights for same-sex couples. See generally Brief of Amici Curiae

Civil Rights Organizations and University Professors ("Amicus of Civil Rights Supporters") (detailing Governor Romney's lead role in trying to deny and delay marriage rights for same-sex couples).

Among other things, Governor Romney urged the passage of a constitutional amendment overruling Goodridge.¹¹ Even before the constitutional convention first convened in February, 2004, Governor Romney penned an opinion editorial in the Wall Street Journal encouraging states to pass constitutional amendments on marriage in order to preempt a "Goodridge-type" decision from being rendered in another state. R.A. 544-45. Within a few hours of the Legislature's preliminary approval of a constitutional amendment to ban marriage for same-sex couples on March 29, 2004, Governor Romney asked the Attorney General to seek an extension of the Goodridge stay pending the conclusion of the constitutional amendment process.¹² When the

¹¹ See, e.g., Frank Phillips & Rick Klein, Lawmakers are Divided on Response, BOSTON GLOBE, Nov. 19, 2003, at A1.

¹² See Elisabeth J. Beardsley, Same-Sex Marriage Debate; Chaos Reigns as Wedding Ban OK'd, BOSTON HERALD, Mar. 30, 2004, at 6 (describing Governor Romney's rushing back from Washington, D.C., to tell a live TV audience that he would ask the Attorney General to seek a stay).

Attorney General refused,¹³ Governor Romney proposed a bill seeking the right to retain independent counsel for the purpose of seeking a further stay of the Goodridge decision. See Governor Romney's April 29 Letter to Sister States, R.A. 661.

Foiled in his attempts to seek a stay, Governor Romney announced in late April, 2004, that only resident same-sex couples could marry. R.A. 523-25. Governor Romney publicly stated that he did not want to issue marriage licenses to same-sex couples from other states: "Massachusetts should not become the Las Vegas of same-sex marriage ... We do not intend to export our marriage confusion to the entire nation." R.A. 523.

By letter dated April 29, 2004, Governor Romney wrote to the Governors and Attorneys General of each U.S. state and territory highlighting his concern that "same-sex couples from around the country will come to Massachusetts to attempt to get married." R.A. 661. Although Governor Romney's letter explained that §11 would bar couples whose marriage would be "void" in their home state, he asked each state official to

¹³ See Frank Phillips & Kathleen Burge, Reilly Gives Governor A Hurdle, Reilly Rebuffs Romney on Possible SJC Appeal, BOSTON GLOBE, Mar. 30, 2004, at A1.

confirm his view "that same-sex marriage is not permitted under the laws of [their particular state]", and indicated that he would not issue marriage licenses to same-sex couples from their respective states "unless [he] receive[d] [from them] an authoritative statement to the contrary." Id.

Governor Romney threatened to veto any legislative repeal of §11. R.A. 514.

Application of §§11-12
in Anticipation of Goodridge Implementation

In direct response to Goodridge, Governor Romney's Administration rolled out new marriage procedures. It amended its Notice of Intention of Marriage form.¹⁴ In addition, Governor Romney's legal staff¹⁵ also created a new 57-page guide listing the marriage laws of other U.S. states and territories

¹⁴ See Presentation of Governor's Legal Counsel Daniel Winslow to Municipal Clerks, frames 8-14, R.A. 637-40; Johnstone Aff., ¶18 (verifying Daniel Winslow's Presentation), R.A. 177; Ellis Aff., ¶18 (same), R.A. 205. Compare Post-May 17 Notice of Intention, R.A. 570, with Pre-May 17 Notice of Intention, R.A. 547.

¹⁵ See 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.")

(the "Guide"). See Registrar Nyberg's Letter to Municipal Clerks, R.A. 628, and enclosed Guide, R.A. 572-627; Nyberg Aff., ¶19, R.A. 62.

The most relevant change to the Notice of Intention is the requirement that non-resident applicants indicate where they intend to reside following their marriage.¹⁶ See Winslow Presentation, frame 12, R.A. 639. In a training session with municipal clerks concerning the new marriage procedures, Governor Romney's legal counsel said that the Commonwealth amended the Notice of Intention "to help clerks implement the laws of the Commonwealth, including the SJC's Goodridge ruling." Winslow Presentation, R.A. 637 (frame 8), 645 (frame 23). Though he acknowledged that Massachusetts does not have a residency requirement for marriage, R.A. 644 (frame 22), the Governor's legal counsel stated that information concerning a non-resident applicant's intention of residency was now being required to

¹⁶ The amended Notice of Intention now includes a new warning for non-residents: "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)." R.A. 570-71.

implement §11 in light of Goodridge. See Winslow Presentation, R.A. 637 (frame 8), 645 (frame 23).

The Governor's legal counsel expressly pointed to marriage rights for same-sex couples as the reason for the Commonwealth's new desire to enforce §11:

At the present time, Massachusetts is the only state in the United States where marriage between people of the same sex is permitted by law. With this change in Massachusetts law, there may now be individuals from other states who come to Massachusetts to be married because their own state does not allow same-sex marriage.

Winslow Presentation, frame 26, R.A. 646.

In his presentation, the Governor's counsel defined §11's reach: "Section 11 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.'" Winslow Presentation, frame 24, R.A. 645 (emphasis added). Under this interpretation, no non-resident same-sex couple can marry in Massachusetts unless the home state "has affirmatively indicated that same-sex marriage is permitted in that state." Winslow Presentation, frame 39, R.A. 653. See also Governor Romney's April 29,

2004 Letter to Sister States, R.A. 661; Registrar Nyberg's Letter to Clerks, May 11, 2004, R.A. 628.

The Romney Administration also ordered municipal clerks to rely upon its new 57-page Guide listing the marriage laws of other U.S. states and territories -- and only the Guide -- to test whether non-resident applicants face any "legal impediments" to marriage in their home states. See Winslow Presentation, frame 32, R.A. 649. Under this mandate, if the Guide were to indicate that a non-resident could not enter into the marriage in his or her home state, a clerk could not issue a license, even if the non-resident were to complete the Notice of Intention's incorporated affidavit of legal compliance. Id. at frame 35, R.A. 651.

Under the Guide, non-resident same-sex couples from every other U.S. state and jurisdiction are barred from marrying in the Commonwealth, regardless of the exact terms of each state's respective law - or absence of law - on the subject.¹⁷ R.A. 572-627. The Registrar's letter announcing the release of the Guide

¹⁷ According to the Guide, marriage between persons of the same-sex is either void, invalid, prohibited, or not permitted in each of the other forty-nine states and all of the territories. R.A. 572-627.

discusses its applicability to same-sex couples only.
R.A. 628.

Events on May 17, 2004 and Thereafter

Starting May 17, 2004, certain municipal clerks issued (and recorded) marriage licenses to non-resident same-sex couples. R.A. 521-22. At the urging of the Governor's office, Attorney General Tom Reilly questioned the municipalities about these practices and called to their attention the applicable criminal enforcement statute, G.L. c. 207, §50, which penalizes the issuance of licenses to non-residents in violation of §11. See Letter from AAG David Kerrigan dated May 21, 2004, R.A. 629-633. In response, cities and towns suspended the issuance of licenses to non-resident same-sex couples. R.A. 539-40.

The Effect of the Romney Administration's
Actions on the Plaintiff Couples

The Couples, comprised of eight same-sex couples residing in the other five New England states and New York,¹⁸ have been together for between five and thirty-

¹⁸ The couples reside in Connecticut (Katrina and Kristin Gossman and Mark Pearsall and Paul Trubey), Maine (Michael Thorne and James Theberge), New Hampshire (Ed Butler and Les Schoof), New York (Amy Zimmerman and Tanya Wexler), Rhode Island (Judith and Lee McNeil- Beckwith and Wendy Becker and Mary

six years and sought to marry because of their deep and abiding commitment to one another. See Amended Verified Complaint, R.A. 73-86.

Sandra and Roberta Cote-Whitacre of Essex Junction, Vermont, 57 and 56 years of age, respectively, met in the Women's Army Corps during the Vietnam War and have been a committed couple for over thirty-six years. R.A. 76-77 ¶¶15-21. Together over twenty-six years, Edward Butler and Leslie Schoof of Hart's Location, New Hampshire jointly run the Notchland Inn and serve as officers of their small town. R.A. 85-86 ¶¶65-71. Michael Thorne and James Theberge of Cape Elizabeth, Maine, together twenty-one years, adopted their two-year-old son through an open adoption process in Massachusetts and, before moving to Maine over a year ago, lived and worked in the Commonwealth for a combined total of 67 years. R.A. 84-85 ¶¶59-64, 102-105. Wendy Becker and Mary Norton of Providence, Rhode Island, committed to each other for sixteen years, are raising two young children, a four-year-old daughter and a one-year old foster son. R.A. 82-84 ¶¶52-58. Mark Pearsall and Paul Trubey of

Norton), and Vermont (Sandra and Bobbi Cote-Whitacre). R.A. 73-86.

Lebanon, Connecticut, both Massachusetts natives, have been a committed couple for fifteen years. R.A. 78-79 ¶¶30-36. Amy Zimmerman and Tanya Wexler of New York, New York have been together thirteen years and have three young children, ages 1, 4, and 5. R.A. 77-78 ¶¶22-29. Both nurses, Judi and Lee McNeil-Beckwith married after six years together. R.A. 81-82 ¶¶44-51. Katrina Gossman, an agent with the Federal Bureau of Investigation, and Kristin Gossman, a hospital technician, of Meriden, Connecticut, married after five years together. R.A. 80-81 ¶¶37-43.

Though not a prerequisite for marriage eligibility, many of the Couples have deep roots in Massachusetts (see R.A. 73-86): they presently work here, ¶45); they have worked here previously (¶¶45, 51, 61); they attended school here (¶¶ 30-31, 39, 67); they fell in love here (¶¶30, 51, 62, 65), they adopted their children here (¶ 60); they frequently travel here to visit their hometown friends and family (¶¶ 26, 36); they were born here (¶¶26, 36, 51, 62); they were raised here (¶¶26, 36, 39); and they have retirement benefits due them from Massachusetts employers (¶47). Two couples even live within approximately 10 miles of the Massachusetts border

(¶¶44 and 52). See also R.A. 102-105 (Affidavit of Michael Thorne and James Theberge).

Nonetheless, three of the plaintiff couples were denied the right to marry because they are non-resident same-sex couples who intend to continue residing out of state: Plaintiffs Becker and Norton (RI), Butler and Schoof (NH), and Thorne and Theberge (ME). R.A. 83-84 ¶58, 85 ¶64, 86 ¶71.

The other five plaintiff couples were able to marry in Massachusetts after disclosing that they lived outside of Massachusetts and had no present intent to move here.¹⁹ R.A. 456-460 (applicable Notices of Intention); R.A. 77 ¶¶20-21, 78 ¶¶27-28, 79 ¶¶34-35, 80-81 ¶¶42-43, 82 ¶¶49-50. However, Governor Romney declared that the Commonwealth will not register the licenses that were issued to non-residents intending to reside out-of-state, including the five married plaintiff couples, contending that the marriages are void under §11.²⁰

¹⁹ Plaintiffs Cote-Whitacre (VT) and Zimmerman and Wexler (NY) also obtained court waivers of the three-day waiting period from the Probate Court pursuant to G.L. c. 207, §30. R.A. 77 ¶20, 78 ¶¶27-28.

²⁰ R.A. 518-20 ("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

Summary of the Argument

The Commonwealth's application of §§11-12 to the Couples violates Massachusetts law and the Privileges and Immunities Clause of the United States Constitution (U.S. Const. art. IV, § 2).

In light of Goodridge, 440 Mass. 309 and Opinions of the Justices to the Senate, 440 Mass. 1201 (2004), the Commonwealth cannot deny same-sex couples the right to obtain a marriage license on the same terms as different-sex couples because the liberty and equality provisions of the Massachusetts Constitution, upon which those decisions rest, apply to non-residents. (pp. 21-33)

Sections 11 and 12 have been purposely selected and applied because of their discriminatory impact on same-sex couples. The invidious motivation and disparate impact on same-sex couples combine to deny

state on their applications that they 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."). Although the Governor relied upon G.L. c. 207, §11 in stating his refusal to record the licenses, in this action, the Defendants claim that the five already completed marriages are invalid under §12, not §11. See Commonwealth's App. for Direct Appellate Review, p. 2, n. 2.

the Couples the equal protection of the laws.
(pp. 33-45).

The Commonwealth's application of §§11-12 to non-resident same-sex couples violates the Privileges and Immunities Clause of the U.S. Constitution. The right to marry is a "privilege" or "immunity" of state citizenship, and is therefore deserving of protection under the Privilege and Immunities Clause. The Commonwealth lacks a substantial justification for its discrimination between non-resident same-sex couples and resident same-sex couples and cannot demonstrate a substantial relationship between its discrimination and its purported justifications for §§11-12. (pp. 45-69).

Even if, arguendo, these statutes are constitutional as applied to same-sex couples, by their express terms, only persons residing in states where their marriage is expressly declared "void" are precluded by §§11-12 from marrying in Massachusetts. (pp. 69-79).

ARGUMENT

The trial court erred in denying the Couples' Motion for injunctive relief. The Commonwealth's application of §§11-12 against non-resident same-sex

couples violates Massachusetts law as well as the Privileges and Immunities Clause of the United States Constitution (U.S. Const. art. IV, § 2), causing irreparable harm to the Couples.

I. APPLICABLE STANDARD OF REVIEW

The focus of appellate review of the denial of injunctive relief is whether the trial court applied proper legal standards. Caffyn v. Caffyn, 441 Mass. 487, 490 (2004) (citing Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20 (1981)).²¹ The judge's "conclusions of law are subject to broad review and [should] be reversed if incorrect." Id. As to factual findings, when, as here, the trial judge's order is predicated solely on documentary evidence, the reviewing court may "draw [its] own conclusions from the record." Packaging Industries Group, Inc. v. Cheney, 380 Mass.

²¹ 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; (3) that the risk of irreparable harm to the moving party outweighs the potential harm to the nonmoving party; and when a party seeks to enjoin governmental action, (4) that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public. Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980) (assessing whether a trial judge erred in denying a request for injunctive relief by looking to same factors considered by the judge).

615-16 (1980); see also Comm. v. Novo, 442 Mass. 262, 266 (2004) (same).

In addition, in a matter seeking injunctive relief such as this, the reviewing court may decide all preliminary injunction issues sufficiently illuminated below without remanding the case for further hearing by the trial court judge. See American Grain Products Processing Institute v. Dept. of Public Health, 392 Mass. 309, 312 (1984).²²

II. GOODRIDGE AND OPINIONS OF THE JUSTICES RENDER UNCONSTITUTIONAL ANY ATTEMPT TO DENY MARRIAGE RIGHTS TO SAME-SEX COUPLES AS SAME-SEX COUPLES.

The state constitutional issues presented here are undeniably familiar because this Court has already decided them twice before. See Goodridge, 440 Mass. 309 and Opinions of the Justices, 440 Mass. 1201.

This Court has determined that the arbitrary deprivation of marriage to same-sex couples is "incompatible with the constitutional principles of respect for autonomy and equality under law."

²² This Court is well positioned to reverse the trial court's legal finding of "no likelihood of success," R.A. 117, and make any additional determinations necessary to order immediate relief. See, e.g., T & D Video, Inc. v. City of Revere, 423 Mass. 577, 582 (1996) (holding that the violation of a constitutional right inherently constitutes irreparable harm).

Goodridge, 440 Mass. at 313. This determination extended marriage rights to same-sex couples and “render[ed] 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 1206. In reaching its determination, this Court expressly held that the Commonwealth itself may not “use its formidable regulatory authority to bar same-sex couples” from marriage. Goodridge, 440 Mass. at 312; Opinions of the Justices, 440 Mass. at 1205.²³

A. Non-Residents Are Entitled to the Constitutional Protections That Form the Basis of Goodridge.

That the Commonwealth cannot deprive non-residents of the liberty and equality protections of the Massachusetts Constitution while on Massachusetts soil, was settled 169 years ago in the landmark case of Commonwealth v. Aves, 35 Mass. 193 (1836), which principle remains vital today. See Goodridge, 440

²³ The Couples agree with the unremarkable proposition that the Commonwealth has ongoing authority to regulate marriage. Yet, the Commonwealth’s authority is bounded by the liberty and equality principles of the Massachusetts Constitution. See, e.g., Goodridge, 440 Mass. at 349. After Goodridge and Opinions of the Justices, the Commonwealth cannot use its regulatory authority to bar same-sex couples from marriage. Goodridge, 440 Mass. at 313.

Mass. at 312 (“The Massachusetts Constitution affirms the dignity and equality of all individuals.”)

In Aves, this Court refused to send a six-year-old girl who had been voluntarily brought to Massachusetts by her “owner” back to slavery in Louisiana. 35 Mass. at 217. The Aves court considered whether the girl’s legal status within Massachusetts was affected by the law of Louisiana, her state of domicile, which accorded her the legal status of slave. Id. at 207. Despite this Court’s express recognition of the sovereign rights of sister states to regulate their own citizens and the corollary restraint on Massachusetts’s authority to void sister states’ laws, id. at 211-212, this Court held that “all persons coming within the limits of a state, become subject to all its ... laws ... and entitled to the privileges which those laws confer...” id. at 217. Under Aves, article I’s protections “secure the liberty and personal rights of all persons within [the Commonwealth’s] limits” even if the invocation of this constitutional protection were to effectively dissolve a legal status conferred by another state’s laws.²⁴ Id.

²⁴ Chief Justice Shaw acknowledged that other States were free to permit slavery, just as Massachusetts was

Similarly, in Woodworth v. Spring, 86 Mass. 321, 323 (1862), where this Court considered whether a child domiciled elsewhere but lawfully within Massachusetts territory could invoke the protections of Massachusetts law, this Court held:

[One who] is now 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. Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government.

86 Mass. at 323.²⁵

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.

²⁵ 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 U.S. Constitution, and that under federal equal protection and due process, whether one is "an alien or a citizen, a corporation or an individual, [one] may invoke the rights established by this part of the Constitution").

Consistent with this authority, the Massachusetts Constitution, by its own terms, is not limited to residents in all cases. The substantive provisions on which the Couples rely here (and on which Goodridge rests) -- articles I (as amended by art. 106 of the Amendments), VI, VII, and X -- use the terms "all people," "no man," "the people," and "each individual," respectively.²⁶ Except for certain rights,²⁷ a constitutional scheme that varied the protections available to persons found within Massachusetts territory depending upon their domicile would effectively undermine the rights of all.²⁸

Thus, 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. Like resident same-sex couples, the Couples specifically enjoy the equality and liberty protections in

²⁶ 440 Mass. 316-17 n. 7 and n. 8.

²⁷ See, e.g., Mass. Const. art. 9 (addressing voting rights of "inhabitants").

²⁸ 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 (1992) (analyzing unlawful seizure claim under art. 14 despite express finding that defendant's Massachusetts residency could not be established).

Goodridge and the Opinions of the Justices finding and reiterating that gay men and lesbians cannot be denied marriage rights by the Commonwealth because they are gay men and lesbians.

B. The Commonwealth Cannot Impose Laws Banning Equal Marriage Rights, Even if Such Laws Come From The Sister States.

Despite Goodridge's clear mandate that equal marriage rights cannot be denied same-sex couples by and within the Commonwealth, the Commonwealth hides behind G.L. c. 207, §§11-12 as authorization to impose the marriage laws of other states against same-sex couples.²⁹ Yet, the Commonwealth's desire to cater to the laws of the sister states cannot sustain §§11-12, when applied to same-sex couples, because the principles of comity cannot justify imposing the law of a sister state that would violate the Massachusetts Constitution. See, e.g., Aves, 35 Mass. at 217-18.

Again, Aves is instructive and controlling here. In Aves, this Court concluded that Louisiana's slavery laws could not be accorded respect within

²⁹ For the reasons discussed in Section V, infra, §12 is only referenced here and throughout this Brief because the Commonwealth has inappropriately drawn §12 into service in an attempt to bolster its argument that the intended reach of Massachusetts law is to deny marriage to same-sex couples from every other U.S. state and territory.

Massachusetts territory because they were fundamentally incompatible with Massachusetts's own constitutional values. Id. at 217. The Aves 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: "[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." Id. at 217-18. See also Woodworth v. Spring, 86 Mass. 321 (1862) ("The 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.")³⁰

Because the touchstone is the Massachusetts Constitution, this constitutional limitation on comity applies regardless of whether the Commonwealth's

³⁰ 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).

desire to defer to another state's laws arises from a general comity principle or a statute expressly incorporating the laws of other states.³¹ "[A] provision contained in a statute cannot have any force as law if it conflicts with any provisions contained in the higher law of the Constitution." Bowe v. Sec'y of the Commonwealth, 320 Mass. 230, 244 (1946); Goodridge, 440 Mass. at 349 (Greaney, J., concurring) ("To [the Constitution's] provisions the conduct of all governmental affairs must conform.") (citation omitted)).

Given that the sister states' marital bans against same-sex couples are fundamentally incompatible with the Commonwealth's own constitution,³² the Commonwealth's preference to cater to the laws of the

³¹ If the Commonwealth had enacted a "slaveholders' rights" statute allowing them to keep their "property" while in Massachusetts and thereby give effect to slavery laws, that statute, too, would have fallen under article I of our Constitution because, as Aves made clear, slavery was repugnant to the Massachusetts Constitution.

³² The Commonwealth cannot explain how its administration of the sister states' laws within the Commonwealth sidesteps the very constitutional infirmity identified in Goodridge. See, e.g., Goodridge, 440 Mass. at 331 (holding 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.").

other states, even though codified, cannot justify §§11-12's application to same-sex couples. After Goodridge, the Commonwealth cannot deny equal marriage rights -- directly or indirectly -- by and within the Commonwealth. Cf. Vigeant v. Postal Telegraph Cable Co., 260 Mass. 335, 341 (1927) (recognizing that statutes may become unconstitutional because of altered circumstances). Doing so merely perpetuates the regulatory action declared unconstitutional in Goodridge and Opinions of the Justices.

C. The Commonwealth Contorts the Meaning of Goodridge.

Unable to deny that the protections of article I apply to non-residents or that marital bans against same-sex couples are constitutionally inapplicable by and within the Commonwealth, the Commonwealth contends that Goodridge constricted article I's scope and, accordingly, limited equal marriage rights to residents. This reading is untenable.

Consistent with article I's broad sweep, Goodridge is replete with references to "persons" and "individuals."³³ The Commonwealth's gloss fixates on

³³ For example, see Goodridge, 440 Mass. at 329 ("Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family--

this Court's use of the term "resident" in Goodridge where it appears once, 440 Mass. at 340, and Opinions of the Justices, 440 at 1209, where it appears twice.³⁴

these are among the most basic of every individual's liberty and due process rights."); id. at 342 ("Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."); id. at n. 33 ("We are not required to impute an invidious intent to the Legislature in determining that a statute ... violates the rights of individuals under the Massachusetts Constitution."); id. at 344 ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.") (emphasis added throughout).

³⁴ The term "citizen" is also sparingly used in both decisions but its use does not signify that equal marriage rights have been limited to "residents." See, e.g., Goodridge, 440 Mass. at 312 ("The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens."); id. at 338 (rejecting argument that same-sex couples can be denied marriage to advance policy priorities for "citizens of the Commonwealth"); id. at 345 (Greaney, J. concurrence) (discussing classification that inappropriately "disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social significance"); id. at 348 (Greaney, J. concurrence) (discussing prohibitions against "invidious distinctions between classes of citizens"); id. at 349 (discussing state constitution as "the final statement of the rights, privileges and obligations of the citizens and ... the conclusive definition of the limitations of the departments of State and of public officers"); id. (Greaney, J. concurrence) (expressing hope that decision will be accepted by "citizens" of Massachusetts who do not support marriage equality); Opinions of the Justices, 440 Mass. at 1209 (discussing the inappropriate

In both instances, the term “resident” is used in direct reply to arguments raised by amici concerning other jurisdictions’ objections to marriage in Massachusetts. Id. That this Court’s rebuttal to those “extra-territorial” arguments was framed in terms of “residents versus non-residents” underscores the nature of the debated issue. In no way does it signal a deviation from the well-established principle that residents and non-residents receive the protections of the equality and liberty provisions of the Massachusetts constitution while within Massachusetts.³⁵ Id. at 312 (“Our concern is with the Massachusetts Constitution as a charter of governance for every *person* properly within its reach.”) (emphasis added).

Sections 11 and 12 are also referenced in the concurring opinion in Goodridge, 440 Mass. at 348 n. 4 (Greaney, J., concurring). That fact, however, does not support the Defendants in this action. The constitutionality of §§11-12 was not before the

creation of “a separate class of citizens” and “second-class citizen status”).

³⁵ That the Goodridge plaintiffs themselves were all residents may also explain why the Goodridge court used more case-specific terminology in this instance. Goodridge, 440 Mass. at 313.

Goodridge Court and was neither briefed nor argued. See Commonwealth v. Stasiun, 349 Mass. 38, 49 (1965) (establishing that case cannot be regarded as authority for proposition not considered by court). This case highlights the importance of requiring the full briefing of issues before bestowing authoritative effect on a legal proposition. For example, when Goodridge was decided, this Court would have been unlikely to know that §§11-12 had not been enforced for at least several decades, see pp. 5-7, supra; that the Commonwealth would only choose to enforce §§11-12 because of its intended discriminatory effect against same-sex couples, see Section III(A), infra; that the Commonwealth would selectively enforce §§11-12 against same-sex couples, see Section III(B), infra; that the Commonwealth is exceeding the literal terms of §§11-12 to bar all U.S. non-resident same-sex couples from marrying, see Section V, infra; or that §§11-12 run afoul of the Privileges and Immunities Clause, see Section IV, infra. In any event, any concerns about other states being required to grant recognition to marriage licenses issued in Massachusetts is addressed by the laws of the other states without need of reference to §§11-12. See generally Brief of Amici

Curiae of Professors of Conflict of Laws and Family Law ("Amicus on Conflict of Laws").

In sum, because Goodridge imposes a constitutional limitation on the Commonwealth's authority to deny marriage rights, this Court should immediately enjoin the Commonwealth from administering §§11-12 to bar marriage to otherwise qualified non-resident same-sex couples.

III. BY USING §§11-12 AS A WEAPON TO PURPOSEFULLY DENY THE COUPLES' EQUAL MARRIAGE RIGHTS, THE COMMONWEALTH DENIES THE COUPLES THE EQUAL PROTECTION OF THE LAWS.

The Commonwealth is using §§11-12 as a weapon of purposeful discrimination, and in doing so, violates the state equal protection rights of the Couples.³⁶

A facially neutral statute can deny equal protection in two different ways. See, e.g., Coyne v. City of Somerville, 770 F. Supp. 740, 744 (D. Mass. 1991); Ronald Rotunda and John Nowak, *Treatise on Constitutional Law: Substance and Procedure* (3rd ed. 1999), pp. 254-56. First, a facially neutral statute can result in an intended, disparate impact. Coyne,

³⁶ Notably, the standard employed for equal protection review under the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment to the Federal Constitution. See, e.g., Dickerson v. Attorney General, 396 Mass. 740, 742 (1986).

770 F. Supp. at 744; Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977). Second, the unequal enforcement of a facially neutral statute can single out a class of persons for disfavored treatment. Coyne, 770 F. Supp. at 744; Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

Both of these types of equal protection violations are present here, and they are doctrinally distinct. Section II(A) addresses purposefully intended impact. Section II(B) discusses selective enforcement.

A. The Romney Administration's Purposeful Resurrection of §§11-12 Following Goodridge Constitutes A Denial of Equal Protection of the Laws.

Despite decades of desuetude, the Commonwealth seized upon §§11-12 following Goodridge, motivated by its desire to deny marriage rights to as many same-sex couples as possible.³⁷ The Commonwealth concedes,

³⁷ The Couples do not dispute that the Commonwealth may revive a statute long thought moribund. However, the right to give new life to an old statute does not include the right to maliciously activate a moribund law. See, e.g., Town of Burlington v. Labor Relations Commission, 12 Mass. App. Ct. 184, 186-87 (1981) (invalidating a valid but defunct ordinance brought to life by town selectmen for a retaliatory purpose because a statute or regulation cannot be enforced "in aid of an ulterior and forbidden purpose"). The "element of invidious discrimination" changes

because it must, that its administration of §§11-12 following Goodridge was expected to, and actually does, disparately impact same-sex couples.³⁸ The Commonwealth knew that the "certain consequences" of applying §§11 and 12 (as the Romney Administration was interpreting the statute) would be to deny marriage to same-sex couples from all 49 states and all U.S. territories. Not surprisingly, the Commonwealth's actual administration has produced this disparate effect.

The Commonwealth's resurrection and administration of §§11-12 following Goodridge constitutes a denial of equal protection of the laws because the discriminatory effect of this action was purposefully intended. Village of Arlington Heights

everything. Bachrach v. Sec'y of the Comm., 382 Mass. 268, 274-75 (1981).

³⁸ See Commonwealth's App. for Direct Appellate Review, p. 27 ("And although the violations to be anticipated starting in May 2004 would largely if not entirely involve same-sex couples, the Registrar recognized that his duty to enforce §§11 and 12 applied to all applicants..." (emphasis omitted)). But see Brief of Municipal Clerks in Johnstone v. Reilly (companion case) (refuting Commonwealth's self-serving statements of evenhandedness and highlighting Commonwealth's utter lack of enforcement of legal impediments applicable to different-sex couples such as prohibitions concerning mental incompetency, physical incapacity, duress or divorce).

v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65; Romer v. Evans, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (citation omitted).

1. Purposeful Discrimination and Disparate Impact Combine to Establish a Classic Equal Protection Violation.

Doctrinally, Arlington Heights establishes that an equal protection violation can arise when a moribund statute is resurrected because of its disparate impact on an identifiable group. 429 U.S. at 264-66; see also Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). Arlington Heights involved a challenge to a city's refusal to rezone a parcel of land to allow construction of low and moderate-income housing. The plaintiffs alleged that the city's refusal to rezone had a discriminatory effect in excluding blacks from the city. Because the facially neutral zoning law had a clear, discriminatory impact, the Court looked to circumstantial and direct evidence of intent to determine whether an invidious discriminatory purpose

was a motivating factor for the government's action.³⁹ Id. at 266. Although the plaintiffs in Arlington Heights failed to prove that discriminatory purpose was a motivating factor in the city's refusal to rezone, the Court made clear that proof of a discriminatory purpose, coupled with discriminatory impact, would establish a violation of the equal protection clause. Id. at 265.

The Supreme Court has defined discriminatory purpose to include circumstances where "the decisionmaker ... selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." Feeney, 442 U.S. 256, 279 (1979); Fedele v. Sch. Comm. of Westwood, 412 Mass. 110, 115-16 (1992) (same). The plaintiffs in Feeney challenged a veteran's preference statute, claiming that it

³⁹ Under Arlington Heights, 429 U.S. at 266-68, a discriminatory purpose may be inferred from the totality of relevant facts including, without limitation: (1) the discriminatory effect of the official action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) departures from the normal procedural sequence, (5) departures from the normal substantive [standards], and (6) the legislative or administrative history, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports.

disparately impacted, and thus discriminated against, women. The Feeney court concluded that the veteran's preference statutes were not being used as pretext for gender discrimination. However, it made expressly clear that the veteran's preference would have denied equal protection to women if "the State, by favoring veterans, intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans."

When a discriminatory motive enters into the government's decision to undertake or reaffirm a course of action -- even if not the sole or dominant motive -- and that action disparately impacts the class targeted for discrimination, the governmental action violates equal protection guarantees.⁴⁰

⁴⁰ It does not matter whether the disparate impact on the disfavored group is complete or whether other groups may be affected as well. Feeney, 442 U.S. at 277 ("Invidious discrimination does not become less so because the discrimination accomplished is of lesser magnitude."); Hunter v. Underwood, 471 U.S. 222, 232 (1985) (finding equal protection violation from disenfranchisement law having disparate impact on blacks despite adverse impact upon some whites too). Thus, the Commonwealth mistakenly seeks refuge in the theoretical possibility that (i) some different-sex couples could be denied marriage eligibility under

Arlington Heights, 429 U.S. at 265-66; Feeney, 442 U.S. at 282-83 (J., Brennan, dissenting); Rotunda and Nowak, *Treatise on Constitutional Law*, pp. 267.

This prohibition against a government acting through invidious motives applies to the administration of laws and is not limited to legislative action. See, e.g., Town of Burlington v. Labor Relations Commission, 12 Mass. App. Ct. 184, 186-87 (1981) (preventing the board of selectman from administering a previously defunct town ordinance for a retaliatory purpose); Arlington Heights, 429 U.S. at 265 (expressly noting that inquiry into discriminatory motives extends to "legislators and administrators"); Washington v. Davis, 426 U.S. 229, 234-35 (1976) (subjecting police recruiting procedures resulting in disparate impact to inquiry for purposeful discrimination); Village of Willowbrook v. Olech, 528 U.S. 562, 566 (2000) (Breyer, J., concurring) (recognizing that equal protection violations may

§§11-12; or (ii) a same-sex couple from Canada, Belgium, or the Netherlands may marry in the Commonwealth without impediment by §§11-12. Moreover, the Commonwealth has never instructed clerks to issue licenses to same-sex couples from anywhere, even from Canada, Belgium, or the Netherlands. Registrar's May 11, 2004 Letter to Municipalities, R.A. 628; Guide, R.A. 572-627; 2nd Nyberg Aff., R.A. 106-07.

arise from an executive officer's malicious administration of the laws). When the executive branch acts with malicious intent in its administration of a neutral law - there is no requirement that the affected persons prove selective enforcement. Town of Burlington, 12 Mass. App. Ct. at 186-87. Rather, where the administration of the law already imposes a disparate impact on a disfavored class, the need for showing selective treatment is obviated. See Arlington Heights, 429 U.S. 266-68.⁴¹

2. The Commonwealth Was (And Remains) Motivated by a Discriminatory Purpose.

An impermissible purpose is readily evident in the Commonwealth's decision to make use of §§11-12 following Goodridge. The trial court itself "[found] troubling the timing of the resurrection of the implementation of §11 immediately after the Supreme Judicial Court declared the prohibition against gay marriages unconstitutional." R.A. 122. The trial court expressly determined that the Commonwealth's interest in administering this law was "triggered by

⁴¹ See also Olech v. Village of Willowbrook, 160 F. 3d 386, 387-88 (7th Cir. 1998) (Posner, J.) (invalidating administrative action driven by vindictive ill will without requiring proof of uneven enforcement), affirmed on other grounds, 528 U.S. 562, 566 (2000).

the fallout of Goodridge." R.A. 123. The trial court's instinct was surely correct.

When Goodridge and the Opinions of the Justices declared that the Commonwealth could not constitutionally deny marriage rights to gay men and lesbians, the Romney Administration responded with a plan: first try to stop the implementation of Goodridge completely and then, when that failed, to stop as many marriages of same-sex couples as possible by focusing on non-residents. See pp. 7-10, supra; see also Amicus of Civil Rights Supporters. Sections 11-12 became of interest to the Administration not because of the statute itself but because of the purpose it seemed to serve - to cut off rights for same-sex couples. Id. Indeed, the Defendants concede that it was only the possible Massachusetts marriages by non-resident same-sex couples that were deemed intolerable and sparked the revived administration of this previously moribund statute.⁴² See, e.g.,

⁴² That the Defendant Registrar Nyberg disclaims any invidious motivation on the part of the Commonwealth by jumpstarting its enforcement priorities post-Goodridge does not alter the inescapable conclusion that invidious discrimination motivated the Commonwealth's decision to administer the previously defunct law. See, e.g., Anthony v. Sundlun, 952 F.2d 603, 606 (1st Cir. 1991) (rejecting testimony

Governor Romney's April 29, 2004 Letter to Sister States, R.A. 661; Registrar Nyberg's May 11, 2004 Letter to Municipalities, R.A. 628; Nyberg Aff., ¶¶6-9, R.A. 60-61; AAG David Kerrigan's May 21, 2004 Letter to Municipalities, R.A. 631.

Governor Romney controls the Defendants' enforcement of Chapter 207 (see G.L. c. 17, § 4); and he has controlled decisions made about marriage eligibility and the application of §§11-12. See pp. 10-14, supra; see also Amicus of Civil Rights Supporters. His actions indicate that he has been motivated by a desire to deny or curtail Massachusetts marriage rights for same-sex couples. Id. This is the quintessential discrimination scenario hypothesized in Feeney: Governor Romney has seized upon §§11-12 *because* these statutes, as interpreted by the Commonwealth, incorporate the law of sister states

disclaiming inappropriate political motives: "[W]hat an actor says is not conclusive on a state-of-mind issue. Notwithstanding a person's disclaimers, a contrary state of mind may be inferred from what he does and from a factual mosaic tending to show that he really meant to accomplish that which he professes not to have intended. ... [J]udges, after all, are not required to ignore that which is perfectly obvious or to take a witness' word for his state of mind, no matter how strongly the circumstances point in a different direction.")

that operate to deny marriage rights to all U.S. non-resident same-sex couples.⁴³

The Commonwealth cannot legally undertake to administer §§11-12 with this malicious intent. See, e.g., Town of Burlington, 12 Mass. App. Ct. at 186-87; Hunter v. Underwood, 471 U.S. 222, 232 (1985) (finding equal protection violation where evidence proved state had enacted a provision for the purpose of disenfranchising blacks and the law had a discriminatory effect on blacks); Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47 (1985) ("[S]ome objectives - such as 'a bare ... desire to harm a politically unpopular group,' are not legitimate state interests.") (citing Department of Agriculture v. Moreno, 413 U.S. 528, 535 (1973)).

Moreover, allowing this purposeful discrimination to stand here undermines the very rights afforded by Goodridge and Opinions of the Justices itself. See, e.g., School Cte. Of Springfield v. Bd. of Educ., 366

⁴³ By embracing the law of sister states and inviting their application within Massachusetts's borders, Massachusetts cannot escape responsibility for the discrimination effected. Cf. Reitman v. Mulkey, 387 U.S. 369, 375-82 (1967) (holding that the right to discriminate becomes a basic policy of the state when a state takes "affirmative action designed to make private discriminations legally possible").

Mass. 315, 329 n.21 (1974) (preventing school officials from relying on a state law forbidding busing as a desegregation remedy where the law's enforcement "would [have] tend[ed] to reverse or impede the progress" toward desegregation and would have violated the state Constitution.)

Because the record before the trial court established that the desire to deny marriage rights to same-sex couples motivated the Romney Administration here, the enforcement of §§11-12 denies the equal protection of the laws.⁴⁴ For these reasons, this Court should immediately enjoin the Commonwealth from administering §§11-12 to deny marriage rights to otherwise qualified same-sex couples.

B. The Defendants' Selective Pursuit Of Only Same-Sex Couples Under §§ 11-12 Denies The Couples The Equal Protection Of The Laws.

⁴⁴ Though not applicable here, the Arlington Heights court left open the possibility that a government could rebut evidence of a discriminatory purpose by proving that it would have taken the exact same action without the discriminatory motivation. 429 U.S. at 270 n. 21 (imposing upon the government "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.") This Court, however, need not imagine what would have happened under different circumstances because the Commonwealth has admitted that it was only the marriages of same-sex couples that triggered its resurrection of §11.

The Commonwealth's selective enforcement of §§11-12 against same-sex couples denies the Couples the equal protection of the laws. See, e.g., Yick Wo v. Lee, 118 U.S. 356, 373-74 (1886). The Couples, join in, and rely upon, the arguments and facts set forth by the Clerks in the companion case, Johnstone v. Reilly, in support of this doctrinally distinct equal protection argument.

IV. SECTIONS 11-12 VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION.

Sections 11-12's application to non-resident same-sex couples violates the Privileges and Immunities Clause of the U.S. Constitution (article IV, § 2) (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, non-resident couples the right to marry in Massachusetts because they reside in another state impermissibly interferes with the non-residents' individual constitutional rights afforded under the Clause. See Toomer v. Witsell, 334 U.S. 385, 395 (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."). 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).⁴⁵

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. 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); Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (noting that the Clause protects not only national unity but also individual, personal interests). The Clause effectuates national unity and

⁴⁵ The Privileges & Immunities Clause of Article IV addresses one aspect of the right to travel: "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." Saenz, 526 U.S. at 500.

comity among the sister states "by 'plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 296 (1998) (citing Paul v. Virginia, 8 Wall. 168, 180 (1868)). The "norm of comity" is thus advanced by the Clause, not through comity extended between and among states themselves but through each state's obligation to respect the rights of the residents of other states. In the Matter of Jadd, 391 Mass. 227, 228 (1984) ("The privileges and immunities clause ... 'establishes a norm of comity,' that is to prevail among the States *with respect to their treatment of each other's residents*") (citing Hicklin v. Orbeck, 437, U.S. 518, 523-24) (1978) (emphasis added)).

In the present case, the Couples would be able to marry - without objection from the Commonwealth - if they were residents of the Commonwealth. This differential treatment of non-residents triggers heightened scrutiny under the Clause, specifically examining (i) whether the disparate treatment between residents and non-residents concerns a "privilege" or

"immunity" for which the Clause extends protection, and if so, (2) whether the Commonwealth has a substantial reason for the difference in treatment. See Lunding, 522 U.S. at 298. The differential treatment can only survive if the Commonwealth demonstrates that non-residents 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 non-residents unequally. Toomer, 334 U.S. at 396, 398. Sections 11-12 cannot survive this heightened review.

A. Sections 11-12 Discriminate Against Non-Residents With Respect to a "Privilege" or "Immunity" of State Citizenship.

As a preliminary matter, the Clause extends protection to non-residents with respect to a "privilege" or "immunity" of Massachusetts citizenship. Here, §§11-12 undermine non-resident same-sex couples' right to marry the partner of their choice - which is a right that Massachusetts extends to all its residents, regardless of whether they are same-sex or different-sex couples. This right, being integral to state citizenship in Massachusetts, as demonstrated by this Court in Goodridge, must be protected by the Clause.

In determining what aspects of state citizenship are protected privileges and immunities under the Clause, the Supreme Court has expressed a number of interlocking formulations to articulate those important rights integral to state citizenship. 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 seminal interpretation of the Clause can be found in the so-called "Washington's List" in Justice Washington's opinion in Corfield v. Coryell, 6 F. Cas. 546 (No. 3,230) (CC ED Pa. 1823).

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 551-52 (emphasis added).

Though the "natural rights" aspect of Washington's List has been replaced by more recent formulations, 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 yet ruled 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 non-resident 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.⁴⁶ Whether or not it is deemed fundamental for purposes of the Fourteenth Amendment, the right to marry is deserving of protection under the Clause.⁴⁷ The Supreme Court has recognized other protected privileges similar to the right to marry. In Doe v. Bolton, 410 U.S. 179, 200 (1973), the Supreme Court protected non-residents' access to healthcare. The Doe Court reasoned that because the Clause included the lesser right to earn a living, it must also include the greater right to

⁴⁶ This Court's descriptions of marriage in Goodridge are consistent with a finding that marriage is an essential activity and basic right under the Clause: marriage provides "membership in one of our community's most rewarding and cherished institutions", id. at 313; the decision to marry plays in a "central role" in "shaping one's identity," id. at 313; "[m]arriage also bestows enormous private and social advantages on those who choose to marry," id. at 322; the "tangible as well as the intangible benefits" ... "accessible only by way of a marriage license are enormous", id. at 322-23; and "[w]ithout the right to marry ... one is excluded from the full range of human experience and denied full protection of the laws ...", id. at 326.

⁴⁷ Whether the Couples are protected under the Clause is not dependent upon the right to marry being designated an independent constitutional right: a right can be fundamental under the Clause even though it may or may not be fundamental for Fourteenth Amendment purposes. See, e.g., Hicklin, 437 U.S. 518 (protecting opportunity to work); Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986) (protecting distribution of veteran's benefits); Zobel v. Williams, 457 U.S. 55 (1982) (protecting distribution of direct cash dividends).

secure medical treatment. Id. So too must the Clause protect the even greater 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).⁴⁸

The opportunity to marry advances the type of national unity that animates the Clause. 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). No state has ever imposed a residency requirement for marriage, and citizens of the several states have consistently and repeatedly crossed state borders to marry, despite differing state eligibility requirements. See Amicus on Conflict of Laws. Across the Nation, couples are regularly selecting, planning, and celebrating their marriages in destinations away from their home state -- whether to marry in the state of the bride's childhood, the place

⁴⁸ 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 551-522 (holding that the "enjoyment of life and liberty" and "the pursuit and [attainment] of happiness and safety" are privileges under the Clause).

where an elderly grandparent can best be accommodated, or simply the preferable climate of another locale. Hawaii, for example, would stand as an affront to national unity if it tried to reserve its picturesque shores for the marriages of Hawaiian residents only. See, e.g., Paul, 8 Wall. 168, 180-81 (emphasizing the Clause's advancement of nationalism by assuring the equality of all citizens within any state).

In the instant case, the disparate treatment of non-residents concerns a privilege protected by the Clause, triggering heightened constitutional scrutiny.

B. The Commonwealth Cannot Justify Its Discrimination Against Non-Resident, Same-Sex Couples.

Because §§11-12 discriminates against non-residents with respect to a protected privilege, the burden is on the Commonwealth to demonstrate that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against non-residents bears a substantial relationship to the [Commonwealth's] objective." Lunding, 522 U.S. 287, 298-99. To meet the first prong of this test, the Commonwealth must demonstrate that non-residents are the "peculiar source of the evil" that §§11-12 seek to remedy. See United Building and Construction

Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden et al., 465 U.S. 208, 222 (1984); Toomer, 334 U.S. at 398; Hicklin, 437 U.S. at 525-26. To meet the second prong of the test, the Commonwealth must show that there is no less restrictive alternative to the discrimination imposed upon non-residents by §§11-12. See Piper, 470 U.S. 274, 284 (interpreting Clause to require showing that less restrictive means were unavailable to accomplish the state's purported objectives); In the Matter of Jadd, 391 Mass. at 229-30 ("The discrimination must not sweep more broadly than necessary to achieve the purpose that justifies the discrimination."). The Commonwealth cannot meet either prong of this heightened review.

1. The Commonwealth Cannot Carry Its Burden Of Demonstrating A Substantial Reason For Discriminating Against Non-Resident Same-Sex Couples.

"Unless there is something to indicate that non-citizens constitute a peculiar source of evil at which the [discriminatory] statute is aimed", a "substantial reason for the discrimination" cannot exist. Opinions of the Justices to the Senate, 393 Mass. 1201, 1204 (1984) (citing Hicklin, 437 U.S. at 525-26)). Here,

the Commonwealth cannot demonstrate a substantial reason.

Governor Romney himself has conceded that marriages of non-resident same-sex couples “do no harm to the Commonwealth,” R.A. 520, and this fact alone is fatal to the Commonwealth’s defense. Under the Clause, the “evil” must be a problem or harm that befalls the state enacting the discriminatory legislation. See Toomer, 334 U.S. at 398 (focusing upon harm to state’s shrimp supply); Camden, 465 U.S. at 222 (looking at “grave economic and social ills” in the city of Camden itself); Piper, 470 U.S. at 281 (concerning harm to legal profession and the bar in New Hampshire). The Clause does not give a state the right to discriminate against non-residents based on the state’s analysis of *foreign*, out-of-state evils. Cf. Camden, 465 U.S. at 223 (emphasizing authority to regulate “local evils”).

The single argument advanced by the Commonwealth here to justify its disparate treatment of non-residents under the Clause, see Application for Direct Appellate Review, p. 40, is rooted in a purported concern for the welfare of non-residents, not the welfare of the Commonwealth. In its Application, the

Commonwealth asserts that it may refuse to marry a non-resident in the absence of a guarantee that the home state "stands at the ready to enforce marital rights." Id. Underlying this assertion is the Commonwealth's contention that non-resident couples may be harmed by the Commonwealth's inability to guarantee the extra-territorial regulation of the marital rights and obligations conferred by marriage. Id. at 32-33. Even if this were true, however, it does not present a demonstrable harm to the Commonwealth or its residents. See, e.g., Doe, 410 U.S. at 200 (invalidating Georgia restriction on abortion services to non-residents because it did not harm Georgia residents).

The Commonwealth's purported need for an "approving state" other than Massachusetts cannot be justified for other reasons as well. First, contrary to the Commonwealth's distorted reading of Goodridge, marriage requires "two willing spouses and an approving State," Goodridge, 440 Mass. at 321, not two willing spouses and two approving states (i.e., Massachusetts and another state). Second, that the Commonwealth, acting out of paternalism, presumes that these Couples are better off without marriage does not

mean that they are, and more importantly, does not legitimize the discrimination imposed by §§11-12. See Zablocki v. Redhail, 434 U.S. 374, 393-94 (1978) (holding that paternalistic concerns for the financial well-being of a marital couple, while legitimate, did not “justify the absolute deprivation of the benefits of a legal marriage”). The Commonwealth’s presumption that all marriage licenses issued to non-resident same-sex couples will go unregulated extra-territorially is speculative.⁴⁹ Moreover, there is no reason to credit the Commonwealth’s paternalistic and speculative assumption that non-resident same-sex couples will be better off without any marriage rights than with the possibility of some.⁵⁰ Even if, for the

⁴⁹ Critically, the Commonwealth does not, and cannot, know what effect will be accorded the marriage licenses issued to non-residents. See Section IV(B)(2), infra. See also Amicus on the Conflict of Laws. Over two hundred years of experience applying the governing conflict of laws principles for marriage recognition demonstrates that the Commonwealth’s purported need to know the identity of the “approving state” is unreasonable and unnecessary. Id.

⁵⁰ The argument that same-sex couples should be denied marriage rights until those rights are definitively assured has already been rejected by courts of this Commonwealth. See, e.g., C. Joseph Doyle v. Supreme Judicial Court, SJ-2004-0169 (May 3, 2004)(Ireland, J.) (rejecting request to extend Goodridge stay due to possibility of constitutional amendment undercutting these marriages), on appeal, No. SJC-09254. Notably, Attorney General Tom Reilly previously disclaimed the

sake of argument alone, non-recognition were guaranteed extra-territorially, the Commonwealth cannot demonstrate why marriage rights undeniably available within the Commonwealth should be withheld by the Commonwealth when the exercise of these in-state rights are independently valuable to non-resident couples.⁵¹ See Opinions of the Justices, 440 Mass. at 1208-09 (rejecting argument that non-recognition of marriage by other states provides a legitimate justification -- much less a substantial one -- for denying marriage rights within the Massachusetts). The Commonwealth's quixotic search for an approving state in addition to Massachusetts

argument that couples are harmed by marrying in the absence of guaranteed marital rights. See Frank Phillips and Kathleen Burge, Reilly Gives Governor a Hurdle, Reilly Rebuffs Romney on Possible SJC Appeal, BOSTON GLOBE, March 30, 2004, A1 ("Reilly said he was not swayed by the arguments that gay couples who marry will be hurt and that the state will be in legal confusion if the voters approve an amendment banning same-sex marriages. 'Everyone is going into this with their eyes wide open,' he said.")

⁵¹ While in Massachusetts, there should be no question that the Couples should have the right to embrace the expressive attributes of marriage, see, e.g., Opinions of the Justices, 440 Mass. at 1203, and be treated equally, e.g., visiting each other in the emergency room, claiming the remains of the other in the event of a tragedy, or simply obtaining joint insurance for a vacation home.

does not provide a substantial reason for the disparate treatment of non-residents.

Even looking beyond this one argument, the Commonwealth has not, and cannot, assert a protective interest on its own behalf when it comes to the distribution of marriage licenses. Massachusetts does not have a residency requirement for marriage. See generally, G.L. c. 207 and §§30, 39; R.A. 644, frame 22. Moreover, marriage licenses do not fall within the category of things deserving of, or requiring, preservation for residents only.⁵² Issuing licenses to non-residents does not place an extra burden on the Commonwealth.⁵³ Rather than threatening the

⁵² Restrictions on non-residents may be appropriate in some instances: for example, where the consumed good (such as education benefits or scarce natural resources) is in finite supply and could be transported and enjoyed out-of-state to the detriment of the States' residents. See Saenz, 526 U.S. at 502; see also Martinez v. Bynum, 461 U.S. 321, 325-26 (1983) (upholding bona fide residence requirement for attendance at Texas public school). 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 (emphasizing finite supply of elk in its conclusion that recreational right to hunt elk need not be extended to non-residents).

⁵³ Despite the Commonwealth's protestations, Massachusetts will not become a divorce mill by licensing non-resident couples: Massachusetts has a residency requirement for divorce and annulment. See G.L. c. 208, §§4-5. Moreover, any contention that

Commonwealth's financial resources, non-residents marrying in Massachusetts create an economic benefit.⁵⁴

Moreover, refocusing upon the marital prohibitions existing in the non-residents' home states does not solve the Commonwealth's Privileges and Immunities Clause problem. Under the Clause, the configuration of the home states' laws cannot be a substantial reason for the difference in treatment.

Lunding, 522 U.S. at 314 (recognizing that the constitutionality of laws affecting non-residents

non-resident same-sex couples will only be able to divorce within the Commonwealth is unfounded. See generally Amicus Brief on Conflict of Laws (discussing general rule of marriage validation; drawing parallels to dissolutions of civil unions; and noting likelihood that even disapproving states may recognize certain incidents of marriage, especially to facilitate the dissolution of this legal relationship or impose legal support obligations).

⁵⁴ 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. "While it is very hard to predict with much certainty exactly how much money would be spent in the Commonwealth as a result of legalizing same-sex marriages, it is likely to be more than \$150 Million over the next year or so." Randy Albelda, Michael Ash and M.V. Lee Badgett, "Now That We Do: Same-Sex Couples and Marriage in Massachusetts - A demographic and economic perspective," Massachusetts Benchmarks, vol. 7, p. 21 at <http://www.massbenchmarks.org/issues/vol7i2/pdf/feature05v7i2.pdf>. See also Aude Lagorce, The Gay-Marriage Windfall: \$16.8 Billion, April 5, 2004, at http://www.forbes.com/2004/04/05/cx_al_0405gaymarriage_2.html.

cannot "depend upon the present configuration of the statutes of another State."); Austin v. New Hampshire, 420 U.S. 656, 667-68 (1975) (same).⁵⁵ The fact that another state restricts the marriage rights of its own citizens does not excuse Massachusetts from its own obligation under the Clause to treat non-residents equally when they are in Massachusetts territory. See Saenz, 526 U.S. at 509 (invalidating California's welfare policy of anchoring benefit levels to the levels of the beneficiary's former domicile -- despite argument that policy was merely a specialized choice of law provision -- because "California law alone discriminates among its own citizens").

The "norm of comity" established by the Clause concerns the treatment of other states' residents, not the regulatory preferences of other states. See generally Amici Curiae Brief of the Professors of Constitutional Law ("Amicus on Privileges &

⁵⁵ See also Laurence Tribe, American Constitutional Law, §6-37, p. 1268 (3rd ed. 2000)("[T]he law of a challenger's home state or former home state is irrelevant . . . For a state to subdivide visitors ... into classes based upon the state from which [each visitor] came ... and to accord better or worse treatment to each visitor ... based on the class to which that visitor belongs, would be incompatible with the Constitution of 'a more perfect Union' and, in particular, with ... Article IV's Privileges and Immunities Clause...").

Immunities"). That a sister State may approve the discrimination against its own residents while they are within Massachusetts territory does not justify the Commonwealth's disparate treatment of non-residents under the Clause. See Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 82 (1920) ("A State may not barter away the right ... to enjoy the privileges and immunities of citizens when they go into other States."). As Professor Tribe explains, by virtue of the Clause,

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-à-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.

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). Massachusetts cannot work together with other states to help them do indirectly what they cannot do directly: apply their laws extra-territorially and enclose their citizens in this legal cage. See Amicus on Privileges & Immunities. The territorial limits of our federal system contemplate that individual citizens have a robust right to sample

the legal offerings available in other states. Id. Massachusetts cannot force non-residents to forfeit this right and bear the brunt of the discrimination, even if it prefers "to go along to get along."⁵⁶ See Travis, 252 U.S. at 82.

Thus, the Commonwealth cannot articulate a substantial reason for discriminating against non-resident same-sex couples based on the perceived status quo in a couple's resident state. Because the Commonwealth cannot demonstrate that non-resident same-sex couples are a peculiar source of evil *for the Commonwealth*, §§11-12 violate the Privileges and Immunities Clause.

2. Even If The Commonwealth Could Articulate A Substantial Reason, It Cannot Demonstrate A Close Relationship Between The Discrimination And The Commonwealth's Ends.

⁵⁶ States have always expected that their residents will marry in other states despite the marital prohibitions existing in their own laws. See Amicus on Conflict of Laws. The issuance of a marriage license to non-residents does not create the concerns about "officious intermeddling" that the issuance of a divorce decree over non-residents would, and thus, the Commonwealth's reliance upon Sosna v. Iowa, 419 U.S. 393 (1975) is misplaced. See Amicus on Privileges & Immunities (discussing inapplicability of Sosna given critical differences between the regulation of marriage licenses and the issuance of divorce decrees). See also Amicus on Conflict of Laws (contrasting extra-territorial effect of divorce decrees and marriage licenses).

Sections 11-12 do not bear a substantial or close relationship to the Commonwealth's stated goals. Under the Clause, the Commonwealth must demonstrate that "the discrimination practiced against non-residents bears a substantial relationship to the State's objective." Lunding, 522 U.S. at 298-99. This test invalidates laws where "[t]he discrimination must not sweep more broadly than necessary to achieve the purpose that justifies the discrimination." In the Matter of Jadd, 391 Mass. at 229-30 (citing Hicklin, 437 U.S. at 527-28). Where less restrictive alternatives to the discrimination against non-residents are available, the overly-inclusive legislation violates the Clause. Piper, 470 U.S. at 284 (striking bar residency requirement because less restrictive means were available to accomplish the state's purported objectives); Toomer, 334 U.S. at 399 (invalidating shrimping restriction where other approaches to conservation - e.g., proscribing large boats or harmful methods - could be used to same effect).

Here, §§11-12 bear no connection, much less a substantial one, to the purported goal highlighted by

the Commonwealth in its Request for Direct Appellate Review of guaranteeing extra-territorial marriage recognition. The operation of §§11-12 turns on whether the marriage of a couple from another jurisdiction (e.g., New York) "would be void if contracted in such other jurisdiction," G.L. c. 207, §11, or as the Commonwealth contends, whether the marriage would be "permitted" (i.e., not prohibited) in the other jurisdiction. In no instance, however, does §11 or §12 consider what treatment any other jurisdiction (e.g., New York) would give to a marriage of its residents contracted in Massachusetts. In the Attorney General's own words:

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

Letter from AAG David Kerrigan dated May 21, 2004 to Various Municipalities, R.A. 632. See also Letter from AAG David Kerrigan dated May 26, 2004 to the City of Springfield, R.A. 71-72 (same).

The legislation's overinclusiveness and underinclusiveness evidence the lack of substantial connection to the Commonwealth's asserted objective. See Piper, 470 U.S. 285 n. 19 (looking at overinclusiveness and underinclusiveness as evidence of insubstantial relationship between ends and means). Regardless of how construed, see Section V, infra, §§11-12 are overinclusive because they prevent marriages that may be recognized, in whole or in part, in a non-resident's home state. A domicile's express or implicit prohibition on marriage is not determinative of whether the domicile will respect a marriage legally celebrated elsewhere, even for residents of the domicile. See generally Amicus on Conflict of Laws.⁵⁷ The Commonwealth cannot look to

⁵⁷ Whether a state's statutes, precedents, and public policies would result in the recognition or non-recognition of a marriage is complex and requires a case-by-case analysis. See generally Amicus on Conflicts of Laws. A state may refuse to give one effect to a foreign marriage and at the same time allow the marriage another effect. Id. The mere fact that a marriage is contrary to a statute in the forum may not make it so offensive to that forum's policy as to be refused enforcement. Id. Even with evasive marriages, much depends upon the degree of importance which the state of domicile attaches to the particular prohibition evaded and the requested incident of marriage. Id. Thus, just as the Commonwealth cannot represent that any other state will be forced to recognize Massachusetts licenses against its will, it

the marital restrictions in any particular state as a proxy for whether that state will respect a marriage validly celebrated elsewhere. Id. The elaborate body of law governing the recognition of marriage licenses from other states is replete with instances where states respect the marriages of residents and non-residents even though the marriages could not have been performed in that state in the first instance. Id.

Notably, prior to May 17th, New York and Rhode Island indicated that each would respect Massachusetts marriages involving same-sex couples from their respective States, even if such couples could not marry at home. See R.A. 317 (Statement of Rhode Island Attorney General Patrick Lynch dated May 17, 2004) and 672-700 (Letter from Solicitor General of New York to Governor Romney dated May 13, 2004). As sister states continue to grapple with the question of marriage rights for same-sex couples, there is reason to believe that other states will join New York and

is equally true that some states may choose to allow their resident same-sex couples to enjoy some or all of the rights incident to marriage in their home state based upon the couples' marriage in Massachusetts. Id.

Rhode Island in respecting legal marriages entered into by same-sex couples in Massachusetts.⁵⁸

Sections 11-12 are also underinclusive. Resident same-sex couples are not required to relinquish their licenses when leaving the Commonwealth's borders, even though several of the sister states have proclaimed their intent to discriminate against them. See, e.g., Va. Code Ann. §20-45.2 (1997); Fla. Stat. Ann. §741.212 (1997); Ga. Code Ann., §19-3-3.1 (1996). If the subject legislation were truly aimed at guaranteeing extra-territorial respect of Massachusetts licenses, it would regulate all "vulnerable" licenses (i.e., licenses that have been threatened with non-recognition extra-territorially) when they leave Massachusetts territory. Yet, §§11-12 permit Massachusetts same-sex couples to move away from the Commonwealth or travel beyond its borders without relinquishing their marriage licenses. Though

⁵⁸ Connecticut and Vermont have left the question of how their states would recognize a Massachusetts marriage of their own residents unresolved. R.A. 455, 662-671. By statute, New Hampshire and Maine will not presently accord respect. NH Rev. Stat. Ann. § 457:1-3; 19-A Me. Rev. Stat. Ann., tit. 19-A, §§ 650, 701. Yet, even these adverse statutes do not definitively resolve the question of whether these states will accord respect to the marriage in whole or in part. See Amicus on Conflict of Laws.

Massachusetts married same-sex couples - like non-resident same-sex couples -- face the possibility that their marriages will not be respected when they leave Massachusetts territory, see, e.g., Opinions of the Justices, 440 Mass. at 1208-09, §§11-12 do not address that concern.

In addition, there are less restrictive alternatives to accomplish the Commonwealth's purported interest than discriminating against all non-resident same-sex couples from throughout the United States. Thus, because §§11-12 cannot satisfy the "substantial justification" or the "substantial relationship" requirement of the Clause, §§11-12 violate the Privileges and Immunities Clause.

V. PROPERLY CONSTRUED, §§11-12 DO NOT REACH ALL STATES & TERRITORIES OF THE UNITED STATES

Assuming for the sake of argument alone that §§11-12 withstand constitutional scrutiny on the grounds discussed in Sections II-IV, supra, the Commonwealth has nonetheless improperly interpreted the reach of §12 to foreclose marriage here to all same-sex couples from every other U.S. state and territory.

The provisions of Chapter 207 "must be construed, where capable, so as to constitute a harmonious whole

consistent with the legislative purpose." See Labor Relations Commission v. Board of Selectman of Dracut, 374 Mass. 619, 624 (1978) (citation omitted). The trial court correctly determined that the Commonwealth's interpretation of §12 improperly isolated §12 from the statutory scheme. R.A. 118. Although the trial court did not address the favorable implications of that statutory interpretation for the Couples, properly construed, the statutory scheme would foreclose marriage to same-sex couples from only a subset of states and would allow seven of the eight plaintiff couples (from New York and all the New England States except Maine) to marry.

A. The Commonwealth's Application of §§11-12 and Its Impact on Non-Resident Couples.

The Commonwealth presently applies §§11-12 to three categories of persons. The first category includes persons who reside in states where the law is silent on the marriage eligibility of same-sex couples.⁵⁹ The second includes persons whose marriage is expressly precluded, but not "void," under the laws

⁵⁹ This includes Wendy Becker and Mary Norton and Judi and Lee McNeil-Beckwith from Rhode Island; Paul Trubey and Mark Pearsall and Katy and Kristin Gossman from Connecticut, and Tanya Wexler and Amy Zimmerman from New York.

of the home state.⁶⁰ Combined, these first two categories describe "non-void" states. The third category includes persons whose marriage is expressly declared "void" under the laws of their home state.⁶¹ Marriages are prohibited for many reasons but are "void" for few.⁶²

The Commonwealth concedes that seven of the eight Couples hail from states that do not declare their marriages "void" within the meaning of §11. R.A. 118. The Couples submit that this concession means that the

⁶⁰ This includes Sandi and Bobbi Cote-Whitacre from Vermont and Ed Butler and Les Schoof from New Hampshire. See Vt. St. T. 15 § 1201(4); N.H. Rev. Stat. Ann. 457:1-3.

⁶¹ This includes only Michael Thorne and James Theberge from Maine. See 19A Me. St. Rev. Ann. §§701 and 751 (declaring "void" marriages prohibited in §701 such as a marriage by a same-sex couple).

⁶² All "void" marriages are prohibited, but not all prohibited marriages are "void." "[A] marriage between persons of a class that the statute simply says shall not marry is not void, in the absence of a declaration in the statute that such marriage is void." Mazzolini v. Mazzolini, 155 N.E.2d 206, 209 (Oh. 1958) (addressing §11's application to marriage of first cousins from Ohio). A "void" marriage is one that is treated as a nullity from its inception (*i.e.*, void ab initio), requiring no legal process to dissolve. See, *e.g.*, Charles P. Kindregan and Monroe L. Inker, Family Law and Practice, Massachusetts Practice Series, §19-2, p. 735-36 (3rd ed. 2002). "Voidable" marriages are presumptively valid and attended by all the incidents of a valid marriage unless annulled pursuant to the request of one or both of its participants. Id. at §19-3, pp. 738-39.

seven Couples from "non-void" states will succeed on the merits because they are simply not subject to §11, the only operative statutory provision relevant to the issue before the Court.

B. Within the Statutory Framework, §11 is the Substantive "Reverse Evasion" Provision and §12 is Part of Its Enforcement.

Sections 10-13 and 50 were adopted verbatim from the 1912 recommendations of the Commissioners on Uniform Laws. Compare R.A. 511-12 (1912 Committee Report) with St. 1913, 360, §§1-5. Within the statutory framework, Sections 10 and 11 are substantive; Section 12 is administrative; Section 13 is interpretive; and Section 50 is penal in nature.

1. The Substantive Provisions of the Statutory Scheme Are Directed Only to "Void" Marriages

The development of the statutory language by the Commissioners on Uniform State Laws demonstrates a clear intent to bring within the statutes' substantive provisions only marriages that are void, not merely prohibited.⁶³ With respect to "reverse evasion,"

⁶³In the course of drafting the marriage evasion statute, which was the only portion of the law under consideration initially, the Committee on Marriages and Divorce first proposed that the evasion statute directed at residents (now §10) nullify any out-of-state marriage if the marriage would have violated any

Section 11 provides the operative prohibition:
marriages contracted in the Commonwealth that would be
"void" if contracted in the home state "shall be null
and void."

When considering the validity of marriages
contracted by non-residents in Massachusetts under
this statutory scheme, courts have viewed the term
"void" as outcome determinative. See, e.g., Mazzolini
v. Mazzolini, 155 N.E.2d 206, 209 (Oh. 1958)
(validating first cousin marriage of Ohio residents in
Massachusetts because the marriage would have been
prohibited, but not void, if contracted in Ohio).⁶⁴

laws "forbidding or declaring void" the marriage in-
state. R.A. 508. The language of the Act ultimately
passed by the Conference and recommended to the
States, however, changed the words "forbidding or
declaring void" to "prohibited and declared void."
R.A. 511. In addition, the Act passed by the
Conference added a reverse evasion statute directed at
non-residents (later adopted verbatim by the
Massachusetts Legislature as §11) that prohibited
marriages that "would be void" in the parties' home
state. The change in the language of the evasion
statute from "forbidden or declared void" to
"prohibited and declared void," together with the use
of the word "void" in the reverse evasion statute,
evinces a deliberate and conscious choice that to come
within the scope of these statutes a marriage must not
merely be prohibited, but also "void."

⁶⁴ See also Canwright v. Canwright, 76 N.Y.S.2d 10, 12
(N.Y. App. Div. 1947) (invalidating Massachusetts
marriage of New York domiciliary because their
marriage would have been void if contracted in New
York); Beaudoin v. Beaudoin, 62 N.Y.S.2d 920, 923

The fact that these cases turn on whether the Massachusetts marriages were expressly "void" under the home state's laws undercuts the Commonwealth's novel "theory": that the marriage would be invalid even if it were merely prohibited, rather than "void." Id. Notably, commentators at the time criticized the effectiveness of the Uniform Marriage Evasion Act because its operative provisions solely reached marriages expressly declared "void," not merely prohibited. See Amicus on Conflicts of Law.

2. Sections 12 and 50 Serve to Reinforce and Administer the Statute's Substantive Concern for "Void" Marriages

Section 12 is expressly directed at municipal clerks and imposes upon them an administrative obligation. That this administrative obligation is to enforce §11's operative terms is confirmed by §50.

Section 50 provides for penalties upon an "official issuing a certificate of notice of intention of marriage knowing that the parties are *prohibited by section eleven* from intermarrying..." (emphasis added). The use of the word "prohibited" in §50, just as in §12, refers back to the substantive prohibition

(N.Y. App. Div. 1946) (same); Seagriff v. Seagriff, 195 N.Y.S.2d 718 (N.Y. Fam. Ct. 1960) (same).

of §11 - i.e., that a marriage be "void" in the home state. Notably, when enacted in 1913 as §§3 and 4, respectively, of St. 1913, c. 360, §§12 and 50 both applied to persons or parties "prohibited from intermarrying." At that time, the text of the sections followed seriatim after the reverse evasion provision itself (§2 of St. 1913, c. 360, and now §11) and implicitly incorporated the operative term of §11: "void." That §50 later became separated from its antecedents when it was codified in c. 207, explains why §50 contains an express cross-reference back to §11, while §12, which remained in its intended sequential order, does not.

A logical reading of §12 is that it is meant to administer §11 and, thus, should be read to mean that "a person is not prohibited from intermarrying" if the proposed marriage is not "void" in the home state under §11. The use of the term "prohibited" rather than "void" in §§12 and 50 logically flows from the subjects of the various provisions. Whereas the subject of §11 is marriage, which is frequently characterized as being "void" or "voidable," the subjects of §§12 and 50 -- "persons" and "parties" -- are never properly described by the term "void." That

the term "prohibited" is used in §§12 and 50 as a synonym for "void," harmonizes this statutory scheme to effectuate its intended purpose. See, e.g., Upshaw v. Katherine Gibbs School of Boston, __ Mass. App. Ct. __, 2005 WL 502812, *2 (2005) ("Statutes concerning a common topic are to be read 'as a whole to produce an internal consistency.'") (citation omitted).

3. The Commonwealth's Historical Practices Demonstrate that this Statutory Scheme Reaches "Void" Marriages Only.

Moreover, reading §11 as the sole substantive term governing the marriages of non-residents is consistent with the Commonwealth's historical administration of this statutory scheme. The Commonwealth's Notice of Legal Impediments to Marriage has never forced any marriage applicant to consider the laws of a sister state unless the sister state's law declared the non-resident marriage "void" within the meaning of §11. R.A. 566-69. Even to this day, the Commonwealth's Notice of Legal Impediments to Marriage does not identify the "non-void" prohibitory laws of other states as impediments to marriage in Massachusetts. See Registrar Nyberg's May 11, 2004 Letter to Clerks, R.A. 628 (instructing continued use of Notice of Legal Impediments found at R.A. 569).

In sum, the reverse evasion statute, if it can be applied at all, reaches only marriages that would be "void" if contracted in the home state.

C. The Commonwealth Cannot Expand the Reach of the Reverse Evasion Law by Attempting to Give Substantive Force to §12.

The Commonwealth presses an incongruous interpretation of §§11-12: claiming that whether a marriage would be "void" if contracted in another state (for purposes of applying §11) is a separate question from whether it is "prohibited" by that other state's laws (for purposes of applying §12). R.A. 117-18. By this reading, the Commonwealth advocates that a non-resident couple can be properly eligible to marry in the Commonwealth under §11 but then lose that eligibility by operation of §12. This makes no logical sense, and the trial court correctly rejected the Commonwealth's "discordant reading of §§11 and 12." R.A. 118.

Recognizing that §11 cannot operate to foreclose same-sex couples from every other state from marrying in Massachusetts, the Commonwealth turns to §12. However, the Commonwealth does not argue that §12 supplants §11. Rather, it argues that "prohibited" in §12 operates to deny all marriages for all non-

Massachusetts same-sex couples coming from the 49 states, and to the extent any such marriages occur, to void them. See Commonwealth's App. for Direct Appellate Review, p. 2, n. 2. This argument simply renders §11 meaningless. See, e.g., Upshaw, 2005 WL 502812 at *2 (recognizing that courts may not "interpret a statute so as to render it or any portion of it meaningless or superfluous" or "make[] the statute a nullity").

The Commonwealth must press this illogical reading of the statutes to shore up Governor Romney's malicious administration of §11 to bar marriage to all same-sex couples from every U.S. state and territory. See Winslow Presentation, frames 23-26, R.A. 645-46; frame 39, R.A. 653. Yet, the Commonwealth cannot convert §12 into a substantive bar to marriage for all U.S. same-sex couples. As a matter of statutory construction, seven of the eight Couples, as well as other couples from non-void states, are eligible to marry in Massachusetts even if §§11-12 survive state and federal constitutional review.

CONCLUSION

For these reasons, §§11-12 violate Massachusetts law and the Privileges & Immunities Clause of the U.S.

Constitution. Given the irreparable harm they face from the denial of their constitutional right to marry, this Court should reverse the trial court's denial of the Couples' motion for injunctive relief and immediately enjoin the Commonwealth from further use of §§11-12 to deny marriage licenses to non-resident same-sex couples.

Respectfully submitted,

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Dated: March 11, 2005