

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT

RAYMOND FLYNN, <i>et al.</i> , Plaintiffs, v. DOUGLAS JOHNSTONE, <i>et al.</i> , Defendants.	CIVIL ACTION NO. 04-3136-A
DOUGLAS JOHNSTONE, <i>et al.</i> , Plaintiffs, v. THOMAS REILLY, <i>et al.</i> , Defendants.	CIVIL ACTION NO. 04-2655-G
SANDRA COTE-WHITACRE, <i>et al.</i> , Plaintiffs, v. DEP'T OF PUBLIC HEALTH, <i>et al.</i> , Defendants.	CIVIL ACTION NO. 04-2656-H

**PLAINTIFFS' MOTION TO CONSOLIDATE, WITH
MEMORANDUM AND AFFIDAVIT IN SUPPORT**

Now come Plaintiffs Raymond Flynn and Thomas Shields and, pursuant to Rule 42(a) of the Massachusetts Rules of Civil Procedure, move this Court for an order consolidating the above actions. All of the cases involve common questions of both law and fact. This Motion is supported by the accompanying Memorandum and the separately filed Affidavit of Philip D. Moran.

MEMORANDUM

I. INTRODUCTION

Courts are encouraged as a matter of judicial economy and justice to consolidate cases when they involve common issues of law or fact. The case proposed for consolidation involves a state statute that prohibits city clerks from issuing marriage licenses to non-residents if the jurisdiction in which they reside prohibits the marriage, and seeks an order in the nature of mandamus compelling city clerks to comply with that statute and a declaration that marriage licenses issued by city clerks in violation of the statute are null and void. Likewise, the cases with which Plaintiffs seek to consolidate their case involve the same statute, and the plaintiffs therein ask the Court to determine whether that statute violates the Massachusetts Constitution or the United States Constitution, and whether the Commonwealth's interpretation of the statute deprives the clerks of their alleged discretion to issue same-sex marriage licenses to couples when one or both resides in a jurisdiction that prohibits same-sex marriage.

II. PROCEDURAL HISTORY

On May 25, 2004, Plaintiffs Raymond Flynn and Thomas Shields filed an action in the Supreme Judicial Court of Suffolk County (before the single justice) against the city or town clerks of Provincetown, Somerville, and Worcester, requesting that the Court: (1) issue an order in the nature of mandamus compelling clerks to stop issuing marriage licenses to out-of-state couples in violation of G.L. c. 207, § 12¹; and (2) declare that marriages contracted in violation of G.L. c. 207, § 11² are void. Meanwhile, on June 18, 2004, several out-of-state same-sex

¹ G.L. c. 207, § 12 provides: "Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides."

² G.L. c. 207, § 11 provides: "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

couples (“Couples”) filed suit in this Court against the Department of Public Health and various public officials requesting a declaration that G.L. c. 207, § 11 is unconstitutional, and seeking an injunction enjoining its enforcement by the defendants.³ The same day, twelve city clerks (“Clerks”), including the clerks of Provincetown, Somerville and Worcester, also filed suit in this Court against the Attorney General and the Department of Public Health, challenging the constitutionality of G.L. c. 207, § 12. The cases were thereafter consolidated pursuant to Mass.R.Civ.P. 42(a).

Shortly after the Couples and Clerks filed their lawsuits, Plaintiffs filed a motion to transfer and to consolidate in the SJC. On July 9, 2004, the single justice partially granted that motion, ordering that the case be transferred to this Court, but reserving the issue of consolidation for this Court to decide. This motion now seeks to have that question resolved.

III. ARGUMENT

Cases involving common questions of fact or law should be consolidated to conserve judicial resources and prevent inconsistent rulings or decisions. Mass. R. Civ.P. 42(a); Wright & Miller, *Federal Practice and Procedure* § 2382 (2004). These motions are viewed favorably and courts are encouraged to consolidate such cases even if the parties have not requested it, so long as it is in the interests of judicial economy and justice. See *Shea v. Town of Danvers*, 21 Mass. App. Ct. 996, 998-99, 490 N.E.2d 806 (1986).

The cases proposed for consolidation involve the constitutionality and applicability of the same statutes—G.L. c. 207, §§ 11, 12—and arise under the same facts—city clerks issuing marriage licenses to out-of-state couples. Each case will involve common questions of fact and law concerning the applicability of the statutes to the couples, the applicability of the statutes to

null and void.”

³ The Couples later amended their Complaint to include a challenge to the constitutionality of G.L. c. 207, § 12.

the Clerks, and the statutes' ultimate constitutionality. Virtually no material fact or point of law will be addressed in the already consolidated *Johnstone* and *Cote-Whitacre* cases without it also being addressed in the *Flynn* case. And because all parties are asking the same questions of the Court, no party will be prejudiced by consolidation. In addition, these cases are also both in their initial stages, so consolidation will cause no delay. Moreover, absent consolidation, the Court's time will be expended needlessly in that it will be called upon to render duplicate procedural and evidentiary rulings, and conduct two trials when only one is necessary. Thus, the cases should be consolidated.

Plaintiffs request that the Court consolidate all of the matters at issue in the actions. The primary issue in both the Clerks' and the Couples' case is the constitutionality of the statutes. Plaintiffs' lawsuit seeks to have those same statutes enforced, and thus the constitutionality of the statutes is an integral component of Plaintiffs' lawsuit, and Plaintiffs should be afforded the opportunity to defend their constitutionality. Otherwise, their claims may be significantly jeopardized.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to consolidate their case with the Clerks' and Couples' respective cases, and all of the matters at issue therein.

Respectfully submitted,

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* Pending admission *Pro hac vice*