COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT

RAYMOND L. FLYNN and THOMAS A. SHIELDS Plaintiffs, vs. DOUGLAS JOHNSTONE, JOHN J. LONG, DAVID J. RUSHFORD, SUSAN FLOOD and CAROL VALCOURT, Defendants.	)	Docket N0. 04-3136-A **PLAINTIFFS' RESPONSE TO DEFENDANT JOHNSTONE'S AND DEFENDANT LONG'S RENEWED MOTION TO DISMISS THE AMENDED COMPLAINT**

INTRODUCTION

Defendants' renewed motion to dismiss challenges Plaintiffs' standing to bring an action in the nature of mandamus with an accompanying declaration that the marriage licenses already illegally issued are void under G.L. c. 207 §§ 11, 12. (Long MTD memo at 7-8). Defendants also argue that Plaintiffs failed to respond to their motion to dismiss within the time limits, and have therefore waived the right to respond.[1]

Plaintiffs have standing to bring this action in the nature of mandamus under the public right doctrine. And under mandamus, this court has the authority to require the Defendants to

fulfill their non-discretionary, ministerial duty to determine whether couples residing out of state are permitted to marry in their home states. G.L. c. 207 §§ 11 & 12. As a necessary component of its mandamus jurisdiction, this court also has the authority to declare those licenses issued contrary to §§ 11 and 12 null and void.

In addition, Defendants' assertion that Plaintiffs have waived their right to respond to the motions to dismiss is not well-grounded, since the rule Defendants cite has no applicability to the SJC. Defendants option was to re-file or renew their motion in the Superior Court, as they did, which Plaintiffs are now responding to in a timely fashion

Standard For A Motion To Dismiss

To be entitled to a motion to dismiss, Defendants must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nader v. Citron*, 372 Mass. 96, 97-98 (1977) (citation omitted). "Furthermore, the allegations of the complaint, as well as such inferences that may be drawn therefrom in the plaintiff's favor, are to be taken as true." *Id.* Defendants do not meet this burden.

I. Plaintiffs Opposition To The Renewed Motion To Dismiss Is Timely.

Plaintiffs filed an amended petition in the Supreme Judicial Court on June 8, 2004, and served it by mail. On June 30, 2004, Defendants Long and Johnstone filed their original motions to dismiss and served Plaintiffs by mail. On July 2, 2004, before receiving Defendants' motions to dismiss, Plaintiffs filed a motion with the SJC to have the case transferred to this Court, and consolidated with the case that Defendants filed challenging the state's action under G.L. c. 207, §§ 11, 12, *Johnstone et al. v. Reilly*, No. 04-2655G. Plaintiffs' motion to transfer the case to the superior court was granted by the SJC on July 9, 2004, but it reserved for this Court the decision

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[1] Although Defendants originally filed separate motions, because their renewed motion was filed jointly, and

on the motion to consolidate. Defendants have never served or filed an opposition to that motion to consolidate.

Because this matter was transferred to the Superior Court, Plaintiffs renewed their motion to consolidate by filing and serving the motion on August 2, 2004.[2] Defendants Johnstone and Long's response on August 11, 2004, was to file their renewed motion to dismiss with this Court, in which they claim a right to have the Court decide their motions before deciding the motion to consolidate.

Defendants' arguments that Plaintiffs' response is not timely fail for several reasons. First, Defendants cite a non-existent rule, Massachusetts Rules of Civil Procedure 9A, as setting the time limit on opposition motions. (Renewed Motion at 1). Likely the rule Defendants meant to cite was Superior Court Rule 9A(a)(2), which deals with time limits for opposing motions. But Superior Court Rule 9A does not apply to actions in the Supreme Judicial Court, and indeed there is no rule setting a specific time for opposing motions in the SJC. So Defendants' contention that Plaintiffs failed to respond timely to their motions to dismiss is without merit. The time for opposition to the motions under Rule 9A did not begin to run until Defendants filed their renewed motion to dismiss in the Superior Court, at the earliest. Thus, Defendants' claim that Plaintiffs are untimely in their opposition is untenable. Now that Defendants have renewed their motions in this Court, Plaintiffs may respond.

Second, Defendants did not treat their motions in the SJC as though they were governed by Superior Court Rule 9A because they filed them with the Court rather than serving them pursuant to Rule 9A. If Rule 9A governed, Plaintiffs' response to the motions to dismiss would

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because the arguments raised in both motions are essentially identical, Plaintiffs address their motions jointly.

have been due on July 13, and Defendants should have filed an affidavit of compliance with the rule and "no opposition" in a timely fashion. Rule 9A(b)(2). This they did not do, and any effort to do so now would be untimely.

Finally, there is an absurd irony in Defendants' position in their renewed motion to dismiss. Defendants have never responded to Plaintiffs' motion to consolidate filed with the SJC. They have served no substantive objection to Plaintiffs' new motion to consolidate in the Superior Court, but ask for an opportunity to do so in the future when the Court denies the motion to dismiss. Yet at the same time, Defendants claim that Plaintiffs defaulted on the motions that Defendants filed in the SJC because Plaintiffs did not serve their opposition prior to Defendants' renewed motion to dismiss. Defendants cannot have it both ways. Either they waived the right to object to consolidation before Plaintiffs filed the new motion in this Court, or Plaintiffs have not defaulted on the motions to dismiss. The reality is that Rule 9A did not apply to any of the motions filed in the SJC.

Finally, even if Plaintiffs had defaulted on Defendants Johnstone and Long's motions to dismiss, the default would not justify dismissing Plaintiffs' complaint in its entirety for a very simple reason: Plaintiffs responded to Defendant Rushford's motion to dismiss in the SJC. Defendants' failure to mention that significant detail in their renewed motion highlights the frivolity of their timeliness argument.

If this Court were to find that Plaintiffs' opposition to Defendants' motion to dismiss should have been served pursuant to Rule 9A, the Court may grant additional response time

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[2] Rightly or wrongly, Plaintiffs' Counsel was under the impression that Judge Ball authorized filing the motion to consolidate with the Court rather than merely serving it in accordance with Rule 9A. However, there is no prejudice to the other parties because Plaintiffs also served the motion on the parties.

under Superior Court Rule 9A(a)(2)(C). Plaintiffs respectively request such an order if the Court finds Plaintiffs' opposition untimely, as no party would be prejudiced.

II. An Action In The Nature Of Mandamus Is Appropriate To Compel Defendants to Perform Their Non-Discretionary Duties Under M.G.L. c. 207.

An action in the nature of mandamus may be brought to compel public officials to perform non-discretionary, ministerial duties. M.G.L. c. 249, § 5. "The court from earliest days has exercised it judicial power to compel public officials to do their duty." *Attorney General v. Sheriff of Suffolk County*, 394 Mass. 624, 629 (1985) (citing string of examples where mandamus issued to compel public officials to comply with statutory duty). Mandamus is especially appropriate where there would be a failure of justice and no other adequate remedy is available. *Fort v. Commonwealth*, 429 Mass. 1019, 1020 (1999). This case is <u>precisely</u> the sort that relief in the nature of mandamus is designed to remedy—reigning in public officials who disregard the rule of law and willfully ignore a statutory mandate.

A. Plaintiffs Have Standing to Bring an Action in the Nature of Mandamus

Plaintiffs have standing to bring an action in the nature of mandamus through the "public right doctrine." "When the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such interested in the execution of the laws." *Brewster v. Sherman*, 195 Mass. 222, 224-25 (1907); *see also Bancroft v. Building Commissioner of City of Boston*, 257 Mass. 82, 84-85 (1926) (citing "great weight of American authority in favor of the doctrine"); *Sears v. Treasurer & Receiver Gen.,* 327 Mass. 310, 315 (1951) (same). Plaintiffs stand in the shoes of all Massachusetts citizens by demanding that city clerks fulfill their statutory duty when issuing marriage licenses.

Accordingly, Plaintiffs have standing to bring an action in the nature of mandamus to compel performance of that duty.

Defendants argue that because this is not an action involving election or voting issues, the clerk's duties are owed "to the government, not the people as such." (Long MTD memo at 8-9) (citing *Kaplan v. Bowker*, 333 Mass. 455, 460 (1956)). But the public right doctrine has never been so narrowly construed.

It is true that when a duty is owed to the "*government as such*," mandamus will not lie. *Kaplan*, 333 Mass. at 460 (emphasis added). But in *Kaplan*, the duty was owed *specifically* to the government. In that case the General Court formed a special commission to conduct an "investigation and study of the extent, character and objects of communism and subversive activities." *Id.* at 456. The commission was to report its findings directly to the General Court. *Id.* at 457. Five members of the Massachusetts Bar filed a mandamus petition to direct the commission on how to report its findings. *Id.* But because the commission owed the duty directly and solely to the General Court, the SJC held that the petitioners did not have standing to bring the mandamus action. *Id.* at 46-61.

The facts in *Kaplan* stand in contrast to those in *Bancroft v. Building Commissioner of Boston*, as well as the present case. In *Bancroft*, the petitioners brought a mandamus action under the public right doctrine to compel the building commissioner to deny a permit that would plainly violate a statute. 257 Mass. at 84-85. The Court found that the petitioners had standing under the public right doctrine, even though they had no interest "beyond the right and interest of the public." *Id.*

Here, the duty not to issue illegal marriage licenses is like the duty not to issue an illegal building permit. If private citizens have standing to bring a mandamus action to compel a public

official to obey a statute and deny a building permit, surely Plaintiffs have standing to bring an action to compel clerks to obey a statute and deny illegal marriage applications.

B. Mandamus by Private Citizens Is Not Precluded Simply Because the Government Can Bring an Enforcement Action.

Defendants also claim that a mandamus action by private citizens is precluded because the state may enforce the statutes under c. 207. (Long MTD Memo at 9). The Defendants' view, however, would completely eviscerate the mandamus action because the Attorney General can *always* bring an action to enforce state law. Simply because the government may enforce a statute does not preclude private citizens from bringing an action in the nature of mandamus.

The rule that mandamus is available under the public right doctrine only if there is no other method of enforcement refers to no other method of enforcement *for the plaintiff*. For example, in *Bancroft v. Building Commissioner*, 257 Mass. 82 (1926), the plaintiffs brought a mandamus action to compel officials to obey the law, even though the attorney general could have brought the action. But it is only when there is an alternative method of enforcement *for the plaintiff* that mandamus is unavailable. *See Levine v. Chief Justice of the District Court*, 434 Mass. 1014, 1015 (2001) (denying mandamus because normal course of appeal was available).

In this case, relief in the nature of mandamus is Plaintiffs' only effective remedy to ensure that clerks are carrying out their statutory duty. Indeed, no other remedy would suffice to safeguard the public trust and prohibit public officials from violating state law.

C. Massachusetts Law Imposes a Non-Discretionary Duty on Defendant Clerks

Massachusetts law imposes an unambiguous duty on public officials to ensure that couples domiciled out of state are not issued marriage licenses that are prohibited under the laws of their home state.

> 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.

M.G.L. c. 207, § 12. Indeed, any marriage license issued contrary to the laws of the individuals' home state is null and void (M.G.L. c. 207, §11), and the licensing official may be subject to criminal sanction. (M.G.L. c. 207, § 50).

The Massachusetts Department of Public Health has distributed information and has held seminars on c. 207, §11, *et seq*., informing public officials of the law's requirements. *Cote-Whitacre v. Dep't of Pub. Health*, No. 04-2656-G, slip op. at 6-7 (Mass. Sup. Ct. August 18, 2004). Nonetheless, Defendants announced their defiance of Massachusetts law by declaring that they would issue marriage licenses to persons domiciled out of state without regard to c. 207, § 12, and began doing so. *Id.* at 7-8. The duty imposed by c. 207, §12, however, is non-discretionary. To be in compliance with the law, public officials must ensure that same-sex couples domiciled out of state are not obtaining marriage licenses that are prohibited in their home state.

1. The limited discretion afforded to Defendants in Sections 12, 20 and 35 does not bar mandamus in this case.

Defendants contend that G.L. c. 207, §§ 12, 20, and 35 defeats Plaintiffs' claim for mandamus, because it affords discretion to clerks on *how* they are to carry out their duty.[3] This argument, however, is irrelevant to the narrow issue before this Court, which is whether the clerks have a clear legal duty to deny a marriage certificate to same-sex couples who do not reside and do not intend to reside in Massachusetts.

[3] Long MTD memo at 10; Johnstone MTD memo at 7-8.

The Court in *Cote-Whitacre* ruled that §§ 11 & 12 must be read together. No. 04-2656-G, at 11. It further ruled that § 11 clearly prohibits marriages of non-residents if the marriage is invalid in the couple's home state. *Id.* at 14. The clerks cannot have discretion to issue a license to a couple that is prohibited from marrying in Massachusetts.

Under § 35, if the applicant fails to provide his or her residence on the notice of intention of marriage, the clerk must satisfy himself that such information cannot with reasonable effort be obtained by the applicant.[4] In such circumstance, one of two things will happen: either the Clerk will determine to his satisfaction that the applicant's residence can be obtained with reasonable effort (in which case the applicant must provide his residence or the marriage certificate will be rejected), or the Clerk will determine to his satisfaction that the applicant's residence cannot be obtained with reasonable effort (in which case the applicant is not required to provide his residence).[5] The fact that the statute affords the Clerk some measure of discretion in making the determination of whether the applicant can obtain his or her residence with "reasonable effort" is inapposite to the discussion of whether the clerk has a clear legal duty to ensure that non-residents do not have any legal impediment to marriage.[6] The clerks certainly are not given discretion to ignore the law altogether, although this is precisely what they have done.

That brings us to the crux of the matter: does Section 12 afford "discretion" to a city or town clerk to issue a marriage license to a same-sex couple, when at least one of them resides (and intends to continue to reside) outside of the Commonwealth. Defendants assert that it does

[4] Of course, if the applicant provides his or her residence, Section 35 is inapplicable, at least with respect to residence.

[5] It is hard to conceive of a situation where an applicant would with reasonable effort be unable to obtain such information.

because of language in the statute that the clerk is "to satisfy himself" that non-resident applicants are not prohibited from intermarrying. According to Defendants, the statute's use of the phrase "satisfy himself" translates into "discretion," which allows clerks to ignore the facts and the law if he so desires. This is an incorrect (not to mention self-serving) interpretation of the statute, and one which collides with its legislative purpose, which is "to make uniform the law of those states which enact like legislation." G.L. c. 207, ¶ 13.

In considering non-resident applicants, § 12 establishes an affirmative duty on the part of the clerk to make the necessary *factual* inquiry ("by requiring affidavits or otherwise") to allow him to determine whether the non-resident is prohibited by any legal impediments in his state of residence (as provided to the clerks by the commissioner pursuant to § 37) from marrying in Massachusetts.[7] Certainly the legislature did not intend by inclusion of the "to satisfy himself" language that a clerk has discretion simply to ignore the legal impediments to marriage in the applicant's state of residence, or to ignore undisputed facts (such as the gender or residence of the applicants) which are plainly evident from the face of the completed notice of intention of marriage. Such an interpretation would render the statute meaningless.

G.L. c. 207, § 50 further derails any notion that clerks are afforded discretion under Section 12 to issue certificates to non-resident same-sex couples. Section 50 provides that any official that issues a certificate of notice of intention of marriage "knowing that the parties are prohibited by section eleven from intermarrying" shall be guilty of a misdemeanor. *Id.* It is nonsensical to suggest that § 12 authorizes a clerk to essentially ignore the law and issue a

[6] Obviously, the clerk's duty under Section 12 does not arise until it has been determined that the applicant is a nonresident that intends to continue to reside in another state. If the clerk has *properly* dispensed with the applicant's requirement to identify his or her residence (pursuant to Section 35), Section 12 is not applicable.

marriage license to a same-sex couple that intends to reside in a state which prohibits same-sex marriage, yet while doing so the clerk would subject himself to criminal prosecution for exercising that discretion. The proper interpretation of § 12, read in *pari materia* with §11 and § 50, is that clerks have no such discretion, and are thus subject to mandamus to compel them to deny marriage licenses to non-resident same-sex couples.

2. Defendants' position in this case is contrary to the position they have asserted in a separate lawsuit.

Defendants' argument that they have discretion under the law is inconsistent with the position they have already taken. In a *separate* lawsuit filed against the Attorney General and Commissioner of Public Health by thirteen city and town clerks, Defendants assert the exact opposite, *i.e.*, that they have been specifically instructed by the Department of Public Health (which promulgates policies and procedures for the issuance of marriage licenses by city and town clerks):

> not to accept Notices of Intention of Marriage from any same-sex couple who reside outside of Massachusetts and who state that they do not intend to reside in Massachusetts, or from any same-sex couple when one member of the couple resides in Massachusetts and the other resides in a different state.

(See Complaint Seeking Declaratory and Injunctive Relief in *Johnstone v. Reilly*, Suffolk County Superior Court Case No. 04-2655-G, at 5, ¶ 22.) It is certainly disingenuous for Defendants to assert in one lawsuit that they have discretion to issue same-sex marriage licenses to non-residents, yet at the same time assert in a different lawsuit that they do not. For this reason alone, Defendants' motion should be denied.

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[7] The clerk is required to make findings of fact, and then apply the law (which in this case is provided to him by the commissioner). Just because the clerk has discretion in the means he utilizes to make his factual findings, and in the particular findings he makes, does not also give him discretion to ignore the undisputed facts or the law.

III. Plaintiffs' Claims Are Not Moot Simply Because Defendants Have Temporarily Stopped Violating The Law.

Defendants cannot avoid a mandamus action simply by temporarily ceasing illegal conduct, then declaring the case moot. "If the underlying controversy continues, a court will not allow a defendant's voluntary cessation of his allegedly wrongful conduct with respect to named plaintiffs to moot the case . . . . In fact, to establish mootness in such circumstances, a defendant bears a heavy burden of showing that there is no reasonable expectation that the wrong will be repeated; and a defendant's mere assurance on this point may well not be sufficient." *Wolf v. Commissioner of Public Welfare*, 367 Mass. 293, 299 (1975). In this case, defendants have not given any assurance that they will not continue to violate Massachusetts law by granting marriage licenses to out of state couples without regard to the law of the couples' home state. Indeed, Defendants filed a lawsuit claiming a right to ignore the law because they claim it is unconstitutional. When it became clear that they had no standing to file in their official capacities, they re-filed in their individual capacities. *Cote-Whitacre*, No. 04-2656-G at 3 n. 2.

Thus, under well-established law, Plaintiffs' claims cannot be mooted simply because the Defendants have temporarily ceased their illegal conduct.

IV. This Court Has Authority Under Mandamus To Recognize And Declare That Licenses Issued Contrary To State Law Are Void.

Defendants challenge Plaintiffs' standing to seek a declaration that the licenses already illegally issued are invalid.[8] But the authority to require clerks to revoke illegally issued licenses flows directly from this Court's authority under actions in mandamus. *See, e.g., Mariano v.*

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[8] Long MTD memo at 6-7; Johnstone MTD memo at 2-6. Although Plaintiffs' Amended Complaint included a request for a declaratory judgment, this Court's jurisdiction to issue an order in the nature of mandamus is sufficiently broad to encompass the relief sought as a declaratory judgment. *See* Mass. R. Civ. P. 8(f) ("[a]ll pleadings shall be so construed as to do substantial justice"); *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 463 (1997).

Building Inspector of Marlborough, 353 Mass. 663, 666 (1968) (applying mandamus to prohibit officials from issuing illegal licenses *and* to require those official to revoke licenses already illegally issued). A judgment that the licenses already issued to out-of-state couples contrary to state law are null and void is simply recognizing what state law already declares. M.G.L. c. 207, § 11 ("every marriage contracted in this commonwealth in violation of hereof shall be null and void").

This is precisely what the California Supreme Court recently did under a similar set of circumstances. In that case, the court issued a writ of mandamus to compel the Mayor of San Francisco to cease issuing marriage licenses to same-sex couples in violation of state law. The court also concluded "that it is appropriate in this mandate proceeding not only to order the city officials to comply with the applicable statutes in the future, but also to direct the officials to take all necessary steps to remedy the continuing effect of their past unlawful actions, including correction of all relevant official records and notification of affected individuals of the invalidity of the officials' actions." *Lockyer v. City and County of San Francisco*, 2004 WL 1794627, *31 (Cal. August 12, 2004).

This Court should issue a similar order commanding city clerks to permanently cease from unlawfully issuing marriage licenses to out-of-state couples, and remedy the continuing effect of that unlawful action by requiring clerks to inform those affected couples that illegally issued marriage licenses are invalid. Anything short would be incomplete relief under mandamus and would essentially ratify illegal conduct.

Plaintiffs respectfully request a hearing under Superior Court Rule 9A(c)(3) to oppose Defendants' Renewed Motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that the original and one copy of the foregoing Memorandum was served by regular U.S. mail, postage prepaid, this 24th day of August, 2004, upon the following in accordance with Superior Court Rule 9A:

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