

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Superior Court
Civil Action No. 04-2655-G

DOUGLAS JOHNSTONE, Clerk of the Town of Provincetown,
et al.,

Plaintiffs,

v.

THOMAS REILLY, in his official capacity as ATTORNEY
GENERAL OF THE COMMONWEALTH OF
MASSACHUSETTS, et al.,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs in this case are the duly elected or appointed clerks of thirteen cities and towns throughout the Commonwealth. Pursuant to Mass. R. Civ. P. 65, plaintiffs seek a preliminary injunction that would bar the defendants from: (1) ordering plaintiffs to cease and desist from accepting completed Notices of Intention to Marry ("Notices") from same-sex couples from outside of Massachusetts who state under oath that there is no impediment to their marriage, or (2) taking other enforcement action that would prevent the plaintiffs from or penalize them for accepting Notices from or issuing marriage licenses to such couples. In support of their motion, plaintiffs submit the accompanying memorandum, affidavits of each of the plaintiffs and a consolidated appendix of exhibits to the clerks' affidavits.

Request for Hearing

Pursuant to Superior court Rule 9A(c)(3), plaintiffs request a hearing on their motion for a preliminary injunction.

John Long, Clerk of the City of Somerville,
David Rushford, Clerk of the City of Worcester,
Edward Ellis, Clerk of the Town of Acton,
Jane Chew, Clerk of the Town of Burlington,
Margaret Drury, Clerk of the City of Cambridge,
Thomas McNulty, Clerk of the Town of
Marblehead,

Catherine Stover, Clerk of the Town of Nantucket,
Wendy Mazza, Clerk of the City of Northampton,
Laurence Pizer, Clerk of the Town of Plymouth,
Carole Marple, Clerk of the Town of Sherborn,
Kaari Mai Tari, Clerk of the Town of Westford,
Susan Wood, Clerk of the Town of Rowe,
all in their official capacities as municipal clerks,

By their attorneys,



Scott P. Lewis, BBO #298740
Kevin Batt, BBO #634852
Anne Robbins, BBO #561968
Kara A. Krolkowski, BBO #658160
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
(617) 239-0100

Sarah Wunsch, BBO #548767
ACLU OF MASSACHUSETTS
99 Chauncy Street, Suite 310
Boston, MA 02111
(617) 482-3170

Dated: June 21, 2004

Douglas Johnstone, in his official capacity
as Clerk of the Town of Provincetown,


By his attorney,



Gretchen Van Ness, BBO #553632
LAW OFFICES OF GRETCHEN VAN NESS
44 School Street, Suite 510
Boston, MA 02108
(617) 723-5060

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon
the attorney of record for each other party by hand on June 21, 2004.



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THOMAS REILLY, in his official capacity as ATTORNEY
GENERAL OF THE COMMONWEALTH OF
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Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION¹**

Plaintiffs are municipal clerks from various cities and towns throughout the Commonwealth. They seek to enjoin the defendants from: (1) ordering them to cease and desist from accepting completed Notices of Intention to Marry ("Notices") from same-sex couples from outside of Massachusetts who state under oath that there is no impediment to their marriage, or (2) taking other enforcement action that would prevent the plaintiffs from or penalize them for accepting Notices from and issuing marriage licenses to such couples. Same-sex couples from outside of Massachusetts also have filed suit against the defendants, and the plaintiff clerks anticipate that the couples also will seek a preliminary injunction barring the defendants from

¹ The memorandum is accompanied by affidavits of each of the plaintiff clerks and a consolidated Appendix of exhibits to the clerks' affidavits ("App. Ex. ___"). For points on which the clerks' affidavits are substantively similar to each other, this memorandum will make reference to only one or two of them.

taking enforcement action against clerks who accept Notices from same-sex couples from outside of Massachusetts.

Last month, on the eve of the issuance of marriage licenses to same-sex couples in accordance with the Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*, the defendants the Department of Public Health ("DPH") and the Registry of Vital Records and Statistics ("Registry"), a DPH bureau, issued forms and guidance that effectively interpret the Massachusetts reverse evasion statute, G.L. c. 207, § 11, to bar municipal clerks from issuing marriage licenses to same-sex couples from any state other than Massachusetts, even though defendants have never required clerks to enforce the statute against opposite-sex couples from outside of Massachusetts. After some of the plaintiffs accepted Notices from and issued marriage licenses to same-sex couples from outside of Massachusetts, the defendant Attorney General ("AG") threatened to take enforcement action against clerks who failed to abide by the DPH's and Registry's directives.

The defendants' actions constitute impermissible selective enforcement of the marriage laws motivated by discriminatory animus. There is good reason why the reverse evasion statute has never been enforced in the ninety years since it was enacted, and why the DPH instead has consistently urged municipal clerks to exercise their statutory-granted discretion in the issuance of marriage licenses to out-of-state couples by relying on couples' sworn affirmations that they are unaware of any impediment to their marriage. The statute was adopted by Massachusetts as part of a backlash against mixed-race marriages; was designed to be part of a long since abandoned nationwide scheme that never achieved its purpose; and would require the Commonwealth to invest its time and money to enforce restrictions of other states, no matter how inimical to the public policy of this state. Because defendants consistently chose for nearly

a century not to enforce this misguided statute against opposite-sex couples, they cannot resort to it now to prevent marriages of same-sex couples.

Plaintiffs seek the Court's immediate intervention in order to prevent their continued conscription into the defendants' discriminatory enforcement scheme and to avoid the resulting risk of personal liability. The defendants will suffer no harm if the injunction is granted, as they seek to enforce a statute that explicitly protects only the interests of other states, not Massachusetts, in a way that offends core Constitutional principles of the Commonwealth.

BACKGROUND.

Plaintiffs are the duly elected or appointed clerks of thirteen cities and towns in the Commonwealth. Some of the plaintiffs have served as clerks or in the clerk's office for as long as thirty years. *Chew Aff.*, ¶ 1; *Mazza Aff.*, ¶ 1. Municipal clerks are responsible for accepting Notices of Intention of Marriage ("Notices") from and issuing Marriage Certificates ("Licenses") to couples who wish to marry. G.L. c. 207, §§ 19, 20, 28, 35. Defendants DPH and the Registry provide municipal clerks with standard Notice forms and a list of "Legal Impediments to Marriage," which clerks are required to display to couples applying for a marriage license. G.L. c. 207, § 37. From time to time the DPH also provides municipal clerks with written guidance regarding the issuance of marriage licenses. *E.g.*, *Johnstone Aff.*, ¶¶ 2, 9-12; *Mazza Aff.*, ¶¶ 2, 9-12.

The Goodridge Decision

In November 2003, the Supreme Judicial Court issued its decision in *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003). The Court held that denying marriage licenses to same-sex couples "does not meet the rational basis test for either due process or equal protection." *Id.* at 331. The Court held that the Commonwealth had "failed to identify any

relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex,” *id.* at 341, and that denying the right to marry to persons who wished to marry a person of the same sex denied them “the full range of human experience and . . . full protection of the laws” *Id.* at 326. The Court accordingly ordered that civil marriage be construed to mean the voluntary union of two persons as spouses. *Id.* at 343. The Court stayed entry of judgment for 180 days to permit the Legislature to take such action as it deemed appropriate in light of the Court’s opinion. *Id.* at 344. That stay expired on May 17, 2004.

In the weeks just before May 17, 2004, the DPH issued a new Notice form to municipal clerks throughout the Commonwealth, App. Ex. J. For the first time ever, the Notice form requires couples to state where they intend to reside, even though Massachusetts has no residency requirement for marriage and even though the statute regulating the Notice form, G.L. c. 46, § 1, does not require that couples state where they intend to reside. *E.g.*, Long Aff., ¶ 14; Pitzer Aff., ¶ 17. Also for the first time ever, the Registry issued a “guide of legal impediments,” App. Ex. K, that purports to describe the impediments to marriage under the laws of the other 49 states and various territorial jurisdictions of the United States. *E.g.*, Rushford Aff., ¶ 18; Marple Aff., ¶ 17. For each of the other states and jurisdictions, the guide states that marriage between persons of the same sex is void, invalid, prohibited or not permitted. App. Ex. K. Notably, for the first time ever, municipal clerks were instructed by DPH that they could not rely on a couple’s sworn affirmation on the Notice that the couple is unaware of any legal impediment to their marriage. Instead, the DPH directed clerks that they could not accept Notices from same-sex couples who state that they reside and intend to continue to reside outside of Massachusetts,

even if the couple affirms under oath that they are unaware of any legal impediment to their marriage. *E.g.*, Long Aff., ¶ 15; Ellis Aff., ¶ 18.

The Reverse Evasion Statute

The new forms and directives issued by the DPH and Registry were part of their highly publicized effort to resuscitate the long moribund Massachusetts “reverse evasion” statute, G.L. c. 207, § 11, solely to prevent municipal clerks from issuing marriage licenses to same-sex couples from outside of Massachusetts. The reverse evasion statute is derived from a proposed uniform act, the Uniform Marriage Evasion Act, that was promulgated by the National Conference of Commissioners on Uniform State Laws in 1912. Charles Thaddeus Terry, *Uniform State Laws in the United States*, 123, 403-04 (Baker, Voorhis & Co. 1920). The Commissioners reportedly were concerned that laxity in the issuance of marriage licenses was resulting in “ill-advised” marriages. Seneca Taylor, *Restrictions Upon Improper and Illegal Marriages*, 21 *Case & Comment* 41 (1914).

Massachusetts adopted the four sections of the Uniform Marriage Evasion Act in 1913. As enacted by Massachusetts, the first section of the uniform act declares “null and void” any marriage entered into by a Massachusetts resident in another state if the marriage is “prohibited and declared void” under Massachusetts law. G.L. c. 207, § 10. That provision of the Act is often referred to as the “evasion” statute, because it nullifies marriages of Massachusetts residents who marry elsewhere in order to evade restrictions on marriage under Massachusetts law.

The second section of the uniform act, as enacted by Massachusetts, applies to residents of other states who come to Massachusetts to marry. This provision would purport to nullify marriages of residents of other states who come to Massachusetts to marry in order to evade

restrictions on marriage in their home states. Currently codified as G.L. c. 207, § 11, and commonly called the “reverse evasion” statute, it 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 null and void.

The third section of the uniform act addresses the authority of clerks to issue marriage licenses to couples from outside of Massachusetts. Currently codified as c. 207, § 12, this provision is titled “Legal ability of non-residents to marry; duty of licensing officer to ascertain.” It provides:

Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having the 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.

The fourth and final section of the uniform act provides for criminal penalties for officials who issue licenses with knowledge that the parties are “prohibited from intermarrying.” As enacted by Massachusetts, the provision states that “any official who issues a notice of intention of marriage knowing that the parties are prohibited by section 11 from intermarrying . . . shall be punished by a fine of not less than one hundred or more than five hundred dollars or by imprisonment for not more than one year or both.” G.L. c. 207, § 50.

Enforcement of the Reverse Evasion Statute Before May 2004

Until May 2004, the DPH and its predecessors² relied solely on couples’ sworn affirmations that there was no legal impediment to their marriage for enforcement of the reverse

² Responsibility for the enforcement of the marriage registration laws was transferred from the

evasion statute. That statement appeared at the bottom of the Notice form and stated, "We/I, hereby state that there is an absence of any legal impediment to the marriage and do hereby depose and say that all of the statements as set forth in the above notice whereof we/I, could have knowledge are true and are made under the penalties of perjury (c. 4, s. 6, Rule 6 General Laws)." App. Exs. A, B. The Notice forms issued by the DPH and its predecessors did not require couples to state where they intended to reside. *Id.* Further, the List of Impediments forms issued by the DPH and its predecessors did not purport to list impediments to marriage for any state other than Massachusetts. The "List" was a one-page poster that, with regard to other states, said only: "No marriage shall be contracted in this commonwealth by a party residing and intending to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction . . . (Chapter 207, Section 11)." App. Exs. F - 1.

Further, before May 2004, the DPH consistently had instructed clerks to "satisfy" themselves in regard to the legal ability of out-of-state couples to marry by accepting a couple's sworn affirmation that there was no impediment to their marriage. The last paragraph of a letter written to the Clerk of Somerville by the Registrar of Vital Records and Statistics ("Registrar") in 1995, for example, succinctly summarizes the DPH's pre-May 2004 guidance:

I sincerely hope that this brief summary will clear up once and for all any questions your office staff may have concerning an individual's right to file their marriage intentions in your office. Remember, the oath they take after filling out their intentions affirms that the information they've provided is true to the best of their knowledge. Otherwise, they will have committed perjury. *However, it is not the clerk's job to prevent them from committing perjury. Your job is to assist them in getting married.* [emphasis supplied].

Secretary of State to the DPH in 1977. St. 1976, c. 486. There is no evidence that the Secretary of State attempted to enforce the reverse evasion statute prior to 1976.

App. Ex. D, at 2. The same letter “urge[d]” that clerks, as “standard procedure,” not ask for proof of residency, not routinely ask for proof of age and not ask for proof of divorce. *Id.*

The DPH’s more formal publications similarly directed clerks to “satisfy” themselves by accepting the couple’s sworn affirmation. A 1995 DPH publication that purported to set forth “standard policies and procedures” for taking Notices and issuing Licenses stated only that clerks should display the Impediments to Marriage form (which provided no information about the marriage laws of other states), explain that the oath on the Notices was legally binding and have the couple take the oath. App. Ex. C, at 1. Although the publication explicitly noted the possibility that marriages might be contracted in Massachusetts with the intention of evading the laws of other states, it instructed clerks not to request proof of any statements in the Notice, including proof of divorce, because “the couple [was] providing all the information under pains and penalties and [sic] perjury” *Id.* at 3-4, 19.⁷ As recently as 2000, the DPH’s written guidelines confirmed that clerks should simply show the couples the list of impediments and have them take the oath. App. Ex. E at 5-6.

Enforcement of the Reverse Evasion Statute Beginning in May 2004

Beginning in May 2004, in anticipation of the effective date of the *Goodridge* decision, the DPH undertook, for the first time ever, to enforce the reverse evasion statute. The DPH issued a revised Notice form that not only requires couples to state where they reside, but also where they intend to reside and, in addition: (a) added the statement “[I have reviewed a list of impediments to marriage for my place of residence” to the beginning of the oath, (b) deleted from the warning that false statements are punishable by fine the information that the maximum

⁷ The only exception to this policy of deference was age, and even then: (a) the concern was whether the couple was of legal age to marry under Massachusetts law, and (b) clerks were instructed not to

fine is \$100, and (c) added at the bottom of the Notice a warning that “if you are not a Massachusetts resident and you enter into a marriage in Massachusetts that would be void if contracted for in the state where you reside and intend to continue to reside, your marriage ‘shall be null and void’ (G.L. c. 207 § 11).” App. Ex. J. at 1. At the same time, the Registry issued a state-by-state “guide of legal impediments” that states that marriages of same-sex couples are void, invalid, prohibited or not permitted under the law of every state other than Massachusetts. App. Exs. K, L.

The DPH also held a training session for clerks. *E.g.*, *Johnstone Aff.*, ¶ 18; *Chew Aff.*, ¶ 18. The seminar included a presentation by Daniel Winslow, Chief Legal Counsel to the Governor, during which he instructed the clerks that they could not accept Notices from or issue Licenses to same-sex couples who state that they reside and intend to continue to reside outside of Massachusetts, even if the couple affirms under oath that they are unaware of any impediment to their marriage. *Id.*; App. Ex. N. Mr. Winslow also instructed clerks that they could not accept Notices from same-sex couples if either person states that he or she intends to reside outside of Massachusetts, even if the intended spouse is a Massachusetts resident. *Johnstone Aff.*, ¶ 18, App. Ex. N.

The Plaintiffs' Response

Each of the plaintiffs quickly concluded that the sudden effort by the DPH and Registry to enforce the reverse evasion statute, after decades of urging clerks to satisfy themselves in regard to out-of-state couples' legal ability to marry by relying solely on couples' affirmations that there is no impediment to their marriage, was blatantly discriminatory. *E.g.*, *Rushford Aff.*, ¶ 20; *Drury Aff.*, ¶¶ 21-22. The Town of Provincetown adopted a formal policy that expressly

routinely ask for proof of age. App. Ex. C at 4.

authorized the Provincetown clerk to issue Licenses to same-sex couples who stated that they reside and intend to continue to reside outside of Massachusetts, as long as the couple signed the oath stating that they are unaware of any impediments to their marriage. *Johnstone Aff.*, ¶ 20. The mayor of Somerville and the clerks of Provincetown and Worcester, as well as the clerk of Springfield, publicly announced that they would issue licenses to same-sex couples from outside of Massachusetts. *Johnstone Aff.*, ¶ 20; *Long Aff.*, ¶ 17. Ultimately, four of the plaintiffs accepted Notices from and issued Licenses to same-sex couples from outside of Massachusetts on May 17, 2004 and the days immediately following. *Long Aff.*, ¶ 18; *Rushford Aff.*, ¶ 20; *Johnstone Aff.*, ¶ 20; *Chew Aff.*, ¶ 20.

The AG's Cease-and-Desist Order

On or about May 18, 2004, Judith Goldberg, Deputy Chief Legal Counsel to Governor Romney, called counsel for Provincetown, Somerville and Worcester. *Johnstone Aff.*, ¶ 21; *Long Aff.*, ¶ 19; *Rushford Aff.*, ¶ 21. Ms. Goldberg directed that the clerks of these communities send to her or the Registry copies of all of the Notices they had accepted and Licenses they had issued during the week of May 17th. *Id.* Certain of those records were forwarded to the defendant AG. *Id.*

The AG promptly faxed a letter (the "cease-and-desist letter") to Provincetown, Somerville and Worcester, as well as to Springfield. *App. Ex. M.* The letter demanded that each of these municipalities explain how accepting Notices from same-sex couples from outside of Massachusetts "may be reconciled" with the reverse evasion statute. *Id.* at 1. The letter threatened "enforcement action" against clerks who continued to accept Notices from same-sex couples from outside of Massachusetts, and directed the municipalities to advise the clerks to "cease and desist" from accepting such Notices until the AG received a "satisfactory

explanation” of how the clerks’ actions were consistent with the reverse evasion statute. *Id.*

Faced with the threat of criminal sanctions, the clerks from each of the four municipalities that received the cease-and-desist letter have stopped accepting Notices from same-sex couples from outside of Massachusetts. Johnstone Aff., ¶ 23; Long Aff., ¶ 21; Rushford Aff., ¶ 23.⁴

The numbers make plain the discriminatory effect of the new enforcement regime. Since May 17, 2004, the plaintiffs collectively have turned away approximately 140 same-sex couples from outside of Massachusetts who wished to apply for a License. Johnstone Aff., ¶ 10; Long Aff., ¶ 21; Rushford Aff., ¶ 23; Chew Aff., ¶ 21; Drury Aff., ¶ 20; Mazza Aff., ¶ 20. During the same time period, the plaintiffs were not required to turn away any opposite-sex couple from outside of Massachusetts who wished to apply for a License, e.g., Drury Aff., ¶ 20, and issued licenses to more than 50 opposite-sex couples who reside and intend to continue to reside outside of Massachusetts. Long Aff., ¶ 21; Rushford Aff., ¶ 23; Chew Aff., ¶ 21; Drury Aff., ¶ 20; Mazza Aff., ¶ 20; Pizer Aff., ¶ 20; Marple Aff., ¶ 20. As a result of the defendants’ discriminatory enforcement scheme, the plaintiffs are at risk of being sued by same-sex couples to whom they have been forced to deny Licenses. The risk that plaintiffs will be sued increases daily, as plaintiffs continue to be required to deny Licenses to same-sex couples from outside of Massachusetts.

ARGUMENT.

The plaintiffs are entitled to a preliminary injunction because (1) they are likely to succeed on the merits of their claim; (2) they will suffer irreparable harm in the absence of the

⁴ Though the Provincetown Board of Selectmen voted to temporarily suspend the town policy authorizing the town clerk to accept notices from out-of-state same-sex couples after receiving the AG’s cease-and-desist letter, the policy remains in effect. *Issuance of Marriage Licenses in Provincetown*, at <http://www.provincetown.gov/marriage.html> (last visited Jun. 17, 2004).

requested injunction; and (3) the risk of harm to them absent the requested injunction outweighs any harm that granting the injunction would create for the defendants. *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980). In balancing these factors, “[w]hat matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party’s chance of success on the merits.” *Id.* When a party seeks to enjoin governmental action, the Court must also “determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.” *Commonwealth v. Massachusetts CRINC*, 392 Mass. 79, 89 (1984).

1. THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE DPH’S NEW ENFORCEMENT SCHEME IS UNLAWFULLY DISCRIMINATORY.

In enforcing the state’s laws and regulations, the defendants must act even-handedly. They may not enforce laws in a way that targets a subset of a group of similarly-situated people for impermissible reasons. *Yerardi’s Moody Street Rest. & Lounge v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989). *Daddario v. Cape Cod Comm’n*, 56 Mass. App. Ct. 764, 773 (2002). *See also Goodridge v. Department of Pub. Health*, 440 Mass. 309, 341-342 (2003) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect”) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). In their rush to resuscitate the reverse evasion statute in order to restrict marriages of same-sex couples, the defendants have run afoul of both prongs of the selective enforcement test. They have required municipal clerks to treat same-sex couples from outside of Massachusetts differently than opposite-sex couples from out of state, and they have done so based on the impermissible consideration of sexual orientation.

A. The Current Enforcement Scheme Targets Same-Sex Couples.

The first prong of the discriminatory enforcement test is selective treatment of a subset of similarly-situated individuals. That prong is easily satisfied here. *Goodridge* established unequivocally that same-sex couples and opposite-sex couples who wish to marry are similarly situated. See, e.g., 440 Mass. at 341 (stating that there is no reasonable relationship between the exclusion of same-sex couples from civil marriage and the protection of public health, safety or general welfare). The defendants' directives, however, require plaintiffs to treat same-sex couples from outside of Massachusetts differently than opposite-sex couples from outside of Massachusetts have been treated for more than ninety years.

Under the new enforcement scheme, enforcement of the reverse evasion statute in regard to opposite-sex couples remains essentially the same as it always has been. Municipal clerks are not required to disregard sworn statements of opposite-sex couples regarding their legal ability to marry, despite the fact that there are any number of grounds on which other states could declare a marriage of opposite-sex persons void or prohibit the marriage. Just since May 17, 2004, for example, the plaintiff clerks have issued licenses to couples from the District of Columbia and fourteen states other than Massachusetts, including New York, North Carolina and Pennsylvania. E.g., Pizer Aff., ¶ 20; Marple Aff., ¶ 20; Drury Aff., ¶ 20; Mazza Aff., ¶ 20; Rushford Aff., ¶ 23. According to the guide of legal impediments issued by the defendants, these states declare a marriage void or prohibit marriage if one member is "physically impotent" (North Carolina), is "weak-minded" (Pennsylvania), or is incapable of entering into marriage for "physical cause" or "by reason of force, duress or fraud" (New York). App. Ex. K. The defendants continue to permit clerks to issue licenses to opposite-sex couples from these and every other state solely on the strength of the couples' affirmations that there is no impediment to their marriage.

For same-sex couples from outside of Massachusetts, however, there is a new, unprecedented enforcement scheme. The defendants have instructed municipal clerks that they cannot rely on the affirmations of same-sex couples from outside of Massachusetts that there is no legal impediment to their marriage, and that clerks must reject those couples' Notices. *E.g.*, *Johnstone Aff.*, ¶ 18; *Stover Aff.*, ¶ 18. The AG also has threatened enforcement action against clerks who accept Notices from same-sex couples from outside of Massachusetts. Ex. M, at 5. This demonstrably different treatment of same-sex couples is directly contrary to the even-handed enforcement required under *Yerardi's* and *Daddario*.

B. Same-Sex Couples from Outside of Massachusetts Are Similarly Situated to Opposite-Sex Couples from Outside of Massachusetts.

The fact that other states may deem marriages of same-sex couples void, prohibit marriages of same-sex couples or not explicitly permit marriages of same-sex couples does not mean that same-sex couples from outside of Massachusetts are differently situated from their opposite-sex counterparts. As the Registry itself suggested in the guide of legal impediments distributed to municipal clerks in May 2004, App. Exs. K, L, there are numerous grounds on which other states deem a marriage of opposite-sex couples void or prohibit the marriage. The defendants have chosen, however, consistently to ignore restrictions on opposite-sex marriages imposed by other states. They cannot now select the one restriction that applies solely to same-sex couples and on that ground declare that same-sex couples are differently situated than opposite-sex couples. *See Goodridge*, 440 Mass. at 333 (rejecting the state's argument that the restriction of marriage to opposite-sex couples furthers the state's interest in procreation because the argument impermissibly defines persons by a single trait that would exclude an entire class of persons from the protection afforded by marriage).

The defendants also cannot excuse their conduct on the ground that it is obvious if both members of a couple are the same gender, while the other impediments would be difficult for clerks to discern. Even in the defendants' woefully incomplete guide of legal impediments,⁵ there are several types of impediments to opposite-sex marriages that are potentially obvious or are not difficult to investigate, but the defendants have never instructed clerks to enforce those impediments. For example, several states still impose a waiting period before a person may remarry after a divorce or permit the divorce decree to impose a waiting period.⁶ The defendants easily could have enforced these restrictions by providing clerks with a list of the states that impose or permit such waiting periods and by requiring clerks to ask for a copy of the divorce decree. The defendants instead explicitly instructed clerks *not* to ask for proof of divorce. App. Exs. C at 4, D at 1. In addition, many states, unlike Massachusetts, impose by statute some form of restriction based on mental competency.⁷ Until May 2004, the defendants never provided

⁵ It is particularly hard for the defendants to assert that the restriction on same-sex marriage is different than other restrictions when their own guide of legal impediments is incomplete. For more than half of the 49 other states, the guide states, as to impediments other than age, consanguinity and "sex," that information is "not available at this time." App. Ex. K.

⁶ Ala. Code § 30-2-10 (1994) (neither party may remarry for sixty days after divorce decree becomes final); Miss. Code Ann. § 93-5-25 (2000) (divorce decree may provide that a party against whom a divorce is granted because of adultery may not marry again); N.D. Cent. Code § 14-05-02 (1997) (divorce decree must specify whether either or both parties shall be permitted to remarry and, if so, when); Okla. Stat. Ann. tit. 43, § 123 (2003) (neither party may remarry for six months after divorce decree becomes final); Tex. Fam. Code Ann. § 6.109 (Vernon 2002) (neither party may remarry for thirty days after divorce decree becomes final); Wis. Stat. § 765.03 (West. Supp. 2003) (neither party may remarry for six months after divorce decree becomes final).

⁷ According to the Registry's guide of legal impediments, App. Ex. K, other states prohibit or void marriage if one of the persons is of "unsound mind" (Delaware, Georgia, Pennsylvania and Vermont), is "mentally incompetent" (Indiana, Nebraska, New Jersey, Rhode Island, South Carolina and Wyoming), has been "adjudged mentally disabled by a court of competent jurisdiction" (Kentucky), "lacks sufficient understanding or capacity to make responsible decisions regarding [his or her person or property]" (Maine), is "insane or an imbecile" (Mississippi and Tennessee), "lacks capacity to enter into marriage" (Missouri), is "incapable of consent for want of understanding" (New York and Wisconsin), has been "incurably mentally ill for five years" (New York), is "incapable of contracting from want of will or understanding" (North Carolina) or is "weak-minded" (Pennsylvania).

clerks with information about those restrictions, nor did they instruct clerks to make any further inquiry even if there was reason to question the mental competency of one or both applicants. Similarly, the defendants have never instructed clerks to take the simple step of asking both members if they were entering into the marriage voluntarily, even though the Registry's own guide of legal impediments indicates that at least three states, including New York, void or declare invalid a marriage if consent is obtained by force, duress or fraud. App. Ex. K.

Any argument that same-sex couples are differently-situated than opposite-sex couples because restrictions against same-sex marriage are a legal impediment, while other restrictions are factual impediments, is similarly pretextual. Whether or not a person is divorced or whether their marriage violates a provision of their divorce decree turns on a legal conclusion. Likewise, whether a person is "mentally incompetent," is not of "sound mind," lacks "sufficient understanding or capacity" to enter into marriage or is "insane" turns on a legal conclusion, as does whether or not a person obtained the other's consent by force, duress or fraud. In all of these situations, the defendants have instructed municipal clerks, and continue to instruct municipal clerks, to rely on couples' sworn affirmations that there is no legal impediment to their marriage. The defendants' decision to enforce only the restriction against same-sex marriage is based not on the nature of the impediment, but on the sexual orientation of the people whom the impediment targets.

C. The Current Enforcement Scheme Is Motivated by Discriminatory Animus.

The second prong of the discriminatory enforcement test requires that the selective treatment of similarly-situated persons stem from an impermissible consideration. *Yerardi's*, 878 F.2d at 21; *Daddario*, 56 Mass. App. Ct. at 773. Here, the timing of the new enforcement

regime, the public pronouncements of Governor Romney and the selective treatment itself leave no doubt that the impetus behind the defendants' newfound desire to enforce the reverse evasion statute is bias against same-sex couples. The decisions in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), and *Goodridge*, 440 Mass. 309 (2003), coupled with this state's long-standing prohibitions against discrimination on the basis of sexual orientation, establish that such bias is an impermissible consideration.

I. If the Commonwealth Truly Were Concerned About Enforcing Other States' Marriage Restrictions, It Would Have Enforced the Reverse Evasion Statute During the Ninety Years Since It Was Enacted.

Any attempt by the defendants to articulate any other motive for their resurrection of the reverse evasion statute is doomed by a simple fact – the Commonwealth has never before sought to enforce the reverse evasion statute or the marriage restrictions of other states. To the contrary, in the past the DPPL explicitly instructed municipal clerks to rely on couples' affirmations that there is no legal impediment to their marriage. On these facts, any assertion that the defendants are motivated by anything other than animus toward same-sex couples is not tenable. *See, e.g., Lawrence*, 123 S. Ct. at 2479 (observing that the infrequency of prosecutions of consenting adults for sodomy undermines the state's argument that society approved of punishing such activity); *Evans v. Romer*, 882 P.2d 1335, 1346 n.9 (Colo. 1994) (rejecting the state's assertion that an amendment repealing statutes prohibiting discrimination based on sexual orientation was motivated by the desire to conserve resources to fight discrimination against "suspect" classes, not by animus toward gay men and lesbians, because the amendment did not repeal statutes prohibiting discrimination against other non-suspect groups).

2. The Administration's Public Pronouncements Erase Any Doubt As to the Motive Behind the Current Enforcement Regime.

The administration's public statements confirm that the impetus behind the defendants' newfound desire to enforce the reverse evasion statute is animus toward same-sex couples. Because the reverse evasion statute had never been enforced before May 2004, the administration had no choice but to announce that it intended to begin enforcing the statute. Absent such an announcement, the statute may well have been declared null and void under the desuetude doctrine. That doctrine holds that it is fundamentally unfair for the state, because of lack of fair notice, to begin enforcing a statute that has been repeatedly violated without prosecution. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 502 (1961).

The same statements by which the defendants seek to avoid application of the doctrine of desuetude, however, make plain that the impetus for the new enforcement regime is bias against same-sex couples. In announcing his intent to begin enforcing the reverse evasion statute, Governor Romney said that "Massachusetts should not become the Las Vegas for same-sex marriage" and "[t]he citizens of other states should be able to make their own definitions of marriage and not have Massachusetts export our unique definition to them." Shaun Sutner and John J. Monahan, *Out-of-Staters Will Test Gay Marriage Law*, Worcester Telegram & Gazette, May 7, 2004, at A1. Conspicuously absent from the Governor's statements is any reference to other impediments to marriage. There is no intent here to enforce the reverse evasion statute in any sort of even-handed fashion. The undisguised goal of the new enforcement regime is the restriction of same-sex marriages.

3. The Selective Treatment Itself Confirms That the New Enforcement Scheme Is Rooted in Discriminatory Animus.

The United States Supreme Court recognized in *Romer v. Evans*, 517 U.S. 620, 634-635 (1996), that laws that impose a special disability on one class of persons "raise the inevitable

inference that the disadvantage imposed is born of animosity toward the class of persons affected." Here, like the constitutional amendment at issue in *Romer*, the defendants' new enforcement regime singles out gay men and lesbians for selective treatment. The new enforcement regime, like the constitutional amendment, thus raises "the inevitable inference" that the regime is rooted in animosity toward gay men and lesbians. See also *Washington v. Davis*, 426 U.S. 229, 242 (1976) (stating that "an invidious discriminatory purpose may . . . be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one [group] than another").

4. The DPH's Assertion that Other Differences in Restrictions on Marriage Are Not Important Further Demonstrates Its Bias.

The DPH likely will argue, as it asserted at the training seminar for the municipal clerks, that it is enforcing the reverse evasion statute now not because of any discriminatory animus, but because until now, Massachusetts has not had significantly broader marriage laws than other states. App. Ex. N. This assertion is simply not true.

In the decades since the reverse evasion statute was enacted, the requirements of other states with respect to interracial marriage, consanguinity and waiting periods before remarriage after divorce have been more restrictive than those in Massachusetts. For example, Massachusetts has permitted marriage between persons of different races since 1843. 1843 Mass. Acts, c. 5 (repealing G.L. c. 75, § 5 and c. 76, § 1 to the extent that they prohibited and declared void any marriage between a white person and a "negro, indian or mulatto"). When Massachusetts enacted the reverse evasion statute in 1913, however, more than half of the states prohibited mixed-race marriages. F. Hall and E. Brooke, *American Marriage Laws In Their Social Aspects: A Digest*, 51-132 (1919). At least 16 states continued to prohibit interracial marriage as late as 1967, when the Supreme Court decided *Loving v. Virginia*, 388 U.S. 1, 6

(1967). To this day, many states continue to impose a waiting period before remarriage after divorce, or to allow a divorce decree to impose restrictions on remarriage. See note 6, *supra*. Massachusetts, however, has not imposed any restriction on remarriage after divorce since 1965. 1965 Mass. Acts c. 640, § 24 (repealing G.L. c. 208, § 24, which prohibited persons from remarrying for two years after divorce). Similarly, while other states, including Maine and New Hampshire, prohibit first cousins from marrying, Massachusetts does not. App. Exs. I, L, K.

Therefore, since the reverse evasion statute was enacted in 1913, opposite-sex couples seeking to evade their home states' requirements would have had reason to come to Massachusetts to marry. There is no evidence, however, that state regulators ever required clerks to deny licenses to interracial couples or to other opposite-sex couples whose marriages were prohibited under the laws of their home state. The DPH's argument, therefore, is not that there have been no differences between other states' restrictions and those of Massachusetts, but rather that some differences matter more than others. This argument, however, brings the DPH back to the very inference it tries to avoid – discriminatory animus. The very act of picking and choosing one particular restriction for enforcement through the reverse evasion statute demonstrates that the motive behind the new enforcement regime is bias toward the group that the regime targets – same-sex couples.

D. Defendants May Not Selectively Enforce the Reverse Evasion Statute on the Basis of Sexual Orientation.

Defendants may not pick and choose which restrictions to enforce based on an “impermissible consideration.” *Yerardi's*, 878 F.2d at 21. Sexual orientation is an impermissible consideration. The United States Supreme Court has held that states may not use criminal law to impose the view on all of society that homosexual conduct is immoral. *Lawrence*, 123 S. Ct. at 2480, 2484. In *Lawrence*, for example, the Court held unconstitutional a

Texas statute that made sodomy between persons of the same sex a criminal offense, but did not prohibit sodomy between persons of the opposite sex. *Id.* at 2476, 2484. Just as it was impermissible in *Lawrence* for Texas to single out sexual relations between persons of the same sex for criminal sanctions, it is impermissible here for the defendants to threaten enforcement activity only in regard to same-sex couples.

Further, Massachusetts consistently has rejected discrimination based on sexual orientation. Long before *Goodridge* held that same-sex couples may not be denied the protections afforded by civil marriage, Massachusetts prohibited by statute discrimination on the basis of sexual orientation in employment, housing, credit, services, public accommodations and public education. G.L. c. 151B; G.L. c. 272, § 98; G.L. c. 76, § 5. State regulations provide that persons shall not be denied the opportunity to become a foster or adoptive parent based on sexual orientation, 110 C.M.R. § 1.09(3). The Massachusetts courts have held that sexual orientation is an insufficient ground on which to deny child custody in a divorce action, *Doe v. Doe*, 16 Mass. App. Ct. 499, 503 (1983), and have recognized same-sex second parent adoptions, *Adoption of Tammy*, 416 Mass. 205, 206 (1993). Against this backdrop, there is no question that the defendants' selective enforcement of the reverse evasion statute based on the sexual orientation of the couples is based on an impermissible consideration. *See also Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002) (holding that school board's failure to discipline students who harassed a school teacher because she was a lesbian when board had disciplined students who harassed teachers who were black was based on an impermissible consideration).

II. THE DPH'S NEW ENFORCEMENT REGIME UNLAWFULLY STRIPS CLERKS OF THE DISCRETION CONFERRED ON THEM BY STATUTE.

The statute governing the issuance of licenses to couples from outside of Massachusetts explicitly grants the clerks discretion. The statute, which is entitled "Legal ability of non-residents to marry; duty of licensing officer to ascertain," provides:

Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having the 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.

G.L. c. 207, § 12. The statute requires only that the officer having authority to issue the license – the clerk – “satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying” *Id.* The phrase “satisfy himself” (emphasis added) indicates that the only person that need be satisfied with the evidence provided by couples applying for a marriage license is the clerk. Further, the statute explicitly contemplates that clerks may choose to rely on sworn affidavits. The statute leaves entirely to the clerk’s discretion whether to make further inquiry.

The statute entitled “Refusal of certificate,” G.L. c. 207, § 35, confirms that the Legislature has committed to the clerks’ discretion the question of whether to require proof beyond a sworn statement. This statute provides:

The clerk or registrar may refuse to issue a certificate if he has reasonable cause to believe that any of the statements contained in the notice of intention to marriage are incorrect; but he may, in his discretion, accept depositions under oath, made before him, which shall be sufficient proof of the facts therein stated to authorize the issuing of a certificate.³

³ The registrar cited in this statute is not the Registrar of Vital Records and Statistics, but a town official. See G.L. c. 46, § 22 (authorizing municipalities of more than 10,000 to appoint a person other than the clerk to be registrar).

The statute again leaves to the clerk's discretion whether or not to issue a License. Even if the clerk has reasonable cause to believe that statements in the Notice are incorrect, the statute says that the clerk "may" refuse to issue a License, but it does not require the clerk to do so. The statute also grants clerks discretion to accept a sworn oath as proof of the facts stated in the Notice. The discretion granted the clerks under §§ 12 and 35 stands in stark contrast to the mandatory language in other sections of the marriage laws, such as G.L. c. 46, § 17, which states that clerks "shall transmit" original records to the state registrar. Compare *Commonwealth v. Cook*, 426 Mass. 174, 180 (1997) (holding that the general "use of the word 'shall' is mandatory, especially where there is nothing in the statute or its history that would lead to a contrary result") and *Hashimi v. Kalit*, 388 Mass. 607, 609 (1983) (stating that "[t]he word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation") with *Shea v. Board of Selectmen*, 34 Mass. App. Ct. 333, 336 (1993) (holding that "may" "is a word of permission and not of command") and *Cline v. Cline*, 329 Mass. 649, 652 (1953) (same).

Since at least 1977, the DPH not only has recognized the discretion granted to municipal clerks in issuing licenses, but also has urged them, in exercising that discretion, to defer to the couples' sworn oaths that there is no impediment to their marriage. This long-standing policy and practice reflects the defendants' past lack of interest in enforcing the reverse evasion statute. It also is consistent with the greater risk borne by the couple if their home state declines to recognize their marriage. The couple, not the clerk, suffers the consequences if the couple is unable to obtain a divorce, including a division of property or a child custody order. So, too, the couple, not the clerk, bears the risk if one of them dies intestate and the other is unable to inherit. The statutory grant of discretion to the clerks, and the DPH's long-standing policy and practice

of instructing clerks to defer to the couples in exercising that discretion, properly place the risk on the parties who have the most to lose if the marriage is not valid.⁹

III. THERE IS GOOD REASON WHY THE REVERSE EVASION STATUTE HAS NEVER BEEN ENFORCED.

The 1913 statute that the defendants have conscripted the plaintiffs to enforce is extraordinary, in several respects:

1. It was borne out of the backlash against mixed-race marriages provoked by the marriage of Jack Johnson, a black man and prominent prizefighter, to Lucille Cameron, a white woman.
2. It was intended as part of a planned nationwide scheme that was stillborn and abandoned long ago, with the result that the statute has never been capable of serving its intended purpose.
3. It would require this state to enforce the marriage restrictions of other states, no matter how abhorrent to the public policy of Massachusetts.

For these reasons, the statute has been a dead letter for the ninety years since it was enacted. See *Poe v. Ullman*, 367 U.S. 497, 502 (1961) ("Deeply embedded traditional ways of carrying out state policy -- or not carrying it out -- 'are often tougher and truer law than the dead words of the written text.'") (quoting *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940)).

The defendants' newfound interest in enforcement of the statute is motivated by one thing only -- a desire to prevent same-sex couples from marrying.

⁹ At the training session for the clerks, the defendants asserted that their enforcement scheme actually is intended to protect same-sex couples from entering into a marriage that may not be considered valid. App. Ex. N. The defendants never made any efforts to protect opposite-sex couples from entering into a potentially invalid marriage, however. Given the publicity surrounding same-sex marriage, opposite-sex couples whose marriages were potentially invalid were much more likely to be unaware of this risk than the same-sex couples who now seek to marry in Massachusetts. Further, the DPH addressed this purported concern by adding a warning to the Notice form that "if you are not a Massachusetts resident and you enter into a marriage in Massachusetts that would be void if contracted for in the state where you reside and intend to continue to reside, your marriage 'shall be null and void.'"

A. The Enactment of the Reverse Evasion Statute Was Motivated by Racist Intent.

The plaintiff clerks anticipate that the plaintiff couples in *Cote-Whitaker v. Department of Public Health*, the companion case filed shortly after this case was filed, will provide a full discussion of the historical context of the Massachusetts reverse evasion statute in a memorandum supporting their request for injunctive relief. As the plaintiff couples are expected to describe in their memorandum, the reverse evasion statute was enacted at the height of nationwide hysteria following the marriage of Jack Johnson, a prominent prizefighter and a black man, to Lucille Cameron, a white woman. That hysteria included a proposed amendment to the United States Constitution that would have prevented mixed-race marriages and a comment by Massachusetts' then-governor, in response to the Johnson-Cameron marriage, that "Massachusetts, I'm sorry to say, has no such [anti-miscegenation] law, but I am in favor of placing such law on her books." *The New York Age*, "Marriage of Whites and Blacks," December 19, 1912. The plaintiff clerks incorporate by reference the anticipated argument of the plaintiff couples in *Cote-Whitaker* that the statute's enactment shortly after the Johnson-Cameron marriage, the speed with which it was enacted, and the number of states that prohibited interracial marriage at the time the statute was enacted demonstrate that the reverse evasion statute was enacted because of prejudice against interracial marriages.

B. The Reverse Evasion Statute Was Enacted as Part of an Intended Nationwide Scheme That Never Achieved Its Purpose.

The reverse evasion statute is part of a uniform statute, the Uniform Marriage Evasion Act, that was enacted by Massachusetts in 1913. As discussed above, the uniform act included both a provision that declared "null and void" any marriage entered into by a state resident in another state if the marriage was "prohibited and declared void" by the laws of the person's home state, and a reciprocal provision – the reverse evasion provision – that purported to nullify

marriages contracted by persons residing and intending to continue to reside in another state if the marriage would have been void if contracted in that other state. The uniform act was intended to create a nationwide scheme in which all states would refuse to recognize marriages of their residents who crossed state lines to evade local marriage restrictions and would aid and abet each other's prohibitions on evasion by refusing to issue licenses to couples from other states whose marriage would not be recognized in their home state. Seneca Taylor, *Restrictions Upon Improper and Illegal Marriages*, 21 Case & Comment 41 (1914).

Success of the uniform act in achieving its intended purpose depended on widespread adoption of the act. Enactment by only by a handful of states would leave too many safe havens for the restrictions of the uniform statute to have any effect. This was particularly true in light of the fact that in 1913, many states did not have any form of an evasion statute, and several states had enacted statutes declaring that a marriage was valid if it was valid where celebrated. F. Hall and E. Brooke, *American Marriage Laws in Their Social Aspects: A Digest*, 51-132 (1919) (identifying at least 28 states as not having an evasion statute and at least 12 states as following the celebration rule). Adoption by a handful of states also would leave the adopting states in the awkward position of enforcing other states' restrictions without any sort of reciprocal guarantee that those states would enforce the adopting states' restrictions. Indeed, a Massachusetts board established to promote uniformity in legislation recommended in 1913 that Massachusetts adopt a uniform act that addressed marriage licensing procedures because "[a]t the present time the Massachusetts law can be evaded by parties going out of State to get married. If the uniform law is adopted in Massachusetts it will help the commissioners in other States in getting the same law enacted." *Fifth Annual Report of the Bd. of Comm'rs for the Promotion of Uniformity of Legislation in the United States* (Boston, Wright & Potter 1913). Similarly, when it enacted the

Uniform Marriage Evasion Act, Massachusetts also enacted another statute, now codified as G.L. c. 207, § 13, that provides that the preceding three sections (§§ 10, 11 and 12) “shall be interpreted so as to effectuate their purpose of making uniform the laws of those states that adopt the act.” This provision was not part of the uniform act, and its enactment demonstrates the Legislature’s expectation that the uniform act would be widely adopted.

The Uniform Marriage Evasion Act, however, was a dismal failure. The Act ultimately was adopted by only five states (Massachusetts, Illinois, Louisiana, Vermont and Wisconsin). Louisiana subsequently repealed it. *Handbook of the Nat’l Conference of Comm’rs of Uniform State Laws & Proceedings of the Annual Conference* 64 (1943). In 1943, the Committee on Obsolete Acts and Acts Withdrawn from the List of Active Acts recommended the withdrawal of the uniform act, noting that, “The Uniform Act can be effective only if it has widespread adoption; otherwise, it merely tends to confuse the law.” *Id.* The Uniform Commissioners withdrew the act that same year. The statute thus has never been, and never will be, capable of achieving its intended purpose.

C. The Reverse Evasion Statute Would Require Massachusetts to Enforce Laws of Other States That Are Contrary to Our Public Policy When Other States Refuse to Recognize Our Marriage Laws.

The consistent non-enforcement of the reverse evasion statute in the decades since it was enacted also reflects the difficulty inherent in a statute that would require Massachusetts to enforce laws of other states that are inimical to our public policy. Under the common law doctrine of comity, states retain the right not to enforce laws of other states that violate their public policy. *Pacific Wool Growers v. Commissioner of Corps. & Taxation*, 305 Mass. 197, 209-210 (1940). Enforcement of the reverse evasion statute would turn this long-recognized rule on its head. Enforcement of the reverse evasion statute would have required, for example, that

Massachusetts deny marriage licenses to mixed-race couples as late as 1967, even though Massachusetts had long since repealed its anti-miscegenation statute.

There is simply no reason for Massachusetts to spend its time and money enforcing the marriage laws of other states, including restrictions that violate our public policy, when those same states are not recognizing our marriage laws. The common-law doctrine of comity rests, in part, on the understanding that except where recognizing the laws of another state would violate public policy, states generally will enforce each other's laws. *Mason v. Intercolonial Ry. of Canada*, 197 Mass. 349, 352-53 (1908). The drafters of the Uniform Marriage Evasion Act similarly assumed that, in the context of the marriage laws, states would enforce each other's restrictions. Here, however, the states whose restrictions Massachusetts would enforce through the reverse evasion statute have made no such reciprocal commitment, and the Uniform Commissioners themselves acknowledged that the statute required widespread adoption to have its intended effect. The inequity is even more pronounced now, as many states have adopted constitutional amendments and statutes under which they refuse to recognize marriages of same-sex persons¹¹ even if both persons were Massachusetts residents at the time they were married here and their marriage is indisputably valid under Massachusetts law.

IV. THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT THE REQUESTED INJUNCTION

Where, as here, there is a strong likelihood that plaintiffs will prevail on the merits, plaintiffs are entitled to a preliminary injunction on even a minimal showing of irreparable harm. *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981) (stating that “even a “possible” irreparable injury has been held to suffice if there

¹¹ See, e.g., Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex*

is a strong probability of success on the merits”) (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977)). *Packaging Indust. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980) (stating that “what matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party’s chance of success on the merits”).

Here, the plaintiffs are suffering ongoing irreparable harm. The defendants’ threat of enforcement action has stripped the plaintiffs of the discretion conferred on them by statute. Like the physician in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the distributor of contraceptives in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the plaintiff clerks face prosecution if they choose to assist persons who wish to exercise their constitutional rights. See also *Bantum Books v. Sullivan*, 372 U.S. 58, 67-69 (1963) (affirming the grant of a preliminary injunction against a state commission charged with encouraging morality in youth that used “informal sanctions – the threat of invoking legal sanctions and other means of coercion, persuasion and intimidation” to pressure booksellers into not selling certain types of books). Those constitutional rights include not only the right to marry the person of their choice, but also the First Amendment rights of free association and freedom of expression. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (describing marriage as “an association that promotes a way of life”); *Goodridge*, 440 Mass. at 323 (describing marriage as a “highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity and family”).¹¹

Marriage, 117 Harv. J. Rev. 2684, 2687 & n.28 (2004).

¹¹ Deprivation of First Amendment rights constitutes irreparable harm requiring the issuance of a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 273-74 (1976). *T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 582 (1996). The Supreme Court has recognized that a third party can seek to protect the constitutional rights of others in certain circumstances, particularly where the third party “can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.” *Maryland v. Munson Company*, 467 U.S. 947, 956 (1984). See also *Benefit v. City of Cambridge*,

As a result of the defendants' actions, the plaintiffs are between a rock and a hard place, with potential and irreparable harm no matter which course they choose. If the plaintiffs choose to assist same-sex couples who seek to exercise their constitutional right to marry the person of their choice, and to express themselves through that choice, they face the threat of criminal prosecution. A threat of criminal prosecution is considered irreparable harm. *Frawley v. Watson*, No. Civ. A. 01-4486, 14 Mass. L. Repr. 141 (Mass. Super. Dec. 12, 2001). If, on the other hand, plaintiffs comply with the defendants' edicts and deny same-sex couples their constitutional rights, they face the threat of civil suits filed by same-sex couples whom they have been forced to turn away, with all of the financial and emotional costs that litigation entails. Title 42 of the United States Code, § 1983, for example, grants a private right of action to persons denied their rights under the United States Constitution by state actors. General Laws c. 93, § 102 grants a private right of action to all persons "within the Commonwealth" whose rights "to the full and equal benefit of all laws and proceedings for the security of persons and property" are violated. Successful claimants are entitled not only to compensatory damages, but also to exemplary damages and attorneys' fees and costs. *Id.* Claimants also could seek prejudgment security, including attachment of the plaintiffs' homes or other property and assets.

Moreover, the plaintiffs here are public officials, some of whom are elected. They are being forced by threat of criminal sanction to take actions that could cause them to be branded in the public eye as homophobic. Courts have long recognized that being unfairly branded with a stigmatizing label is a cognizable form of harm. See, e.g., *Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888, 891-94 (1st Cir. 1988) (affirming recovery on contract theory where defendant's cancellation of plaintiff's performance contract caused potential employers to

424 Mass. 918, 921 (1997) ("A party has the 'definite interest' necessary to confer standing to challenge

conclude her presence would be disruptive). In particular, courts have recognized that being branded as a racist, a sexist, or a homophobe may result in cognizable harm. *Pulchanski v. School District of Springfield*, 161 F. Supp. 2d 395, 408 (E.D. Pa. 2001) (holding that "[t]o impute racism to a plaintiff, particularly one for whom such an attitude could be incompatible with the performance of his public responsibilities," may be defamatory); *MacFtree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1055 (Pa. 1996) (holding that statement that plaintiff district attorney had acted in racist manner in his official capacity supported defamation claim). Indeed, although the United States Supreme Court has now foreclosed the imposition of a heightened pleading standard except where required by statute or procedural rule, *see Educadores Puertorriquenos en Accion v. Hernandez*, No. 03-1588, 2004 U.S. App. LEXIS 9076, at *14 (1st Cir. May 10, 2004), for many years the First Circuit imposed a heightened pleading standard in civil rights cases "to avoid tarring defendants' reputations." *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). Even if plaintiffs could recover money damages under a defamation theory, those money damages could not undo the harm to their reputation. *See Ross-Simons v. Baccarat, Inc.*, 217 F.3d 8, 13 (1st Cir. 2000) (holding that irreparable harm occurs where traditional legal remedies fail to accurately measure or adequately compensate the plaintiffs for the damages they are suffering).

V. A BALANCING OF THE HARMS WEIGHS DECISIVELY IN FAVOR OF THE PLAINTIFFS

A. The Requested Injunction Will Not Harm the Defendants or Adversely Affect the Public.

In contrast to the plaintiffs, who are suffering immediate and continuing irreparable harm absent an injunction, the defendants will suffer no harm at all if the injunction issues. The

the constitutionality of a statute if he has suffered, or is in danger of suffering, legal harm.").

defendants will suffer no harm if licenses are issued to same-sex couples whose marriages might later be held invalid under the laws of other states, just as they suffered no harm if licenses were issued to opposite-sex couples whose marriages might be held to be invalid.

Further, the requested injunction, which seeks only to bar the defendants from taking enforcement action against municipal clerks who choose to accept Notices from nonresident same-sex couples, will not adversely affect the public. See *Commonwealth v. Massachusetts CRINC*, 392 Mass. 79, 89 (1984) (stating that where a party seeks to enjoin governmental action, the Court must consider whether “the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public”). The Supreme Judicial Court, in *Goodridge*, squarely rejected the argument that permitting same-sex couples to marry adversely affects the public. 440 Mass. at 341 (holding that there is no reasonable relationship between the exclusion of same-sex couples from civil marriage and the protection of the public health, safety or general welfare).

The requested injunction also will not adversely affect the public because, at most, the reverse evasion statute protects the interests of *other* states, not the interests of Massachusetts. Massachusetts citizens will suffer no harm if the marriage restrictions imposed by other states are not enforced. Governor Romney himself has conceded that marriages of nonresident gay and lesbian couples “do no harm to the Commonwealth.” Yvonne Abraham & Raphael Lewis, *Romney Turns to AG for Halt to Licensing*, Boston Globe, May 21, 2004, at A1.

As evidenced by the Commonwealth’s failure to enforce the reverse evasion statute for nearly a century, Massachusetts does not have a strong interest in enforcing the restrictions of other states. Although the reverse evasion statute was envisioned as part of a nationwide scheme under which states would enforce each other’s restrictions, that scheme never came to pass.

Because other states have not been enforcing Massachusetts' marriage restrictions, there is no risk that they will stop enforcing those restrictions if Massachusetts refuses to enforce discriminatory restrictions on same-sex marriage. The requested injunction, which seeks only to bar the defendants from taking enforcement action against municipal clerks who accept Notices from same-sex couples from outside of Massachusetts, will not harm the interests of Massachusetts.

B. The Requested Injunction Promotes the Public Interest.

The requested injunction would, in fact, promote the public interest. The public has an interest in promoting civil marriage. *Goodridge*, 440 Mass. at 322 (“Civil marriage anchors an ordered society by encouraging stable relationships over transient ones”). By barring the defendants from taking enforcement action, the injunction also would eliminate the risk that those municipal clerks who are unwilling participants in the defendants' discriminatory enforcement scheme, and their cities and towns, will be sued by same-sex couples they have been forced to turn away, with the resulting depletion of public funds required to defend those suits. Most importantly, Massachusetts has a long and principled history of opposing discrimination, including discrimination on the basis of sexual orientation. *See Goodridge*, 440 Mass. at 341 (noting Massachusetts's “strong affirmative policy of preventing discrimination on the basis of sexual orientation”). The *Goodridge* decision extended the guarantees of equal protection and liberty under the Massachusetts Constitution to same-sex couples who wish to marry. Enforcement of the reverse evasion statute would require Massachusetts to enforce discriminatory laws of other states that violate Massachusetts public policy.

Conclusion.

For the reasons set forth above, the Court should grant plaintiffs' motion for a preliminary injunction.

John Long, Clerk of the City of Somerville,
David Rushford, Clerk of the City of Worcester,
Edward Ellis, Clerk of the Town of Acton,
Jane Chew, Clerk of the Town of Burlington,
Margaret Drury, Clerk of the City of Cambridge,
Thomas McNulty, Clerk of the Town of
Marblehead,

Catherine Stover, Clerk of the Town of Nantucket,
Wendy Mazza, Clerk of the City of Northampton,
Laurence Pizer, Clerk of the Town of Plymouth,
Carole Marple, Clerk of the Town of Sherborn,
Kaari Mai Tari, Clerk of the Town of Westford,
all in their official capacities as municipal clerks,

By their attorneys,



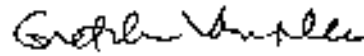
Scott P. Lewis, BBO #298740
Kevin Batt, BBO #634852
Anne Robbins, BBO #561968
Kara A. Krolkowski, BBO #658160
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
(617) 239-0100

Sarah Wunsch, BBO #548767
ACLU OF MASSACHUSETTS
99 Chauncy Street, Suite 310
Boston, MA 02111
(617) 482-3170

Date: June 21, 2004

Douglas Johnstone, in his official capacity
as Clerk of the Town of Provincetown,

By his attorney,



Gretchen Van Ness, BBO #553632
LAW OFFICES OF GRETCHEN VAN NESS
44 School Street, Suite 510
Boston, MA 02108
(617) 723-5060

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party by hand on June 21, 2004.

