

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-9436

Sandra and Roberta Cote-Whitacre, et al.

Plaintiff-Appellants

v.

Department of Public Health, et al.

Defendant-Appellee.

ON APPEAL FROM MEMORANDUM OF DECISION AND ORDER OF THE
SUPERIOR COURT DATED AUGUST 18, 2004 ON PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

BRIEF OF AMICI CURIAE
MASSACHUSETTS BAR ASSOCIATION BOSTON BAR ASSOCIATION

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I. INTEREST OF AMICI CURIAE

Boston Bar Association

The mission of the Boston Bar Association ("BBA"), founded by John Adams in 1761, is "to advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large." The members of the BBA provide a vast pool of legal expertise, and accordingly, the BBA serves as a resource for the judiciary, as well as the legislative and executive branches of government.

The interests of the BBA in this case relate most strongly to its goal of ensuring justice for all. Out of state same-sex couples are denied the right to marry in Massachusetts, a right granted to resident same-sex couples and guaranteed by this Honorable Court under Goodridge v. Department of Public Health, 440 Mass. 309 (2003). The BBA submits that the Goodridge decision compels the provision of marriage licenses to out-of-state same-sex couples who are being denied the right to marry in Massachusetts solely because of their same-sex status.

Massachusetts Bar Association

The Massachusetts Bar Association ("MBA") is a voluntary, non-profit, statewide professional association of attorneys in the Commonwealth of Massachusetts. The MBA presently comprises more than 18,500 members, including lawyers and judges. The purpose of the MBA is to promote the administration of justice and reform in the law; to uphold the honor of the profession of law; to seek advancements in the field of jurisprudence in this Commonwealth; to promote the public good; and to insure that all citizens of the Commonwealth who seek justice are afforded an opportunity to obtain it.

The MBA House of Delegates has considered and twice voted on issues that are core to those the parties present herein. In this regard, the MBA House of Delegates has voiced its strong opposition to defining the term "marriage" as a legal contract between a man and a woman, as well as to prohibiting recognition of any other relationship as marriage or its legal equivalent. In particular, the MBA House of Delegates voted to oppose H472 and H3375 at its July 15, 1999 and June 20, 2001 Meetings, respectively.

On March 25th 2004 the Massachusetts Bar Association's policy making authority, the House of Delegates, unanimously passed the following resolution:

Having steadfastly supported equal rights and equal protection under the law for all persons as determined by the courts of our Commonwealth and of the United States;

Having continually sought to ensure that the dignity provided by our laws is available to all persons;

Having unwaveringly supported the independence and integrity of our Judiciary;

OPPOSES all attempts to alter the Constitution and laws of our Commonwealth in any way which would deprive individuals of any of the rights, protections or dignity recognized by our Supreme Judicial Court in Goodridge v. Department of Public Health, 440 Mass 309 (2003).

The passage of the foregoing resolution was consistent with amicus curiae briefs the Massachusetts Bar Association filed in Goodridge v. Department of Public Health, 440 Mass 309 (2003) and the Opinions of Justices, 440 Mass. 1201 (2004). The interest of the

MBA in this case underscores the Association's long-standing policies of ensuring equal rights and fundamental fairness for all.

II. STATEMENT OF THE ISSUE

1. Are the constitutional principles that were recognized in Goodridge v. Department of Public Health, 440 Mass. 309 (2003), limited in their application to residents of Massachusetts, or do those principles apply equally to non-residents who legally enter the Commonwealth and seek the protections and liberties afforded under Massachusetts law?

2. Can non-resident same-sex couples constitutionally be denied the same marriage rights that are afforded under Massachusetts law to all opposite-sex couples and to resident same-sex couples?

III. STATEMENT OF THE CASE

Amici incorporate herein the Statement of the Case contained in the brief of the plaintiff/appellants in Cote-Whitacre v. Department of Public Health, et. al., No. SJC-9436.

IV. SUMMARY OF THE ARGUMENT

This Court declared in Goodridge v. Department of Public Health, 440 Mass. 309 (2003), that to deny same-sex couples the right to marry is a violation of the Massachusetts Constitution. Applying both liberty and equality principles, the Court struck down the limitation on civil marriage to opposite-sex couples only. Section 11 runs counter to the constitutional principles enumerated in Goodridge. (pp. 8-11).

The liberty and equality provisions of this Commonwealth's Constitution apply to all individuals within its borders, regardless of residency. By entering lawfully into this state, individuals render themselves subject to the jurisdiction of Massachusetts laws and avail themselves of the protections provided by our Constitution. When drafting the liberty and equality provisions of the Constitution, our forefathers made no distinction based on residency. Rather, they guaranteed the right to the protection of life, liberty and property to "each individual" of society. (pp. 12-17).

This Court applied the framers' clear intent in its rulings in Commonwealth v. Aves, 18 Pick. 193

(1836) and Woodworth v. Spring, 4 Allen 321 (1862). In both Aves and Woodworth, the Court declared that a non-resident individual while within the jurisdiction of the Commonwealth submits himself to the authority and security of our Constitution. In so ruling, the Court in Aves altered the status of a Louisiana slave brought into Massachusetts for the time when the slave was within the Commonwealth, as Massachusetts had abolished slavery. In its analysis, the Court held it would not import the law of a sister state that was so egregiously contrary to our State laws. The Court should likewise refuse to allow marriage bans in other states to dictate Massachusetts' own treatment of the marriage rights of non-resident same-sex couples (pp. 18-23).

Interstate comity cannot provide any basis for enforcing laws of other states in a manner that would violate the Massachusetts Constitution. Comity does not override constitutional considerations. "The comity of a state will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those who are within its jurisdiction." Woodworth v. Spring, 4 Allen 321, 323 (1862). (pp. 24-28).

The Court in Goodridge cataloged the numerous important rights that marriage bestows on couples and through its decision extended those benefits to same-sex couples. The Department's interpretation of Section 11 deprives non-resident same-sex couples of access to those rights. By striking down Section 11, this Court would assure that "all persons," resident and non-resident individuals alike, who are within the boundaries of Massachusetts, are afforded the protections of our Constitution. The benefits associated with marriage are no less important to non-residents as they are to resident couples. (pp. 28-33).

V. ARGUMENT

A. INTRODUCTION

Commencing May 17, 2004, the Commonwealth resurrected a moribund 1913 statute, G.L. c. 207, § 11 ("Section 11" or "§ 11") which effectively prohibited non-resident same-sex couples from marrying in Massachusetts or forced them to assert residency.¹ This

¹ Section 11 provides: "No marriage shall be contracted in this commonwealth by any party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every

amicus brief of the MBA and BBA focuses on the constitutional incompatibility between this Court's ruling in Goodridge and Section 11. The Goodridge decision and its constitutional underpinnings unequivocally preclude the denial of the right to marry in Massachusetts to out-of-state same-sex couples.

B. THIS COURT'S HOLDING IN GOODRIDGE IMPOSES A CONSTITUTIONAL RESTRAINT ON THE "FORMIDABLE REGULATORY AUTHORITY" OF THE COMMONWEALTH TO DENY MARRIAGE RIGHTS TO SAME-SEX COUPLES.

When this Court declared in Goodridge v. Department of Public Health, that "barring an individual from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex" is unconstitutional, it correctly did not limit that statement to Massachusetts residents. 440 Mass. 309, at 344 (2003). This Court's holding in Goodridge prevented the Commonwealth from using its "formidable regulatory authority" to deny marriage rights to same-

marriage contracted in this commonwealth in violation hereof shall be null and void." G.L. c., 207, §11. Although the Commonwealth relies on a combination of §11 and G.L. c. 207, §12 to support its position, it is clear that §11 is the only operative, substantive provision.

sex couples because they are same-sex couples. Id. at 312-13. This case, like Goodridge, "is not a matter of social policy but of constitutional interpretation." Opinions of the Justices to the Senate, 440 Mass. 1201, 1206 (2004). Section 11 must be declared unconstitutional because Goodridge and the Massachusetts Constitution require it.

Although it was invited to do so, the Court did not avoid the larger constitutional issue in Goodridge by interpreting the marriage licensing statute itself to apply to same-sex couples. Goodridge, 440 Mass. at 318-19 (holding that the statute itself may not be construed to permit same-sex couples to marry). Instead, the Court squarely addressed the constitutional question of "whether ... government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State's authority to regulate conduct, or whether ... this categorical marriage exclusion violates the Massachusetts Constitution." Id. at 320. The Court held that such an exclusion, which is an "absolute disqualification of same-sex couples who wish to enter into civil marriage," was unconstitutional under the equality and liberty provisions of the Massachusetts

Constitution. Id. at 341; see also art. 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution; arts. 6, 7 and 10 of the Massachusetts Declaration of Rights. As the Court said, "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." Id. at 342-43.

By basing its decision on the "elegant and universal pronouncements" of the Massachusetts Constitution on equality and liberty, the Court imposed far reaching constitutional restraints on the ability of the Commonwealth to deny marriage rights to same-sex couples. Opinions of the Justices, 440 Mass. at 1206 n.3. As the Court itself recognized in Goodridge, "[b]ecause civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not 'interfere directly and substantially with the right to marry'." 440 Mass. at 326 (citing Zablocki v. Redhail, 434 U.S. 374, 387 (1978); Perez v. Sharp,

198 P.2d 17, 13-14 (1948)). Denying non-residents the right to choose to marry a person of the same sex is just such an "incursion" and just such an "interference" with the right to marry. As discussed below, the Court's holding in Goodridge mandates that such denial, to the extent effectuated by Section 11, must be declared unconstitutional.

C. THE RESTRAINTS IMPOSED BY GOODRIDGE AND THE PROVISIONS OF THE MASSACHUSETTS CONSTITUTION UPON WHICH GOODRIDGE IS BASED PREVENT THE COMMONWEALTH FROM USING G.L. c. 207 § 11 TO DENY NON-RESIDENT SAME-SEX COUPLES THE RIGHT TO OBTAIN A MARRIAGE LICENSE.

Once within the borders of the Commonwealth, residents and domiciliaries of other states may claim rights and privileges under the Massachusetts Constitution. See, e.g., Commonwealth v. Cast, 407 Mass. 891, 895 (1990) (analyzing constitutionality of automobile search of Connecticut resident under art. 14 of the Massachusetts Declaration of Rights); Commonwealth v. Caceres, 413 Mass. 749, 752-54 (1992) (analyzing unlawful seizure claim under art. 14 despite express finding that defendant's Massachusetts residency could not be established).

When it declared that the Massachusetts Constitution "affirms the dignity and equality of all

individuals," the Goodridge Court was merely reiterating what has long been recognized by the courts of this Commonwealth: that non-residents are also protected by our Constitution. Goodridge, 440 Mass. at 312 (emphasis added); see also Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 320-21 (1933) (noting that the equality guarantees of Massachusetts Constitution are at least as broad as under the Federal Constitution, and that under federal equal protection and due process, whether one is "an alien or citizen, a corporation or an individual, [one] may invoke the rights established by this part of the Constitution"). This Court in Goodridge, by declaring that "barring an individual from...civil marriage solely because that person would marry a person of the same sex" is a violation of this Constitution, has mandated the protection of plaintiffs and other non-resident same-sex couples as a constitutional matter. Goodridge, 440 Mass. at 344.

1. The Provisions of the Massachusetts Constitution Make Clear that The Liberty and Equality Provisions of the Constitution Apply to All Persons, not Just to Massachusetts Residents.

Under the Massachusetts Constitution, individuals who are within the Commonwealth's borders enjoy the

rights to equal protection of the laws and due process of law regardless of the length of their stay. On their face, the Constitutional provisions on which the Court relied (arts. 1, 6, 7, and 10 of the Declaration of Rights) extend equally to all persons within the territorial jurisdiction of the Commonwealth, and make no distinction between residents and non-residents. From its very first sentence, Article 1 of the Declaration of Rights (as amended by art. 106 of the Amendments to the Massachusetts Constitution) applies its protections to the broadest possible class of individuals: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties ... in fine, that of seeking and obtaining their safety and happiness" (emphasis added). Article 10 of the Declaration guarantees the right to the protection of life, liberty and property through due process of law to "[e]ach individual of ... society," without reference to his or her place of abode. All of the other constitutional provisions upon which plaintiffs rely use similarly inclusive terms and none of them restricts its application to residents. See art. 6 of

the Massachusetts Declaration of Rights ("man"; "association of men"); art. 7 of the Massachusetts Declaration of Rights ("people"). These declarations are best understood as establishing rights that should be enforced without reference to an individual's residency.

The use of such inclusive terms in the liberty and equality provisions of the Constitution was hardly an accident. The provisions of the Declaration of Rights that the framers intended to limit to residents are explicitly so limited: Article 9, for example, concerns the franchise and expressly guarantees participation in elections only to "inhabitants of the Commonwealth."² The provisions relating to equality and liberty are not limited in the same way because

² It makes sense, of course, that the framers should establish equality and due process as available to all, while denying the franchise to individuals who do not have a long-term connection to the Commonwealth. To make the franchise uniformly available would, among other things, give individuals who reside elsewhere the ability to affect public policy in Massachusetts through the political process, notwithstanding that they would not then be subject to any of the laws or regulations resulting from that process. Because residents have a stake in the community, they are more likely to participate in and care about how the political process plays itself out in Massachusetts. See Martin v. Gardiner, 240 Mass. 350, 353 (1922) (noting that "the term 'inhabitant' imports many privileges and duties which aliens cannot enjoy or be subject to").

they were intended to be available to all persons who may be found within the Commonwealth. See, e.g., Barlow v. Town of Wareham, 401 Mass. 408, 415 (1988) (assuming Massachusetts equal protection guarantee to apply uniformly to resident and non-resident fishermen); see also Frost v. Commissioner of Corps. & Tax'n, 363 Mass. 235, 240-41, 247-53 (1973) (addressing claim that tax provision discriminating between residents of other States and residents of foreign nations violated art. 10 of Declaration of Rights); Schinkel v. Maxi-Holding, Inc., 30 Mass. App. Ct. 41, 45 (1991) (non-residents found within the jurisdiction are subject to the jurisdiction of the Commonwealth's courts).

This Court impliedly recognized this same universality, and the common humanity from which the right to marry springs, in reasoning that the marriage licensing law in Goodridge violated established constitutional principles of liberty and equality. In Goodridge and Opinions of the Justices, the Court analyzed the marriage exclusion by focusing on the purposes of marriage as defined by the laws of the Commonwealth, and whether any rationale existed for treating same-sex couples differently. In the end,

the Court could not "identify any constitutionally adequate reason for denying civil marriage to same-sex couples." Goodridge, 440 Mass. at 312. Indeed, the Court concluded that "[t]he very nature and purpose of civil marriage ... renders unconstitutional any attempt to ban all same-sex couples, as same-sex couples, from entering into civil marriage." Opinions of the Justices, 440 Mass. at 1206 (first emphasis added). That the Court's holding in Goodridge recognized the universality of the equality and liberty provisions of the Constitution is evidenced by the fact that Goodridge is replete with references to "persons" and "individuals," while the terms "residents" and "citizens" are used merely a few times.³ This Court should stand by its holding in

³ See, e.g., Goodridge, 440 Mass. at 313 ("[b]arred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions"), 320 n. 11 ("[n]othing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying persons of the opposite sex"), 326 ("[b]ecause civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion"), 327 ("the right to marry means little if it does not include the right to marry the person of one's choice"), 329 ("[w]hether

Goodridge and confirm that marriage rights are available to all otherwise eligible individuals without regard to residency.

and whom to marry, how to express sexual intimacy, and whether and how to establish a family--these are among the most basic of every individual's liberty and due process rights"), 329 ("central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations"), 329 ("[t]he liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage"), 337 ("[r]ecognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, ..."), 337 ("extending civil marriage to same-sex couples reinforces the importance of marriage to individuals ..."), 337 n. 29 ("[w]e are concerned only with the withholding of the benefits, protections, and obligations of civil marriage from a certain class of persons for invalid reasons. Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons"), 337 n. 29 ("[o]ur concern ... is whether ... the State [may] ... impose limits on personal beliefs concerning whom a person should marry"), 341 ("[the Commonwealth] has 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"), 341 n. 33 ("[w]e are not required to impute an invidious intent to the Legislature in determining that a statute ... violates the rights of individuals under the Massachusetts Constitution"), 343 ("[w]e construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others"), 344 ("[w]e declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution") (emphases added throughout).

2. The Courts of the Commonwealth Have Extended The Application of Massachusetts Constitutional Protections Without Regard To Residency.

For almost 170 years, this Court has recognized the full application of Massachusetts law to all persons within the Commonwealth even if they do not reside or are not domiciled here, and it should continue to do so in this case. Recognizing the territorial nature of sovereignty, this Court in Commonwealth v. Aves, 18 Pick. 193, 218 (1836), held that "the several states, in all matters of local and domestic jurisdiction are sovereign, and independent of each other, and regulate their own policy by their own laws...."

The Aves decision is dispositive for this case, illustrating the application of the territorial principle of sovereignty in stark and salient terms. The matter was brought before this Court as a habeas corpus petition on behalf of a six year old Negro slave. Id. at 193. The slaveholder's wife had brought the child with her on a visit to the wife's father in Boston while the child's natural mother remained enslaved in Louisiana. Id. at 194. The ultimate question before the Court was whether a citizen of a state where slavery is established by law, who brings

a slave with her for a temporary stay in Massachusetts, can rightfully restrain the liberty of the slave while within the boundaries of the Commonwealth. Id. That is, may the condition of slavery be continued while in Massachusetts? This Court held that such an egregious deprivation of liberty was contrary to our State laws and could not be enforced within the Commonwealth even though the slave and the slave owner were only temporarily visiting in the Commonwealth. Id. at 217. This Court grounded its decision in the established principle that slavery had long been abolished in the Commonwealth, whether by the adoption of the law of the English decision in Sommersett's Case, 20 Howell's St. Tr. 1 (K. B. 1771), the modification of common law, the Declaration of Independence, or at the very latest, the adoption of the Massachusetts Constitution in 1780. Id. at 210. In Aves, this Court articulated that the Constitution's Declaration of Rights reference to "all men" was broad enough to encompass non-resident Negro slaves temporarily present in the Commonwealth. Id.

Upon this foundation, this Court held that while other states were within their sovereign right to make

laws to perpetuate the institution of slavery, the laws of other states did not operate to vitiate the prohibition within the boundaries of the Commonwealth. Id. at 217. In short, Massachusetts could not incorporate the discriminatory provisions of sister states that were contrary to the laws of the Commonwealth. This is precisely what Section 11 attempts to do.

This Court in Aves held that while a sister state is authorized to make "such laws it may think most expedient to the extent of its own territorial limits," Id. at 211, Massachusetts may not enforce those laws if they are contrary to our own laws. To be sure, the Commonwealth is bound to take notice of the existence of those laws, and is not at liberty to declare those acts "unlawful and void." Id. at 215. However, "as a general rule, all persons coming within the limits of a state, become subject to all its municipal laws, civil and criminal, and entitled to the privileges which those laws confer ... that if such persons have been slaves, they become free." Id. at 217. In Aves, the Court imposed no minimum period of residence for the person temporarily here to invoke Massachusetts law. This Court allowed the non-

resident to invoke our law even if the visitor is within the Commonwealth "for ever so short a time." Id. at 223.

Aves is singularly applicable to the matter presently before the Court. In that case, as here, the person seeking to invoke Massachusetts constitutional protections was a non-resident. In Aves, as here, the freedom sought in the Commonwealth was denied in the sojourner's home state. There, as here, the non-resident's reliance on Massachusetts law altered her status in the Commonwealth, but not necessarily in her home state. In Aves, as here, the defendants urged the Court to apply the discriminatory laws of sister states to persons within the Commonwealth, even though such were in violation of the Massachusetts Constitution. Just as the Court reasoned in Aves, it should decline here to allow marriage bans in other states to countermand what the Massachusetts Constitution requires, *i.e.*, recognition of the marriage rights of all couples - same-sex and opposite-sex, resident and non-resident - lawfully within the Commonwealth and who otherwise satisfy the qualification to marry here.

This Court restated and reaffirmed the basic principles of Aves in Woodworth v. Spring, 4 Allen 321 (1862). When confronted with a controversy over inter-state guardianship, the Court ruled that although the minor child was a domiciliary of Illinois, “[h]e is now lawfully within the territory and under the jurisdiction of this commonwealth, and has a right to claim the protection and security which our laws afford to all persons coming within its limits, irrespective of their origin or of the place where they may be legally domiciled.” Id. at 323.

In Woodworth, while Illinois had appointed a guardian to the minor child, the Court held that the Commonwealth had the authority to appoint a guardian under the laws of Massachusetts when the minor was present within its borders. Id. at 326. Indeed, “[e]very sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. Id. at 323. The laws of a foreign state cannot be permitted to intervene to affect the personal rights and privileges even of their own citizens, while they are residing on the

territory^[4] and within the jurisdiction of an independent government." Id. In fact, the rights of an individual within the boundaries of the Commonwealth are not determined on the basis of his foreign domicile, but rather are controlled by the law of the Commonwealth. See id.

In the instant case, the plaintiffs came "lawfully within the territory" of Massachusetts, and thereby rendered themselves subject to jurisdiction in Massachusetts. Id. at 323. They therefore have the right to claim the "protection and security" afforded by the Massachusetts Constitution. This Court should not allow the Commonwealth to deny plaintiffs the "protection and security" of the Massachusetts Constitution merely because they happen to live somewhere else.

⁴ In this case, the minor child "never by an act or election of his own or of his guardian obtained a new home" in Massachusetts. Id. The phrase "residing on the territory" does not mean living continuously in Massachusetts, but rather means simply being located in Massachusetts for a limited period of time. See Commonwealth v. Aves, 35 Mass. at 223("for ever so short a time" is all that is required).

3. Principles of Comity Cannot Undermine the Protections Afforded by Massachusetts Constitutional Guarantees, Particularly Where the Laws and Regulations of a Foreign State Are Antithetical To The Massachusetts Constitution.

This Court should not allow considerations of comity to undermine the protections afforded by the Massachusetts Constitution. Comity cannot justify the application of the discriminatory laws of sister states in Massachusetts particularly where the laws of a sister state offend the Constitution of the Commonwealth.

As the Commonwealth has noted, "[c]omity is not a rule of law ... Comity persuades; but it does not command. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals." Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488-89 (1900).

Liberty and equality are constitutional commands, while principles of comity are "a matter of State policy, not constitutional mandate." McDonnell v. State of Illinois, 748 A.2d 1105, 1106-07 (N.J. 2000) (holding that principles of comity do not bar assertion of personal jurisdiction over State of Illinois, and noting that a sister state's claim of

sovereign immunity will not be recognized if the forum of litigation permits recovery against the home state in similar circumstances). At most, the Commonwealth's interest in comity reflects a policy preference, at one time codified into state statute, and that cannot override constitutional concerns.

Indeed, this Court has already impliedly passed on the rule of comity in the context of marriage for same-sex couples. "Deference to other jurisdictions" as a justification for different treatment for a discrete class is unacceptable under the Massachusetts Constitution. See Opinions of the Justices, 440 Mass. at 1208.

Comity, whether expressed in general principles or statutory enactments, cannot trump a state's public policy interests. In Metropolitan Life Ins. Co. v. Chase, 189 F. Supp. 326 (D.N.J. 1960) a federal district court in New Jersey ruled that a common-law marriage that was recognized in the District of Columbia after an impediment to that marriage was removed (and the husband was divorced from his first wife) would not be recognized in New Jersey where there was no New Jersey law that validated common-law marriages on the basis of the removal of an impediment

to marriage (in this case, bigamy). "While a marriage, if valid by the law of the State where entered into, will be recognized as valid in every other jurisdiction ... comity between New Jersey and the District of Columbia would not require recognition by the former of a status which may have arisen in the latter if contrary to the policy of the former." Id. at 333.

Denying marriage licenses to same-sex couples in Massachusetts is repugnant to Massachusetts stated public policy and constitutional protections. "Courts will not under the guise of comity between states enforce or carry into effect or recognize a foreign contract, which is void under the statutes of this state, where the statute is a declaration of public policy." Nehring v. Nehring, 1911 WL 2818 at *3 (Ill. App. 2 Dist. Oct. 1911).

Though Massachusetts cannot interfere with the rights of other states to administer marriages within their borders, the Commonwealth has an obligation to ensure that its own constitutional protections are applied to individuals who enjoy the protections of the Massachusetts Constitution. Nearly two centuries ago, in Greenwood v. Curtis, 6 Mass. 358 (1810), this

Court made clear that comity did not apply where the contract at issue was prohibited by the laws of the Commonwealth. In Greenwood, the contract at issue was made in an unspecified country in Africa involving the sale of slaves to be delivered to South Carolina. Id. This Court examined the contract and asked whether it could "rightfully reduce to bondage beings, in their central character, (whatever supercilious arrogance may suggest to the contrary,) bear equally with ourselves the impress of Divinity, and are equally entitled to all the rights of humanity?" Id. at 362. This Court refused to enforce the contract and made explicit that comity did not apply: "Comity prevails amongst most civilized nations ... that justice is generally administered in conformity to the laws of the country in which the cause of action arose. But it would be carrying [the] courtesy too far to enforce the execution of contracts in themselves vicious. No foreign nation can justly require, and no civility demands, that judges should become panders of iniquity (sic)" Id.

Fifty years later, this Court again rejected the law of comity in Aves, 18 Pick. at 217. In refusing to uphold the right of a slaveholder to deprive

another person of the protections afforded by the Constitution's Declaration of Rights, this Court held that "the law arising from the comity of nations cannot apply; because if it did ... [it] would be wholly repugnant to our laws, entirely inconsistent with our policy and our fundamental principles, and is therefore inadmissible." Id. at 217-218. As denying same-sex couples the right to marry is inconsistent with the Commonwealth's stated policy and fundamental principals, this Court may not permit considerations of comity to justify using Section 11 to deny marriage rights to same-sex couples.

4. The Equality And Liberty Provisions Of The Massachusetts Constitution Apply To Protect The Marriage Rights Of Non-Resident Same-Sex Couples Because This Right Is Equally Important To Non-Residents.

In holding in Goodridge that the Massachusetts Constitution protects the marriage rights of same-sex couples, this Court placed great emphasis on the important rights that marriage bestows on couples. Because these rights are equally important to non-residents as they are to residents, the Court ought not allow a line to be drawn denying marriage licenses based on residency.

This Court characterized the Massachusetts marriage law as a "licensing law" that "creates civil marriage" -- a state-administered license for which "[n]o religious ceremony has ever been required." Goodridge, 440 Mass. at 318, 321; see also Opinions of the Justices, 440 Mass. at 1206 ("the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution"). This Court recognized that in addition to enhancing the welfare of the community, marriage "bestows enormous private and social advantages on those who choose to marry" and gives rise to "[t]angible as well as intangible benefits." Goodridge, 440 Mass. at 322. Among the tangible benefits of civil marriage enumerated by the Court were property rights, the right to tenancy by the entirety, eligibility to continue certain businesses of a deceased spouse, financial protections for spouses of certain employees of the Commonwealth, evidentiary rights, and automatic "family member" preference in medical decisions for a disabled spouse absent a contrary healthcare proxy. Id. at 322, 323-26.

This Court clearly perceived the importance of the benefits that derive from civil marriage, characterizing these benefits as "enormous," "valuable" and "touching nearly every aspect of life and death," Id. at 322, 323. The Court held that denying the plaintiffs "the right to choose to marry" deprives them of "the full range of human experience and ... full protection of the laws" in an area that is "at the core of individual privacy and autonomy." Goodridge, 440 Mass. at 326 & 326 n.15. Indeed, Goodridge went so far as to note that "civil marriage has long been termed a 'civil right.'" Id. at 325(citing Loving v. Virginia, 388 U.S. 1, 12 (1967), Milford v. Worcester, 7 Mass. 48, 56 (1810)).

The numerous intangible benefits of civil marriage are no less important to non-residents of Massachusetts than to residents. For examples, intangible benefits such as the "enormous private and social advantages" that marriage bestows, the "enhanced approval that still attends the status of being a marital child," and the experiences of "security, safe haven and connection" that derive from marriage are benefits no less important to non-resident same-sex couples as they are to resident

same-sex couples. Goodridge, 440 Mass. at 322, 325. These benefits accrue to any couple electing to marry in Massachusetts, irrespective of where the couple lives, and irrespective of the status of their marriage under the laws of their home states.

Moreover, the manifold tangible benefits of marriage deriving from Massachusetts statutes, regulations and common law are plainly of no less importance to non-residents of Massachusetts than to residents and should apply equally to them. A same-sex couple with a primary residence in Maine that marries in Massachusetts seeks the same rights to hold Massachusetts property as a tenancy by the entirety as a same-sex couple residing in Massachusetts. A New Hampshire same-sex couple that marries in Massachusetts seeks the same certainty "concerning whether one will be allowed to visit one's sick child or one's partner in a [Massachusetts] hospital." Opinions of the Justices, 440 Mass. at 1204. A Rhode Island same-sex couple that marries in Massachusetts seeks to secure the same entitlement to "wages owned to a deceased [Massachusetts] employee" in the event of the death of a spouse employed in Massachusetts. Goodridge, 440 Mass. at 324. These benefits sought by

non-resident same-sex couples desiring to marry in Massachusetts impact social, economic and liberty interests, "touching nearly every aspect of life and death," that are as important to such couples as they are to Massachusetts residents. Goodridge, 440 Mass. at 323.

It is precisely because of the critical nature of these rights and benefits that derive from marriage, that the equality and liberty provisions of the Massachusetts Constitution extend to all persons with respect to such interests, irrespective of where they live. The foregoing examples illustrate that the right to choose to marry sought by the plaintiffs in this case is not merely a "hollow" right, but gives rise to important tangible benefits that are real and important, the same benefits that were at stake in Goodridge. At the same time, the fact that the Massachusetts Constitution requires Massachusetts to extend civil marriage rights and its accompanying benefits to same-sex non-resident couples does not in any way require similar treatment of such couple from any other state, including their home state. As such, this Court need only rule that such laws cannot be applied to non-residents of the Commonwealth who are

within its borders. The question of the status of the Massachusetts marriages of these plaintiffs when they return to their home states is not before the Court.

VI. CONCLUSION

It is requested that this Honorable Court declare that the enforcement of Massachusetts General Laws, Chapter 207, Section 11 is unconstitutional as applied to same-sex couples and immediately enjoin the defendants from enforcing it to deny marriage licenses to otherwise qualified same-sex couples.

Respectfully Submitted,
By their attorneys,

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ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-

Sandra and Roberta Cote-Whitacre, et al.

Plaintiff-Appellants

v.

Department of Public Health, et al.

Defendant-Appellee.

CERTIFICATE OF SERVICE

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