COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-09436

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

PLAINTIFFS-APPELLANTS,

v.

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

DEFENDANTS-APPELLEES.

ON APPEAL FROM AN INTERLOCUTORY ORDER FROM THE SUPERIOR COURT, SUFFOLK COUNTY

AMICI CURIAE BRIEF OF THE PROFESSORS OF UNITED STATES CONSTITUTIONAL LAW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United Constitution

State Statutes

Other Authorities

I. Statement of the Case and the Amici's Interest

We are United States Constitutional Law scholars at various universities around the United States; our names, institutional affiliations, and brief biographies are listed in an Appendix to this brief. We have written leading books and articles that include the analysis of the meaning and application of the Privileges and Immunities Clause of the United State Constitution. This brief is submitted to assist the Court's deliberations by offering an analysis of the Privileges and Immunities Clause based on our scholarship.

We adopt the Statement of the Case and Statement of Facts in the brief of the Plaintiffs-Appellants.

II. Introduction

This Court has already held that, under the equality and liberty provisions of the Massachusetts Constitution, same-sex couples cannot be denied access to marriage because they are same-sex couples. See Goodridge v. Dep't Pub. Health, 440 Mass. 309 (2003); Opinions of the Justices to the Senate, 440 Mass. 1201 (2004). Thus, in Massachusetts, the right to marry the partner of one's choice is a right that extends to all Massachusetts residents, regardless of whether

they are same-sex or different-sex couples. By virtue of the Privileges and Immunities Clause of the Federal Constitution (art. IV, §2) ("the Clause"), if not by virtue of Goodridge itself, the Commonwealth may not deny non-residents the right to marry.

The Privileges and Immunities Clause of the United States Constitution, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," is one of the bedrock principles upon which this nation stands. U.S. Const. art. IV, § 2, cl. 1. Alexander Hamilton underscored the importance of this clause when he said "It may be esteemed the *basis of the Union*, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'" The Federalist No. 80 (Hamilton), at 478. The Clause embodies the idea that when we travel from state to state, we are not foreigners but, rather, members of the *same* nation, entitled to the *same* basic rights. As the Supreme Court has stated, without this Clause, we would be "but a league of States" and not the *United* States. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868).

It is clear that a state cannot provide every non-resident *all* the same rights and benefits of state residents. There are some rights that are reserved to state residents. For instance, a non-resident visitor does not have the right to vote in state elections. See J. Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. 487, 521 (1981) (citing Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972)). The state must, however, grant other, basic and essential rights that are not unique to state citizenship equally to residents and non-residents alike, unless the state can constitutionally justify their denial to non-residents.

Marriage is such a basic and essential right and the Commonwealth has presented no constitutionally adequate justification for denying it to non-residents.

In derogation of the Clause and its protections, the Commonwealth's policy imposes on visiting citizens of other states the "disabilities of alienage," Paul, 75 U.S. at 180, binding them to the laws of their home state when they seek to marry in Massachusetts. The Commonwealth's approach subverts the guarantees of the Clause.

First, the Commonwealth's approach subverts the rights of individual citizens who reside in the sister states. The constitutional system embodied in the Clause does not envision the creation of the *United* States by forcing identical laws on all 50 states and creating complete homogeneity. Rather, American federalism is premised on a diversity of legal regimes. Each state is free to embody its own commitments in legal rights, but it must, absent overriding justification, make those rights available to all American citizens within its territory. It is the citizens' right to travel to other states to experience or experiment with different legal regimes -- and the correlative obligation of states to treat the traveler from another state as "a welcome visitor rather than an unfriendly alien," Saenz v. Roe, 526 U.S. 489, 500 (1999) -- that establishes national unity. S. F. Kreimer, "But Whoever Treasures Freedom ...": The Right to Travel and Extraterritorial Abortions, 91 Mich. L. Rev. 907, 915 (1993). The territorial limits of our federal system guarantee that individual citizens have a robust right to travel to other states and participate in their diverse legal regimes on a basis of equality, even if those regimes

differ substantially from the commitments of their home state. See Bigelow v. Virginia, 421 U.S. 809, 824-25 (1975). "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." Id. Similarly, "[a] State cannot punish [an individual] for conduct that may have been lawful where it occurred." State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 421 (2003). The approach to marriage advocated by the Commonwealth flouts these commitments, for it allows the administration to huddle together with other states to help these states do indirectly what they cannot do directly: impose their regimes extraterritorially and deprive their citizens of the right to be treated like Massachusetts citizens when in Massachusetts territory. By tethering these individuals to their home states' laws, Massachusetts is depricing them of critical protections available to Massachusetts residents, including the right to engage in a profound act of "self-definition," to associate and express themselves as married persons, and to gain access to any or all of the legal, tangible protections of

marriage while within Massachusetts territory.[1] See Goodridge, 440 Mass. at 322-23.

Second, by attempting to regulate marriage based upon its own view of what the other states desire, the Commonwealth is subverting its role as a co-equal state in our federal system. Massachusetts is not positioned to determine what is best for the Nation as a whole. Massachusetts should not make political or legal calculations for the Nation by, for example, predicting what the laws of each state require or deciding how best to enforce those laws. In fact, by taking matters into its own hands, Massachusetts finds itself prohibiting marriages that other states have said they would respect or may in the future say they respect. Massachusetts cannot pursue its purported interests in license regulation in this way because there are less restrictive alternatives to accomplish

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[1] This individual right also redounds to the Nation's benefit. It allows citizens of the several states "to experiment with other modes of living other than those sanctioned at home and to return with the potentially transformative knowledge gained." See Kreimer, "But Whoever Treasures Freedom ...," 91 Mich. L. Rev. at 915. By not forcing travelers to become actual residents of another state in order to "escape from the force of [the home] state's laws," the nation guards against "increasing moral homogeneity in the state," which is one of the aims of the Clause. Id.

that interest than discriminating against all non-residents.

With these principles in mind, the legislation at issue, G.L. c. 207, §§ 11-12 ("Sections 11-12"), violates the Privileges and Immunities Clause and should not be upheld by this Court.

III. Argument

The Privileges and Immunities Clause of the United States Constitution reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. Depriving all same-sex couples who are non-Massachusetts residents the privilege and right of marrying in Massachusetts, while allowing both same-sex couples who reside in Massachusetts and non-resident different-sex couples to do so, violates this Clause of our Constitution. In essence, the Commonwealth, by administering Sections 11-12, is discriminating between non-resident same-sex couples and resident same-sex couples.

The Supreme Court has developed a three-part analysis to determine whether a state law that discriminates against non-residents violates the Privileges and Immunities Clause. First, a court must

examine whether the right impinged upon by the state law is protected under the Clause. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 (1985). If so, the court must consider whether there is a "substantial reason for the difference in treatment" between residents and non-residents, and if so, whether "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." Id. at 284.

Here, the case law shows that the right to marry is protected by the Privileges and Immunities Clause. There is no substantial reason to treat non-resident same-sex couples any differently from Massachusetts same-sex couples or non-resident couples who are permitted to marry in their home state. Non-resident same-sex couples are not "a peculiar source of evil" for Massachusetts itself, and the Commonwealth's arguments that their marriages may not be respected elsewhere have already been determined by this Court to be an inadequate justification for denying marriage rights within Massachusetts. And even if there were a substantial reason for the discriminatory legislation, the discrimination practiced does not bear a substantial relationship to the Commonwealth's stated

objectives. Despite the overinclusiveness of the administration of Sections 11-12, the Commonwealth has not come forward with a less restrictive alternative, as is required by the Clause.

A. Marriage is a Privilege and Immunity under the Privileges and Immunities Clause of the United States Constitution.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. Marriage is such a privilege and immunity.

The earliest case decided under the Clause is Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823). In Corfield, Justice Washington, sitting as circuit justice, stated that the Clause protected

> those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union . . . . What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; *the enjoyment of life and liberty*, with the right to acquire and possess property of every kind and *to pursue and obtain happiness and safety*; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state,

> for purpose of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain action of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities . . . ."

Id. at 551-52 (emphasis added).

Justice Washington's holding that the Clause protected "the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety" remains vital today.[2] And what is more essential to the

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[2] The Supreme Court has cited Justice Washington's language time and again to describe the privileges and immunities protected by the Clause, even though it has not explicitly adopted Justice Washington's natural rights interpretation of the Clause. Piper, 470 U.S. at 281 n.10. For example, recently in Saenz, 526 U.S. at 501 n.14, the Supreme Court elaborated on the right to travel and found it was "expressly protected" by the Clause, citing Justice Washington's opinion in Corfield. In Piper, 470 U.S. at 281 n.10, the Supreme Court cited Corfield for the proposition that "professional pursuits" are protected by the Clause. And in Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 387 (1978), Justice Blackmun stated that the types of rights protected by the Clause were "essential activit[ies]" or "basic right[s]," that is, those termed "fundamental" by Justice Washington in Corfield.

pursuit of life, liberty, happiness, and safety than marriage?

While no Supreme Court case has ever expressly found that marriage is a fundamental right in the Privileges and Immunities context, the Court has, on numerous occasions re-affirmed what we all know -- that marriage is an "essential activity" and a "basic right." In Loving v. Virginia, the decision declaring anti-miscegenation laws unconstitutional, the Supreme Court recognized that "[t]he freedom to marry has long been recognized as one of the *vital personal rights essential to the orderly pursuit of happiness* by free men." 388 U.S. 1, 12 (1967) (emphasis added). In Zablocki v. Redhail, 434 U.S. 374 (1978), the Supreme Court declared unconstitutional a Wisconsin state statute that did not allow non-custodial parents who were under an obligation to support a child to marry without a court order. In Zablocki, the Supreme Court confirmed once again that "the right to marry is of fundamental importance for *all* individuals." 434 U.S. at 384 (emphasis added). See also Skinner v. State of Okla., 316 U.S. 535, 541 (1942) (holding that marriage is one of the "basic civil rights of man"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing "the

right of the individual . . . to marry, establish a home and bring up children").

Loving and Zablocki were decided based on the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. And, although the fundamental rights protected by the Privileges and Immunities Clause are not synonymous with "the fundamental rights and interests recognized by equal protection" and due process doctrine, 1 L. Tribe, Am. Constitutional Law § 6-37, at 1258-59 (3d ed. 2000), all rights protected under the Equal Protection and Due Process clauses are necessarily fundamental under the Privileges and Immunities Clause. See id.; 2 R. D. Rotunda & J. E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 12.7, at 248-50 (3d ed. 1999). Indeed, the Privileges and Immunities Clause protects a broader set of rights than the Equal Protection and Due Process Clauses of the Fourteenth Amendment. See 2 Rotunda & Nowak, Treatise on Constitutional Law, § 12-7, at 249-50.

Citing Loving and Zablocki, among others, this Court has explained why marriage is a basic civil right. Goodridge, 440 Mass. at 321-26: "Marriage …

bestows enormous private and social advantages;" id. at 322; it has "[t]angible as well as intangible benefits;" id.; there are "concrete" advantages to marriage, such as property rights, tax benefits and "'family member preference' to make medical decisions," id. at 323-25; and marriage has "intimately personal significance" that is part of "the full range of human experience," id. at 325-26. For all these reasons, marriage is a fundamental right that must be protected under the Privileges and Immunities Clause.[3]

B. Individual Rights are Protected by the Clause.

In its brief below, the Commonwealth argued that the Privileges and Immunities Clause protects only "those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity," to suggest

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[3] As this Court ruled in Goodridge, the inclusion of same-sex couples in the institution of marriage does not diminish the nature of the right: "marriage has long been termed a 'civil right,'" and "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty." 440 Mass. at 325, 342. Moreover, in Massachusetts, marriage is a constitutional right and "[i]t would be difficult to argue that a state constitutional right is not a 'privilege or immunity' of state citizenship." S.F. Kreimer, The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451, 499 n.167 (1992).

that marriage is *not* such a privilege and immunity, and that if Massachusetts were to allow non-resident same-sex couples to marry here, it would harm the vitality of the Nation as a single entity.

This argument, however, misperceives the purpose of the Clause, and incorrectly places the rights protected by the Clause in the hands of the states rather than in the hands of the individual, where they belong. It is true that the Supreme Court has stated that "the primary purpose of [the Privileges and Immunities Clause] . . . was to help fuse into one Nation a collection of independent, sovereign States." Toomer v. Witsell, 334 U.S. 385, 395 (1948); United Bldg. & Constr. Trades v. Mayor of Camden, 465 U.S. 208, 216 (1984). But the Supreme Court is quick to explain that this purpose is to be accomplished by giving rights to individuals. "[The Clause] was designed to insure to *a citizen* of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer, 334 U.S. at 395 (emphasis added); see also Supreme Court of Va. v. Friedman, 487 U.S. 59, 64 (1988); Camden, 465 U.S. at 216. The goal of this Clause, therefore, was not only "to avoid interstate friction," but also to do so by

"further[ing] a sense of national unity among the individual citizens who comprise the 'people' of the Republic." Kreimer, "But Whoever Treasures Freedom ...", 91 Mich. L. Rev. at 918. "By restricting state power to limit or discourage either creation of advantageous interstate relationships or the non-resident's pursuit of advantages found in other states, the nondiscrimination principles [of the Clause] foster cumulative attachments among people in different states, maximize individual opportunities for self-betterment, and increase aggregate productivity." Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. at 519.

The principle behind the Privileges and Immunities Clause is to create unity by prohibiting discrimination that could generate cleavages among the nation's citizens. Indeed, when Justice Field wrote for a unanimous Supreme Court about the purpose of the Clause in Paul v. Virginia, he stated:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the *same footing* with citizens of other States, so far as the *advantages* resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; . . . it insures to them in other States the *same*

> *freedom* possessed by citizens of those States in the acquisition and enjoyment of property and in the *pursuit of happiness*.

75 U.S. at 180 (emphasis added). Thus, "in placing some constraints on states' freedom to discriminate against nonresidents, the framers were moved in part by democratic ideals." G. J. Simson, Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV, 128 U. Pa. L. Rev. 379, 384 (1979). The framers recognized that non-residents are "outsiders in the fullest sense," and that laws disadvantaging them "clash" with democratic principles of government. Id.

The rights protected by the Clause, therefore, belong to the individual citizens of the United States, and not to the states in which they reside. A state cannot "impose its own policy choice on neighboring states." BMW of N. Am. v. Gore, 517 U.S. 559, 571 (1996); see also Bigelow, 421 U.S. at 824. And, "[a] State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other states." Austin v. New Hampshire, 420 U.S. 656, 667 (1975) (quoting Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 82

(1920)). As a logical corollary to this reasoning, a state may not deny a right to a resident of another state because of any expectations of the resident state's reaction. Such denial would allow one state to effectively impose its policies extraterritorially in a state where the traveler is constitutionally entitled to be treated on a basis of equality with the local citizenry. Through the Clause, the U.S. Constitution "protect[s] nonresidents who . . . wish to travel to or through . . . other states in order to take advantage of opportunities available in other parts of the country." Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. at 519; Saenz, 526 U.S. at 501. As Professor Lawrence Tribe notes, "legislation that essentially forces citizens to carry wherever they travel a cage consisting of their home state's restrictive laws [is] deeply inconsistent with the nature of our federal Union [and] such legislation should be declared unconstitutional." 1 Tribe, Am. Constitutional Law § 6-36, at 1250 n.3. The Commonwealth's argument that the Clause allows states to trample on individual rights in the name of comity thus lacks merit.

C. The Commonwealth Faces a High Burden of Proof to Show the Constitutionality of the Legislation.

The Supreme Court has never clearly articulated a standard of review for cases arising under the Privileges and Immunities Clause, 2 Rotunda & Nowak, Treatise on Constitutional Law § 12.7, at 250. The case law, however, does shed some light on the issue: Once a court determines that a right that is protected under the Clause has been abridged, the state must show that there is "a substantial reason" for the difference in treatment between residents and non-residents, and that the "discrimination practiced against non-residents bears a substantial relationship to the State's objective." Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 298 (1998); Piper, 470 U.S. at 284; Camden, 465 U.S. at 222; Toomer, 334 U.S. at 396.

It is plain to see that this type of analysis is "more searching" than rational basis review under the Equal Protection Clause, which only requires legislation to be *rationally related* to a *legitimate* government purpose. B.P. Denning, Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine, 88 Minn. L. Rev 384,

386 n.6 (2003); Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. at 514 (the standard of review under the Privileges and Immunities Clause is "considerably stricter than minimum rationality"); see also In re Jadd, 391 Mass. 227, 234 n.11 (noting that the Privileges and Immunities clause provides greater protection than the Equal Protection Clause). On the other hand, the demands of the Clause differ from the strict scrutiny test used for "suspect classes" in Equal Protection Clause jurisprudence, which requires that the classification is *necessary* to serve a *compelling* state interest.[4] See Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. at 514. Under the Clause, the Court requires the government to have a "substantial" reason for its discrimination and a "close relation" between its reason and the practiced discrimination. Toomer, 334 U.S. at 396. This standard both shifts the burden of

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[4] Some scholars have noted that non-residents are a "quasi-suspect" class because they do not have the right to vote in the enacting state and are "vulnerable to local prejudice." Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. at 515. Thus, the standard "is almost as demanding as . . . [the] strict scrutiny" analysis under Equal Protection law. 1 Tribe, Am. Constitutional Law § 6-37, at 1269; see also J. N. Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425, 454 (1982).

proof to the state and demands a close relationship between the state legislation and the state's purpose. 1 Tribe, Am. Constitutional Law § 6-37, at 1269.

To meet its burden of proof, the Commonwealth cannot make mere assertions. Instead, the state must develop a factual record to show its substantial reason for the discrimination against non-residents and a close relationship between the legislation and the state's purpose. See Camden, 465 U.S. at 223 (stating that a record is necessary to evaluate the government's justification for the discriminatory legislation); see also Opinion of the Justices to the Senate, 393 Mass. 1201, 1204 (1984) (finding that there is no substantial reason for discrimination other than non-residence where there is "no factual record").

D. There is No Substantial Reason to Discriminate Against Non-Resident Same-Sex Couples

When the Supreme Court has examined whether a state has a substantial reason to discriminate between residents and non-residents it has inquired whether "there is something to indicate that [non-residents] constitute a *peculiar* source of the evil at which the

statute is aimed." Toomer, 334 U.S. at 397 (emphasis added); see also Camden, 465 U.S. at 222.

This Court has properly recognized that the Clause's demand that there be a "substantial reason" for the discrimination against non-residents and its requirement that non-residents constitute a "peculiar source of the evil" at which the legislation is aimed have been intertwined in one test: "'[a] substantial reason for the discrimination' would not exist . . . 'unless there is something to indicate that non-citizens constitute a peculiar source of evil.'" Opinion of the Justices to the Senate, 393 Mass. at 1204 (citing Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978)).[5]

Thus, here, the Commonwealth cannot discriminate against non-resident same-sex couples because they are same-sex couples. Rather, their status as non-residents in the state must be "a source of evil" in and of itself. See Opinion of the Justice, 393 Mass. at 1205 (noting that a "substantial reason beyond non-residence" must be shown).

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[5] The trial court erred by parsing this one standard into two alternative tests. See Memorandum and Order, R.A. 127.

The Commonwealth claims an "interest in not creating a marriage relationship here unless the couple lives in 'an approving State' that stands definitely and immediately ready to enforce the spouses' and their children's rights." Req. for Direct Appellate Review at 25 (Dec. 28, 2004). This asserted interest does not qualify as a substantial justification. First, this Court in Goodridge has already decided that this justification does not clear the lower hurdle of rational basis review. For example, Amici Curiae of the States of Utah, Nebraska, and South Dakota argued that "[t]he possibility for confusion as parties move from state to state, where same-sex marriage is valid in one, voidable in another, and void *ab initio* in a third is too great to ignore." Brief of Amici Curiae of the State of Utah Nebraska and South Dakota, in Goodridge v. Dep't of Pub. Health, at 7. In holding that there was no rational basis for discriminating against same-sex couples with regard to marriage, however, this Court implicitly ruled that the fact that same-sex couples may be present in states where their marriages may not be respected is *not* a rational basis for denying equal marriage rights within Massachusetts territory.

Goodridge, 440 Mass. at 340-41; Opinion of the Justices, 440 Mass. at 1208-09. That same-sex couples may encounter states with different legal regimes that may not respect their marriage cannot be a substantial reason for the discriminatory legislation here.

Second, and perhaps most importantly, the discrimination resulting from the legislation cannot pass the substantial reason test because the stated reason has no adverse effect on Massachusetts itself. The "peculiar source of evil" standard articulated in Toomer, makes it apparent, that "the evil" must be a problem or harm that befalls the state enacting the discriminatory legislation. In Toomer, for example, the alleged harm was to the shrimp supply in the waters of South Carolina. 334 U.S. at 398. In Camden, the stated harms were the "grave economic and social ills" in the city of Camden itself. 465 U.S. at 222. And in Piper, the evils were focused on the legal profession and the bar in New Hampshire. Indeed, the Privileges and Immunities Clause case law does not discuss the discriminatory legislation's effect on other states, but only on the enacting state. As the Supreme Court has stated, "states should have considerable leeway in analyzing *local*

evils and prescribing appropriate cures," Camden, 465 U.S. at 223 (emphasis added); Toomer, 334 U.S. at 396, but this does not give them the right to discriminate based on their analysis of *foreign*, out-of-state evils. According to the Supreme Court, "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State." Austin, 420 U.S. at 668.

The Commonwealth's justification for the statute indicates that the statute does not impact the Commonwealth at all. Despite the Commonwealth's unsubstantiated assertion that non-resident couples will flood Massachusetts divorce courts, the Commonwealth has a residency requirement for divorce, see G.L. c. 208, §§4-5, and is thus well-protected against such speculative harm. The Commonwealth has made no factual showing that a marriage celebrated in Massachusetts that goes unregulated elsewhere creates any evil in Massachusetts or for Massachusetts residents. See Doe v. Bolton, 410 U.S. 179, 200 (1973) (holding that residency requirement to obtain an abortion in Georgia was unconstitutional under the Clause because it did nothing to aid Georgia

residents). In addition, under Austin, the Commonwealth's concern for the fate of a marriage in another state is not an appropriate concern for Privileges and Immunities analysis.

Moreover, the Commonwealth's reliance upon Sosna v. Iowa, 419 U.S. 393 (1975), does not provide it with a substantial justification for denying marriage licenses to non-residents under the Clause. Sosna upheld a one-year residency requirement for divorce under equal protection principles. Notwithstanding the Commonwealth's desire to equate the regulation of divorce under the Equal Protection Clause with the regulation of marriage under the Privileges and Immunities Clause, Sosna does not support the Commonwealth in doing so. Unlike divorce, marriage eligibility has never been founded on domicile. Moreover, with marriage, there can be no question that both parties to the marriage consent to the license's issuance as they both travel to the state and jointly make that request. In addition, divorce judgments must be respected beyond a state's borders (if jurisdiction were properly founded), see Sosna, 419 U.S. at 407 (citing Williams v. North Carolina, 325 U.S. 226,229 (1945)), and may compel a specific action

in another state or require ongoing supervision of the parties for purposes of custody or property dissolution. Id. In contrast, a marriage license is continually subject to the marriage recognition laws of each encountered state and is not presently guaranteed automatic respect in any state. Given the differing interests and the differing levels of control over extra-territorial outcomes, equating marriage with divorce does not advance the Commonwealth's case here.

Thus, the Commonwealth does not have a substantial reason for discriminating against non-resident same-sex couples based on the status quo in the couple's resident state. Because the Commonwealth cannot show a substantial reason for the discrimination that results from the legislation or that non-resident same-sex couples are a peculiar source of evil for the Commonwealth, the legislation is unconstitutional under the Privileges and Immunities Clause.

E. There is No Substantial Relationship Between the Discrimination Against Same-Sex Non-Resident Couples and the Commonwealth's Justification

Even if the Commonwealth could somehow show that it has a substantial interest in licensing only marriages that will be regulated in other states is substantial, the Commonwealth cannot show that there is a close or substantial relationship between the discrimination against non-resident same-sex couples and the legislation at issue.

In Toomer, the Supreme Court held that "the degree of discrimination" must "bear[] a *close* relation to" the reasons for the discrimination. 334 U.S. at 396 (emphasis added). In that case, the Court declared unconstitutional a South Carolina statute that imposed a licensing fee on shrimp boats owned by non-residents that was 100 times larger than the fee for resident-owned shrimp boats. Id. at 389. In doing so, the Court stated that even if the non-residents used larger boats or more harmful shrimping methods, the legislation could have been drafted to specifically target these harms. For example, the state could "restrict the type of equipment used" or "graduate license fees according to the size of the

boats." Id. at 399. Similarly, more recently, in Piper, the Supreme Court invalidated a New Hampshire rule that barred non-resident attorneys from admission to the state bar. 470 U.S. at 275. The Court stated that the state had not "demonstrate[d] that the discrimination practiced bears a close relationship to the proffered objectives." Id. at 287. For example, one of the state's stated objectives was to assure that attorneys would be available for court appearances on short notice. The Court stated that the state could "protect its interests through less restrictive means," by, for instance, requiring the appointment of local counsel. Id.[6]

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[6] First Amendment jurisprudence may be instructive here as it applies a similar standard of "less restrictive alternatives." Piper, 470 U.S. at 294 (Rehnquist, J. dissenting) (stating, disapprovingly, that "the less-restrictive-means analysis . . . is borrowed from our First Amendment Jurisprudence.")

When legislation impinges on a citizen's freedom of speech, the Court looks to see whether there is a legitimate reason for the legislation. Even if a legitimate purpose is found, "that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the list of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). Recently, in Ashcroft v. ACLU, 124 S. Ct. 2783, 2791-93 (2004), the Supreme Court reiterated its stringent "least restrictive alternative" test in the First Amendment context. According to the Court, "the purpose of the test is to ensure [the right] is

The Commonwealth has not met its burden here of showing at its enforcement of Sections 11-12 the least restrictive means of achieving its goals. Sections 11-12 bear no connection - much less a close one - to the purported goal of assuring that another state will respect a Massachusetts marriage license. In the Commonwealth's own words, "General Laws c. 207, §§ 11 and 12, make the permissibility of a marriage here turn on whether the marriage could be validly contracted in the couples' home state, not whether it would be recognized there after being contracted in the Commonwealth." Letter from Assistant Attorney General David Kerrigan dated May 26, 2004 to the City

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restricted no further than necessary to achieve the goal," and the Court must "ask whether the challenged regulation is the least restrictive means among available, effective alternatives." Id. at 2791. In Ashcroft, the challenged regulation was the Child Online Protection Act (COPA). The Court ruled that filtering software, while "not a perfect solution" to the problem of children gaining access to harmful pornographic materials on the internet, is a "less restrictive" solution than COPA. Id. at 2792, 2793. The Court emphasized that when examining alternatives to the regulation, "[t]he Government's burden is not merely to show that the proposed less restrictive alternative has some flaws; its burden is to show that it is less effective." Id. at 2793. Importantly, the Court held that it is not Plaintiffs' "burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective. The Government has the burden to show that they are less so." Id.

of Springfield, R.A. 71-72. "For purposes of G.L. c. 207, §§ 11 and 12, it is irrelevant whether another state would recognize a same-sex marriage if validly performed in the Commonwealth." Letter from Assistant Attorney General David Kerrigan dated May 21, 2004 to Various Municipalities, R.A. 632.

For example, by interpreting Sections 11-12 to bar marriage to all persons who are not permitted to marry in their home state, the Commonwealth has barred marriage to some persons whose marriage would only be "voidable" in the home state, as opposed to "void." "Voidable" marriages are presumptively valid and attended by all the incidents of a valid marriage unless annulled by one or both of its participants. See, e.g., C. P. Kindergan & M. L. Inker, Massachusetts Practice, Family Law and Practice §19-3, at 738-39 (3d ed. 2002).

The Commonwealth has not come forward with evidence showing that all 49 other states and U.S. territories in the uynion would not respect a marriage of a same-sex couple, or with an indication that it has studied this issue at all. That its defense rests on a blanket and speculative assumption that other states will not respect Massachusetts marriages

between same-sex couples does not create a connection between this legislation and the purported aim of guaranteeing extra-territorial recognition of the licenses, even assuming, for argument's sake, that such an aim were a substantial one for purposes of the Clause.

The legislation's overinclusiveness and underinclusiveness evidence the lack of substantial connection to the Commonwealth's asserted objectives. See Piper, 470 U.S. at 285 n.19 (focusing upon overinclusiveness and underinclusiveness as evidence of insubstantial relationship). Sections 11-12 are overinclusive because they prevent marriages that may be recognized, in whole or in part, in a non-resident's home state. For example, Rhode Island and New York have asserted a willingness to respect Massachusetts marriage licenses granted to its resident same-sex couples. See R.A. 317 (Statement of Rhode Island Attorney General Patrick Lynch dated May 17, 2004) and 672-700 (Letter from Solicitor General of New York to Governor Romney dated May 13, 2004); see also Hernandez and Cohen v. Robles, No. 103434/2004, (N.Y. Sup. Ct. Feb. 4, 2005) (holding New York's ban on same-sex marriage unconstitutional).

There is reason to believe that other states will join them in recognizing Massachusetts licenses issued to same-sex couples from their states. R.A. 662-671 (Letter from Connecticut Attorney General Richard Blumenthal to Governor Romney dated May 17, 2004); R.A. 455 (Letter from Counsel to Vermont Governor to Governor Romney's Chief of Staff).

The legislation is also underinclusive. If the subject legislation were truly aimed at guaranteeing extra-territorial respect of Massachusetts licenses, it would regulate all "vulnerable" licenses (i.e., licenses that have been threatened with non-recognition extra-territorially) when they leave Massachusetts territory. Id. Yet, this legislation permits Massachusetts same-sex couples to move away from the Commonwealth or travel beyond its borders without relinquishing their marriage licenses. Id. Though Massachusetts married same-sex couples face the possibility that their marriages will not be respected when they leave Massachusetts territory, see, e.g., Opinion of the Justices, 440 Mass. at 1208-09, this legislation does not concern itself with that. Of course, it would be fairly easy to construct a less

restrictive alternative than discriminating against *all* non-resident same-sex couples.

Thus, even assuming, for argument's sake, that the Commonwealth's objectives surmounted the high threshold of the substantial reason test, the legislation at issue is not narrowly tailored to fit the purpose of only marrying those couples whose marriages will be recognized in their home states. Because the Commonwealth has not met its burden of proof of showing that the legislation at issue bears a close relationship to its stated objectives, the legislation is unconstitutional under the Privileges and Immunities Clause.

IV. Conclusion

For the reasons stated above, Sections 11-12 violate the Privileges and Immunities Clause of the United States Constitution when applied to deny marriage rights to otherwise qualified same-sex couples.

Respectfully submitted,

The Professors of United States Constitutional Law

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-09436

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

PLAINTIFFS-APPELLANTS,

v.

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

DEFENDANTS-APPELLEES.

ON APPEAL FROM AN INTERLOCUTORY ORDER FROM THE SUPERIOR COURT SUFFOLK COUNTY

APPENDIX: BIOGRAPHIES OF AMICI

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APPENDIX;
BIOGRAPHIES OF AMICI

Erwin Chemerinsky is the Alston & Bird Professor of Law at Duke University School of Law. He has recently published two books on Constitutional Law: Constitutional Law: Principles and Policies (Boston: Aspen Law & Business 2d. ed. 2002; 1st ed. 1997)(a one volume treatise) and Constitutional Law (Boston: Aspen Law & Business, 2001)(a casebook)(annual supplements in 2001, 2002, 2003). He teaches courses in constitutional law, federal courts and federal practice of civil rights and civil liberties.

Susan Estrich is the Robert Kinglsey Professor of Law and Political Science at the University of Southern California Law School. She is the author of numerous articles and six books including, Sex and Power, (Riverhead Books, 2000). She teaches several courses including constitutional law and gender discrimination. Professor Estrich was born and raised in Massachusetts, and is the former President of the Civil Liberties Union of Massachusetts.

Taylor Flynn is an Associate Professor of Law at Northeastern University School of Law, where she teaches in the areas of constitutional law, first amendment and trusts and estates. Prior to joining academia on a full-time basis, Professor Flynn was a staff attorney with the ACLU of Southern

California. Her specialization, both at the ACLU and in her academic research, focuses on discrimination based on sexual orientation and gender identity.

Karl E. Klare is a George J. and Kathleen Waters Matthews Distinguished University Professor of Law at Northeastern University. His writing and activism focus on workplace issues and human rights.

Seth F. Kreimer, is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School. He teaches courses in constitutional law and constitutional litigation. In the last decade he has published influential analyses of the emerging pattern of state abortion regulation, the debate over the constitutional status of assisted suicide, and the status of gay marriage. He has also written on the process of constitutional litigation, the emerging constitutional enthusiasm for states' rights, and the promise of state constitutional law.

Renee Landers is an Associate Professor of Law at Suffolk University Law School. She teaches courses in health law and administrative law.

Professor Meltsner is a George J. Matthews and Kathleen Waters Matthews Distinguished University Professor at Northeastern University School of Law. He served as dean of Northeastern University School of Law from 1979 until 1984.

Among his writings are four books and numerous articles including "Confronting Unequal Protection of the Law," *24 New York University Review of Law and Social Change* 163 (1998) (with Harry Subin). Prof. Meltsner was first assistant counsel to the NAACP Legal Defense Fund in the 1960s, and has served as a consultant to the US Department of Justice, the Ford Foundation and the Legal Action Center of the City of New York. His courses at Northeastern University School of Law include constitutional law.

Jim Mooney is the Kaapcke Professor of Law at the University of Oregon School of Law. He is an authority on and has written extensively about history and contract law.

Wendy E. Parmet is a George J. and Kathleen Waters Matthews Distinguished University Professor of Law at Northeastern University School of Law. Professor Parmet, directs the law school's JD/MPH program with Tufts University School of Medicine and is co-founder of the Public Health Advocacy Institute. She has published numerous articles on constitutional law, federalism and discrimination. She teaches courses in public health law, health law, bioethics, disability law and federal courts.