

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

C.A. No. 04-2655-G

DOUGLAS JOHNSTONE,
Clerk of the Town of Provincetown, & others¹

vs.

THOMAS REILLY, in his official capacity as ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, & others²

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

The plaintiffs are duly elected or appointed clerks of thirteen Massachusetts cities and towns. They seek, pursuant to Mass. R. Civ. P. 65, a preliminary injunction that would bar the defendants from: (1) ordering the plaintiffs to cease and desist from accepting completed Notices of Intention to Marry (Notices) from same-sex couples from outside 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.

The plaintiffs argue that the defendants' recent directives, which 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 outside Massachusetts, are "an impermissible discriminatory enforcement scheme." Because the court lacks jurisdiction, it cannot consider the plaintiffs' motion.

¹ On behalf of themselves and other similarly situated persons.

² Christline C. Ferguson, Commissioner of the Department of Public Health, Stanley E. Nyberg, Registrar of Vital Records & Statistics.

STANDING

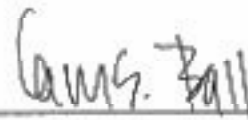
The plaintiff clerks do not have standing to raise this claim. The Supreme Judicial Court recognized a "long-standing and far-reaching prohibition on constitutional challenges by governmental entities to acts of their creator State." *Massachusetts Bay Transportation Authority v. Auditor of the Commonwealth*, 430 Mass. 783, 792 (2000), citing *Spence v. Boston Edison Co.*, 390 Mass. 604, 610 (1983) (holding that an agency is not permitted to bring due process and equal protection claims). The *Spence* doctrine has since been applied to a wide range of cases. See, e.g., *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree*, 415 Mass. 876, 878 (1993) (finding that the board, a municipal agency of the town, cannot challenge the constitutionality of a state statute); *Brookline v. The Governor*, 407 Mass. 377, 386 (1990) (Liacos, C.J., concurring) (concluding that a municipality cannot challenge the constitutionality of a state statute based on its enactment as an "outside section" of the general appropriation act); *Trustees of Worcester State Hosp. v. The Governor*, 395 Mass. 377, 380 (1985) (holding that the takings claim was barred because governmental entities cannot challenge the constitutionality of state statutes). *Massachusetts Bay Transportation Authority*, 430 Mass. at 792.

"The decisional law rests on the proposition that constitutional protections belong to 'persons,' including private corporations, who are generally considered independent of the Commonwealth. Constitutional rights invoked by citizens as 'the people' may not be infringed upon by the government. The word used to describe those entitled to protection is 'people' (Declaration of Rights, art. 1, art. 49 of the Amendments, as amended)." *Commissioner of Hampden County v. Town of Agawam*, 45 Mass. App. Ct. 481, 483 (1998). The clerks, as elected or appointed officials "rather than individuals, are not among those persons who possess the rights." *Id.*

In sum, state officials and state entities may not challenge the constitutionality of state statutes, accordingly, the clerks may not pursue this action. *Spence*, 390 Mass. at 610. Simply stated, the court does not have jurisdiction to consider the plaintiffs' motion.

ORDER

It is therefore **ORDERED** that the plaintiffs' motion for a preliminary injunction be **DENIED** as the plaintiffs lack standing.³



Carol S. Ball

Justice of the Superior Court

DATED: August 18, 2004

³ While this decision was pending, the plaintiffs filed, as of right, an Amended Complaint by which the Clerks bring this action in their individual as well as their official capacity. The defendants have not had the opportunity to address the propriety of this amendment. In these circumstances, the court declines to dismiss the plaintiffs' cause of action at this time.