**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**
**SUPREME COURT OF RHODE ISLAND**

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| MARGARET R. CHAMBERS, Plaintiff, | : | |
| | : | No.2006-340 |
| v. | : | (FC 06-2583) |
| | : | |
| CASSANDRA B. ORMISTON, Defendant. | : | |

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**ON A CERTIFIED QUESTION OF LAW**

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# BRIEF OF *AMICI CURIAE* UNITED FAMILIES INTERNATIONAL, FAMILY WATCH INTERNATIONAL, and FAMILY LEADER FOUNDATION

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## INTRODUCTION AND INTERESTS OF THE *AMICI*

Margaret Chambers and Cassandra Ormiston, two Rhode Island women who entered into a Massachusetts marriage, are now seeking a Rhode Island divorce. Their competing petitions for divorce have given rise to this certified question: "May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?"[1]

No doubt because of the importance of the certified question (and the legal issues subsidiary to it), this Court invited various government officials "and all interested persons and/or organizations … to file briefs as *amici curiae*."[2] United Families International, Family Leader Foundation, and Family Watch International accept the Court's invitation and with this brief demonstrate why the sound and valid answer to the certified question is "no."

*Amicus curiae* United Families International (UFI) is a non-sectarian, non-profit, IRC § 501(c)(3) public charity. UFI, founded in 1978, seeks to maintain and strengthen the family in the United States and other countries. UFI has been granted official consultative status at the United Nations as a non-governmental organization and has participated in UN conferences. UFI has members in Rhode Island.

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[1] Supreme Court, Order of May 21, 2007, at 1.
[2] *Id.*

*Amicus curiae* Family Leader Foundation (FLF) is a non-profit organization that works in the public square to promote principles that support the family—with marriage between a man and a woman at its heart—as central to the hope and future of nations, peoples, and the rising generation. FLF supports educational and other efforts to secure support for principles that strengthen home and family. FLF has members in Rhode Island.

*Amicus curiae* Family Watch International (FWI) is a non-profit organization working to solve social problems at the international, national, and local level by stemming and reversing the tide of family disintegration and fragmentation. In this effort, FWI recognizes the vital importance of defending and promoting fundamental social institutions such as man/woman marriage. FWI has members in Rhode Island.

## STATEMENT OF THE FACTS

To repeat the certified question: "May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?"

Three related sets of historical facts together comprise the foundation for resolution of that question. The first is the history of the Chambers-Ormiston relationship, a history inextricably interwoven with recent legal developments in Massachusetts. The second is the history of the contemporary American marriage institution. The third is the history of the relationship between the State of Rhode Island, on one hand, and, on the other hand, the institution of marriage.

**A. The Chambers-Ormiston relationship and Massachusetts developments**

Prior to November 2003, Chambers and Ormiston resided in Rhode Island.[3] That month, a badly divided (4-3) Massachusetts Supreme Judicial Court (SJC) held that marriage as the union of a man and a woman was irrational and mandated that, effective May 17, 2004, the legal meaning of marriage in that state would be the union of any two persons.[4] The state's Senate then asked the SJC whether statutory provision of civil unions for same-sex couples would be an adequate remedy, but the SJC (again dividing 4-3) held no, the legal meaning of marriage must be the union of any two persons.[5]

Massachusetts's then-governor, Mitt Romney, responded to these developments by directing that state officials comply with a Massachusetts statute prohibiting marriage in that state "by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction" (the 1913 statute).[6]

On May 26, 2004, Chambers and Ormiston applied for a Massachusetts marriage license.[7] They used the address of their shared Rhode Island residence and stated their

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[3] Family Court, Affidavit of Margaret R. Chambers, February 8, 2007, at ¶ 3.

[4] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("we conclude that the marriage ban [i.e., limiting marriage to the union of a man and a woman] does not meet the rational basis test").

[5] In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[6] General Laws c. 207, § 1l. *See* Yvonne Abraham, *Romney: gay outsiders can't marry in Mass.*, THE BOSTON GLOBE, April 25, 2004, *available at* http://www.boston.com/news/local/articles/2004/04/25/romney_gay_outsiders_cant_marry_in_mass/.

[7] Technically, Chambers and Ormiston filled out a written "notice of intention of marriage" on forms provided by the registrar of vital records and statistics. The details of the technical aspects of marrying in Massachusetts are set out in Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 632-33 (Mass. 2006) (Spina, J., concurring). A certified

intention to reside in this state.[8] They received and then used the marriage license; a Fall River justice of the peace solemnized the marriage.[9] The couple then returned to their Providence residence.[10]

In June 2004, in a Massachusetts state court, a number of out-of-state, same-sex couples (including two couples from Rhode Island) challenged the 1913 statute, its constitutionality, and its application.[11] In March 2006, at the SJC, one justice believed the 1913 statute unconstitutional,[12] one appeared to say both that the statute was constitutional and that it was not,[13] while five said the statute was constitutional.[14] Regarding application, three (the Spina concurrence) believed that the 1913 statute applied to residents of all states where the public and legal meaning of marriage was the union of a man and a woman.[15] The Spina concurrence based this conclusion on the simple and plain reality that where a state's "law has interpreted the term 'marriage' as the legal union of one man and one woman as husband and wife … then same-sex marriage would be 'prohibited' in that State …."[16] If the man/woman meaning is the

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copy of the Chambers-Ormiston "Notice of Intention of Marriage" is attached to this brief as Exhibit A.

[8] *See* attached Exhibit A.

[9] Family Court, Affidavit of Margaret R. Chambers, February 8, 2007, at ¶¶ 5-7.

[10] *Id.* at ¶¶ 4, 8.

[11] Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 632-33 (Mass. 2006) (Spina, J., concurring). Some Massachusetts clerks also initiated an action challenging the 1913 statute, Johnstone v. Reilly, Civil Action No. 04-2655-G; this action was consolidated with the action initiated by the out-of-state, same-sex couples.

[12] Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 660-72 (Ireland, J., dissenting).

[13] *Id.* at 659-60 (Greaney, J., concurring).

[14] *Id*. at 645, 651-52 (Spina, J., concurring); *id.* at 652 (Marshall, C.J., concurring).

[15] *Id*. at 639 n. 12 (Spina, J., concurring).

[16] *Id*.

public and legal norm in Rhode Island and New York, then same-sex "couples from Rhode Island and New York would not be able to secure a marriage license in Massachusetts."[17] In this way, the Spina concurrence acknowledged that each of the two possible legal meanings of marriage – "the union of a man and a woman" or "the union of any two persons" – necessarily displaces the other. But three other justices (the Marshall concurrence) said that the 1913 statute did not apply to out-of-state couples from states that had no law saying *both* "marriage is the union of a man and a woman" and "marriage is not the union of a man and a man or a woman and a woman"[18] – even though, of course, the second legal idea is entirely present within the first legal idea.

The case went back to the trial court to determine whether the one New York plaintiff-couple and the two Rhode Island plaintiff-couples could marry in Massachusetts.[19] On September 29, 2006, the trial court elected to follow the Marshall concurrence relative to the Rhode Island question.[20] On that basis, the trial court found

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[17] *Id.*

[18] *Id.* at 652-59.

[19] *Id.* at 658 (Marshall, C.J., concurring). Interestingly, one of the two Rhode Island couples had received a Massachusetts marriage license and had the marriage solemnized in Massachusetts, although government officials thereafter refused to register the completed marriage certificate. *Id.* at 659 n. 12.

[20] Cote-Whitacre v. Dep't of Pub. Health, 2006 WL 3208758 at *4 (Mass. Super. 2006) ("this Court will apply Chief Justice Marshall's construction of [the 1913 statute] to determine whether same-sex marriage is prohibited in Rhode Island.")

The trial court found that, under either the Spina concurrence or the Marshall concurrence, the New York same-sex couple could not marry in Massachusetts. *Id.* at *2. The basis of the finding relative to New York was that state's Court of Appeals decision of July 6, 2006, holding that the man/woman meaning of marriage was constitutional. *Id.; see* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006). The trial court did not explain why or how that holding is somehow to be equated with the *affirmative* expression, so important in the view of the Marshall concurrence, that marriage is *not* the union of two persons of the same sex. Perhaps the trial court was (consciously or

that no "constitutional amendment, statute, or controlling appellate decision from Rhode Island … explicitly deems void or otherwise expressly forbids same-sex marriage."[21] In this way, the trial court effectively blocked application of the 1913 statute to Rhode Island same-sex couples. The trial court made no reference to the fact that the public and legal meaning of marriage in Rhode Island is the union of a man and a woman, even though the trial court had that fact before it.[22] The Massachusetts Attorney General took no appeal.

Meanwhile, back in Rhode Island, Chambers and Ormiston decided to divorce, and each hired lawyers. The resulting "competing petitions for divorce"[23] caused the Family Court in December 2006 to certify to this Court the question of the Family Court's subject-matter jurisdiction to hear such.[24] Obviously well versed in the nuances of the recent Massachusetts developments, this Court directed the Family Court to address a number of questions relative to the Chambers-Ormiston marriage in

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otherwise) accepting the reality accepted by the Spina concurrence, that each of the two possible legal meanings of marriage – "the union of a man and a woman" or "the union of any two persons" – necessarily displaces the other. Or perhaps the trial court was reading (correctly or otherwise) the Marshall concurrence as an invitation to other state supreme courts to "refine" the meaning of marriage in their respective states, as four of the SJC had done to Massachusetts with *Goodridge*.

[21] Cote-Whitacre v. Dep't of Pub. Health, 2006 WL 3208758 at *4 (Mass. Super. 2006)

[22] That fact was before the trial court in Cote-Whitacre v. Dep't of Pub. Health, Civil Action No. 04-2656-H, by way of both Defendants' Opposition to Clerks' and Couple's Motions for Preliminary Injunction 30-31, July 12, 2004, and Defendants' Memorandum of Law Regarding Rhode Island Law 7-9, May 30, 2006; both are available at http://www.glad.org/marriage/Cote-Whitacre/cote_documents.shtml.

[23] Family Court, Joint Memorandum of the Parties on the Pending Request for Certification of February 8, 2007, at 3.

[24] Supreme Court, Order of January 17, 2007, at 1.

Massachusetts, in order to compile "an appropriate factual record."[25] And apprehending a key and threshold issue in this case, this Court also directed the Family Court to reword the certified question "to whether or not the Family Court may properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state."[26] The Family Court then complied with both directives.[27]

**B. The contemporary American marriage institution**

This is a question of fact: What *is* marriage in contemporary America and in Rhode Island in particular? In two not unimportant ways, that fact question is disputed. First, it is disputed in court cases addressing the marriage issue – whether marriage will continue to mean the union of a man and a woman (man/woman marriage) or whether, by force of law, that meaning must be changed to the union of any two persons (genderless marriage). The opposing sides have repeatedly presented to the courts two quite different "packages" of marriage facts.[28] Genderless marriage proponents put forward what is

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[25] *Id.* at 2.

[26] Supreme Court, Order of January 17, 2007, at 3.

[27] Family Court, Decision of February 21, 2007.

[28] The most recent and comprehensive examination of these competing packages of marriage facts is Monte Neil Stewart, *Marriage Facts and Critical Morality* (2007), *available at* http://www.marriagelawfoundation.org/mlf/publications/Facts.pdf [hereinafter Stewart, *Marriage Facts*]. (A shorter version of this article publishes in the Fall of 2007 as Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y xx (2007). Other recent and important examinations of the aspects of contemporary American marriage relevant to the marriage issue include DAVID BLANKENHORN, THE FUTURE OF MARRIAGE (2007); INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES (2006); THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2006), *available at* http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf; W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS, SECOND EDITION:

known as the "narrow description," while man/woman marriage proponents put forth what is known as the "broad description."[29] The result is

> not so much divergence as a broad delimitation or description encompassing most but not all of a very much smaller one. The man/woman marriage proponents' broad description encompasses a wide range of marriage-produced social goods; the genderless marriage proponents' much more narrow description, far fewer. And the same holds true relative to marriage's purposes, practices, formative (of individuals) powers, and interactions with other social institutions: the broad description encompasses much, while the narrow description excludes much.[30]

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TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (2005). *See also* Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZAGA L. REV. 501, 516-46 (2007), *available at* http://manwomanmarriage.org/jrm/pdf/Eliding_in_WA_and_CA.pdf [hereinafter Stewart, *Washington and California*]; Monte Neil Stewart, *Dworkin, Marriage, Meanings – and New Jersey*, 4 RUTGERS J. L. & PUB. POL'Y 271, 280-81 (2007), *available at* http://manwomanmarriage.org/jrm/pdf/Dworkin.pdf [hereinafter Stewart, *Dworkin*]; Monte Neil Stewart, *Eliding in New York*, 1 DUKE J. CONST. L. & PUB. POL'Y 221, 231-58 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/ElidingInNewYork.pdf [hereinafter Stewart, *New York*]; Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 28-77 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf [hereinafter Stewart, *Judicial Elision*]; F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in* Reference re Same-Sex Marriage 42 ALBERTA L. REV. 1099, 1102-03 (2005) [hereinafter DeCoste, *Leviathan*]; Maggie Gallagher, (*How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L. J. 33, 35-65 (2004) [hereinafter Gallagher, *Reply*]; Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-*Lawrence *World*, 23 QUINNIPIAC L. REV. 447, 451-71 (2004) [hereinafter Gallagher, *Does Sex Make Babies*]; Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 41-99 (2004), *available at* http://manwomanmarriage.org/jrm/pdf/jrm.pdf [hereinafter Stewart, *Redefinition*]; F.C. DeCoste, *The* Halpern *Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 625-28 (2003) [hereinafter DeCoste, *Transformation*].

[29] Stewart, *Marriage Facts*, *supra* note 28, at 30-33.

[30] *Id.* at 30.

In any event, each judge, in upholding man/woman marriage or mandating its replacement by genderless marriage, has to some degree both expressly premised her ultimate legal conclusion on the contents of the supportive package and attempted to counter the contents of the other package.[31]

The second kind of dispute swirling around the key question of fact – What *is* marriage in contemporary America? –centers on *is* and *ought*. Often, one encounters concepts of what marriage *ought* to be, palmed off as descriptions of what it *is*. With more or less justification, each side accuses the other of such palming off.[32] Certainly the temptation to that intellectual sin is omni-present; each side fights this fight because of what it wants for our society or for a particular part of our society, because of how it believes things *ought* to be, and each side accurately sees its particular version of marriage as essential to achieving its vision of the good.

But in a deep and very important way, the key question of fact – What *is* marriage in contemporary America and in Rhode Island in particular? – is not genuinely disputed. It is not genuinely disputed because, as a matter of fact, genderless marriage proponents have not genuinely engaged, and certainly have not successfully countered the factual accuracy of, the important portions of the broad description of marriage that go beyond the narrow description's portrayal. Rather, the history is that genderless marriage

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31 *See id.* at 8.
32 *See id.* at 28-29.

proponents ignore, evade, and otherwise elide the important marriage facts not encompassed by their own narrow description.[33] That is the way it is to this day.

Thus, in summarizing the broad description of contemporary American marriage, the following paragraphs present a factual description that is just that, factual.[34] Certainly, the description is uncontroversial at the level of serious intellectual discourse.

Marriage is a vital social institution. Like all social institutions, marriage is constituted by a unique web of shared public meanings. Or, in slightly different words, widely shared meanings are the constituent stuff of institutions. For important institutions, again including marriage, many of those meanings rise to the level of norms. Consequently, important social institutions affect individuals profoundly; institutional meanings teach, form, and transform individuals, providing identities, purposes, practices, and projects.

Those meanings, as the constituent stuff of social institutions, are therefore the source of the institutions' respective social goods. In other words, it is by teaching, forming, and transforming individuals across the society that an institution's constitutive meanings provide the social goods. And it is those social goods that led to the institution's evolvement and that continue to give reason for its perpetuation.

Across time and cultures, a core meaning constitutive of the marriage institution

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[33] This pattern of evasion and elision is well documented in the scholarly literature. *See, e.g., id.* at 33-91; Stewart, *Washington and California, supra* note 28, at 516-46; Stewart, *Dworkin, supra* note 28, at 292-313; Stewart, *New York, supra* note 28, at 231-59; Stewart, *Judicial Elision, supra* note 28, at 28-78.

[34] As a summary of Stewart, *Marriage Facts, supra* note 28, at 9-21, the following paragraphs, to the end of this sub-section, are presented without footnotes, except for quoted material.

has virtually always been *the union of a man and a woman*. This core man/woman meaning is powerful and even indispensable for the marriage institution's production of at least six of its valuable social goods. The man/woman marriage institution is:

1. Society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult).
2. The most effective means humankind has developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not just the basic requirements like food and shelter but also education, play, work, discipline, love, and respect).
3. The indispensable foundation for that child-rearing mode – that is, married mother/father child-rearing – that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's – and therefore society's – well-being.
4. Society's primary and most effective means of bridging the male-female divide.
5. Society's only means of conferring the identity and status of, and transforming a male into, husband/father, and a female into wife/mother, statuses and identities particularly beneficial to society.
6. Social and official endorsement of that form of adult intimacy – married heterosexual intercourse – that society may rationally value above all other such forms.

Those are not all the social goods produced by the marriage institution, but for purposes of adjudicating the marriage issue they are the relevant ones. They are relevant exactly because they are the social goods produced materially and even uniquely by the man/woman *meaning* and that must therefore disappear when that *meaning* is de-institutionalized.

In contemporary America, the man/woman meaning has *not* been deinstitutionalized by broad social trends anywhere, and only Massachusetts has a legal mandate designed to perform that task. *The union of a man and a woman* continues as a widely shared, public, and core meaning constitutive of the marriage institution across the Nation. That is not to say that the man/woman meaning is universally shared; an alternate view of marriage (the "close personal relationship" model[35]) makes that meaning quite dispensable, and that model's description of what marriage now *is* – after a

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[35] The close personal relationship model of marriage *is* the narrow description advanced by genderless marriage proponents. Under that model, "marriage is simply one kind of close personal relationship. The [model] … tend[s] to strip marriage of the features that reflect its status and importance as a social institution." COUNCIL ON FAMILY LAW (DANIEL CERE, PRINCIPAL INVESTIGATOR), THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 14 (2005), *available at* http://www.marriagedebate.com/pdf/future_of_family_law.pdf. Consequently, "marriage is seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. Marriage is about the couple. If children arise from the union, that may be nice, but marriage and children are not really connected." *Id.* Some scholars believe (or hope) that we are in fact moving from "a marriage culture to a culture that celebrates 'pure relationship,'" *id.* at 15, with that term being understood as a relationship "that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship currently brings to the [two adult] individuals involved." *Id.* Under this model, marriage's social goods are "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment," LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 6 (2006) – *and nothing more*. See Stewart, *Marriage Facts, supra* note 28, at 33-43.

process of evolution – is not inaccurate in some American communities or in portions of that world created by Hollywood. But its description is inaccurate beyond those particular spheres, exactly because the man/woman meaning continues fully institutionalized as a widely shared public meaning across every state and therefore across the Nation.

With its power to suppress social meanings, however, the law can radically change and even deinstitutionalize man/woman marriage. The consequence of such deinstitutionalization must necessarily be loss of the institution's social goods. Further, genderless marriage is a radically different institution than man/woman marriage. (This does not mean, of course, that there is no overlap in formative instruction between the two possible marriage institutions; the significance is in the divergence.) This significant divergence is seen in the nature of the two institutions' respective social goods (in the case of genderless marriage, only promised, not yet delivered). Nor should this divergence be surprising: fundamentally different meanings, when magnified by institutional power and influence, do not produce the same social identities, aspirations, projects, or ways of behaving, and hence the same social goods. Or to use popular contemporary terminology, the man/woman marriage institution will socially construct a people and hence a society different from the people and society socially constructed by the genderless marriage institution. It could not be otherwise because the genderless marriage institution is radically different in what it aims for and in what it teaches. To say that the result will be otherwise is to say that the core meanings constitutive of powerful social institutions do not matter in the formation and transformation of

individuals, and no rational and informed observer says that. Indeed, the observers of marriage who are both rigorous and well-informed regarding the realities of social institutions uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage, and this is so regardless of the observer's own sexual, political, or theoretical orientation or preference.

Although the contemporary social institution of marriage in America has evolved in important ways over the centuries and undoubtedly now includes the ideal of "a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support," enduring aspects of the institution go far beyond that limited and limiting description of transformative meanings, and those enduring aspects are grounded in the man/woman meaning:

> Conjugal marriage [i.e., man/woman marriage] has several characteristics. First, it is inherently normative. Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid. Instead, its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.
>
> As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage. . . . [Man/woman marriage] provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for their children. . . .
>
> Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation. Not every married couple has or wants children. But at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life:

> humanity is male and female, men and woman often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care. Conjugal marriage attempts to sustain enduring bonds between women and men in order to give a baby its mother and father, to bond them to one another and to the baby.[36]

Regarding this last-mentioned marriage fact – the institutionalized objective and practice of bonding a man and a woman and the children that their sexual relation produces –, one judge said:

> The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. … Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. … The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.[37]

Or, as Maggie Gallagher has cogently observed:

> [T]he justification for legal preferences for marriage for couples attracted to the opposite sex rests on three [factual] assertions: sex makes babies; society needs babies; and children need mothers and fathers. Marriage is about uniting these three dimensions of human social life: creating the conditions under which sex between men and women can make babies safely, in which the fundamental interests of children in the care and protection of their own mother and father will be protected, and so that

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[36] COUNCIL ON FAMILY LAW, *supra* note 35, at 12-13.

[37] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting).

> women receive the protections they need to compensate for the high and gendered (*i.e.*, nonreciprocal) costs of childbearing.[38]

Or, in David Blankenhorn's words:

> In all or nearly all human societies, marriage is socially approved sexual intercourse between a man and a woman, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are – and are understood by the society to be – emotionally, morally, practically, and legally affiliated with both of the parents.
>
> That's what marriage is. It's a way of living rooted in the fundamental physiological and biochemical adaptations of our species, as developed over the course of our long prehistory. … It is constantly evolving, reflecting the complexity and diversity of human cultures. It also reflects one idea that does not change: For every child, a mother *and* a father.[39]

None of this is to assert that an institutionalized purpose is to mandate or even promote procreation; rather, it is to ameliorate the consequences of heterosexual coupling. The marriage institution in important part exists as a response to two essential realities of man/woman intercourse: its procreative power and its passion. And that institutional response's purpose is understood as the provision of adequate private welfare to children. (As used here, the phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.) Man/woman intercourse, as an act of compelling passion often leading to child-bearing, has important implications for society. Societal interests are

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[38] Gallagher, *Does Sex Make Babies?*, *supra* note 28, at 451.

[39] BLANKENHORN, *supra* note 28 at 91 (emphasis in original). Blankenhorn notes that his definition of marriage "rests on a large and growing mountain of scholarly evidence. It incorporates widely shared conclusions about the meaning of marriage reached by the leading anthropologists, historians, and sociologists of the modern era." *Id.*

corroded when child-bearing occurs in a setting of inadequate private welfare and are advanced when it occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter and is conducive of the former. That is because passion, not rationality, may well dictate the terms of the encounter. While rationality considers consequences nine months hence and thereafter, passion does not, to society's detriment. Thus, what is understood to be a fundamental and originating purpose of marriage: to confine procreative passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion's consequences (children) begin and continue life with adequate private welfare. Although the immediate objects of the protective aspects of this private welfare purpose are the child and the often vulnerable mother, society itself is rationally seen as the ultimate beneficiary.

Because the contemporary man/woman marriage institution advances, albeit imperfectly, this private welfare purpose, many tens of millions in this Nation continue to enjoy the significant incremental increase in child and adult happiness, health, and productivity associated with that institution, something that social science has measured and stated in conclusions that are by now rather uncontroversial.

A society can have, at any given time, only *one* social institution denominated *marriage*. That is because a society, as a simple matter of reality, cannot, at one and the same time, have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons." A society, as a simple matter of reality, cannot, at one and the same time, tell people, and especially children, that *marriage* means "the union of a man and a woman" *and* "the union of any

two persons." The one meaning necessarily displaces the other. Hence, every society must choose either to retain the old man/woman marriage institution or, by force of law, to suppress it and put in its place the radically different genderless marriage institution. But again, to suppress, by force of "constitutional" law no less, the shared public meanings constituting the old institution is to lose the valuable social goods flowing from those institutionalized meanings.

This reality – that a society can have, at any given time, only *one* social institution denominated *marriage* – illuminates the misleading nature of phrases such as *same-sex marriage, homosexual marriage,* and *gay marriage*. These phrases are misleading in two related ways. First, no where in the world is marriage defined legally, socially, or otherwise as the union of two persons of the same sex. It is either defined as the union of any two persons, as in Massachusetts (at least legally), or as the union of a man and a woman, as in the other 49 states (both legally and socially). Second, when people confront the marriage issue, the terms *homosexual marriage*, *gay marriage* and *same-sex marriage* get those people thinking of a new, different, and separate marriage arrangement or institution that will co-exist with the old man/woman marriage institution. But although the legal definition of civil marriage as the union of any two persons allows same-sex couples to marry, it of course also allows a woman and a man to marry and, indeed, once judicially or legislatively adopted is the *sole* definitional basis for the *only* law-sanctioned marriage any couple can enter, whether same-sex or man/woman. (That is the way it now is in Massachusetts.) Thus, legally sanctioned genderless marriage (the not-misleading term for what is being proposed), rather than peacefully co-existing with

the old man/woman marriage institution, actually displaces and replaces it.

Another salient social institutional reality is this: man/woman marriage is a pre-political institution, while genderless marriage must of necessity be a post-political, law-constructed, and hence fragile institution. Joseph Raz captures the reality well and accurately when he observes that the law's role relative to man/woman marriage and other pre-political institutions is "to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations."[40] Thus, when a same-sex couple successfully asserts a "right to marry" they are necessarily imposing on the state *not* a correlative duty to allow them into the existing man/woman marriage institution – which the law is impotent to do, although it is sufficiently potent to de-institutionalize man/woman marriage – *but* a correlative duty to construct and maintain in all its fragility the radically different genderless marriage institution, in which every couple who claims to be married (whether same-sex or man/woman) must participate if the couple's claim is to have legitimacy.

**C. Rhode Island and the institution of marriage**

In Rhode Island, the public and legal meaning of marriage is the union of a man and a woman. That has always been the case. That is the case today.

Rhode Island's statutes reflect repeatedly the man/woman meaning. For example, "[p]ersons intending to be joined together in marriage in this state must first obtain a license from the clerk of the town or city in which: (1) *the female party to the proposed*

[40] JOSEPH RAZ, THE MORALITY OF FREEDOM 393 (1986); *see also* DeCoste, *Transformation, supra* note 28, at 635.

*marriage* resides; or in the city or town in which (2) *the male party resides*, if the female party is a nonresident of this state …."[41] Further, "[b]oth *the bride and groom* shall subscribe to the truth of data in the application" for a marriage license.[42] Other Rhode Island marriage statutes refer to "husband" and "wife."[43] And, tellingly, in listing kindred persons a man cannot marry in this state, the statute describes only females, from "mother" through "wife's daughter's daughter" to "mother's sister."[44] For those kindred a woman cannot marry, the statute describes only males.[45]

Rhode Island's common law also defines marriage as the union of a man and a woman. Thus, in *State v. Downing*, 175 A. 248, 249 (R.I. 1935), this Court said: "'Marriage' is a status which determines the relations between husband and wife."[46] And in *DeMelo v. Zompa*, 844 A.2d 174, 177 (R.I. 2004), this Court said: "Although common-law marriages have long been recognized as valid in this state, … the existence of a common-law marriage must be 'established by clear and convincing evidence that the parties seriously intended to enter in the husband-wife relationship.'"

It cannot be gainsaid that the public and legal meaning of marriage in Rhode Island is the union of a man and a woman.

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41 R.I. G.L. § 15-2-1 (emphasis added).
42 *Id.* at § 15-2-7 (emphasis added).
43 *E.g., id.* at § 15-1-5 & 6.
44 *Id.* at § 15-1-1.
45 Id. at § 15-1-2.
46 Strong contemporary work regarding social institutions in general and marriage in particular reaffirms the validity of this focus on the statuses of *husband* and *wife*. *See, e.g.*, DeCoste, *Transformation*, *supra* note 28, at 625-27.

The three related sets of historical facts set forth in the preceding sub-sections, when clearly apprehended, are the solid foundation for good legal analysis in this important case; misapprehension of any one of them, a quicksand foundation.

## QUESTIONS AND STANDARD OF REVIEW

The certified and fundamental question is: "May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?"

From that question flow, necessarily and logically, a number of questions subsidiary to it:

1. Does this case present an actual case or controversy? (The Court specified this question.[47])

2. What is the relationship, if any, between Rhode Island recognition of a marriage as valid, on one hand, and, on the other hand, the granting of a Rhode Island divorce?

3. Does Rhode Island's judge-made law best serve the interests of this state by altering the state's public and legal meaning of marriage from the union of a man and a woman to the union of any two persons, even for the limited purpose of granting a divorce?

4. Is the federal Defense of Marriage Act, 28 U.S.C. § 1738C, relevant to this case? (The Court also specified this question.[48])

5. Is the Full Faith and Credit clause of the United States Constitution relevant to this case. (The Court also specified this question.[49])

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[47] Supreme Court, Order of May 21, 2007, at 2.
[48] *Id.*
[49] *Id.*

6. Does Rhode Island's public and legal meaning of marriage (the union of a man and a woman) violate state or federal constitutional norms of equality, liberty, privacy, personal autonomy, human dignity, and so forth?

Regarding the standard of review, because the certified question (and the questions subsidiary to it) present issues of law, this Court will employ a de novo standard of review in resolving all those questions, giving great weight and deference, however, to the findings of historical fact made by the Family Court.[50]

## DISCUSSION OF THE QUESTIONS

### Point 1

### Because Chambers and Ormiston are genuinely adverse relative to the merits of this case, their agreement on the Family Court's power to resolve those merits does not render this case non-justiciable; this case continues to qualify as a fully justiciable case or controversy.

The Family Court found, based on "the pleadings, exhibits and affidavits," that the conflicting contentions of Chambers and Ormiston present a real and substantial controversy between those two; their dispute (the terms of the divorce) is definite and concrete, not hypothetical or abstract.[51] As just noted, under the applicable standard of review, this Court will give great weight and deference to the Family Court's findings of historical fact, including the factual findings embedded in its ultimate conclusion of "an actual case in controversy."[52]

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[50] *See* City of Providence v. Employee Retirement Bd. of City of Providence, 749 A.2d 1088, 1096 (R.I. 2000).

[51] Family Court, Decision of February 21, 2007, at 3-4.

[52] *Id*. at 4.

The justiciability of this case is not altered by the fact, and it is a fact, that Chambers and Ormiston agree that the Family Court has the power to resolve the terms of their contested divorce and grant a divorce. If that fact were deemed to render this case non-justiciable, then virtually no couple facing divorce could present a justiciable case or controversy; that is because nearly all couples, in going into a divorce proceeding, do not dispute the court's power to resolve the matter. They agree on that particular matter, just like they will agree, during the course of the proceeding, on any number of other auxiliary matters, such as the applicability of certain procedures and even certain components of the large substantive questions (property division, etc.). Yet such agreements certainly cannot be deemed to render their case non-justiciable; an insistence on complete and total "adverseness" with respect to every imaginable issue in a case would throw all our courts into chaos.

The best thinking on the "adverseness" element of justiciability fully supports what the Family Court and this Court have done relative to the issue now before this Court (whether, as a predicate to a Rhode Island divorce, the Family Court can, will, or must recognize the Chambers-Ormiston marriage). *Federal Practice and Procedure* addresses the situation, just like this one, where genuine adverseness is present on the merits but an issue arises that has "not been advanced between parties who are in court on other claims."[53]

> Once a [genuinely adverse] claim is advanced, … a more complex calculus is needed to determine whether to resolve issues that have not been argued by the parties but that might advance decision. If the issues are not needed to dispose of the case in a way that seems appropriate, they

[53] CHARLES ALLAN WRIGHT ET AL., 13 FEDERAL PRACTICE & PROCEDURE § 3530.

> may be put aside. If the court believes that an issue might provide a desirable basis for decision, however, several paths can be followed. One is to raise the issue on the court's own motion, even if the parties have agreed that the issue is out of the case. Another is to direct the parties to argue the issue; at times this course may be pushed with vigor. Or the court may appoint a friend of the court to argue an issue that the parties cannot be led to argue in a helpful way. *None of these actions violates the case or controversy requirement.*[54]

Here, of course, the legal issue reflected in the certified question is more than one "needed to dispose of the case in a way that seems appropriate" and even more than one that "might provide a desirable basis for decision." Here the legal issue reflected in the certified question is absolutely essential to and unavoidable in any sensible resolution of the Chambers-Ormiston divorce proceeding. If the certified question is not answered – one way or the other – the divorce proceeding is dead in the water. Accordingly, it was wise and proper for the Family Court "to raise the issue on the court's own motion" in the form of a certified question to this Court. Likewise, it was wise and proper for this Court to invite "friend[s] of the court to argue an issue that the parties [perhaps] cannot be led to argue in a helpful way." Because of this amicus brief, at least one brief in this proceeding will present to this Court a negative answer to the certified question and do so to a high level of professionalism. Because that is so, a fundamental purpose of the justiciability requirement is now satisfied in this proceeding: "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[55]

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[54] *Id*. (emphasis added).
[55] Baker v. Carr, 369 U.S. 186, 204 (1962).

In all the circumstances, this case presents an actual case or controversy.

Nevertheless, in this context, something important needs to be said about what has happened across the country in the litigation of the marriage issue and what may well happen in this case. Certain gay and lesbian rights groups and allied organizations have formulated and pursued, with a cadre of brilliant and experienced lawyers, a coordinated litigation strategy across the Nation. In this endeavor, the preeminent organizations have been the ACLU, Lambda Legal Defense and Education Fund (Lambda Legal), and Gay Lesbian Advocates and Defenders (GLAD). GLAD, based in Boston, has led out in New England[56]; the ACLU and Lambda Legal have divided between them the lead role in the other states.[57]

Two central and now clearly evident pillars of the litigation strategy are "the atypical couples tactic" and the "no federal question" strategy. Here is a description of the former:

> The gay/lesbian rights movement has skillfully and often successfully deployed what may fairly be called the "atypical couples tactic." This tactic uses as the public face of the genderless marriage campaign a number of carefully selected same-sex couples virtually indistinguishable (except for gender) from Ozzie and Harriet Nelson or Clair and Heathcliff

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[56] *See* Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003); Kerrigan v. Department of Public Health, 2006 WL 2089468 (Conn. Super. 2006).

[57] Relative to Lambda Legal Defense & Education Fund, *see* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); In re Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. App. 2006); Varnum v. Brien, Case No. CV 5965 (Iowa District Court, pending). Relative to the ACLU, *see* Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005); Deane v. Conway, 2006 WL 148145 (Md. Super. 2006); Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006); Kerrigan v. Department of Public Health, 2006 WL 2089468 (Conn. Super. 2006); In re Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. App. 2006).

> Huxtable and then points relentlessly to those couples as the "answer" to what the genderless marriage campaign is all about. The phrase "atypical couples tactic" is fair because such couples constitute a quite small portion of the gay and lesbian community and because the movement, and especially its most active litigating components—Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders (GLAD)—is indeed being consciously tactical ….[58]

Here is a description of the latter and its recent application:

> The organizations supporting these and similar state court actions across the country [seeking the redefinition of marriage to the union of any two persons] are united in a firm resolve that the definition-of-marriage issue not be raised now or in the foreseeable future, whether in state or federal court, as a *federal* constitutional claim. This resolve is based on the organizations' judgment that for now and in the foreseeable future the federal courts, including the United States Supreme Court, will reject such a federal genderless marriage claim. Maverick lawyers and plaintiffs (that is, those not acting under the control of these organizations) have nevertheless made the federal claim three times, losing twice in federal district court and once in federal bankruptcy court. … The losing lawyer and plaintiffs in the Florida federal action initially vowed publicly to appeal the adverse decision all the way to the Supreme Court but subsequently bowed to organizational pressure in foregoing any appeal. When the losing lawyer and plaintiffs in the California federal action did not bow to similar pressure but pursued an appeal to the Ninth Circuit Court of Appeals, one of the organizations … moved to intervene before the Ninth Circuit to urge that the appeal be dismissed on justiciability grounds. … The Ninth Circuit denied the intervention motion but ultimately ruled as the proposed intervenor desired, that is, the court avoided the federal constitutional issue by ordering dismissal on justiciability grounds.[59]

This history may well be important relative to this case. That is because this case is not one sponsored by the preeminent genderless marriage organizations, does not conform to the atypical couples tactic, and does raise federal statutory and constitutional

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[58] Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. REV. 555, 586 (footnotes omitted).

[59] Stewart, *New York, supra* note 28, at 229 n. 16 (emphasis in original; footnotes omitted).

questions. Thus, it would be consistent with their recent endeavors if these preeminent genderless marriage organizations, directly or indirectly, seek to persuade this Court that somehow it should not resolve this case on the merits, especially the *federal* statutory and constitutional issues.

**Point 2**

**Rhode Island will grant a divorce *only* to a couple whose marriage *this state* deems valid.**

Rhode Island will grant a divorce *only* to a couple in a valid marriage. This fundamental rule appears both in statute and case law. Thus, the statute establishing the Family Court grants the court jurisdiction "to hear and determine all petitions for divorce from the bond of marriage."[60] And, as this Court has said, "the term 'divorce' … presupposes the existence of a valid marriage."[61] All the other 49 states appear to follow this rule as well,[62] and the New Hampshire Supreme Court has stated it particularly well: "The right to a divorce is predicated upon the existence of a valid marriage between the parties. … In the absence of a valid marriage, the court may not exercise its statutory powers incident to a divorce."[63] Thus, this state will not grant a Rhode Island divorce to end an arrangement between two Rhode Island people that, in Rhode Island's view, is not

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60 R.I. G.L. § 8-10-3(a).

61 Leckney v. Leckney, 59 A. 311, 311-12 (R.I. 1904).

62 *E.g.*, 27A C.J.S. § 1 ("the term 'divorce,' in its strict and legal sense, signifies the dissolution of a valid existing marriage"); *id*. at § 2 ("divorce is predicated on, and presupposes the existence of, a valid marriage, which it operates to dissolve, or suspend, from the date of the decree"); *id.* at §3 ("the marriage relation constitutes the foundation of the action" for divorce).

63 Joan S. v. John S., 427 A.2d 498, 499-500 (N.H. 1981).

a valid marriage. For there to be a Rhode Island divorce, there must first be a marriage deemed valid by this state – at least for the purpose of the divorce proceeding.

This rule is as uncontroversial as it is fundamental. For example, in the *DeMelo* case discussed earlier, the plaintiff alleged a common-law marriage and, on that basis, sought a divorce. The Family Court and the parties decided "that the matter be bifurcated, the parties agreeing that they try the issue of the existence of a marriage first. In the event that a common-law marriage was found, the disposition of marital property and other obligations between them would be litigated."[64] After the trial on "the existence of a marriage," the trial justice "denied and dismissed plaintiff's complaint, finding that plaintiff had failed to provide the existence of a … marriage"[65] – an approach that this Court affirmed.[66] Under Rhode Island law, the outcome (dismissal of the petition for divorce) could not have been different. And *DeMelo* is a good reminder that "the issue of the existence of a marriage [always comes] first."

We believe that this Court, in this case, has already acknowledged and acted on the fundamental rule that Rhode Island will grant a divorce *only* to a couple in a valid marriage. As noted in the Statement of the Facts, the initial certified question from the Family Court spoke of that court's subject-matter jurisdiction to resolve the Chambers-Ormiston divorce proceeding.[67] But this Court understood, we believe, that jurisdiction is not the truly fundamental issue here; the truly fundamental issue is the validity in

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64 DeMelo v. Zompa, 844 A.2d 174, 175 (R.I. 2004).
65 *Id.*
66 *Id.* at 175, 178.
67 *See* Supreme Court, Order of January 17, 2007, at 1 ("Does the Rhode Island Family Court have subject matter jurisdiction under" Rhode Island law "to hear a divorce complaint" between a Rhode Island same-sex couple married in Massachusetts).

Rhode Island's eyes of the Chambers-Ormiston marriage. Hence, this Court ordered a reworking of the certified question to its present form, with its emphasis on judicial recognition or not of such a marriage.[68]

The correlative fundamental and uncontroversial point is that, before granting a divorce (or even entertaining a divorce proceeding), a Rhode Island court determines the existence of a marriage for *Rhode Island's* purpose, and that determination is an expression of *Rhode Island* law, not the law of any other jurisdiction. This understanding accords with the bedrock conflict-of-laws principle that even when a court in the forum state elects to give effect to foreign law, that foreign law is not then operating of its own force but instead has force only as an expression of the forum state's power; it becomes, in this way, the forum state's law. In the words of the United States Supreme Court: "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived…. 'All the effect which foreign laws can have in the territory of a state depends absolutely on the express or tacit consent of that state….'"[69]

This concept of *Rhode Island law* recognizing a marriage as valid (or not) *for Rhode Island's purpose* should not be confused or obscured by the modes of analysis that Rhode Island courts apply in resolving the recognition issue. For example, if a Rhode Island couple seeks a Rhode Island divorce to end their marriage validly entered into in the State of Alpha, the court may decide to apply this rule: a marriage which is valid

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[68] *See id*. at 3.

[69] Hilton v. Guyot, 159 U.S. 113, 162-166 (U.S. 1895). *See also* 12 CORPUS JURIS, *Conflicts of Law* § 5. ("It is obvious that no law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. Conversely, every person who is found within the limits of a government, whether for temporary purposes or as a resident, is bound by its laws so far as they are applicable to him.")

under the law of the "marrying" state will generally be recognized as valid by the "divorcing" state.[70] But in applying that rule and proceeding to grant a Rhode Island divorce to the Rhode Island couple, the Rhode Island court's ultimate determination is *not* that the marriage is valid in Alpha; rather, the court's ultimate determination is that *the marriage is valid in Rhode Island, in this state's view, and for this state's purpose.* If the court cannot make that ultimate determination, then, as already seen, it cannot and will not grant a Rhode Island divorce.

Thus, before Chambers and Ormiston can receive a Rhode Island divorce, this Court must decide that, *in Rhode Island's view and for this state's purpose*, the two are validly married or, to use this state's statutory language, are in "the bond of marriage."

**Point 3**

**Rhode Island's judge-made law best serves the interests of this state by sustaining, for all purposes, this state's public and legal meaning of marriage.**

Coming to the question of Rhode Island recognition of the Chambers-Ormiston Massachusetts marriage, a helpful and perhaps even essential concept is one that may be called "limited recognition." Certain scenarios clarify the concept. In those scenarios, we use the State of Alpha, the State of Beta, the Couple (with both people being, at all times, residents of Alpha, although they married in Beta), and the Disqualification (an Alpha law that precludes the Couple from marrying in Alpha but that has no equivalent in Beta). The scenarios are:

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[70] *See* AMJUR, *Marriage* § 63. Of course, a Rhode Island court may apply a different rule: The validity of a marriage is determined by the law of the state with the most significant relationship to the spouses and the marriage. *See, e.g.*, Fungaroli v. Fungaroli, 280 S.E.2d 787 (N.C. App. 1981).

1. Alpha does not deem the Couple married for any Alpha purpose.

2. Alpha recognizes the Couple's marriage *only* for a limited purpose, such as:

a. granting the Couple an Alpha divorce;

b. upholding, after the death of one, the other's rights relative to the deceased's property interests; or

c. upholding, after the death of one, the other's status (and accompanying rights) as the surviving "spouse."

3. Alpha deems the Couple married for all Alpha purposes (tax treatment, spousal immunity, testimonial privileges, next-of-kin status, divorce, intestacy and other death benefits, etc.).

In requiring a new formulation of the certified question,[71] this Court appears to have acknowledged the possibility of a limited recognition, that is, the possibility of the # 2 scenario; the re-formulated question asks whether "the Family Court may properly recognize, *for the purpose of entertaining a divorce petition*, the marriage of two persons of the same sex who were purportedly married in another state."[72] Some scholarship supports the concept of limited recognition.[73]

The possibility of a limited recognition in this case brings to the fore a reality that ought not be evaded. The reality is that a Rhode Island court cannot recognize Chambers and Ormiston as validly married for purposes of receiving a Rhode Island divorce

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[71] Supreme Court, Order of January 17, 2007, at 3 (emphasis added).

[72] *Id*.; Family Court, Decision of February 21, 2007, at 7.

[73] *E.g.*, EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 585 (4th ed. 2004) ("[U]nusual marriages, valid under appropriate foreign law, are recognized as valid for particular purposes. Such limited recognition does not, however, involve a recognition of the right to exercise, in the forum, all the incidents usual to the marriage relation ….").

without first changing in one important context this state's public and legal meaning of marriage from the union of a man and a woman to the union of any two persons. That much is inescapable. It is inescapable because Chambers is a woman and Ormiston is a woman, because theirs therefore is the union of a woman and a woman, and because in this state a core public and legal meaning of marriage, for all purposes, is the union of a man and a woman. Thus, for this Court to say that Chambers and Ormiston are validly married in the eyes of this state (as the essential predicate to granting them a Rhode Island divorce) is for this Court to say, unavoidably, that, at least when it comes to ending a marriage, a core legal meaning of marriage in this state is *now* the union of any two persons. And although this threshold reality does not in itself answer whether this Court *ought* to make such a radical change, there should be no blinking at the reality.

All that brings us to the legal rules and policy considerations guiding this Court's decision whether to make such a radical change. One well-established guideline is the policy preference for validation: "The policies reflected in the law concerning marriage are designed to respond to the need to assure … the protection of those to whom this relationship has direct social significance, particularly the parties, their offspring and possible subsequent spouses."[74] Therefore, one policy is "to sustain its [the marriage's] validity once the relationship is assumed to have been freely created"[75] and has been long recognized in Rhode Island.[76] This policy is reflected in a rule mentioned earlier: a

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[74] *Id.* at 558-59.
[75] *Id.* at 559.
[76] *See Ex parte* Chace, 26 R.I. 351, 58 A. 978, 979-80 (R.I. 1904).

marriage which is valid under the law of the "marrying" state will generally be recognized as valid by the "divorcing" state.[77]

A key word in that rule is "generally," because states have always reserved to themselves the right and power to advance their own important marriage policies. That means that they have always reserved to themselves the right and power to refuse recognition to a foreign marriage in appropriate cases.[78] This Court has long recognized this reserved right and power. Thus, in *Ex parte Chace*, this Court referenced the

> well-recognized exception to the general rule [of validation] …, namely, that if a marriage is odious by the common consent of nations, or if its influence is thought dangerous to the fabric of society, so that it is strongly against the public policy of the jurisdiction, it will not be recognized there, even though valid where it was solemnized. Thus a polygamous marriage, although valid and binding in the country where it was contracted, would probably be denied validity in all countries where such unions are prohibited. … Probably the rule would be the same in case of an incestuous marriage, although valid in the place where contracted.[79]

Here is an exercise, using the earlier Alpha and Beta scenarios, to deepen understanding of the proper line between the general rule of validation and the public-policy exception to it. If the Disqualification in Alpha is a prohibition on first-cousin marriage and Beta has no equivalent, Alpha will almost certainly recognize the Couple as validly married, for all purposes.[80] (This assumes that Alpha, like Rhode Island, has no "evasion" statute.[81]) Although the Disqualification, appearing as it does in statute, may be deemed an expression of sorts of public policy, that policy must be viewed as weak, at

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77 *See supra* note 70.

78 *See, e.g.*, SCOLES, *supra* note 73, at 561, 566, 571-72; RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 307-313 (5th ed. 2006).

79 *Ex parte* Chace, 26 R.I. 351, 58 A. 978, 980 (R.I. 1904).

80 *See* WEINTRAUB, *supra* note 78, at 309 & n. 9.

81 *See generally id.* at 307-308 & n. 6; SCOLES, *supra* note 73, at 579-80.

best. That is so for several reasons. For one, Americans are not at all settled on the question; twenty-five states prohibit first-cousin marriages, eighteen states allow them without restriction, and seven allow them under certain conditions.[82] For another reason, the underlying secular reason for the prohibition – to minimize birth defects – is contested; science is uncertain on the point.[83] For another reason, allowance of first-cousin marriages does little or nothing to disrupt the shared public meanings at the core of and constitutive of the marriage institution and therefore does little or nothing to jeopardize the valuable social goods uniquely provided by that institution.

Assume, however, that the Disqualification in Alpha is a prohibition on father-daughter marriage. Beta previously had such a prohibition, but recently in that state a sterile father and his daughter wanted to marry and, when refused a marriage license, initiated state-court litigation, arguing that state constitutional norms of equality, liberty, privacy, personal autonomy, and human dignity invalidated the incest statute as to father-daughter and mother-son couples where one of the parties was sterile. A bare majority of the Beta Supreme Court agreed. After going to and marrying in Beta, the Couple (a sterile father and his daughter) returns to Alpha and some time later seek an Alpha divorce. In such a scenario, all American states would *not* recognize the marriage, *for any purpose*; such a marriage "would be well beyond the pale."[84] Although some might attribute the non-recognition to unreasoning disgust, to thinly disguised implementation

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[82] *See* Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective On Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1563 (2005).

[83] *See* Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 352 (2004).

[84] *See* WEINTRAUB, *supra* note 78, at 309.

of religious doctrines, to blind adherence to "traditional" mores, or to an invidious prejudice against an unusual kind of sexual attraction, the real societal reason for the non-recognition is none of those. Rather, the real reason is an understanding based on millennia of human experience, resulting in a policy designed to protect and perpetuate valuable social goods. Thus, the "universal taboo" against incest (father-daughter or mother-son) is reasonably viewed "as preserving the nuclear family from the disharmony engendered by sexual jealousy" and as aiding "socialization [in that] … the taboo is an important method of regulating the erotic impulse in children, preparing them to function with mature restraint in adult society."[85] Accordingly, for an Alpha court to recognize as valid, for any purpose, the Couple's Beta marriage is to seriously jeopardize Alpha's strong and reasonable objectives in providing that marriage is not the union of a father and daughter, even if one is sterile.

On the basis of all the fundamental understandings set forth above, we submit that this Court ought not recognize the Chambers-Ormiston marriage for the purpose of granting them a Rhode Island divorce. As already seen, to recognize that marriage is to say, authoritatively and unavoidably, that in an important context marriage in Rhode Island does not mean the union of a man and a woman but rather means the union of any two persons. And to say that is to take a large step away from legal support for the man/woman marriage institution and toward its unmaking. After all, important social institutions, such as marriage, are constituted by nothing other than widely shared public

[85] "incest." Encyclopædia Britannica Online (26 June 2007).

meanings.[86] When those public meanings become confused or not sufficiently widely shared, the phenomenon is called *de-institutionalization* and the result is loss of the old institution's social goods.[87] Certainly, the law has the power to confuse and even suppress widely shared public meanings constitutive of important social institutions[88]; thus, the law has the power to de-institutionalize man/woman marriage and thereby diminish or even eliminate the valuable social goods materially and even uniquely provided now by the institutionalized man/woman meaning.[89] Those goods include, among others, provision of the most effective (or only) means of supporting a child's right to know and be reared by his or her mother and father (with exceptions only in the best interests of the child, not any adult), of maximizing the private welfare provided to the children conceived by passionate man/woman coupling, of sustaining the optimal child-rearing mode (married mother/father), of bridging the male/female divide, and of furnishing the status and identity of *husband* or *wife*.[90] When marriage is de-institutionalized, what a society has left is a dizzying array of different lifestyles. But a

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[86] *See, e.g.*, Stewart, *Judicial Elision, supra* note 28, at 8-10, 26-27, 35-36.

> These judicial assertions of "no change" in the institution of marriage [resulting from judicial redefinition], in light of the acknowledged "profound" and "significant" change in the public meaning of marriage, are flatly contradicted by social institutional realities. Social institutions are constituted by – are nothing other than, if you will – shared public meanings. To change those meanings is to change the institution, including the quantity and quality of its social goods. To change those meanings radically is to deinstitutionalize the old institution (and thereby lose its social goods) and to replace it with a new one.

*Id.* at 35.

[87] *See, e.g., id.*

[88] *See, e.g.*, Stewart, *Judicial Elision, supra* note 28, at 26-27, 36-37.

[89] *See id.* at 16-20.

[90] *Id.*

lifestyle is to a social institution what a sheet of plain paper is to a genuine $1,000 bill. (The analogy is apt, because money is one of our important social institutions.[91])

In light of these social institutional realities – which ought not be evaded or otherwise elided – , we submit that the case for the non-recognition of the Chambers-Ormiston marriage is at least as strong as the case for the non-recognition of the marriage of the Couple in our last scenario. Certainly recognition of the former jeopardizes the perpetuation of social goods at least as valuable as those jeopardized by recognition of the latter. Rhode Island has rationally determined to be of great value the social goods uniquely provided by the institutionalized man/woman meaning; that determination is sensibly viewed as the basis for this state's public and legal support for the man/woman marriage institution[92] and its (unavoidably) concomitant rejection of genderless marriage.

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[91] John Searle notes the following:

> [W]e can say, for example, in order that the concept "money" apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, *marriages*, buying and selling, political offices, and so on.

JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 32 (1995) (emphasis added).

[92] *See, e.g.*, Stewart, *Marriage Facts, supra* note 28, at 10 n. 25:

> This link between the value of institutionally produced social goods and evolvement or perpetuation of the institution must certainly be more than just definitional (although it is that); that link would also seem to be essential. That the link is definitional is seen in Clayton's standard definition of *institution*: "An organized system of social relationships (roles, positions, norms) that is pervasively implemented in the society and *that serves certain basic needs of the society*." … The idea that the link is also essential arises from the insight that a society would hardly expend the vast energy needed to accomplish that "pervasive implementation"

Moreover, the facts of this case present an additional strong reason why this Court should not apply the general rule of validation. A primary purpose of that rule is "to avoid upsetting the expectations of the parties."[93] But that purpose is not at all advanced under the facts of this case. We so demonstrate by inserting those facts into Professor Weintraub's cogent explanation of the problem:

> The only functional difference between a case in which the partners have paid a brief visit to a sister state to speak their vows and one in which they have remained at home is that the parties may have relied upon the law of the place of celebration to validate their marriage. But in a case in which [Chambers and Ormiston] have gone to another state with the specific purpose of avoiding the interdiction of [Rhode Island's man/woman marriage law], there is doubt as to whether this reliance is justifiable or should be given much weight. The policies underlying [Rhode Island's man/woman marriage law] are just as applicable as if the ceremony had been performed [in Rhode Island,] and [Massachusetts as] the state that has no contact except as a place of celebration can have only an officious interest in wishing its validating policy to prevail over the contrary policy of [Rhode Island].[94]

In sum, Rhode Island's judge-made law best serves the interests of this state by sustaining, for all purposes, this state's public and legal meaning of marriage – the union of a man and a woman. And that means not recognizing the Chambers-Ormiston marriage for the purpose of a Rhode Island divorce.

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> unless the resulting institution indeed served "certain basic needs of the society."

93 WEINTRAUB, *supra* note 78, at 310.

94 *Id.* at 311.

## Point 4

**This state's public and legal meaning of marriage is in harmony with state and federal constitutional norms of equality, liberty, privacy, personal autonomy, human dignity, and so forth.**

Of course, this Court cannot sustain the man/woman meaning embedded in Rhode Island marriage law if that meaning violates any state or federal constitutional norm. But it is fair and accurate to say that the serious debate over the constitutionality of man/woman marriage has been over for some time now, and man/woman marriage is clearly the victor. We say that in part – but only in small part – because of the fact that of the twenty American appellate court decisions to date on the constitutionality of man/woman marriage, nineteen have refused hold it unconstitutional and the further fact that all eight American appellate court decisions on the issue since the SJC's decision in *Goodridge* have refused to follow that case.[95] In much larger part, we say that the debate is over in favor of man/woman marriage because of the nature of the strong arguments sustaining constitutionality and the concomitant on-going failure of genderless marriage proponents to genuinely and seriously engage, rather than evade, those arguments. That thorough-going failure to engage is now well-documented in the scholarly literature and quite simply has not been rebuted.[96]

The strong arguments for the constitutionality of man/woman marriage are premised on the uncontroversial reality that marriage is a vital social institution; the arguments together are referred to as "the social institutional argument for man/woman

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[95] The cases are collected at Stewart, *Marriage Facts*, *supra* note 28, at 4 n.7.

[96] *See, e.g.*, Stewart, *Judicial Elision, supra* note 28, at 28-78; Stewart, *New York,supra* note 28, at 231-59; Stewart, *Washington and California, supra* note 28, at 516-46.

marriage." The building blocks of the social institutional argument appear above in Part B of the Statement of Facts, "The contemporary American marriage institution." Here is a concise summary of the argument[97]:

Marriage, like all social institutions, is constituted by a web of shared public meanings; these meanings teach, form, and transform individuals, providing identities, purposes, and projects; and in this way, these meanings provide vital social goods. Across time and cultures, a core meaning constitutive of the marriage institution has virtually always been the union of a man and a woman. As demonstrated above, this core man/woman meaning is powerful and even indispensable for the marriage institution's production of a number of valuable social goods.

The social institutional argument further demonstrates that, with its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage, with concomitant loss of the institution's social goods. Further, genderless marriage is a radically different institution than man/woman marriage, as evidenced by the large divergence in the nature of their respective social goods (in the case of genderless marriage, only promised, not yet delivered).

Another social institutional reality is that a society can have, at any one time, only one social institution denominated *marriage*. That is because a society, as a simple matter of reality, cannot, at one and the same time, have as shared, core, constitutive meanings of the marriage institution "the union of a man and a woman" *and* "the union of

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[97] Because the following paragraphs summarize Stewart, *Judicial Elision*, *supra* note 28, at 7-78, those paragraphs are presented without footnotes.

any two persons." The one meaning necessarily displaces the other. Hence, every society must choose either to retain the old man/woman marriage institution or, by force of law, to suppress it and put in its place the radically different genderless marriage institution. But to suppress, by force of "constitutional" law no less, the shared public meanings constituting the old institution is to lose the valuable social goods flowing from those institutionalized meanings. Thus, the social institutional argument refutes the "no-downside" argument advanced by genderless marriage proponents and seen in the famous tactic of asking: "How will letting Jim and John marry hurt Michael's and Mary's marriage?"

These social institutional realities further reveal phrases like *gay marriage* or *same-sex marriage* to be misleading. These phrases get people thinking that a society will keep its old kind of marriage and just a get a new and separate kind. But that is not so because of the social institutional realities just reviewed; a society can have one or the other but never at the same time both possible kinds of civil marriage. And after a judicial decree of genderless marriage, made in the name of constitutional norms of equality, liberty, dignity, or autonomy, an American state will certainly *not* be the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, and each equally secure in its own space. Rather, that state will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially constrained, officially disdained, and sharply curtailed. Moreover, there are profound problems with the notion that supporters of the old marriage institution can, if they want,

just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings. Social institutional studies teach that the dominant society and its language and meanings will, like an ocean and its waves, inevitably wear down and cause to disappear any island enclave of an opposing norm. To the degree that members of the enclave were to adopt the speech of the dominant society, they would lose the power to name, and in large part the power to discern, what once mattered to their forbears. To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible.

Because of what the social institutional argument succeeds in demonstrating, it is a sufficient response to all constitutional attacks leveled at man/woman marriage.

> The man/woman meaning in marriage, the social goods that meaning provides, and the susceptibility to loss of both the meaning and the goods – as described by the broad description of contemporary American marriage and analyzed by the social institutional argument – satisfies [even] strict scrutiny review. The social goods, especially those pertaining to child-bearing and child-rearing and enhancing child welfare, qualify as compelling societal (and hence governmental) interests; "a society without the institution of [man/woman] marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic." The compelling nature of the societal interests are not diminished by the fact, and it is a fact, that the growth of the close personal relationship ideology and the concomitant increase in unmarried co-habitation and births out of wedlock have rendered the marriage institution less effective than formerly in furthering those interests. The compelling nature of the interests are not diminished by that fact because, as the resource becomes more scarce, it becomes correspondingly more essential to society's well-being. The resource of which I speak includes children grown to adulthood blessed with significant incremental increases in educational attainments and in physical, mental, and emotional health and with a complete sense of who they are and from whom they came and not hampered by the consequences of significant incremental increases in criminal conduct and other forms of self-and other-destructive behavior. It also includes adults

> secure as *husband* or *wife*, with all the significant incremental increases in health, happiness, and productivity associated with those statuses.
>
> Nor do notions of "over-inclusive" and "under-inclusive" lead to a conclusion of unconstitutionality. That is because society, if it is to have a normative marriage institution, has *only* two choices. Either it will choose genderless marriage or it will choose man/woman marriage. To choose genderless marriage is to cause the loss of the man/woman meaning and therefore the loss of its valuable social goods. Man/woman marriage is neither over-inclusive nor under-inclusive because it *must be only what it is* – the source of institutional power to the man/woman meaning – to sustain society's compelling interests in the perpetuation of that meaning's social goods.[98]

**Point 5**

**As the steward of Rhode Island's common law, this Court should not change this state's public and legal meaning of marriage from the union of a man and a woman to the union of any two persons.**

As just demonstrated, man/woman marriage well withstands all constitutional attacks leveled against it. That is so because our society (including its government) has compelling interests at stake in the man/woman marriage institution's perpetuation. All those compelling interests provide powerful reasons why a judge, sitting as steward of the common-law and governor of its development, will choose to maintain the common-law meaning of marriage (the union of a man and a woman)[99] rather than decree a radical departure from it. But the fact that the redefinition from the union of a man and a woman to the union of any two persons is genuinely radical[100] is, *in itself*, powerful reason under the common-law tradition to not decree it. Simply stated, the common-law grows and

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[98] Stewart, *Marriage Facts*, *supra* note 28, at 92-95 (footnotes omitted; emphasis in original).

[99] The classic common-law statement is in Hyde v. Hyde, L.R. 1 Prob. & Div. 130, 133 (1866) (Lord Penzance): "marriage [is] … defined as the voluntary union for life of one man and one woman to the exclusion of all others."

[100] *See* Stewart, *Judicial Elision*, *supra* note 28, at 20-24.

changes only incrementally and only as shared experience and the resulting well-tested wisdom dictate,[101] and that feature is understood to be near the core of the common law's genius and the reason for the tradition's long endurance.[102] The legislature, for good or ill, has the power to implement radical, even revolutionary, programs (always called, of course, "reforms" and always presented as "progressive"). But the common-law tradition gives no such power to a judge, and, if true to that tradition, the common-law judge will not arrogate such power to herself or himself.

In the name of "developing" the common law, this Court should not mandate the radical change from man/woman marriage to genderless marriage, for any purpose.

**Point 6**

**The federal Defense of Marriage Act reinforces a decision by this Court to not recognize the Chambers-Ormiston marriage, while the federal constitution's Full Faith and Credit Clause clearly does not require Rhode Island recognition of that marriage.**

Whole forests have been cut down to make the paper on which to print the news and journal articles speaking about the connection between genderless marriage, on one

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[101] *See, e.g.*, McClure v. Life Ins. Co. of North America, 84 F.3d 1129, 1135 (9th Cir.1996) ("the common law decision-making process is inherently incremental in nature ... [and] calls for devising a rule that does not stray too far from the existing regime."); PM Group Life Ins. Co. v. Western Growers Assur. Trust, 953 F.2d 543, 547 (9th Cir.1992) ("While we are free to adopt any rule, the common law decisionmaking process is inherently incremental in nature …."); Aranson v. Schroeder, 671 A.2d 1023, 1027 (N.H.1995) ("we are mindful that fundamental changes in our jurisprudence must be brought about sparingly and with deliberation.").

[102] *See, e.g.*, RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 8 (1989) ("the genius of the common law is that it proceeds empirically and gradually, testing the ground at every step.").

hand, and, on the other hand, the federal Defense of Marriage Act (DOMA)[103] and the federal constitution's Full Faith and Credit Clause.[104] Discussion of that connection generates a lot of passion, not because the principles of the conflicts of law (including the principles implicated by DOMA and the Full Faith and Credit Clause) are able to and do generate that kind of passion (they really cannot and do not) but because the idea of genderless marriage generates a lot of passion. When that passion is put aside and a court resorts in a sober and deliberate way to the principles of the conflicts of law, the conclusions come rather easily and are quite clear and straightforward. Fortunately, as an aid in that task there is the solid, lucid, and straightforward work of Patrick J. Borchers, dean and professor of law at the Creighton University School of Law, appearing in his article *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*.[105]

As to the Full Faith and Credit Clause's meaning for and relevance to this case, after reviewing the "full faith and credit basics," Dean Borchers explains:

> Consequently, it is hard to imagine a case of a state applying its own marriage law [to not recognize a same-sex couple's out-of-state marriage]

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[103] In 1996, Congress enacted and President Clinton signed the Defense of Marriage Act, Pub L No 104 -199, 110 Stat 2419 (1996) (codified at 28 USC § 1738C and 1 USC § 7). It has two provisions. One defines marriage for all federal statutory purposes as the union of a man and a woman. 1 U.S.C. § 7. The other says that each State need not to "give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." 28 U.S.C. § 1738C.

[104] U.S. Const. art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

As to the volume of print regarding the matter, *see* Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 353 & nn.1-3. (2005).

[105] Borchers, *supra* note 104.

that presents a close constitutional question. Probably the most commonly hypothesized case is one in which a couple lives in a state which does not allow same-sex marriage, but gets married in a state that allows it, and then returns home and becomes involved in litigation in which the couple's marital status is crucial. But under the *Allstate* test, the domiciliary connection to the forum state is easily sufficient to justify application of the forum state's law. Perhaps the best case that could be made for a constitutional duty to apply the celebration state's law would involve a couple genuinely domiciled in a state allowing same-sex marriages and then becoming involved in litigation in a state that does not allow them. Suppose, for example, a same-sex couple is married and living in Massachusetts and one of them is injured in Nebraska and a loss of consortium claim is brought by the other spouse in Nebraska, a state whose constitution prohibits recognition of same-sex marriages. Would Nebraska be required to treat the couple as married? Admittedly, this is a closer question than the first hypothetical, but the answer is still in the negative. The public policy exception is a deeply ingrained feature of traditional choice-of-law principles, and recall that the Supreme Court held in *Wortman* that such principles are constitutional even if they do not meet the *Allstate* test. State courts have long refused to recognize marriages that violate their public policy even if the marriage was validly celebrated elsewhere.

So why all the confusion over this relatively straightforward matter? A good deal of it stems from the confusion of the two branches of the Supreme Court's full faith and credit jurisprudence. As we have seen, while the Supreme Court's constitutional review of state choice of law has been deferential, its review of full faith and credit as to judgments has been "exacting." Much of the commentary has wrongly assumed that a marriage license is the functional equivalent of a judgment for full faith and credit purposes. This, however, is obviously incorrect. A judgment requires the adjudication of a controversy or at least a potential controversy. A marriage license (or a fishing, hunting or law license for that matter) lacks this character. Marriage is not a matter of one potential spouse wanting to get married, the other not wanting to get married, and then heading to the courthouse to resolve the dispute. The superficially appealing analogy to divorces is therefore wanting, because divorce decrees involve controversies (or at least the potential therefor) that involve opposing positions of the parties requiring a court's resolution. Thus, whichever branch of the full faith and credit jurisprudence is followed, the ultimate result is that states are free to recognize or not recognize same-sex marriages celebrated in other states.[106]

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[106] *Id.* at 357-58 (footnotes omitted).

As to DOMA's meaning for and relevance to this case, there is this expression of clear thinking:

> In large part, DOMA simply states what the law would be without it, a point made by some who testified in opposition to it. As we have seen, DOMA or no DOMA, full faith and credit principles do not require one state to give effect to a marriage celebrated in another state. For the most part, therefore, the arguments against the constitutionality of DOMA are fanciful. The common mistaken premise of these attacks is that DOMA engaged in a radical revision of the accepted understanding of full faith and credit principles when, in fact, it did not.[107]

DOMA is relevant to this case in one important way, however. It is yet another expression – in this instance, one with nationwide scope – of the strong public policy in favor of man/woman marriage and the perpetuation of both that institution and its valuable social goods.

In sum, DOMA is constitutional and expresses the same public policy reflected in Rhode Island's marriage laws – one in favor of man/woman marriage. The Full Faith and Credit Clause leaves this Court entirely free to resolve the recognition issue as a matter of state law and in furtherance of this state's marriage policy, a policy centered on this state's public and legal meaning of marriage as the union of a man and a woman.

[107] *Id.* at 358-59 (footnotes omitted).

## CONCLUSION

This Court should hold that the Family Court may not recognize, for the purpose of entertaining the Chambers-Ormiston divorce petitions, the Massachusetts marriage of these two Rhode Island women.

Respectfully submitted,


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The undersigned hereby certifies that a true copy of the within has been sent to the above persons by regular mail, postage prepaid, on July 10, 2007.

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