SUPREME COURT
OF THE STATE OF RHODE ISLAND

No. 06-340-M.P.

MARGARET CHAMBERS,
Plaintiff

v.

CASSANDRA ORMISTON,
Defendant

On a Certified Question from
the Providence County Family Court
(C.A. No. 06-2583)

BRIEF OF MARGARET CHAMBERS

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STATE OF RHODE ISLAND
PROVIDENCE, S.C.

FAMILY COURT

Margaret Chambers, Plaintiff	*	C.A. No. P06-2583 (SC No. 2006-340)
v.	*	
Cassandra Ormiston, Defendant	*	

MARGARET R. CHAMBERS' BRIEF ON THE CERTIFIED QUESTION

In response to this Court's request for briefing by the parties on the questions articulated in the Order of this Court dated May 21, 2007 Chambers respectfully avers that there is indeed a case in controversy in the within matter, that the Full Faith and Credit Clause and 28 U.S.C. §1738C are irrelevant to the instant case.

I. WHETHER OR NOT THE INSTANT CASE PRESENTS AN ACTUAL CASE OR CONTROVERSY.

The instant case presents an actual case or controversy for the reasons stated below. Both parties in this case are spouses to each other as a matter of Massachusetts law and seek to divorce in their home state of Rhode Island in order to settle their various rights and liabilities as a divorcing married couple and be restored to the status of unmarried persons.

On May 26, 2006, the parties traveled together to the City Hall in Fall River, Massachusetts and completed a marriage application.[1] On this application, which is also known as a Notice of Intention of Marriage, they revealed their qualifications for marriage in Massachusetts, including the facts that they were not too closely related (see

Mass. Gen. L. c. 207, §§1, 2), were not then married to someone else (see Mass. Gen. L. c. 207, §§4, 6), and were older than 18 years of age (see Mass. Gen. L. c. 207, §§ 7, 24-25).

They also disclosed their Rhode Island residence and their intent to return to Rhode Island following their marriage. Importantly, same-sex couples who reside in Rhode Island are and were at that time eligible to marry in Massachusetts, notwithstanding their status as non-residents of Massachusetts. Cote-Whitacre v. Dep't of Pub. Health, 21 Mass.L.Rptr. 513, 2006 WL 3208758 (Mass. Super. Sept. 29, 2006) (concluding that Mass. Gen. L. c. 207, §§11-12 do not disqualify Rhode Island same-sex couples from marriage in Massachusetts).[2]

While in Fall River, the couples also applied for, and received, a waiver of the three-day waiting period for their marriage in Massachusetts under Mass. Gen. L. c. 207, §30, and the City Clerk of Fall River, Carol A. Valcourt, who is herself a justice of the peace with authorization to solemnize marriages in Massachusetts pursuant to Mass. Gen. L. c. 207, §38, solemnized the parties' marriage in City Hall that very day. Ms. Valcourt, as the officiant and City Clerk, then completed the Certificate of Marriage (i.e.

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[1] Same-sex couples became eligible to marry in Massachusetts as of May 17, 2004 pursuant to Goodridge v. Dep't of Public Health, 440 Mass. 309, 798 N.E. 2d 941 (2003).

[2] In May, 2004, Governor Mitt Romney of Massachusetts resurrected a then-moribund law, Mass. Gen. L. c. 207, §§11-12, and construed it "in a manner purposefully intend[ing] to deny to any nonresident same-sex couple the opportunity to marry in Massachusetts." Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350, 391, 844 N.E.2d 623, 657-58 (2006) (Marshall, C.J., concurring). In March, 2006, the Massachusetts Supreme Judicial Court concluded that the Commonwealth of Massachusetts purposefully misinterpreted §§11-12. Id. According to the Supreme Judicial Court, non-resident couples who are not expressly forbidden to marry in their home state are and have always been eligible to marry in Massachusetts under §§11-12. Id. at 392-93, 844 N.E.2d at 658-59. Thus, the parties here were actually eligible to marry when they did,

the marriage license) and recorded it in the Fall River City Clerk's Office on May 26, 2004, thus completing the marriage licensing and solemnization process. The parties left Fall River that day with a marriage license, which itself is prima facie evidence of their marriage. Mass. Gen. L. c. 207, §4; Mass. Gen. L. c. 46, §19.

The parties themselves have been residents of Rhode Island and domiciled here at all relevant times. For neither party has Rhode Island been a temporary home. As noted on their marriage application, they lived in Rhode Island at the time of their marriage in Massachusetts, intended to return to Rhode Island immediately thereafter, and subsequently did so. Each of the parties has lived in the state and been domiciled there continuously for at least one year preceding the filing of their respective petitions for divorce.

The parties' competing petitions for divorce are predicated on the Family Court's power to proceed. Certainly, the parties are Rhode Island domiciliaries and residents for purposes of Gen. Laws §15-5-12. To the extent a court perceives a threshold issue of whether it may or must recognize the parties' marriage in order to have the power to dissolve it, the parties and this Court have no grounds for contesting the existence or validity of the marriage. On May 26, 2004 the parties met all of the requirements for a valid marriage license in Massachusetts, and thus, under no circumstances could this Court consider the marriage unrecognizable for purposes of dissolving it.[3] Similarly, under no circumstances could this Court consider the marriage somehow undeserving of dissolution through divorce. <u>See</u> <u>Leckney v. Leckney</u>, 59 A.311, 312-13 (R.I. 1904)

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notwithstanding the actions taken by the Massachusetts Governor to discourage them from seeking a Massachusetts marriage license.

("[A]ll that the law requires is the proof or admission of a de facto marriage" in order to dissolve it by divorce or annulment).[4]

Thus, the parties' competing divorce petitions present a "case or controversy" for the Family Court. While it is true that Chambers and Ormiston do not have antagonistic positions relative to the issue of whether or not the Family Court should have jurisdiction to hear their divorce case, this litigation is most certainly adversarial by its very nature. The complaint for divorce filed by Chambers and the counterclaim by Ormiston evinces, in and of itself that a substantial case and controversy exists between the parties. Further illustrative of this true controversy is the filing of a Petition to Partition filed by Ormiston against Chambers in the Superior Court of the State of Rhode Island (See PC 06-6516), that Petition having been filed (subsequent to the divorce action being instituted) in December, 2006 in an effort by Ormiston to obtain certain relief not presently available to her in the Family Court until this Honorable Court rules on the certified question of law. Matter of factly, that cause of action is likewise stalled pending this ruling.

This State Supreme Court has always had the authority to define exactly the scope and nature of its own judicial power, this being contrary to the role of the Federal Court system wherein it is well established law that the judicial power of the Federal Courts under the Federal constitution is restricted to adjudicating actual "cases" and "controversies", Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed. 556 (1984). Rhode Island's constitution has no such "case" and "controversy" requirement.

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[3] Cf. Gen. Laws §15-5-1 (authorizing divorce in Rhode Island even in the case of void or voidable marriages).

[4] See also Gen Laws §8-10-3 (providing Family Court with jurisdiction "to hear and determine all petitions for divorce from the bond of marriage"); §15-5-3.1 (allowing

Arguendo, should this Court find that a true case and controversy is required, yet lacking, a ruling on the certified question is nonetheless appropriate. This Court has reserved unto itself this authority and has stated that "This Court will not adjudicate a moot case unless the issues raised are of extreme public importance, which are capable of repetition but which evade review." In re: Christopher B., 823 A.2d 301, 319 (R.I. 2003), citing Sullivan v. Chafee, 703 A.2d 748, 752 (R.I. 1997). Further, this Court has stated that "Cases demonstrating extreme public importance are usually matters that relate to important constitutional rights, matters concerning livelihood, or matters concerning citizen voting rights", id at 319. The certified question here is most obviously one which demonstrates extreme public import and clearly relates to matters involving livelihood. Not only do Chambers and Ormiston have the need but also the right to obtain a divorce which cannot and will not be subject to collateral estoppel in the future. This Court must give extraordinary weight to the reality that Rhode Island neighbors the State of Massachusetts which provides for the legitimacy of same-sex marriages. Therefore, it is not just likely, but most certainly inevitable that such a factual scenario shall be repeated time and again and therefore cannot now escape this Court's review at this time. The future is now.

II. WHETHER OR NOT THE FULL FAITH AND CREDIT CLAUSE IS RELEVANT TO THE INSTANT CASE.

The Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution, both self-executing and as implemented by Congress, is not relevant in the current posture of this action. Though it has had clear relevance in the area of domestic

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divorce for irreconcilable differences); §15-5-12(b) (providing gender neutral construction of divorce statutes).

relations law, courts grappling with the question of whether and when to recognize marriages entered in other jurisdictions have not, to date, relied upon the Full Faith and Credit Clause. Rather, the comity law of the home state has traditionally governed the question of whether to recognize a marriage from another state, and this approach is well-settled in Rhode Island. See, e.g., Ex Parte Chace, 58 A.978, 980 (R.I. 1904). The lack of clear doctrinal guidance provided by the Full Faith and Credit Clause in the marriage recognition arena is of no consequence here because comity law, as applied by Ex Parte Chaçe and its progeny to out-of-state marriages, controls the pending question concerning this Court's authority to recognize the parties' marriage for the purpose of entertaining the competing claims for divorce.

A. Domestic Relations Law Does Implicate the Full Faith & Credit Clause.

The Full Faith and Credit Clause figures prominently in the long established rule that states must give full faith and credit to divorce decrees entered by another state if that state properly exercised jurisdiction to entertain an action for divorce. See, e.g., JH v. RB, 796 A.2d 447, 449 (R.I. 2002); Ramsay v. Ramsay, 79 R.I. 441 (1952); see also Boyls v. Boyls, 463 A.2d 1307, 1309 (R.I. 1983); Williams v. North Carolina, 317 U.S. 287 (1942); Williams v. North Carolina, 325 U.S. 226 (1945).

More recently, Congress has acted to make it clear that the states must, in certain delineated circumstances, grant full faith and credit to certain custody and visitation determinations, 28 U.S.C. §1738A (1980) ("the Parental Kidnapping Prevention Act"), and to child support orders, 28 U.S.C. §1738B (1994).

These examples reveal the Full Faith and Credit Clause's prominent role in providing the doctrinal basis for a state's recognition of other states' judgments rendered after adversarial proceedings.

B. Marriage Recognition Questions Do Not Require Resort to the Clause.

With respect to the question of giving full faith and credit to a marriage validly entered in another jurisdiction, it seems fair to say that no one has been able to discover any reported judicial decisions on point let alone any controlling authority from the United States Supreme Court.[5]

In that legal environment, two points are worth noting. First, in the absence of any controlling precedent and in light of the interest generated by the advent of legal recognition of the relationships of same-sex couples (whether by marriage, civil union, domestic partnership or otherwise), there has been considerable speculation by legal commentators on the question of the application of full faith and credit to marriages. Not surprisingly, one can find support for the view that full faith and credit requires courts to give conclusive effect to an out-of-state marriage as well as support for the very opposite view. Compare, e.g., Joseph Singer, "Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation," 1 Stan. J. Civ. Rts. & Civ. Liberties 1, 31-43 (2005) (Full Faith and Credit requires recognition of Massachusetts marriages of same-sex couples; developing his own analysis and discussing the views of other scholars) and Robert H. Bork, "Slouching Toward Gomorrah 112 (1996)("the first part of that sentence [of the

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[5] See, e.g., Currie, "Full Faith & Credit to Marriages," 1 Green Bag 2d 7, 10 and n.21 (1997)(noting inability to discover any court requiring a state to give full faith and credit to an out-of-state marriage, noting only Ram v. Ramharack, 150 Misc.2d 1009, 571 N.Y.S.2d 190 (1991), where the court referenced full faith and credit but then engaged in a different analysis to recognize an out-of-state common law marriage).

Full Faith and Credit Clause] almost certainly means that, if the Hawaii court rules as expected, other states must accept marriages between homosexuals performed in Hawaii") with, e.g., Currie, supra at 8 ("But the full faith and credit clause does not require other states to permit Hawaii to regulate the marital status of their citizens").

Second, the absence of controlling Full Faith and Credit precedents is a reflection of the fact that American courts – including Rhode Island's – have consistently – and with no difficulty – relied on principles of comity alone to address the question of recognition of out-of-state marriages. See, e.g., Chace, 58 A. at 979-80. See also Statement of Rhode Island Attorney General Patrick Lynch dated May 17, 2004, http://www.riag.ri.gov/public/pr.php?ID=209 (discussing Rhode Island's reliance on comity law for marriage recognition questions), attached hereto as Exhibit A.

Comity is also the appropriate vehicle for analysis in the first instance because, for the reasons stated above, it allows for the resolution of the question presented here without resort to constitutional issues.[6] See, e.g., State v. Lead Industries Assoc. Inc., 898 A.2d 1234, 1238-1239 (R.I. 2006) (noting Court's "reluctance to adjudicate constitutional questions when a case is capable of decision upon other, non-constitutional grounds," citing cases); State v. Goldberg, 61 R.I. 461, 1 A.2d 101, 103 (1938) ("Constitutional questions should not be brought in question upon the record before trial for the purpose of certification to this court, unless the case in which such questions are

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[6] If the court were to find that Rhode Island principles of comity would not allow recognition of the parties' Massachusetts marriage, the court would have to address the Full Faith and Credit question only if the parties raised that federal question. To date, the parties have simply asked the Rhode Island court, qua state court, to grant a divorce under state law principles.

raised cannot be determined on any other point, or unless the determination of the constitutional questions is indispensably necessary in the case.").

In addition, comity is applicable more broadly than Full Faith and Credit vis-à-vis marriages that may be presented before state courts since the Full Faith and Credit Clause has no application to foreign countries.[7] A Rhode Island married same-sex couple could come before a Rhode Island court at the present time with either a marriage license from Massachusetts, as in the instant case, or from a foreign country, most obviously today from Canada. Comity provides a uniform legal approach to either type of marriage license.

C. Comity Analysis Can Be Applied In this Case, Rendering the Clause Irrelevant Here.

Rhode Island follows the universal rule of marriage recognition, which is frequently referred to as "the place of celebration rule." Chace, 58 A. at 980. Under this celebration rule, marriages validly entered in other jurisdictions must be respected in Rhode Island unless the "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 Rhode Island. Chace, 58 A. at 980 (respecting a marriage entered in Massachusetts by a Rhode Island ward who, expressly prohibited by Rhode Island's

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[7] It is axiomatic that the Full Faith and Credit Clause applies only to the states of the United States and not to foreign countries. Aetna Life Ins. Co. v. Tremblay, 223 U.S.185, 190 (1912); see also, e.g., Montenurro v. INS, 409 F.2d 832 (9th Cir. 1969)(Mexican divorce "not entitled to recognition by virtue of the Full Faith and Credit Clause … but rather was governed by considerations of comity"); VF Jeanswear Ltd. V. Molina, 320 F.Supp.2d 412, 417 (M.D.N.C. 2004)(business dispute; same general principles). Rhode Island follows this view. Jewell v. Jewell, 751 A.2d 735, 739 (R.I. 2000)(refusing to accord comity to a purported Dominican Republic divorce).

positive law from marrying without his guardian's assent at home, traveled to Massachusetts to marry).

Rhode Island's marriage celebration rule has three central components. The first is the presumption of a valid marriage's continuing vitality. Id. at 980. The second is the refusal to test the validity of the out-of-state marriage under Rhode Island's own marriage licensing laws. Id. That is, Rhode Island officials test the validity of the marriage by the laws of the place where the parties actually married and not by the state's own marriage licensing laws. Id. at 979 ("We think it is clear that the [Rhode Island] statutes relied upon can have no direct application to this marriage, for it was celebrated in another state, under the provisions of other laws."); id. at 980 ("[T]he capacity or incapacity to marry depends on the law of the place where the marriage is celebrated, and not on that of the domicile of the parties.") In this sense, whether or not the marriage would have been licensed in Rhode Island is completely irrelevant to the question of marriage recognition. Cf. Sardonis v. Sardonis, 261 A.2d 22, 23 (R.I.,1970) (reaffirming notion that common law marriage in Rhode Island might be valid even where couple did not attempt to comply "with the statutory provisions relative to the licensing and solemnization of marriages.")

Third, the "odious" exception to the marriage recognition rule is exceedingly narrow. This exception requires a showing that the competing state's law is deeply offensive to some fundamental, well-established Rhode Island value. Chace, 58 A. at 980 (favorably citing Medway v. Needham, 16 Mass. 157 (1819) in which a Rhode Island marriage of Massachusetts domiciliaries was held to be deserving of recognition in Massachusetts even though it violated a Massachusetts criminal prohibition on mixed-

race marriages and the couple intentionally married in Rhode Island to evade that criminal prohibition). The only marriages thought to fall within this exception, though none have been found to do so by Rhode Island courts, are polygamous and closely consanguineous marriages.[8] Chace, 58 A. at 980.

As applied here, the parties' marriage must be recognized for purposes of entertaining the competing divorce petitions because the marriage does not fall within the narrow "odious" exception to Rhode Island's general rule of marriage recognition. To date, Rhode Island has never refused to recognize a marriage because it is "odious by the common consent of nations"[9] or "dangerous to the fabric of society." Chace, 58 A. at 980. The marriage of a same-sex couple presents no reason for state officials to depart from past practice.[10] On October 19, 2004, for example, Attorney General Lynch issued

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[8] Notably, Rhode Island itself does not always consider the marriages of closely-related couples to be "odious." See In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953) (recognizing Rhode Island marriage between New York domiciliaries who were uncle and niece because marriage fell within authorized exception in Rhode Island law even though incestuous marriages are usually "offensive to the public sense of morality to a degree regarded generally with abhorrence.").

[9] It would be impossible to conclude that a marriage of persons of the same-sex would be "odious by the common consent of nations" when marriage between same-sex couples is increasingly becoming a legal option. Same-sex couples are now permitted to marry in Massachusetts along with Canada, the Netherlands, Belgium, Spain, and South Africa. See Halpern v. Canada (Attorney General), 65 O.R. (3d) 161 (2003); *Staatsblad van het Koninkrijk der Nederlanden* 2001, nr. 9 (11 January) (Official Journal of the Kingdom of the Netherlands, Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex); 13 FEVRIER 2003, Loi ouvrant le mariage à des personnes même sexe et modifiant certaines dispositions du Code civil. Moniteur Belge, 28.02.2003, p. 9880 (Belgium's marriage statute); Marriage Act 30, June 2005 (royal assent 1 July 2005) (Spain's marriage act: *Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio*); Minister of Home Affairs and Another v Fourie and Another, 2006 (3) BCLR 355 (CC) (South Africa).

[10] An out-of-state marriage, like that of the parties, cannot be deemed "odious" by reference to Rhode Island's marriage licensing laws given that even "void" and "prohibited" marriages have been deemed "non-odious" under the state's own rule of

a legal opinion to the State Treasurer saying that a same-sex spouse married in Massachusetts is entitled to spousal benefits under the Rhode Island Teacher's Retirement System as a matter of statutory interpretation. See Letter from Attorney General Patrick C. Lynch, to Hon. Paul J. Tavares, General Treasurer (Oct. 19, 2004), attached hereto as Exhibit B. Similarly, the Legislature has considered and repeatedly refused to adopt legislation singling out the marriages of same-sex couples for disrespect by the state.[11]

In addition, as evidenced by its laws and judicial decisions, Rhode Island increasingly regards same-sex partnerships with respect and tolerance, negating any basis for the application of the "odious" exception to the general rule of respect. The state extends health insurance benefits to the domestic partners of state employees. Gen. Laws § 36-12-1 et seq. The Legislature has enacted numerous other measures to provide same-sex domestic partners with legal rights and benefits otherwise reserved to spouses. [Cite family leave law; line of duty benefits]. It has also extended protections against discrimination based on sexual orientation in employment, public accommodations, housing, credit, residential real estate and state services. Gen. Laws §§ 28-5-2 to 28-5-14; §§ 11-24-2 to 11-24-2.1; §§ 34-37-1 to 34-37-5.4; §§28-5.1-4 to 28-5.1-14; see also Gen. Laws § 23-17.16-2 (protecting home health care patients against sexual orientation discrimination); Gen. Laws § 16-76.1-1 (addressing harassment in higher ed. based on

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marriage recognition. Chace, 58 A. at 980 ("[E]ven assuming that the marriage [of a ward without the requisite permission of his guardian] would have been void in this state, ... it was lawfully celebrated in Massachusetts, [and thus] it must be considered valid here."). Thus, whether or not the parties' marriage would be "void" or "prohibited" under Rhode Island law is irrelevant and need not be further considered.

[11] See 1997 – H 5808; 2000 – H 7552: 2004 – H 7571, H 7395, S 2583, S 2663 and H 8223 (proposed non-binding referendum); 2005 – S 0846; 2006 – [cite].

various factors, including sexual orientation). The State also monitors crimes of bias and bigotry on account of sexual orientation, among other things. Gen. Laws § 42-28-46 and § 12-19-38. Notably, the Legislature also decriminalized sodomy for all citizens of Rhode Island in 1998, whether of the same-sex or opposite-sex. See, e.g., Gen. Laws § 11-10-1. In addition, Rhode Island's growing acceptance of same-sex partnerships has also been manifested in the decisions of its courts. See Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (recognizing de facto parenthood rights for lesbian parent); Doe v. Burkland, 808 A.2d 1090 (R.I. 2002) (allowing for the equitable division of property between same-sex partners upon dissolution of relationship). Even in the unlikely finding by this Court that the "odious" exception applies to the existence of same-sex marriages what could possibly be "odious" about dismantling them as Chambers seeks herein? Clearly, based on jurisdictional grounds alone, the parties have nowhere else to obtain a dissolution of their marriage, the Rhode Island State Courts standing alone as the means to their unhappy end.

In sum, particularly in the current posture of this action, the comity law of Rhode Island should lead this Court to recognize the present marriage for purposes of divorce, thus rendering unnecessary and irrelevant any further analysis of the Full Faith and Credit Clause of the United States Constitution.

III. WHETHER OR NOT THE DEFENSE OF MARRIAGE ACT, 28 USC §1738C (2000) IS PERTINENT TO THE INSTANT CASE.

Most simply, 28 U.S.C. §1738C[12] has no bearing whatsoever on the present case. The federal statute does not speak to the fundamental question at issue in the instant case,

[12] 28 U.S.C.A §1738C, entitled "Certain acts, records, and proceedings and the effect thereof," states: "No State, territory, or possession of the United States, or Indian tribe,

i.e., whether as a matter of comity, Rhode Island will recognize the validity of the parties' Massachusetts marriage for the purpose of entertaining this divorce petition in the Family Court.

This is so because, at most, §1738C is solely a "permission slip" from Congress to the States for each to decide for itself whether or not it wants to extend recognition to the marriages of same-sex couples. See, e.g., Smelt v. County of Orange, 447 F.3d 673, 683 (9th Cir. 2006)(§1738C "in effect, indicates that no state is *required* to give full faith and credit to another state's determination [to allow same-sex couples to marry]" (emphasis in original)).

The text of §1738C makes this quite clear in stating that no state "shall be required to give effect" to a marriage of a same-sex couple.[13] And this is amply confirmed by the Congressional Report concerning the enactment of §1738C, H.R. Rep. 104-664, 1996 U.S.C.C.A.N. 2905, which repeated emphasizes that §1738C simply "preserves each State's ability to decide the underlying policy issue however it chooses." Id. at 2906; see also id. at 2921 ("protect[ing] the ability of the elected officials in each State to deliberate on this important policy issue free from the threat of federal constitutional compulsion"); id. at 2929 (nothing in DOMA "would either prevent a State on its own from recognition same-sex marriages, or from choosing to give binding legal effect to same-sex marriage licenses issued by another State"); id. at 2929 n.61 (if a State

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shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

[13] It is also worth noting that Section 2 of the so-called Defense of Marriage Act which added §1738C to the United States Code was entitled "Sec. 2. Powers Reserved to the States." Public Law 104-199 [H.R. 3396], Sept. 21, 1996.

applies its own "choice of law or other principles" to "recognize as valid" a marriage of a same-sex couple from another State, "in that situation too [§1738C] has no effect"); id. at 2931 (§1738C "does not, of course, determine the choice-of-law issue"; when a State is faced with a marriage license of a same-sex couple from another State, "the State will still have to decide whether to recognize the couple as married"); and id. at 2934 (§1738C "does not mandate" disrespect of any marriage).

Therefore, in the current posture of this action, raising state law questions of comity, 28 U.S.C. §1738C is not pertinent to the instant case because the federal statute neither provides any guidance nor mandates any conclusion to the question before the court.[14]

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[14] Section 1738C only conceivably becomes relevant if the Full Faith and Credit Clause becomes relevant (which would be contrary to the undersigned's argument in Section II above that the Full Faith and Credit Clause is, in fact, not relevant). In that circumstance, if a court were to determine that it was compelled by the Full Faith and Credit Clause to give conclusive effect to the marriage of a same-sex couple from Massachusetts, the next question would be whether §1738C worked to eliminate that full faith and credit compulsion.

It was rather clearly Congress' intent to create that exact result. See H.R. Rep. 104-664, 1996 U.S.C.C.A.N. 2905, 2921 ("By taking the Full Faith and Credit Clause out of the legal equation surrounding the Hawaii situation ..."); id. at 2931 (§1738C "does mean that the Full Faith and Credit Clause will play no role in [a State's] choice of law determination ...").

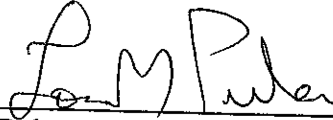
Although §1738C would thus seem to perhaps remove Full Faith and Credit from any consideration with respect to the marriages of same-sex couples, serious questions have been raised about the constitutionality of §1738C, both as a matter of the power of Congress under the Effects Clause of the Full Faith and Credit Clause and also under other substantive provisions of the federal constitution. See, e.g., Koppelman, "Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional," 83 Iowa L. Rev. 1 (1997); Tribe, "American Constitutional Law §6-35, p. 1247 n.49 (3d ed. vol.1, 2000)(§1738C is "of dubious validity" because the Effects Clause "cannot plausibly be construed to empower Congress to prescribe that states may choose to give *no effect at all* to an entire category of official state Acts" (emphasis in text)).

To the extent the Rhode Island Supreme Court has weighed in on the general question of Congressional authority under the Effects Clause, it has taken the view that it

IV. CONCLUSION

It is respectfully averred that the Family Court of the State of Rhode Island may properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same-sex who were married in another State.

Respectfully Submitted,



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"... could not add anything to the scope of the credit clause itself." McGrath v. Tobin, 81 R.I. 415, 423 (1954).

The Undersigned hereby certifies that a copy of the within brief was sent by regular mail, postage prepaid, to Nancy A. Palmisciano Esquire, 665 Smith Street, Providence, Rhode Island, 02908; David Strachman, Esquire McIntyre, Tate & Lynch, LLP, 321 South Main Street, Providence, Rhode Island, 02903; Thomas R. Bender, Esquire, Hanson Curran, LLP, 146 Westminster Street, Providence, Rhode Island, 02903; Gary D. Buseck, Legal Director, Gay & Lesbian Advocates & Defenders, 30 Winter Street, Suite 800, Bosotn, Ma,02108.