STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

MARGARET CHAMBERS Plaintiff,	:	
	:	Case No. 06-340-M.P.
v.	:	(Family Court 06-2583)
	:	
CASSANDRA ORMISTON Defendant.	:	

ON A CERTIFIED QUESTION OF LAW FROM THE FAMILY COURT

BRIEF OF AMICUS CURIAE MARRIAGE EQUALITY RHODE ISLAND

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STATEMENT OF INTEREST OF AMICUS CURIAE

Marriage Equality Rhode Island (MERI) is a statewide coalition of over 5,000 individuals and nearly 100 organizations that seeks legal recognition of same-sex couples through civil marriage in Rhode Island. MERI formed as an *ad hoc* coalition in 2003, on the heels of the Massachusetts Supreme Judicial Court's *Goodridge* decision that granted marriage rights to same-sex couples there. MERI is pursuing independent 501(c)(3) and 501(c)(4) incorporation and presently operates under the fiscal agency of Ocean State Action (OSA) and the Ocean State Action Fund (OSAF), a coalition of nineteen progressive community organizations and labor unions fighting for social, racial, economic, and environmental justice.

MERI believes that a civil society guarantees to all of its citizens certain civil rights; civil marriage is one of these fundamental rights. Consequently, MERI also believes that all Rhode Island couples deserve access to marriage, regardless of gender or sexual orientation. MERI works to educate the public about marriage discrimination and its impact on Rhode Island families, engage people in civic discourse, and advocate for legislation that supports the rights of all to marry. MERI respectfully submits this brief to share with the Court its expertise in the history and evolution of Rhode Island law and policy regarding marriage rights for Rhode Island's lesbian, gay, bisexual and transgender (LGBT) individuals and same-sex couples.

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?

INTRODUCTION

Marriage Equality Rhode Island (MERI) respectfully urges this Court to answer the certified question in the affirmative without making a pronouncement on whether the marriage licensing laws of Rhode Island allow or prohibit same-sex couples from marrying in Rhode Island. *See* Section III, *infra.* Rhode Island law does not expressly prohibit same-sex couples from marrying in Rhode Island or in another jurisdiction, and this Court may answer the pending certified question in the affirmative without commenting upon whether Rhode Island's same-sex couples may practically or legally marry in Rhode Island. *See* Sections II and III, *infra*.

At present, Rhode Island same-sex couples may marry in Massachusetts on the same terms that Rhode Island's different-sex couples may marry there. *See* Section I, *infra*. Yet, as a matter of Massachusetts law, the continued availability of marriage in Massachusetts for Rhode Island's same-sex couples turns upon the continued absence of any express statement in Rhode Island's positive law (i.e., its constitution, statutes, or controlling appellate decisions) prohibiting same-sex couples from marrying in Rhode Island. *See Cote-Whitacre v. Dept. of Pub. Health*, 446 Mass. 350, 844 N.E.2d 623 (2006); *see also* Section I, *infra.*

Yet, if this Court were to take this occasion to make a pronouncement on whether Rhode Island's marriage licensing laws permit or prohibit same-sex couples to marry in Rhode Island -- a question that is not before this Court and need not be answered by it on this occasion -- this Court's pronouncement, although technically dicta, might cause confusion in Massachusetts and cause Massachusetts courts and officials to question whether it constitutes an express prohibition in Rhode Island law on marriage for same-

sex couples for purposes of Massachusetts's so-called "1913 law," Mass. Gen. Laws ch. 207, §§11-12. *See* Section III, *infra*. As such, it would unnecessarily threaten a dramatic and abrupt change in the status quo: the closing of the Rhode Island-Massachusetts border for Rhode Island same-sex couples who seek to marry in Massachusetts. *Id*.

The status quo need not and should not be changed by the Court on this occasion. *See* Sections III and IV, *infra*. Since September 29, 2006, when the Massachusetts court made its narrow ruling authorizing Massachusetts clerks to treat alike Rhode Island's same-sex couples and different-sex couples when they apply for marriage licenses in Massachusetts, Rhode Island has embraced the fact that its same-sex couples may marry in Massachusetts. *See generally* Section IV, *infra*. The Legislature has repeatedly refused to change Rhode Island's marriage licensing laws or otherwise thwart the ability of Rhode Island's same-sex couples to marry in Massachusetts. *See* Section IV.A, *infra.* In the public sector, local governments and other public entities are respecting the spousal status of Rhode Island's same-sex couples. *See* Section IV.B, *infra.* In the private sector, companies have likewise decided to respect the spousal status of these couples within Rhode Island. *Id*.

Simply put, the Legislature has chosen not make any express declarations in Rhode Island marriage laws regarding same-sex couples, and if this Court nonetheless were to make such a declaration here, it would have significant adverse, collateral consequences for Rhode Island's same-sex couples. In the absence of a certified question requiring the Court to wade into that area of the law, MERI urges the Court to resolve the pending question without unnecessarily opining upon abstract legal questions that are not squarely before the Court. *See* Section III, *infra.*

POINTS

I. FACTUAL AND LEGAL BACKGROUND

A. Overview of Rhode Island Same-Sex Couples' Ability to Marry in Massachusetts.

Same-sex couples became eligible to marry in Massachusetts on May 17, 2004. *See Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (declaring it unconstitutional to exclude same-sex couples from obtaining marriage licenses and staying its decision for 180 days until May 17, 2004). From the outset, same-sex couples from Rhode Island took advantage of the opportunity to marry in Massachusetts as well. However, the Commonwealth of Massachusetts contended that the so-called "1913 law," Mass. Gen. Laws ch. 207, §§11-12, forbade all out-of-state same-sex couples from marrying in Massachusetts. As a result of litigation concerning the Commonwealth's position, on September 29, 2006, a Massachusetts court determined that, as of May 17, 2004, no impediment existed in Massachusetts law to the marriage of Rhode Island same-sex couples within Massachusetts, thus rejecting the Commonwealth of Massachusetts's initial contention that the 1913 law legally impeded Rhode Island's same-sex couples who sought to (or actually did) marry in Massachusetts. *See Cote-Whitacre v. Dep't. of Pub. Health*, 21 Mass. L. Rptr. 513, 514, 2006 WL 3208758 at *2 (Mass. Super., Sept. 29, 2006) (on remand). Thus, starting May 17, 2004 (and continuing to present day), Rhode Island same-sex couples were (and are) eligible to marry in Massachusetts regardless of the ongoing vitality of Mass. Gen. Laws ch. 207, §§11-12.

B. The Massachusetts "1913 Law"

This "1913 law" -- Sections 11 and 12 of Chapter 207 of the Massachusetts General Laws -- is a long-ignored statute, with no corollary in Rhode Island, that forbids

non-residents from marrying in Massachusetts if the couple's marriage would be "prohibited" or "void if contracted" in the couple's home state. *Cote-Whitacre,* 844 N.E.2d at 636-37 (Spina, J., concurring).

In 1913, the Massachusetts Legislature enacted §§11 and 12 as part of a (now withdrawn) uniform law called the Uniform Marriage Evasion Act ("UMEA"). The UMEA was "intended to promote general uniformity in the prohibitory laws" of each state by precluding non-residents from marrying in a second state if the non-residents were expressly prohibited from entering into the marriage in their home state.[1] *Cote-Whitacre,* 844 N.E.2d at 644 (Marshall, C.J., concurring). The uniform law was conceived because every state in the nation -- including Rhode Island -- regularly provided marriage licenses to couples resident in other states despite well-acknowledged differences in the marriage laws from state to state. *See generally, Proceedings of the Twenty-Second Annual Conference of Commissioners on Uniform State Laws* held at Milwaukee, Wisconsin, August 21, 22, 23, 24, and 26, 1912, Report of the Committee of Marriage and Divorce, pp. 125-29.

The UMEA was an anomaly in the American legal landscape when it was proposed and thereafter. Only five states (including Massachusetts) ever enacted, in full

[1] The final report of the Uniform Commission's Committee on Marriage and Divorce bluntly acknowledged that the law, if adopted by states, would give effect to the prohibitory laws of States, including those barring marriage between "a white person and a colored person." *See generally, Proceedings of the Twenty-Second Annual Conference of Commissioners on Uniform State Laws* held at Milwaukee, Wisconsin, August 21, 22, 23, 24, and 26, 1912, Report of the Committee of Marriage and Divorce, Comment 4, pp. 127-28. Anti-miscegenation laws barring whites from marrying non-whites existed in 30 of 48 states by the end of 1913. *See* Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law – An American History* (2002), Figure 8.

or in substance, the UMEA,[2] and the Commissioners on Uniform State Laws withdrew it in 1943 after concluding that, in the absence of its widespread adoption, "it merely tend[ed] to confuse the law."[3] *See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Fifty-Third Annual Conference* (1943), p. 64.

Section 11 is a "reverse evasion" statute, providing:

> No marriage shall be contracted in this commonwealth 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, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

Mass. Gen. Laws. ch. 207, §11. Section 12 governs the marriage licensing responsibilities of municipal clerks and provides:

> Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is *not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.*

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[2] *See* 1915 Ill. Laws 496; 1914 La. Acts 151; 1912 Vt. Acts & Resolves 110; 1915 Wisc. Stat. 270.

[3] Massachusetts is one of now only six states to maintain a version of the Uniform Marriage Evasion Act on its books. The three states that maintain this uniform law in addition to Massachusetts include Illinois, Wisconsin, and Vermont. 750 Ill. Comp. Stat. 5/217; Wis. Stat. Ann. §765.04; Vt. Stat. Ann. Tit. 15, §6. Louisiana repealed its law in the wake of *Loving v. Virginia,* 388 U.S. 1 (1967). 1972 La. Acts 171. In 1957 and 1979, Wyoming and New Hampshire enacted reverse evasion statutes of their own. *See* Wyo. Stat. Ann. §20-1-103; N.H. Rev. Stat. §457:44.

Mass. Gen. Laws ch. 207, §12 (emphasis added). The Massachusetts Legislature adopted §§11 and 12 (along with §10[4]) verbatim from the 1912 recommendations of the Commissioners on Uniform Laws.[5]

Until 2004, there is no known instance of Massachusetts ever having applied §§11-12 to prevent an out-of-state couple from obtaining a marriage license. There is also no known instance of any other state having evaluated a marriage license application based upon the laws of the non-resident's home state until Massachusetts resurrected the 1913 law in 2004.

C. The Massachusetts Administrative Response to *Goodridge*

Equal marriage rights for same-sex couples in Massachusetts are firmly established. Recently, the Massachusetts Legislature, sitting in a joint session as a constitutional convention, defeated a citizen-initiated petition to amend the Massachusetts constitution to take away marriage rights by a vote of 151 to 45.[6] This latest action follows a September, 2005 Massachusetts constitutional convention that voted to defeat a

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[4] Section 10 is an "evasion" statute that operates to void the marriages of Massachusetts residents who leave the Commonwealth to marry in evasion of any express law in Massachusetts that would deem such marriages "void" if entered within Massachusetts. *See* Mass. G. L. c. 207, §10. Long before Massachusetts adopted the UMEA, Massachusetts marriage-licensing laws already contained an "evasion" statute. *See* Mass. R.S. 1836, c. 75, § 6 (voiding marriages of residents conducted outside the state for purposes of evading Massachusetts's express statutory prohibitions).

[5] *See* Mass. St. 1913, c. 360, §§ 1-3 and *Proceedings of the Twenty-Second Annual Conference of the Commissioners on Uniform State Laws*, Report of the Committee on Marriage and Divorce, p. 125 and text of Act at pp. 129-30.

[6] *See* Frank Phillips, *Legislators vote to defeat same-sex marriage ban*, Boston Globe, June 14, 2007, http://www.boston.com/news/globe/ city_region/breaking_news/ 2007/06/legislators_vot_1.html. To have appeared on the November 2008 ballot, this citizen-initiated amendment would have required the approval of at least 50 of 200 members of the legislature convened in constitutional convention. Mass. Const., art. 48, § 4. On June 14, 2007, the measure failed to garner the requisite number of votes. Phillips, supra.

legislatively-initiated state constitutional amendment to provide civil union licenses to same-sex couples instead of marriage licenses. *See* Massachusetts Journal of the Senate in Joint Session, September 14, 2005 (evidencing the rejection of the 2004 legislative proposal by a vote of 39-157).

Yet, immediately after the *Goodridge* opinion issued, there was a brief period of unease, during which Massachusetts officials struggled to understand and implement the *Goodridge* decision.[7] During that unsettled period and only a few weeks before Massachusetts was scheduled to issue marriage licenses to same-sex couples, the Governor of Massachusetts decided to commence enforcement of the long-ignored 1913 law. *See also* Pam Belluck, *Romney Won't Let Gay Outsiders Wed In Massachusetts*, N.Y. TIMES, April 25, 2004, at A1.

Relying upon §§11-12, Governor Romney instructed all municipal clerks to deny marriage licenses to all out-of-state same-sex couples unless the couples intended to move to Massachusetts after their marriages. *Id.* The Governor contended that the 1913 law required out-of-state couples to be able to marry in their home states in order to qualify for marriage in Massachusetts without becoming Massachusetts residents. *See Cote-Whitacre*, 844 N.E.2d at 652 n. 1 and 657-59 (Marshall, C.J., concurring).

With respect to Rhode Island, the Commonwealth expressed its reason for barring marriage to all Rhode Island same-sex couples in its 57-page guide listing the marriage laws of other U.S. states and territories, which provided, in relevant part: "Marriage between same-sex persons in Rhode Island is not permitted in Rhode Island." *See, e.g.*,

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[7] *See, e.g., Opinions of the Justices to the Senate,* 440 Mass. 1201, 802 N.E.2d 565 (2004) (evidencing the Legislature's consideration of a civil union bill designed to provide same-sex couples with civil union licenses instead of marriage licenses).

Commonwealth of Massachusetts's June 21, 2005 Guide at http://www.mass.gov/Eeohhs2/docs/dph/vital_records/impediment.pdf. At the time, Massachusetts officials ignored the fact that the marriage laws in certain states -- like Rhode Island -- had no express prohibition against a same-sex couple marrying at home. *See Cote-Whitacre*, 844 N.E.2d at 652 n.1 and 657-59.

Statements from prominent public officials raised serious questions about whether the Massachusetts law was being appropriately implemented by Governor Romney, especially with respect to the filing of marriage license applications[8] by same-sex couples from Rhode Island. *See* Pam Belluck, *New Pall Falls on Gay Wedding Hopes,* N.Y. Times, March 30, 2004 at A-14 (evidencing Massachusetts then-Attorney General Thomas Reilly's statement that the 1913 law would only ban out-of-state same-sex couples living in the 38 states that expressly exclude same-sex couples from marriage). *See also* Rhode Island Attorney General Patrick Lynch's Statement Concerning Same-Sex Marriage, 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 and fact that

[8] To start the marriage process in Massachusetts, marriage license applicants file a "Notice of Intention of Marriage" form at any city or town hall in the Commonwealth. Mass. Gen. Laws ch. 207, §19. Thereafter, the municipal clerk issues the applicant couple a Certificate of Marriage on or after the third day from the filing of the Notice (unless a court waives the 3 day waiting period). Mass. Gen. Laws ch. 207, §§19, 28, 30. With the Certificate of Marriage in hand, an authorized officiant may solemnize the marriage. Mass. Gen. Laws ch. 207, §§38-39. After solemnization, the officiant fills out the portion of the Certificate regarding the time and place of the ceremony, signs it, and returns it to the city or town clerk who issued it. Mass. Gen. Laws ch. 207, §40. The clerk then records the marriage in the municipal registry, Mass. Gen. Laws ch. 46, §§1-2; retains a certified copy of the Certificate; and sends the original to the state Registrar of Vital Records and Statistics. Mass. Gen. Laws ch. 46, §17A. The Commissioner of Public Health then binds the original records of marriage, along with an index, and retains their custody Mass. Gen. Laws ch. 111, §2. The relevant Chambers-Ormiston marriage complied with these statutory formalities.

marriage for same-sex couples is not one of the types of marriages declared "void" in Rhode Island statutes).

Moreover, some municipal clerks questioned the Governor's implementation and seemingly novel interpretation of §§11-12 to exclude 100% of the non-resident same-sex couples from throughout the United States and, thus, allowed out-of-state same-sex couples to marry in Massachusetts on the same terms and under the same procedures that the clerks had long used to process the marriage applications of different-sex couples.[9] *See Cote-Whitacre*, 844 N.E.2d at 634-35 (Spina, J., concurring).

In this context, Margaret Chambers and Cassandra Ormiston -- the divorce petitioners directly before this Court on the certified question pursuant to R.I. Gen. Laws §9-24-27 (1956) – obtained a marriage license from, and had their marriage solemnized by, the Fall River, Massachusetts municipal clerk on May 26, 2004.

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[9] In the case of Rhode Island couples, the actions of these clerks were later validated by the Massachusetts courts. *See Cote-Whitacre*, 844 N.E.2d at 631, and on remand, *Cote-Whitacre,* 21 Mass. L. Rptr. at 514, 2006 WL 3208758 at *2 (establishing that §§11-12 did not apply to Rhode Island's same-sex couples at all, and thus, such marriages were perfectly valid and carry no defect as a result of Mass. Gen. Laws ch. 207, §§11-12).

For couples from other states, the consequences of contracting a marriage in violation of §§11-12 vary depending upon the non-resident couple's particular home state. To the extent an out-of-state same-sex couple who married in Massachusetts came from a state that would have declared their marriage "void" if contracted at home (*e.g.*, Maine), the couples' resulting marriage would violate §11 and be deemed void as a matter of Massachusetts law. *See Cote-Whitacre*, 844 N.E.2d at 636-37 and n. 8 (Spina, J., concurring). If an out-of-state same-sex couple who married in Massachusetts hailed from a state that would have "prohibited" their marriage -- but not declared it "void" -- if contracted at home (*e.g.*, Vermont, Connecticut, New Hampshire), the couples' resulting marriage would violate §12 and be considered "voidable" as a matter of Massachusetts law. *Id*. at 637-38 and n. 10-11. Under Massachusetts law, a "voidable" marriage is presumptively valid. *Id*. at 637 n. 10. Assuming, *arguendo*, that the right of Rhode Island couples to marry in Massachusetts had not been validated on September 29, 2006, in a worst case scenario, the already-completed marriages by Rhode Island couples would still have been "voidable," and thus presumptively valid, as a matter of Massachusetts law.

D. The *Cote-Whitacre* Litigation

Eight non-resident same-sex couples from the New England states and New York filed the *Cote-Whitacre* lawsuit in Massachusetts Superior Court seeking to enjoin, on statutory and constitutional grounds, Massachusetts officials from administering the 1913 law to bar otherwise qualified non-resident same-sex couples from obtaining marriage licenses in Massachusetts.[10]

On March 30, 2006, the Supreme Judicial Court issued its decision on the Plaintiffs' Motion for Preliminary Injunction. *See Cote-Whitacre*, 844 N.E.2d at 623. Though affirming in large part the trial court's denial of the plaintiffs' motion for injunctive relief, a majority of the Justices -- led by Chief Justice Marshall's concurring opinion -- concluded that the Commonwealth's interpretation of Section 12[11] was overly

[10] For a comprehensive summary of the factual and procedural background of this matter, *see Cote-Whitacre*, 844 N.E.2d at 631-35 (2006) (Spina, J., concurring) (affirming denial of motion for preliminary injunction) and *Cote-Whitacre v. Dept. of Pub. Health*, 21 Mass. L. Rptr. at 514, 2006 WL 3208758 at *1 (Mass. Super. Ct. 2006) (on remand).

[11] With respect to Section 11, the court was unanimous in its view that Section 11, by its terms, precludes and renders void only those marriages of non-resident couples whose home State would expressly declare the marriage "void" if entered there. Mass. Gen. Laws ch. 207, §11; *Cote-Whitacre*, 844 N.E.2d at 636, 655-56 (recognizing that "the narrow and specific language of §11" is triggered when "the relevant statutory language of the applicant's home State explicitly provides that particular marriages are 'void.'"). With respect to Rhode Island, all of the justices concurred in their assessment that Rhode Island's marriage licensing statutes do not declare the marriages of same-sex couples "void." *Id*. at 636 n.9 (Spina, J., concurring) ("In Rhode Island, the legal impediments to marriage include (1) consanguinity or affinity (except as specifically provided); (2) bigamy; (3) lack of mental competence; and (4) age (except as specifically provided). See R.I. Gen. Laws § § 15-1-1, 15-1-2, 15-1-4, 15-1-5, 15-2-11 (LexisNexis 2003)."). *See also Cote-Whitacre*, 844 N.E.2d at 639 n.12 (making clear Justice Spina's view that Rhode Island is one of those "very few States" where "there has been no constitutional or statutory pronouncement on the matter [of marriage for same-sex couples].").

broad and implicated the selective enforcement doctrine, and therefore, directed that the case be remanded for a determination of whether Rhode Island and New York same-sex couples were outside the reach of §12, properly construed:

> [T]he record leaves no question that the Commonwealth has applied G.L. c. 207, §12, in a manner purposely intended to deny any non-resident same-sex couple the opportunity to marry in Massachusetts. … This is a classic case of unequal enforcement. See Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L.Ed. 220 (1886) (unequal enforcement of laws regulating laundries to disadvantage Chinese business owners).
>
> In my view, both the requirements of G.L. c. 207, §12, and the requirements of equal protection demand that nonresident same-sex couples who wish to marry in Massachusetts, and who reside in States where they are *not expressly prohibited from marrying by statute, constitutional amendment, or controlling appellate court decision*, be permitted, at the very least, to present evidence to rebut the Commonwealth's claim that their home State would prohibit their marriage.

Cote-Whitacre, 844 N.E.2d at 658-59 (Marshall, C.J., concurring) (emphasis added); *id*. at 668 (Ireland, J., dissenting). *See also id.* at 631 (rescript).

On remand, the Massachusetts trial court determined that Chief Justice Marshall's concurring opinion set forth the proper and controlling interpretation of Mass. Gen. Laws ch. 207, §12, such that, when properly construed, Section 12 only bars the marriage of out-of-state same-sex couples in Massachusetts if the couples' respective home states' positive law (*i.e.*, by constitutional amendment, statute, or controlling appellate decision) contains an express pronouncement against the issuance of marriage licenses to same-sex couples in that state. *See Cote-Whitacre*, 21 Mass. L. Rptr. at 514, 2006 WL 3208758 at *2 (Mass. Super. Ct. 2006).

In the remanded proceedings, the Commonwealth of Massachusetts defendants argued that the trial court should interpret the gendered terms and consanguinity

provisions in Rhode Island marriage licensing laws to be an impediment to marriage in Rhode Island for purposes of Section 12. Yet, the trial court, following Chief Justice Marshall's lead, rejected that approach on the grounds that the Massachusetts court was strictly disempowered from conducting any such interpretative analysis[12] and rejected the argument that such statutory considerations constituted an express prohibition for purposes of Section 12. *See Cote-Whitacre*, 21 Mass. L. Rptr. at 516, 2006 WL 3208758 at *4.

Finding no statement expressly forbidding the marriage of same-sex couples in Rhode Island's positive law (*i.e.*, by constitutional amendment, statute, or controlling appellate decision), the trial court entered judgment in favor of the Rhode Island plaintiffs, thus allowing them to marry and validating the licenses already issued to otherwise qualified same-sex couples from Rhode Island. *See Cote-Whitacre*, 21 Mass. L. Rptr. at 514, 2006 WL 3208758 at *2 (Mass. Super. Ct. 2006) (on remand). The Commonwealth did not appeal this ruling.

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[12] Chief Justice Marshall made clear that a Massachusetts court, when examining another state's laws pursuant to Section 12, should not resort to interpretative processes, such as examining the common law of another jurisdiction "to fill in the gaps and interstices of statutes." *See, e.g.*, *Cote-Whitacre*, 844 N.E.2d at 655 n.4. This is because Section 12 "directs [Massachusetts] courts to employ a specific set of criteria for determining the law of another State." *Id*. In the absence of a direct statement on the question, to allow the Commonwealth to roam the law of another state to predict or divine the meaning of that state's laws, would be, in Justices Marshall's words, to invite the Commonwealth "to act as the final arbiter of the penumbras of another State's 'continually evolving' common law on same-sex marriage, and only same-sex marriage," *id*. at 653; "to cherry-pick the pronouncements as to same-sex marriage to which it will give credence," *id*.; to do "serious damage to the principle of limited government," *id*.; and to go beyond the intent of Section's 12 enactors whose choice of words "urge [] restraint when determining which marriages the Legislature intends to declare 'prohibited.'" *Id*. at 656. In a separate opinion, Justice Ireland agreed with Chief Justice Marshall on this limited approach. Id. at 668

E. *Cote-Whitacre* Litigation Concerning New York

Along with Rhode Island couples, the SJC invited the *Cote-Whitacre* plaintiff couple from New York to present evidence, on remand, to rebut the Commonwealth of Massachusetts's claim that the 1913 law prohibited their marriage in Massachusetts. *See Cote-Whitacre*, 844 N.E.2d at 631 (rescript). In late spring of 2006, when the Massachusetts trial court was first faced with the obligation to evaluate the right of New York same-sex couples to marry in Massachusetts, pending before the New York Court of Appeals were several consolidated affirmative marriage cases, which presented New York's high court with the first opportunity to squarely address the right of same-sex couples to marry in New York. *Hernandez v. Robles*, 7 N.Y.3d 338, 356-57, 855 N.E.2d 1, 5 (2006).[13] The plaintiff couples in *Hernandez* contested their exclusion from marriage in New York on statutory and constitutional grounds.

On July 6, 2006, the New York Court of Appeals upheld the constitutionality of New York's marriage licensing laws after interpreting New York's marriage licensing laws to prohibit same-sex couples from marrying in New York. With this July, 2006 decision, the New York high court definitively precluded same-sex couples from marrying in New York. *Id.* In *Hernandez*, the Court interpreted the gendered terms in

[13] Four other affirmative marriage cases were effectively consolidated with *Hernandez* for the New York Court of Appeals' simultaneous determination. *See Samuels v. N.Y. State Dep't of Pub. Health*, 811 N.Y.S.2d 136 (N.Y.App.Div. 2006), *affirmed sub nom Hernandez v. Robles*, 7 N.Y.3d 338, 357, 855 N.E.2d 1, 5 (2006); *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (N.Y.App.Div. 2006), *affirmed sub nom Hernandez v. Robles*, 7 N.Y.3d 338, 357, 855 N.E.2d 1, 5 (2006); *Kane v. Marsolais*, 808 N.Y.S.2d 566 (N.Y.App.Div. 2006), *affirmed sub nom Hernandez v. Robles*, 7 N.Y.3d at 357, 855 N.E.2d at 5 (2006); *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y.Sup.Ct. 2004), *affirmed* 820 N.Y.S.2d 890 (2006) (directing affirmance for the reasons stated in *Hernandez v. Robles*, 7 N.Y.3d 338, 357, 855 N.E.2d 1, 5 (2006)). For present purposes, Amicus MERI uses the term "*Hernandez*" to refer to all five of these New York marriage cases unless the context requires otherwise.

New York's domestic relations law as a prohibition on New York's issuance of marriage licenses to same-sex couples and also declared the prohibition to be constitutional. *Id*.

On remand in *Cote-Whitacre*, the Massachusetts trial court determined that *Hernandez* constituted a "controlling appellate decision" in New York prohibiting same-sex couples from marrying in New York, and thus, disqualifying New York's same-sex couples from marrying in Massachusetts by virtue of Section 12. *See Cote-Whitacre*, 21 Mass. L. Rptr. at 514, 2006 WL 3208758 at *2 (Mass. Super. Ct. 2006) (on remand). Later, the Massachusetts court amended its initial ruling to clarify that no express prohibition existed in New York law for purposes of Section 12 prior to the New York Court of Appeals July 6, 2006 decision, and thus, any marriage licenses issued to New York same-sex couples in Massachusetts from May 17, 2004 through July 6, 2006 are valid. *See also* Amended and Final Judgment dated May 10, 2007 in *Cote-Whitacre*, http://www.glad.org/marriage/Cote-Whitacre/AmendedFinalJudgment.pdf; and Assented-To Motion for Amended and Final Judgment filed May 10, 2007, http://www.glad.org/marriage/Cote-Whitacre/CWAssentedtomotion.pdf; *See also* Pam Belluck, *Some Gay New Yorkers Gain in Ruling on Marriages*, N.Y. Times, May 15, 2007 (quoting Massachusetts Attorney General Martha Coakley: "[F]or the period between May 17, 2004, when same-sex marriage was legalized, to July 6, 2006, marriages of couples from New York are fully valid and did not and do not violate our general laws.").

II. THE FAMILY COURT SHOULD RECOGNIZE THE MARRIAGE OF MARGARET CHAMBERS AND CASSANDRA ORMISTON.

Margaret Chambers and Cassandra Ormiston married in Massachusetts. They have asked the Family Court to proceed with their pending cross-petitions for divorce, as

it does and has done in the case of every couple who has ever obtained a marriage license in any state, regardless of whether the "marriage-in-fact" is deemed valid, void, or voidable (*see* R.I. Gen. Laws §15-5-1 *et seq.* (1956)*;* R.I. Gen. Laws §8-10-3 (1956)) and regardless of whether Rhode Island would have permitted the couple to marry in Rhode Island in the first place (*see Ex parte Chace*, 26 R.I. 351, 58 A. 978 (1904); *cf. Sardonis v. Sardonis*, 261 A.2d 22, 23 (R.I. 1970) (recognizing that common law marriages need not conform to state licensing laws)).

Amicus MERI supports the right of the petitioners to proceed with their divorce petitions in the Family Court -- just as married different-sex couples do -- and adopts herein the arguments set forth by Amicus Gay & Lesbian Advocates & Defenders in its Amicus Brief to the Court (filed July 27, 2007).

III. THIS COURT SHOULD ANSWER THE PENDING CERTIFIED QUESTION WITHOUT OPINING ON WHETHER RHODE ISLAND'S MARRIAGE LICENSING LAWS PERMIT OR PROHIBIT SAME-SEX COUPLES TO MARRY WITHIN RHODE ISLAND.

Rhode Island's marriage licensing laws do not expressly ban the marriages of same-sex couples, and Rhode Island courts have yet to construe its marriage licensing statutes to determine whether same-sex couples are permitted to marry in Rhode Island.[14]

[14] Notably, Massachusetts also has not construed Rhode Island statutes in this regard. When it allowed same-sex couples from Rhode Island to marry in Massachusetts, the Massachusetts courts did not opine on whether Rhode Island's positive law permits same-sex couples to marry in Rhode Island. *See, e.g.*, *Cote-Whitacre*, 844 N.E.2d at 653 (Marshall, C.J., concurring) ("I pause to emphasize that the relevant question in this case is not what another State might do when confronted with two if its citizens of the same sex who wish to marry. The plaintiffs have asked us to interpret a statute, [Mass.] G.L. c. 207, §12, and we are obliged to do so in the way our Legislature intended.") Rather, the Massachusetts courts addressed a much more narrow question: whether an express statement prohibiting such marriages in Rhode Island existed in Rhode Island's statutes, constitutional amendments, or controlling judicial decisions. *Id.* at 653-54.

Regardless, the present case does not provide an occasion for this Court to determine how Rhode Island's marriage licensing statutes should be construed.

Margaret Chambers and Cassandra Ormiston never sought a Rhode Island marriage license. They have not asked Rhode Island courts to determine whether Rhode Island's statutes might have allowed them to marry in Rhode Island. Nor have they raised constitutional objections to Rhode Island marriage licensing laws. Rather, they seek to dissolve the marriage that they acquired elsewhere.

The pending certified question does not compel this Court to determine whether the couple could have obtained a marriage license within Rhode Island instead of within Massachusetts. *See Chace*, 58 A. at 979 (confirming that any impediments to marriage in Rhode Island would not be relevant to the question of how Rhode Island should interact with couples who married elsewhere). Assuming, *arguendo*, that Rhode Island marriage licensing statutes prohibit the marriages of same-sex couples within its borders, Rhode Island has no evasion statute to support the extra-territorial extension of any such statutory prohibition to marriages entered elsewhere, even by its residents. Thus, whether or not this Court makes explicit the statutory requirements for marriage within the state, such explication would be beside the point. *Id.*

The Court should resist any urge to grapple with unnecessary questions of law on this occasion for two additional reasons. First, the Court's jurisdiction in the present proceeding is predicated on R.I. Gen. Laws 9-24-27, which limits the court to making only those determinations that "affect[] the merits of the controversy." *Id.*; *In re Christopher S.*, 776 A.2d 1054, 1056-57 (R.I. 2001) (requiring adherence to statutory prerequisites for certification); *State v. MacTavish***,** 262 A.2d 383, 384 (R.I. 1970)

(declining to answer certified question where court's answer would no longer affect the resolution of the matter before the trial court). Answering whether the petitioners could have married in Rhode Island will not aid the Family Court in determining the particular case before it or the narrow question that has been certified. *See, e.g., Tillinghast v. Johnson*, 82 A. 788, 790 (R.I. 1912) ("To be a question of law, the certification of which is contemplated by the statute, it must be one actually presented to said justice, and one the determination of which is necessarily involved in his ruling or decisions upon the particular phase of the case then before him.").

Second, any pronouncement by the Court construing Rhode Island's marriage licensing statutes may have the significant effect of altering Rhode Island's legal landscape. A statement by this Court concerning the petitioners' ability or inability to marry under Rhode Island law may prevent other Rhode Island same-sex couples from marrying in Massachusetts. *See Cote-Whitacre* Amended and Final Judgment dated May 10, 2007, http://www.glad.org/marriage/Cote-Whitacre/AmendedFinalJudgment.pdf. This is because such a statement -- although dicta because it is not "controlling" in the context of the current proceedings -- could conceivably be viewed by Massachusetts courts and officials for purposes of the 1913 law as an express statement of prohibition in a "controlling appellate decision" on the question of whether same-sex couples are prohibited from marrying in Rhode Island. *Id. See also Cote-Whitacre*, 844 N.E.2d at 653 (Marshall, C.J. concurring).

For example, when the New York Court of Appeals' *Hernandez* decision stated that New York statutes could not be interpreted to permit same-sex couples to marry in New York, that court's decision, in and of itself, constituted an express prohibition in

New York law for purposes of Massachusetts's 1913 law. Just as New York Court of Appeals' decision in *Hernandez* foreclosed New York's same-sex couples from marrying in Massachusetts after July 6, 2006, a pronouncement by this court interpreting Rhode Island's marriage licensing laws as an impediment to marriage for same-sex couples in Rhode Island would arguably do the same thing (*i.e.*, foreclose Rhode Island same-sex couples from marrying in Massachusetts going forward).[15] Thus, this Court's declaration on the subject might abruptly change Rhode Island's legal landscape by stopping Rhode Island's same-sex couples from doing what they can presently do: marry in Massachusetts.

Given the stakes, the creation of "obiter dictum" in this proceeding would be especially inappropriate. "[W]hen the Court goes beyond what is necessary to decide the case before it, it can only encourage the perception that it is pursuing its own notions of wise social policy, rather than adhering to its judicial role." *Hoffman v. Davenport-Metcalf*, 851 A.2d 1083, 1093 (RI 2004) (Flanders, J., concurring) (citing *United States v. Leon*, 468 U.S. 897, 963, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (Stevens, J., concurring)); *see also Lacey v. Reitsma*, 899 A.2d 455, 458 (R.I. 2006) ("[W]e are cognizant of the fact that our judicial role is to interpret and apply statutes and not to legislate… .")

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[15] There are two differences between *Hernandez* and the present proceeding. First, unlike *Hernandez*, the question of same-sex couples' ability to marry within the state -- on either statutory or constitutional grounds -- is simply not presented here. Second, when the Court of Appeals decided *Hernandez*, New York couples were not then marrying in Massachusetts, and the New York Court's decision did not immediately deprive New York couples of a right they were then enjoying. In contrast, a statement in the present case to the effect that same-sex couples may not marry in Rhode Island would arguably deprive Rhode Island couples of a right many are presently exercising.

For these reasons, this Court should not take this opportunity to sua sponte answer the unasked question of whether same-sex couples may marry in Rhode Island.

IV. RHODE ISLAND IS EMBRACING THE STATUS QUO OF EQUAL MARRIAGE ACROSS THE BORDER.

The existing state of affairs in Rhode Island is that its same-sex couples may readily marry in Massachusetts or Canada[16] and return home to a supportive legislature and community.

A. The Legislature Has Refused to Ban Same-Sex Couples From Marrying or to Deny Recognition to Their Valid Out-Of-State Marriages.

The Rhode Island Legislature has not taken steps to prevent Rhode Island's same-sex couples from marrying in Massachusetts despite having had ample opportunity to do so. The *Cote-Whitacre* court's March 30, 2006 order for an determination on remand as to whether Rhode Island law "prohibited" marriage for same-sex couples within the meaning of the 1913 law had the effect of creating a period of time during which the Rhode Island legislature could have taken any action it deemed desirable in response to

[16] Marriage equality has been the law of Canada, first on a province-by-province basis beginning in May 2003, and nationwide as of July 2005. *See Halpern v. Canada (Attorney General)*, [2003] 65 O.R. (3d) 161 (2003); Marriage for Civil Purposes Act, 2005 S.C. ch. 33 (Can). In addition to Massachusetts and Canada, same-sex couples are also now permitted to marry in the Netherlands, Belgium, Spain, and South Africa. *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 (Act on Opening up of Marriage)]; 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); *Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio* [Marriage Act 30, June 2005 (royal assent 1 July 2005)] (Spain's marriage act):); *Minister of Home Affairs and Another v. Fourie and Another*, 2006 (3) BCLR 355 (CC) (South Africa).

the SJC's decision. The *Cote-Whitacre* decision was immediately and widely publicized.[17]

Yet, the Rhode Island legislature took no responsive action in 2006 despite the pendency of S2310, a bill introduced on February 2, 2006 to expressly prohibit Rhode Island same sex couples from marrying in Rhode Island; to declare void those marriages that nonetheless did occur in Rhode Island; and to deny recognition to valid marriages entered elsewhere by same-sex couples. *See* Rhode Island General Assembly Bill Status System, http://www.rilin.state.ri.us/billtext06/senatetext06/s2310.pdf. More specifically, S2310 would have amended Sections 15-1-1 and 15-1-2 of the General Laws of Chapter 15-1, entitled "Persons Eligible to Marry," to explicitly state that a man cannot marry a man and a woman cannot marry a woman, and by operation of Section 15-1-3, to declare such marriages "void." Further, S2310 would have added a new Section 15-1-7 that would have denied recognition to any marriage entered by a same-sex couple, regardless of where the marriage occurred:

> 15-1-7. Same sex marriages prohibited. – (a) In determining the meaning of any general law or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the state of Rhode Island, the word "marriage" means only the legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.
>
> (b) Neither the state of Rhode Island nor any bureau or agency thereof shall recognize a relationship between persons of the same sex as a

[17] *See, e.g.*, Pam Belluck and Katie Zezima, *Massachusetts Court Limits Gay Unions*, N.Y. Times, March 31, 2006, at A10 (SJC's "ruling left open the possibility that gay couples from states like New York and Rhode Island that do not explicitly ban same-sex marriage might be able to marry in Massachusetts"); Scott MacKay, *Court Unsure if R.I. Gays Can Wed in Massachusetts*, The Providence Journal, March 31, 2006 at A1 (SJC's ruling "left the door open for same-sex couples in Rhode Island looking to cross the state line to marry"; Rhode Island Attorney General's spokesman "said that the General Assembly or state courts are the proper forums in which to decide the issue").

> marriage regardless as to whether such relationship is recognized as a marriage under the laws of any state, United States territory, possession or Indian tribe. …

See S2310, 2006 Leg., Reg. Sess. (RI 2006).[18] After being referred to the Senate Judiciary Committee, S2310 never progressed to a floor vote during the 2006 legislative session.

Then, notwithstanding the fact that Rhode Island same-sex couples began to marry in Massachusetts in greater numbers following the September 29, 2006 *Cote-Whitacre* decision, the most recent 2007 legislative session also failed to produce any legislation expressly prohibiting marriage rights for same-sex couples or denying recognition to valid marriages entered by same-sex couples elsewhere. Although the text of S2310 was re-introduced in its entirety as S0687 and H6159 in the 2007 legislative session, these bills never emerged from their respective judiciary committees during the 2007 legislative session.[19]

Notably, the Legislature also took no steps to amend Rhode Island's marriage laws to expressly deny same-sex couples the right to marry in Rhode Island prior to *Cote-Whitacre*, despite having had ample opportunity to do so. The first occasion on which the Rhode Island legislature considered amending Rhode Island marriage laws to exclude same-sex couples from marriage was in 1997. *See* H5808, 1997 Leg., Reg. Session. (RI 1997) (introduced on February 4, 1997). H5808 would have added a new statutory

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[18] As discussed below, six different bills with this identical text were filed in the legislature in prior and subsequent years as well. *See infra* H7552 (2000); H7571 (2004); S2663 (2004); S0846 (2005); H6159 (2007); and S0687 (2007).

[19] *See also* H5356, 2007 Leg., Reg. Sess. (RI 2007) (proposing, in the context of a bill to provide civil unions to same-sex couples, that "'[m]arriage' means the legally recognized union of one man and one woman). H5356 was also retained by the House Judiciary Committee and did not progress to a floor vote during the 2007 legislative session.

provision expressly forbidding same-sex couples from marrying within the state (and deeming such marriages "void" by operation of Section 15-1-3) and declaring extra-territorial marriages by same-sex couples to be "invalid:"

> 15-1-2.1. Persons forbidden to marry other persons of same sex -- Foreign marriages declared invalid. -- No person shall marry a person of the same sex in this state, and no marriage between persons of the same sex shall be valid or recognized in this state, including any such marriage which is or may be valid in any other state, country or other jurisdiction.

See H5808. The second occasion occurred in 2000 when H7552, a bill identical to the one filed in 2006 (S2310), was introduced on February 3, 2000. H7552 also never progressed beyond the House Judiciary Committee. *See* H7552, 2000 Leg., Reg. Sess. (RI 2000).

The third occasion on which Rhode Island considered amending its marriage laws to exclude same-sex couples from marriage was in 2004, after the Massachusetts Supreme Judicial Court decided *Goodridge*. Before *Goodridge*'s 180-day stay expired on May 17, 2004, five separate bills were introduced in the Rhode Island legislature concerning marriage for same-sex couples. Respectively filed on January 29, 2004 and February 11, 2004, H7395 and S2583 sought to preclude same-sex couples from marrying in Rhode Island or obtaining recognition for valid out-of-state marriages of same-sex couples:

> 15-1-7. Same sex marriages void. – (a) A marriage may only be entered into by one man and one woman.
> (b) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

See H7395 and S2583, 2004 Leg., Reg. Sess. (RI 2004). These bills never emerged from their respective judiciary committees. Two other bills, H7571 and S2663, which were identical in form and substance to the 2006 bill discussed above (S2310), also did not progress beyond their respective judiciary committees. *See* H7571 and S2663, 2004 Leg., Reg. Sess. (RI 2004) (filed February 5 and 11, 2004, respectively). The same is true for H8223, which proposed that a question be submitted by nonbinding referendum at the next general election: "Shall marriage be defined as a union between one man and one woman?" *See* H8223, 2004 Leg., Reg. Sess. (RI 2004) (filed March 2, 2004). The fourth occasion was in 2005 when the legislature again failed to advance a bill identical to the one later introduced in 2006 (S2310) and discussed above.

B. The Rhode Island Community Is Embracing Married Same-Sex Couples.

Moreover, in addition to the Legislature's willingness to let Rhode Island same-sex couples continue to travel to Massachusetts to wed, significant public and private entities alike have extended respect to the out-of-state spousal status of same-sex couples based, in large measure, upon this State's comity doctrine as recognized by this Court long ago in the case of Chace, 58 A. at 980-82.

In the public sector, for example, on February 21, 2007, Attorney General Patrick Lynch, relying upon the principle of comity articulated in *Chace,* advised the Rhode Island Board of Governors of Higher Education to respect the marriages of its gay and lesbian employees. *See* Letter from Attorney General Patrick Lynch to Comm'r Jack Warner, R.I. Bd. Of Higher Ed. (Feb. 20, 2007) (on file with R.I. Office of A.G.). The Rhode Island Board of Governors is now respecting the marriages of same-sex couples entered elsewhere for purposes of employee benefits and the like. *See* Edward

Fitzpatrick, *Lynch: R.I. to Recognize Mass. Gay* Marriages, The Providence Journal, February 22, 2007. Similarly, on October 19, 2004, Attorney General Lynch issued a legal opinion to the State Treasurer holding that the same-sex spouse of a retired teacher 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) (on file with R.I. Office of Attorney General).

Amicus MERI, through its members and allies, recently began an investigation into whether private employers and entities in Rhode Island were joining the public sector in extending same-sex spousal recognition to couples married elsewhere. Amicus MERI reports that the private sector has. The experience of spousal respect in the public sector has been mirrored for married gay and lesbian employees of major Rhode Island employers, including GTECH, Brown University, Neighborhood Health Plan, Roger Williams University, Citizens Bank, Bank RI, CVS, Youth Pride, Family Resources Community Action, and REI.

Significant public and private entities alike have extended respect to the out-of-state spousal status of same-sex couples based upon this State's comity doctrine. Their doing so has had a significant impact upon the structuring of benefit programs throughout the State and upon important decisions about jobs, healthcare, and finances for large numbers of Rhode Islanders. These instances of respect provide every reason to believe that same-sex couples and their communities will continue to receive and extend spousal recognition to same-sex couples married elsewhere, thus enabling more couples to receive the respect and protections they need in their daily lives.

Yet, if this Court were to articulate an express prohibition on marriage for same-sex couples for the first time through its answer to the certified question in this case, the Court could well stop the state's same-sex couples from marrying in Massachusetts, a result that the Legislature has expressly avoided. It would do so without any evidence that the extension of spousal respect is against the interests of the Legislature or of the Rhode Island community that has embraced validly married same-sex couples as the married couples that they are.

V. CONCLUSION

The pending certified question calls upon the court to decide whether to recognize marriages valid where celebrated outside of Rhode Island and not to opine upon whether a couple with a valid marriage from elsewhere could have married within Rhode Island instead. The principle that courts should decide cases on the narrowest legal grounds available is well-established, but that principle is all the more compelling here where an unnecessarily expansive ruling from this Court may abruptly prevent Rhode Island's same-sex couples from continuing to marry in Massachusetts, thereby altering the legal landscape in a manner thus far rejected by the Rhode Island legislature and community. This action may serve to propel this Court into an institutional role it has found unsuitable in the past.

For the foregoing reasons, this Court should answer the certified question in the affirmative and decline any invitation or inclination to determine whether Rhode Island's marriage licensing statutes prohibit the issuance of Rhode Island marriage licenses to same-sex couples within the state.

Respectfully Submitted,

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