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

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

BRIEF OF AMICI CURIAE LAW PROFESSORS, ET AL.,
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INTERESTS OF THE *AMICI*

The *amici curiae* submitting this brief are eleven legal educators (current and former full-time, part-time, and/or adjunct law professors, administrators, directors, and other legal educators) and legal professionals affiliated with at least seven different law schools, and a prominent Rhode Island lawyer. Two have academic appointment or professional practice in Rhode Island. Many of the *amici* teach or have taught Conflict of Laws, Procedure, Family Law, Constitutional Law and related subjects.

The full names of the *amici* and their institutional affiliations are listed at the end of this brief, after the Conclusion. Law school and institutional affiliations are listed solely for purpose of identification. The views expressed herein are those of the amici listed. The amici do not speak for or to represent the universities, law schools, or other institutions indicated.

Several important questions of conflict of laws (and related procedural, constitutional, and family law issues) lie at the heart of this case. As legal educators, including some teachers and scholars of Conflict of Laws and related subjects, the *amici* have a professional interest in supporting credible judicial analysis of conflict of laws principles and precedents rules in this case, in supporting and maintaining integrity in the construction of the Constitution and laws of the United States, and in preserving respect for the rule of law. Thus, the *amici curiae* submit this brief to aid and assist the court in addressing those conflict of laws and related issues.

STATEMENT OF THE FACTS

The material facts in this case appear to be undisputed. Thus, the case turns upon the resolution of the legal issues, many of which involve of conflict of laws principles.

Ms. Margaret Chambers and Ms. Cassandra Ormiston, two women, were residing together in, and domiciled in, Rhode Island in 2004 when, as a result of a decision of the Massachusetts Supreme Judicial Court, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), Massachusetts began to license same-sex couples to marry. However, Massachusetts law prohibits residents of other states to marry in Massachusetts if those marriages are prohibited in their home states. Mass. Gen. Laws. Ch. 207, § 11 & 12.

On May 26, 2004, Ms. Chambers and Ms. Ormiston traveled to Massachusetts and applied for a Massachusetts marriage license as a same-sex couple. Even though they disclosed that they resided in Rhode Island and intended to continue to reside in Rhode Island, they were issued a marriage license and were married by a justice of the peace in Fall River, Massachusetts the same day. *Chambers v. Ormiston*, F.C. No. P06-0340, Decision, at 3 (R.I. Fam. Ct., Feb. 21, 2007) (herein "Decision"); *Chambers v. Ormiston*, F.C. No. P06-2583, SC No. 2006-340, Joint Memorandum of the Parties on the Pending Request for Certification, at 2-3 (field in R.I. Fam. Ct., Feb. 8, 2007) (herein "Joint Memorandum"); *Chambers v. Ormiston*, F.C. No. P06-2583, SC No. 2006-340, Affidavit of Margaret R. Chambers, at ¶¶ 2-8 (filed in R.I. Fam. Ct. February 8, 2007) (herein "MRC Affidavit". The couple then returned to Rhode Island, and continued to reside together in and to be domiciled in Rhode Island. *Id.* at ¶¶ 4, 8; Joint Memorandum, *supra* at 3; Decision, *supra*, at 3.

In 2006, Ms. Chambers and Ms. Ormiston, still residing and domiciled in Rhode Island, filed separate, "competing petitions for divorce" in the Rhode Island Family Court in Providence. Joint Memorandum, *supra* at 3; Decision, *supra* at 3.

In December 2006, the Family Court certified the question of its subject-matter jurisdiction to hear such petitions to this Court. Upon order of this Court, *Chambers v. Ormiston*, 916 A.2d 758 (R.I., Jan. 17, 2007), the Family Court compiled an appropriate factual record and restated the certified question. *Chambers v. Ormiston*, F.C. P06-0340, Decision (R.I. Fam. Ct., Feb. 21, 2007). This Court clarified the questions to be considered on appeal in *Chambers v. Ormiston*, No. 06-340-M.P., Order, at 2 (R.I., May 21, 2007) (herein "Briefing Order").

ISSUES

This case raises multiple conflict of laws and related questions, primarily concerning choice of law. The question certified by the Family Court and accepted by the this Court was: "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?" Briefing Order, at 2. The certified question raises the preliminary question of state court subject matter jurisdiction -- whether the Rhode Island Family Court has jurisdiction to adjudicate the petitions for divorce filed in this case. The answer to that jurisdictional question turns in part on the answer to the choice of law question – what state's law applies to this issue?

This court also ordered that three additional questions be addressed by the parties and *amici curiae* in their briefs: "a) whether or not this case presents an actual case or controversy; b) whether or not the Full Faith and Credit clause of the United States Constitution is relevant to this case; and c) whether or not the Defense of Marriage Act, 28 U.S.C. §1738C (2000), is relevant to this case." *Id.* The case or controversy issue (a) is

a quasi-jurisdictional question concerning the limit of the judicial power of the Family Court. Questions (b) and (c) concern federal constitutional and statutory conflict of laws.

This brief will discuss seven important questions, most of which are or involve conflict of laws issues. They are:

Choice of Law

1. What state's law should the Family Court apply to determine the domestic status in Rhode Island of Rhode Island residents who entered into a same-sex marriage in Massachusetts?

2. Under Rhode Island law, is the relationship of two persons of the same-sex who entered into a same-sex marriage in another jurisdiction deemed and treated as a marriage? [This family law question flows from and is necessary to complete the answer to the conflicts question.]

3. Does federal law in the form of the Full Faith and Credit Clause of the United States Constitution or the federal Defense of Marriage Act (herein DOMA) require Rhode Island courts to apply Massachusetts (or other non-Rhode Island) law to determine the domestic status in Rhode Island of Rhode Island residents who entered into a same-sex marriage in Massachusetts?

Jurisdiction and Related Issues:

4. Does this case present an actual, justiciable case or controversy?

5. Under Rhode Island law, does the Family Court of Rhode Island have subject matter jurisdiction in this case to grant a divorce to a couple who entered into a same-sex marriage in Massachusetts?[1]

6. Does federal law in the form of the Full Faith and Credit Clause or DOMA, require the Family Court of Rhode Island to exercise subject matter jurisdiction in this case to grant a divorce to a couple who entered into a same-sex marriage in Massachusetts?

Judgment Recognition

7. If Rhode Island treats this relationship as a marriage (valid or void) and enters a divorce decree, will the judgment be respected and recognized by other states under normal conflict of laws principles, DOMA, or the Full Faith and Credit Clause?

ARGUMENT

Petitioners seek a divorce under the laws of Rhode Island from an arrangement not recognized as a marriage in Rhode Island. To grant their petition will be to simultaneously recognize their marriage; one entails the other.

Whether the Rhode Island Family Court has jurisdiction to hear the case turns on whether the phrase "divorce from the bond of marriage" encompasses claims to dissolve same-sex marriages. That depends in part on which state's law applies to the resolve issue. We start with that question.

I. Rhode Island Law Applies to Determine the Domestic Status in Rhode

[1] The only type of jurisdiction in doubt is the *subject matter jurisdiction of the Family Court*; it is undisputed that the *parties and their property are within the territorial jurisdiction* of the Rhode Island Family Court.

Island of Rhode Island residents Who Entered into an Evasive Same-Sex Marriage in Massachusetts.

Conflict of laws (known in most other nations as "private international law") is the branch of law that addresses the questions that arise because of the difference in the laws and legal systems of different sovereigns. American Law Institute, Restatement of the Law Second, Conflict of Laws §§ 1-2 (1971) (herein "Restatement Second of Confllicts"); Eugene F. Scoles, et al, Conflict of Laws 1-2 (4th ed. 2004) . Conflict of laws issues arise because different sovereigns have different laws, and because some cases involve or implicate persons, property or interests of or in multiple sovereign jurisdictions. Restatement Second of Confllicts at §1. The complexity of some conflict of laws jurisdictional, choice of law and judgment recognition analysis would tax the wizardry of even Harry Potter.[2] In this case, however, the analysis is simple, straightforward, and clear.

The choice of law question of which state's law applies to determine whether the petitioner's Massachusetts' same-sex marriage is deemed a marriage in Rhode Island has multiple levels of significance. Of primary importance now, the question of Family Court jurisdiction depends in part on the answer to the question whether the petitioners' relationship is deemed a "marriage." That turns on which state's law applies to that issue.

[2] The renowned legal scholar William Prosser once famously wrote: "The conflict of laws is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed or entangled in it." William Prosser, *Interstate Publications*, 51 Mich. L. Rev. 959, 971 (1953).

The starting point for the choice of law analysis of which state's law governs the recognition *vel non* of a marriage from another state is that the forum state court applies the choice of law rules of its own sovereign. *See* Restatement Second of Conflicts § 6; Scoles, *supra* at 120, § 3.1; *see generally Gordon v. Clifford Metal Sales Co., Inc.,* 602 A.2d 535, 537 (R.I. 1992).

Rhode Island courts generally apply "an interest-weighing" choice of law analysis to find the state with the most significant governmental interest in having its law applied. *See, e.g., Oyala v. Burgos,* 864 A.2d 624, 627 (R.I. 2005). Under this approach, the courts "look at the particular case facts and determine therefrom the rights and liabilities of the parties 'in accordance with the law of the state that bears the most significant relationship to the event and the parties.' " *Narajian v. National Amusements, Inc.* 768 A.2d 1253, 1255 (R.I. 2001) quoting *Cribb v. Augustyn,* 696 A.2d 285, 288 (R.I.1997) (per curiam), quoting *Pardey v. Boulevard Billiard Club,* 518 A.2d 1349, 1351 (R.I.1986). *See also Blais v. Aetna Cas. & Sur. Co.*, 526 A.2d 854, 856 (R.I. 1987); *Brown v. Church of Holy Name of Jesus,* 252 A.2d 176, 179 (R.I. 1969).

The specific analytical approach depends upon the type of choice of law issue involved.[3] At least three different choice of law approaches or rules might apply in this case; under all of them Rhode Island law applies.

[3] In tort actions Rhode Island courts evaluate the competing state interests considering factors such as predictability, interjursidictional order, simplification, advancement of the forum's governmental interests, and "the better rule of law." *Narajian,* 768 A.2d at 1255; *Pardey,* 518 A.2d at 1351; *Brown,* 252 A.2d at 226-27. For contract issues Rhode Island generally applies traditional *lex loci contractus* – the law of the state where the contract

If this is deemed an issue of marriage validity, Rhode Island law still applies. Rhode Island has long followed follows the general American rule that a marriage valid where performed will be treated as a valid marriage in Rhode Island unless it is contrary to the strong public policy of the forum state. *Ex Parte Chace*, 58 A. 978 (R.I. 1904). *See* Restatement Second of Conflicts § 283; Scoles, *supra* at 120, § 13.1- 13.6; L. Lynn Hogue, *State Common-Law Choice of Law Doctrine and Same-Sex "Marriage:" How Will States Enforce the Public Policy Exception*,32 Creighton L. Rev. 29 (1998); Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine,* 32 Creighton L. Rev. 24 (1998); Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marraiges,* 32 Creighton L. Rev. 147 (1998).

Massachusetts today might conclude that the parties' evasive same-sex marriage is valid under Massachusetts law.[4] Massachusetts courts have ruled

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was executed. *DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474, 484 (R.I. 2004); *Tim Hennigan Co. v. Anthony A. Nunes, Inc.*, 437 A.2d 1355, 1357 (R.I. 1981). *See* Symeon Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 Am. J. Compar. L. 559, 595-98, *id. at* Table 1(2006).

[4] At the time Ms. Chambers and Ms. Ormiston applied as non-residents for a marriage license in Massachusetts, a Massachusetts "reverse-marriage-evasion" statute forbade (and it still forbids) nonresidents of Massachusetts to marry in that state if the marriage would be "prohibited" or "void" in the home state of a nonresident party to such marriage. Mass. Gen. Laws. Ch. 207, § 11 & 12. This Massachusetts "reverse-marriage-evasion" statute has been the law of Massachusetts for nearly a century. It has since been upheld by the Massachusetts Supreme Judicial Court as applied to same-sex marriages. *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006).)

Last year, in *Cote-Whitacre*, a splintered majority of the Massachusetts Supreme Judicial Court suggested, *id.*, and a Massachusetts trial court -- in an unappealed decision -- later held, that for purposes of the Massachusetts statute, Rhode Island does not prohibit same-sex marriage because Rhode Island has no

that, for purposes of a *Massachusetts* statute, a same-sex marriage is or is not sufficiently "prohibited" by Rhode Island law (as that term is used in a *Massachusetts* statute) for *Massachusetts* officials to decline to issue a marriage license to a couple from Rhode Island to marry in Massachusetts. *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006); *Cote-Whitacre v. Dep't of Pub. Health*, 2006 WL 3208758 at *4 (Mass. Super. 2006). While Massachusetts courts may interpret their own laws as they wish, to the extent that *Cote-Whitacre* purports to interpret Rhode Island law, it clearly misconstrues Rhode Island law.

Even if petitioners' evasive Massachusetts same-sex marriage were deemed a valid marriage in Massachusetts, it will not be recognized in Rhode Island because it violates strong Rhode Island public policy. Rhode Island public policy dramatically differs from that of Massachusetts. Preserving marriage as a unique legal institution for conjugal couples, to protect children and families, is a powerful public policy in Rhode Island. This Court has long acknowledged that "[m]arriage and the family relation is regarded as one of the foundations of our social order. . . . The state is deeply interested in its continuance." *McLaughlin v. McLaughlin*, 117 A. 649, 650 (R.I. 1922); *see also Luttge v. Luttge*, 197 A.2d

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explicit statutory or state supreme court ruling prohibiting same-sex marriage. *Cote-Whitacre v. Dep't of Pub. Health*, 2006 WL 3208758 at *4 (Mass. Super. 2006). However, in *Goodridge*, the Supreme Judicial Court of Massachusetts had acknowledged that same-sex marriage was prohibited at common law, 798 N.E.2d at 952-53, and at the time the petitioners celebrated their same-sex marriage in Massachusetts the Governor of Massachusetts had ordered state officials under this law not to license same-sex marriages for residents of any other states as same-sex marriage was still prohibited by common law or statute in all states. While Massachusetts can interpret its own statutes however it chooses, the history of interpretation of this Massachusetts law is confused and tortured.

500, 502 (R.I. 1964) (Rhode Island's "solicitude for the preservation of the family unit"). This also is the overwhelmingly dominant public policy followed in forty-nine American states and nearly all sovereign nations. Wardle, *What is Marriage?* 6 Whittier J. Child & Fam. Advoc. 53, 67-71 (2006); *id.* at Apps. I & II. This powerful Rhode Island public policy of reserving the status and institution of marriage exclusively for conjugal unions of a husband and a wife would be destroyed if same-sex marriage were recognized.

The Rhode Island Attorney General has opined that same-sex marriages celebrated in Massachusetts by Rhode Island residents should be recognized as valid marriages in Rhode Island. Patrick C. Lynch, Attorney General, Letter to Commissioner Jack R. Warner, Rhode Island Board of Governors for Higher Education, Feb. 20, 2007, at 3-4. The reasoning provided in support of that conclusion is very superficial and that conclusion is erroneous.

The A.G. letter relies primarily on *Ex Parte Chace*, 58 A. 978 (R.I. 1904), in which this Court held that for purposes of Rhode Island habeas corpus proceeding by a wife, the Massachusetts marriage entered into by a man under guardianship in Rhode Island without consent of his guardian would be deemed valid in Rhode Island. However, *Chace* is distinguishable for at least six reasons.

The court in *Chace* accepted the proposition that marriages "in evasion of the law of the [parties'] domicile and contrary to the public policy or laws of the domicile, will not be recognized," *id.* at 979. Under that general principle, the Massachusetts same-sex marriage of petitioners in this case "will not be recognized." First, *Chace* noted that there

was no evidence in the record to support the claim that the marriage was evasive. In this case, however, it is clear that the petitioners went to Massachusetts for the sole purpose of evading Rhode Island's prohibition of same-sex marriage and entering into a same-sex marriage in the only American state where they are legal. *Chambers*, Opinion, at 2-3; Joint Memorandum, at 2-3. Second, *Chace* is further distinguishable because while the court accepted the principle that marriages contrary to Rhode Island public policy will not be recognized, it held that "it is not clear that, even if the marriage had been solemnized in this state, it would have been void," because the guardian's approval was a mere "formalit[y], not a substantive marriage essential. 58 A.2d at 979. In the case at bar, the marriage requirement in issue is not a mere formality, but one of the few, historically ubiquitous, still nearly-universal requirements for marriage, not only in Rhode Island or the United States or common-law jurisdictions, but throughout the world. Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 Family Law Q. 497 (1995).

Third, the *Chace* court upheld the marriage despite the alleged defect in capacity because the nature of the relationship (a conjugal marriage) was universally recognized; "all nations" allowed (and still allow) conjugal marriages. 58 A.2d at 980. By contrast, only four nations (or five -- depending on whether South Africa's Civil Union law is construed to permit actual same-sex marriages) out of 192 sovereign nations recognized by the United Nations, and only one American state, allows the kind of union petitioners entered in Massachusetts -- same-sex marriages. *See* Lynn D. Wardle, *What Is Marriage, supra,* at 67-71& Apps. I & II (listing nations and states). Fourth, the defect in *Chace*

was not deemed "odious by the common consent of nations," 58 A.2d at 980-81), whereas, same-sex marriages are so deemed by most the nations in the world today. *Id.* at 53-54, n.2 (describing the "strong, hostile reaction" against same-sex marriage as one of the driving engines behind the global Islamic fundamentalist revolution)*; see also* Wardle, *What is Marriage, supra*, 53, n.2; *id.* at 65-70 (Muslim nations are very hostile to and public opinion in most nations of Europe opposes same-sex marriage).

Fifth, in *Chace* the ultimate issue was whether to issue a writ sought by a woman to release a man, her husband, from the unwanted guardianship of a third party. The court emphasized the importance of allowing a wife to enjoy the society of her husband whose companionship was denied by the guardian, and of permitting a ward to reside with his wife. 58 A. at 982. That sympathetic litigation context influenced the analysis. The case at bar, however, presents starkly the issue of same-sex marriage recognition. Sixth, this marriage recognition analysis in *Chace* has not been cited by this Court in over eighty years, and the last such case citing *Chace* merely held that common law marriages are valid in Rhode Island. *Holgate v. United Electric Railways Co.*, 133 A. 243 (R.I. 1926).

More fundamentally, the Attorney General's opinion letter fails to grasp that this is not a "toggle-switch," all-or-nothing issue, in which states must *either* recognize same-sex marriages *or* decline to give such relationships and their incidents any recognition. Rather, many states may and do confer many different *non-marital* domestic benefits and even a variety of alternative statuses upon same-sex couples without legalizing same-sex marriage. Indeed, as discussed in

Part VII *infra,* several states (and many western nations, including the Scandinavian nations which led the way globally to give marriage-equivalent legal status to same-sex couples but still do not allow same-sex marriage), extend other (sometimes even comparable) rights and benefits to same-sex partners while preserving the historic, unique status and institution of marriage for the union of a man and woman. While *amici* do not recommend giving formal legal status to same-sex unions, the Attorney General's self-contradictory opinion admits that Rhode Island public policies and laws already recognize same-sex relations and confer a variety of benefits in particular circumstances, while, simultaneously, continuing to maintain its consistent, unbroken, common-law prohibition against same-sex marriage. A.G. Letter, at 5-6. Thus, the preservation of marriage for conjugal couples is Rhode Island's strong public policy and it must be respected.

Second, alternatively, several scholars have recommended application of general principles of governmental interest choice of law analysis is divorce cases. *See* Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Conflict of Laws,* 32 Creighton L. Rev. 1085, 1108-09 (1999); *see also* Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies--International Child Abduction and Same-Sex Unions,* 32 Hofstra L. Rev. 233, 272-73 (2003) (suggesting residency or evasion choice of law rule for Canadian same-sex marriages). That analysis also supports the conclusion that Rhode Island law governs whether petitioners' relationship is a "marriage." Rhode Island has the *only* significant governmental interests at stake in this litigation. The parties were

both residents of Rhode Island when they "married" during a brief trip to Massachusetts; they returned to Rhode Island, and Rhode Island was the center of their relationship; they continued to reside as a couple in Rhode Island (and in no other state) throughout their union; Rhode Island is where resided when they have filed their divorce petitions; the forum is a Rhode Island court; and the effects (economic, social, medical, etc.) of both their relationship and of its break-up are primarily (if not exclusively) in Rhode Island. This is a classic *false conflict* (or, more accurately, *no-conflict* situation.) No state except Rhode Island has any legitimate interest in applying its law to determine the validity of this marriage. *See generally* Linda Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values,* 16 Quinnipiac L. Rev. 191 (1996); Linda Silberman, *Current Debates in the Conflict of Laws Recognition and Enforcement of Same-Sex Marriage*, 153 U. Pa. L. Rev. 2195, 2203 (2005); *see also Wardle, Non-Recognition, supra,* at 403. Indeed, application of the law of Massachusetts which has no "significant contact or aggregation of contacts" with the parties, their residence, their relationship, or the lives, except their transient "suitcase marriage" across state lines would appear to violate the Full Faith and Credit clause. *Allstate Ins. Co. v. Hague,* 442 U.S. 302, 308 (1981).

Moreover, even if a "better rule" choice of law analysis were deemed applicable in this case, the result would be the same. All of the factors point to applying the law of Rhode Island.[5]

[5] The law of the parties' domicile or residence in evasive marriages is both simple to discern and easily predictable in this case. (In most of the world, that is the governing choice of law rule for marriage essentials. Wardle, *International, supra* at 503.)

Finally, since both petitions seek "divorce," and the relevant jurisdictional statutes use the term "divorce," R.I. Gen. Laws§ 8-10-3, and since under Rhode Island law the term "divorce" covers petitions based on alleged marital voidness, R.I. Gen. Laws§ 15-5-1, it is arguable that the prevailing choice of law rule applicable in divorce should apply. That rule, followed in all American states (not contradicted by any case in Rhode Island) will be followed -- that "[t]he local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce." Restatement Second of Conflicts § 285. *See also* Scoles, *supra* § 13.16 ("there is not choice of law rules for divorce. . . . [L]ocal law applies . . . ."); Spaht & Symeonides, *supra,* 32 Creighton L. Rev. at 1106-07 (1999) (forum law is ubiquitously applied in divorce in American states); *see generally Thrift v. Thrist,* 75 A. 484, 485 (R.I. 1910)(applying Rhode Island law in divorce); *Fosdick v. Fosdick,* 23 A. 140, 140 (R.I. 1885) (petitioner becomes domiciled in Rhode Island to to take advantage of liberal divorce laws applicable in divorce here).

Resort to this alternative choice of law rule does not help petitioners. Rhode Island is the both domiciliary state of the petitioners and the forum state in which the petitions for divorce have been filed. Thus, even if the issue is

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Application of Rhode Island law will advance the forum's governmental interests in preserving conjugal marriage. Moreover, the Rhode Island rule prohibiting same-sex marriage is overwhelming considered "the better rule of law" throughout the United States (where *most* states have constitutional and *all* states save Massachusetts have statutory or common law prohibitions against same-sex marriage), and throughout the world (where 98% of the sovereign states bar same-sex marriage). William C. Duncan, *Marriage Amendments and the Reader in Bad Faith* 7 FLORIDA COASTAL LAW REVIEW 233, 233 (2006) (describing law as of 2005).

characterized as one of divorce, under the forum-domicile choice of law rule for divorces, there can be no doubt that the law of Rhode Island applies in this case.

Thus, under any conceivably applicable choice of law rule, Rhode Island law governs if the issue concerns marriage validity of petitioners' putative Massachusetts same-sex "marriage," and their right to petition for "divorce" in a Rhode Island court.

II. Under Rhode Island Law, Same-Sex Marriage is Prohibited.

It is undisputed that under Rhode Island law, same-sex marriage is not permitted. Rhode Island clearly does not allow, and has never allowed, same-sex marriage. *Infra,* Part I. The common law of Rhode Island has always, since the memory of man runneth not to the contrary, considered marriage to be the union of a man and woman. *See* J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's A Constitution For?* 56 Duke L.J. 545, 569 (2006) (Rhode Island and a few other states have no express statutory prohibition against same-sex marriage "however, the common law in all these states appears to leave with the legislatures, not the courts, any decision to break from historical definitions of marriage as between a man and a woman.") Even the Massachusetts Supreme Judicial Court conceded that same-sex marriage is prohibited at common law. *Goodridge,* 798 N.E.2d at 951-53.

Many Rhode Island marriage and related statutes use gendered terms such as "woman or man" and "husband or wife" describing marriage as a gender-integrated conjugal relationship. *See, e.g.,* R.I.Gen. Laws §§ 15-1-5 (void marriages); 15-1-6 (declaration of validity); 15-3-11 (solemnization); 15-4-12

(married women's rights); 15-5-2 (grounds for divorce); 15-5-9 (separation); 15-5-16 (alimony and attorneys fees); 15-5-16.1 (assignment of property); 15-5-19 (executions); 15-15-6 (domestic abuse); *see also id.* §§ 8-10-3 (Family Court jurisdiction); 9-17-13 (testimony); 11-6-1(bigamy crime). There is no question that same-sex marriage is prohibited by implication by these Rhode Island laws.

Rhode Island courts apply the "familiar maxims that unambiguous terms will be given their plain and ordinary meaning." *Perry v. Garey,* 799 A.2d 1018, 1023 (R.I.2002) (citing *Dubis v. East Greenwich Fire District*, 754 A.2d 98, 100 (R.I.2000)). *Hilton v. Fraioli*, 763 A.2d 599, 602 (R.I.2000)); *Zarrella v. Minnesota Mutual Life Insurance Co.*, 824 A.2d 1249, 1259 (R.I.2003). *DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474 (R.I. 2004) The plain meaning of "marriage" includes only conjugal unions. *Goodridge*, 798 N.E.2d at 951-53.

The Massachusetts courts ruled in *Cote-Whitacre, supra,* that since no *explicit* Rhode Island statute or appellate opinion *expressly* prohibits same-sex marriage, they are not legally prohibited. That assumed, wrongly, inconstently, that relations prohibited by centuries of common law are not "prohibited."[6]

It may be understandable for a Massachusetts court to give that bizarre construction for purpose of interpreting of a controversial Massachusetts statute. But it would be an egregious error for a Rhode Island court to mimic that mistake. Even the Massachusetts Supreme Judicial Court does not intend or expect that

[6] It is ironic that the Massachusetts Supreme Court in *Goodridge* in 2003 held that same-sex marriage was prohibited in Massachusetts by the common law, despite the absence of any explicit statutory or appellate court prohibition, but in *Cote-Whiteacre* in 2006 suggested that the Rhode Island common law did *not* prohibit same-sex marriage.

decisions made by Massachusetts courts under Massachusetts law will be binding on Rhode Island courts interpreting Rhode Island law in Rhode Island. *See, e.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003); *Opinion of the Justices to the Senate*, 802 N.E.2d 565, 571 (Mass. 2004).

III. The Full Faith and Credit Clause of the United States Constitution and the Defense of Marriage Act Do Not Require the Rhode Island Courts to Apply Massachusetts Law to Determine the Status in Rhode Island of Rhode Island Residents Who Enter Same-Sex Marriage in Massachusetts.

The federal Defense of Marriage Act, was passed by Congress and signed by President Clinton in 1996. Pub. L. 104-199, Sept. 21, 1996, 110 Stat. 2419. It contains two operative provisions. In brief, section 3(a) of DOMA defines the word "marriage" for purpose of federal law as "only a legal unions between one man and one woman," 1 U.S.C. § 7, and section 2(a) prevents any state from being forced to recognize same-sex marriage from any other state. 28 U.S.C. § 1738C. [7] The latter provision is relevant here.

DOMA's full faith and credit provision is simply a neutrality provision so far as state law is concerned. It forbids the interpretation of federal full faith and credit (or other federal) law to compel a state to recognize same-sex marriages or claims from any other state. It does not forbid any state to recognize same-sex marriage, nor does it require any state to recognize same-sex marriage. *See generally* Wardle, *Divorce*

[7] "No State, territory, or possession of the United States, or Indian tribe, 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." *Id.*

Recognition, supra at 221. Thus, on its face DOMA protect the right of Rhode Island to decide for itself whether it will or will not recognize Massachusetts same-sex marriages like that alleged in the petitions filed in the instant case.

DOMA has stimulated most states to enact similar provisions in either statutory law (45 states) or in constitutional law (27 states), or both.[8] *See infra,* Part VII. However, enactment of a constitutional amendment or statute expressly articulating state policy is not necessary or required by DOMA. Under DOMA a state can decline to recognize a same-sex marriage from another state (or a claim or right derived therefrom) for any valid policy reason – whether based in constitutional, statutory, administrative, common law, choice of law rule, public policy exception, criminal law, civil law, family law, jurisdictional law, etc.. In 1996, when DOMA was enacted to protect states from having to recognize same-sex marriage, few of them had statutory prohibitions against same-sex marriage or recognition. Nothing in the text of legislative history suggests that DOMA was intended to protect only states with statutory prohibitions of same-sex marriage.

Some legal commentators assert that DOMA is unconstitutional, but it is telling that most critics of the constitutionality of DOMA are not Conflict of Laws scholars, and

[8] Alabama Const., amdt. 774; Alaska Const., Art. I, sec. 25; Arkansas Const., Amdt. 83; Colorado Const., Art. II, sec.31; Georgia Const., Art I, sec. 4 par. 1; Haw. Const., Art. I, sec. 23; Idaho Const., Art. III, sec. 28; Kansas Const. Art. 15, sec. 16; Kentucky Const., Sec. 233A; Louisiana Const., Art. XII, sec. 15; Michigan Const., Art. I, sec. 25; Mississippi Const., Sec. 263-A; Missouri Const., Art. I, sec. 33; Montana Const., Art. Art. 13, sec. 7; Neb. Const., Art. I, sec. 29; Nevada Const., Art. I, sec. 21; North Dakota Const., Art. XI, sec. 28; Ohio Const., Art. XV, sec. 11; Oklahoma Const., Art. 2, sec. 35; Oregon Const., Art. XV, sec. 5a; South Carolina Const., Art. XVII, sec. 15; South Dakota Const., XXI, sec. 9; Tennessee Const., Art. XI, sec. 18; Texas Const., Art. I, sec. 32; Utah Const., Art. I, sec. 29; Virginia Const., Art. I, sec. 15-A; Wisconsin Const., Art. XIII, sec. 13.

that most Conflicts scholars who have written have concluded that DOMA is constitutional. *See, e.g.,* Statement of Professor Lea Brilmayer, Howard M. Holtzmann Professor of International Law, Yale Law School in Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Senate Judiciary Committee, March 3-4, 2004 at 8, http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3071 (last visited July 26, 2007) ("Although some people have expressed skepticism about whether DOMA is constitutional, these are mostly people whose expertise lies outside the area of conflict of laws. . . . Constitutional power to enact such legislation is found in Article IV itself"); *id.* ("In my view, the federal DOMA falls within Article IV's grant of congressional power"); Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 Creighton L. Rev. 365 (2005) (DOMA falls within Congress' Article IV "Effects Clause" power to declare the interstate effects of state laws, records and judgments). *See generally Symposium on Interjurisdictional Marriage Recognition* in 32 Creighton L. Rev. 1-476 (1998); *Symposium on the Implications of* Lawrence *and* Goodridge *for the Recognition of Same-Sex Marriages and the Validity of DOMA*, in 38 Creighton L. Rev. 233-543 (2005). *Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005) (DOMA constitutional).

DOMA effectively controls the Full Faith and Credit issue as well. Congress enacted DOMA pursuant to its definitive power under Art. IV, cl. 1, to "Prescribe . . . the Effects" in one state of the "Acts, Record and Judicial Proceedings" of other states.

"Even most lawyers are not fully familiar with the history of congressional implementation of the Full Faith and Credit Clause, and they underestimate the latitude it gives to adopt legislation." Brilmayer, *supra* at 8. DOMA is the latest, controlling federal Full Faith and Credit statute which Article IV makes binding on the states.

Separately, the Full Faith and Credit Clause, U.S. Consti., art. IV, § 1, protects the structural equality of the states by policing the horizontal relations of the states with each other to protects the states from possible overreaching by each other in the enforcement of competing laws and policies. While judgments generally are entitled to "exacting" interstate recognition under the Full Faith and Credit Clause , that provision gives states much broader latitude to not recognize or apply the laws and records of other states. In most choice of law cases (as this one), the Full Faith and Credit Clause allows a forum to apply its own law to decide an issue, even if interests and contacts of another jurisdiction are superior, so long as the forum has "significant contact or a significant aggregation of contacts" with the parties and the occurrence or transaction to which it is applying its law. *Allstate Insur. Co. v. Hague*, 442 U.S. 302, 308 (1981). In this case, application of Massachusetts law would violate this minimal constitutional requirement!

The Supreme Court of the United States has long rejected the notion that the Full Faith and Credit Clause requires a forum state to subordinate its legitimate policies to policies imported from another state. *See, e.g., Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 285 (1980) ("We simply conclude that the substantial interests of the [forum] State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause, as was

implicitly recognized at the time of McCartin."); *Nevada v. Hall*, 440 U.S. 410, 421-422 (1979)("But this Court's decision in Pacific Insurance Co. v. Industrial Accident Comm'n, 306 U.S. 493, clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."); *Carroll v. Lanza*, 349 U.S. 408, 412 (1955) ("The Court proceeded on the premise, repeated over and again in the cases, that the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy."(citing *Pacific Ins. Co.* at 502)); *Hughes v. Fetter*, 341 U.S. 609, 611 (1951) ("We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved."); *Griffin v. McCoach*, 313 U.S. 498, 507 (1941)("Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy."); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 498 (1941) ("The full faith and credit clause does not go so far as to compel Delaware to apply § 480 if such application would interfere with its local policy."); *Alaska Packers Assn. v. Industrial Accident Comm'n. of California*, 294 U.S. 532, 546 (1935) ("It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy.");

Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 159 (1932) ("It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies.")("I can find nothing in the history of the full faith and credit clause, or the decisions under it, which lends support to the view that it compels any state to subordinate its domestic policy, with respect to persons and their acts within its borders, to the laws of any other.") (Stone, J., concurring at 164); *Pacific Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (*passim*).

The Full Faith and Credit Clause influence in this case is also buffered by the principle of federalism in family law. Since 1789, the broad, general authority of the states to regulate family relations and the absence of virtually any authority of the federal government to directly regulate family relations has been one of the clearest boundary lines of our federalism. Indeed, the Supreme Court of the United States has emphasized that the "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states." *Sosna v. Sosna*, 419 U.S. 393, 404 (1975); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). There is no doubt that the U.S. Constitution creates a "special concern" for protecting "the autonomy of the individual States within their respective spheres," *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989); *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996), especially matters of state domestic relations law. *See Elk Grove Unified School Dist. V. Newdow*, 542 U.S. 1, 12, 17 (2004) (dismissing pledge of allegiance case in respect of state control of family law). Congress has a "substantial interest" in "balancing the interests" of the several states by

"prevent[ing] [one state's] policy from dictating" what the legal policy of other states will be. *United States v. Edge Broad. Co.*, 509 U.S. 418, (1993); *see also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). Constitutionally, it is impermissible for one state to "impose its own policy choice on neighboring States." A state's power to impose its legal policy upon other states is "constrained by the need to respect the interests of other States. . . ." *BMW v. Gore*, 517 U.S. at 571. Constitutional "principles of state sovereignty and comity" forbid one state giving its laws and legal policy an extraterritorial effect that "infring[es] on the policy choices of other States," as the Constitution requires each state "[t]o avoid such encroachment." *Id.* at 572.

In sum, the Full Faith and Credit Clause does not even remotely require or encourage Rhode Island to treat petitioners' relationship as a marriage for purpose of divorce jurisdiction. And DOMA expressly forbids any such federal construction or compulsion.

IV. This Case Is Not Justiciable

We now turn to the threshold issues of jusiciability and jurisdiction.

A. It Appears That This Case Presents A Proper "Case or Controversy"

The first question is whether a justiciable "case or controversy" exists in this case such that the dispute is appropriate for judicial resolution. A "necessary predicate to a cour's exercise of its jurisdiction" under the Family Court jurisdictional statutes (as under the Uniform Declaratory Judgments Act) "is an actual justiciable controversy." *Meyer v. City of Newport*, 844 A.2d 148, 151 (R.I. 2004); *Sullivan v. Chafee*, 703 A.3d 748, 751 (R.I. 1997). Courts do not have jurisdiction to resolve disputes that are not actual "cases

or controversies." *Rhode Island Ophthamologic Society v. Cannon*, 317 A.2d 130 (R.I. 1974). A "friendly" lawsuit between parties who collude or conspire to obtain the same result is not a real "case or controversy." As the United States Supreme Court instructively noted 115 years ago: "It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & Grand Trunk Railway Co. v. Wellman*, 143 U.S. 339, 345 (1892). As many other courts have noted, "[t]he determination of whether a justiciable case or controversy exists requires a fact sensitive inquiry on a case by case basis." *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.*, 130 F.R.D. 92, 95 (N.D. Ind. 1990) (citing *Babbit v. Farm Workers*,442 U.S. 289, 297-98 (1979); *Pittman v. Cole*, 267 F.3d 1269, 1281 (11th Cir. 2001) (inquiry is "inherently fact-sensitive"). The record in this case does not contradict the allegation of the parties that Ms. Chambers and Ms. Ormiston are genuinely adverse. *Chambers v. Ormiston*, Decision, *supra*, at 3-4; Joint Memorandum, *supra*, at 2-3.

B. Petitioners Lack Standing to Petition for Divorce

"By definition, a justiciable controversy must contain a plaintiff who has standing to pursue the action." *Meyer v. City of Newport*, 844 A.2d 148, 151 (R.I. 2004); *see also State v. Lead Industries Ass'n. Inc.*, 898 A.2d 1234, 1238 (R.I. 2006) (justiciability includes standing). Petitioners' standing to petition for divorce is defective. Only parties to a valid or void marriage have standing to file a petition for divorce under R.I. Gen. Laws§§ 8-10-3 and 15-5-1 et seq. If the domestic relationship the parties established is not a valid or a void marriage, but an altogether different kind of domestic relationship,

they would lack standing to litigate a claim for divorce and its incidents in the Family Court. Like grandparents who have standing to seek visitation in cases of divorce and separation but lack standing to seek visitation in an adoption case, or whose standing ends when their child's parental rights to the grandchild are terminated, parties to a same-sex union – however denominated – lack standing to seek the relief of a divorce. *See generally Gushlaw v. Rohrbaugh*, 673 A.2d 63 (R.I. 1996) (grandparents have no standing in adoption); *see also Gushlaw v. Rohrbaugh*, 697 A.2d 1097 (R.I. 1997) (biological father whose parental rights terminated lacks standing); *In re Nicholas*, 457 A.2d 1359, 1360 (R.I., 1983) (grandfather lacks standing to participate in grandchild's adoption proceeding or seek visitation rights); *Mowry v. Shith*, 105 A.2d 815 (R.I. 1954) (grandmother lacks standing in her own right). Like those grandparents, petitioners may have standing to assert other claims or seek relief elsewhere, but they lack standing to assert this particular claim (for divorce) in this particular court (the Family Court).

This issue will be discussed further with regard to the lack of jurisdiction of the Family Court, as the same principles underlying justiciability apply to the question of that court's limited subject matter jurisdiction. *McKenna v. Williams*, 874 A.2d 217, 226, 228, (R.I. 2005). Whether considered as a matter of lack of jurisdiction of the court or of lack of standing of the parties, if domestic relationship of the parties is not a marriage in Rhode Island, the petitions of the parties must be dismissed. Either they lack standing to seek divorce in Rhode Island, or their petitions for divorce are outside the jurisdiction of the Family Court to adjudicate -- or (most likely) both.

V. The Family Court Does Not Have Jurisdiction to Adjudicate these Divorce Petitions

As the jurisdiction of the Family Court is limited and the relief the petitioners seek is not within the scope of the legislature's grant of jurisdiction, the petitions must be dismissed. Other courts may have jurisdiction to hear petitioner's claims, but not the Family Court.

A. The Family Court Lacks Subject Matter Jurisdiction Over the Divorce Petitions Herein

If the parties' domestic relationship is not a marriage in Rhode Island, but is some other kind of domestic relationship, the Family Court lacks jurisdiction to grant either of the parties' competing petitions for divorce. Rhode Island Gen. Laws. § 8-10-3 created a "Family Court" and gave the court jurisdiction "to hear and determine all petitions for divorce from the bond of *marriage* . . . ." *Id.* (emphasis added). *See also* Rhode Island Gen. Laws. §§ 15-5-1, -3, -12 (using the term "bond of marriage"), The critical words used in these statute are "*divorce*" and "*marriage*." It is well-established that only marriages can be the subject of divorce proceedings. If the parties' domestic relationship is another type of domestic relationship, a non-marital relationship, the Family Court does not have jurisdiction to adjudicate a divorce petition or to grant a divorce.

The Family Court is not a court of general jurisdiction, but is a court of limited jurisdiction, and has been given the subject matter jurisdiction to dissolve only marriages (whether valid, void, or voidable). *See generally State v. Day*, 911 A.2d 1042 (R.I. 2006) ("As it exists today, the Family Court is a court of limited statutory jurisdiction . . . . and

its governing statutes give it subject matter jurisdiction only over a very narrow [category of cases]"); *Pierce v. Pierce*, 770 A.2d 867, 870-71 (R.I. 2001) (The Family Court has only "limited jurisdiction" and the jurisdictional provisions are construed carefully, according to the usual rules of construction; citing cases); *State v. Kenney*, 523 A.2d 853, 854 (R.I.1987) ("the Family Court is a court of limited jurisdiction whose powers are strictly limited to those conferred by the Legislature"); *see also Carr v. Prader,* 725 A.2d 291, 293 (R.I.1999); *Furia v. Furia,* 638 A.2d 548, 552 (R.I.1994); *Adam v. Adam,* 624 A.2d 1093, 1098 (R.I.1993).

For more than sixty years it has been established that, in Rhode Island, "divorce is purely statutory and the jurisdiction to exercise the power [to grant a divorce] *is a special and limited jurisdiction.*" *White v. White*, 36 A.2d 661, 664 (R.I. 1944) (emphasis added). The Rhode Island legislature granted limited jurisdiction to the Family Court, and the Rhode Island Supreme Court, as noted above, has consistently and conscientiously prevented unauthorized expansions of that limited jurisdiction.

The Rhode Island legislature conferred on the Family Court jurisdiction over divorce and matters incident thereto. The legislature understands and defines divorce not as dissolution of *any kind* of domestic relationship, but as the termination of "the bond of *marriage*" or "dissolution of a *marriage* . . . .". *See* Rhode Island Gen. Laws. §§ 8-10-3; 15-5-1, -3, -12 (emphasis added). If the relationship that the parties seek to dissolve is not a valid or void *marriage* in Rhode Island, it does not come within the jurisdiction of the Family Court under these terms.

A case decided by this Court in 2000 underscores why jurisdiction in the Family Court does not lie in this case. *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000), involved two women who entered into what they called a "committed relationship" and arranged for one of them to have a child by artificial insemination. The biological mother did not allow her same-sex partner to adopt the child, even though they jointly raised the child for a time. Later, the same-sex relationship broke up, and when the mother refused to let the ex-partner visit the child, the ex-partner filed suit in family court seeking visitation. The Rhode Island Supreme Court first addressed the ex-partner's claim that the parties' relationship "constitute[d] a 'family relationship' within the meaning of Rhode Island Gen. Laws § 8-10-3, such that the Family Court has jurisdiction to entertain a miscellaneous petition for visitation by the former same sex partner when the same sex partner is no longer engaged in the committed relationship[.]" 759 A.2d at 963.

This Court emphasized that the statutory jurisdiction of the Family Court is limited, and is not to be expansively construed but must be applied literally. "[T]he Family Court, as a court of statutory origin, has no more powers than those expressly conferred upon it by the Legislature." *Waldeck v. Piner*, 488 A.2d 1218, 1220 (R.I.1985). Thus, it is powerless to act when the subject matter of a dispute is not within its statutory grant of jurisdiction. *See Rogers v. Rogers,* 98 R.I. 263, 267-68, 201 A.2d 140, 143 (1964)." *Rubano*, 759 A.2d at 963. This Court rejected the petitioner's claim that it should give a "'liberal' construction of the Family Court's jurisdictional grant of authority in order to realize the purposes of the law establishing the Family Court." *Id.* This Court emphasized that Rhode Island legislature did not intend to give the Family

Court jurisdiction over disputes concerning any kind of domestic relationship, but only concerning divorces and matters incident to dissolution of the "bond of marriage" and other statutorily-specified kinds of claims. *Rubano,* 759 A.2d at 963-65.

Since the petition filed in the Family Court in *Rubano* was for visitation, not for divorce the Court held that the divorce jurisdiction statute did not confer jurisdiction on the Family Court to hear the visitation claim. *Rubano*, 759 A.2d at 965. (However, the court ruled that the Uniform Law on Paternity, R.I. G. L. § 15-8-26 allowing "any interested party"to bring an action to determine a parental relationship gave the Family Court jurisdiction to hear the visitation claim. *Rubano, id.* at 966-67.)

Rubano stands for several important propositions. One is the importance of filing a petition that, on its face, seeks relief that is within the jurisdiction of the Family Court to grant. More importantly, *Rubano* holds that R.I. Gen. Laws § 8-10-3 does not give the Family Court jurisdiction to adjudicate issues just because they arise out of some type of family relationship or its breakup. *Rubano* also accepted without question and by acting upon it validated the assumption of the petitioner in that case that a party to a same-sex relationship cannot file a petition for divorce because her relationship is not a marriage and thus does not fall within the limited jurisdiction of § 8-10-3.

The *Rubano* case is not the only case in which this court has held that a claim regarding a family relationship does not come within the Family Court's limited jurisdiction. In *Granger v. Johnson*, 367 A.2d 1062 (R.I. 1977) an adult son, his wife, and their children filed a "habeas corpus" proceeding in the Rhode Island Superior Court and obtained an injunction to prevent his mother's new husband from preventing his mother

from visiting his family. The defendant argued that only the Family Court had jurisdiction over such domestic claims and cases. This Court responded: "The short answer to that contention is that the Family Court is a court of limited jurisdiction, having only such authority as has been conferred upon it by statute. . . . Nothing in the enabling legislation, § 8-10-3, as amended, confers jurisdiction upon it in a matter of this kind." *Id.* at 1066-67. That is true in this case, also.

Merely entering into a relationship and calling it a marriage does not make it a marriage. Nor does merely filing a petition for divorce necessarily give the Family Court jurisdiction to adjudicate the breakup of a nonmarital relationship. The reason for this is nicely illustrated by a story attributed to Abraham Lincoln: "[H]e is said to have once asked how many legs a dog would have if you counted a tail as a leg. To the response 'five legs,' Lincoln said, 'No; calling a tail a leg doesn't make it a leg.'"[9]

There are many kinds of relationships that are or may be deemed "marriages" under the law of some other jurisdictions, including tribal customary law applicable in some jurisdictions, that Rhode Island would not consider to be "marriages." For example, Islamic "temporary marriages" have been in the news recently. In Shiite Muslim law, a man and woman may contact a *sigheh* whereby "a man and a woman sign a contract that allows them to be 'married' for any length of time, even a few hours. An exchange of money, as a sort of dowry, is often involved." Associated Press, *Iran Backs Away From Temporary Marriages*, http://www.nytimes.com/aponline/world/AP-Iran-

[9] Lynn D. Wardle, *Is Marriage Obsolete*, 10 Mich. J. Gender & L. 189, 232, n. 173 (2003); *See also* Col. Alexander K. McClure, Lincoln's Yarns and Stories 323 (1980) (same story using a calf instead of a dog).

Temporary-Marriage.html (seen June 9, 2007). Functionally, such "temporary marriages" are little different than prostitution. Indeed, the government of Iran has considered promoting *sighehs* to combat the problem of open prostitution on the streets of Tehran, "where 300,000 women are believed to work the streets . . . ." Nazila Fathi, *To Regulate Prostitution, Iran Ponders Brothels*, N.Y. Times, Aug. 28, 2002 . The Iranian government's "idea for chastity houses [wa]s borrowed from the practice of temporary marriage, or sigheh, which is permitted in [the] Shiite branch of Islam." *Id*. If a man and woman, co-employees from Rhode Island, visited Iran on business and there entered into a *sigheh* for a two hour marriage, but the man failed to pay the woman (the agreed "dowry"), and upon their return to Rhode Island the woman filed a petition for "divorce" and for recovery of her "dowry," but the facts showed that the *sigheh* was in all material respects merely an agreement to provide sex for pay, would the Family Court be required to assert jurisdiction and treat the matter as a complaint for divorce "from the bond of marriage?" The court would treat it for what it was – a commercial relationship involving the payment of money for sex– and dismiss the case for lack of jurisdiction.

Similarly, a man or woman from Rhode Island might enter into a inter-species marriage in another jurisdiction (as permitted under tribal law, for instance),[10] or might

[10] Interspecies marriage arguments have salted the academic debate over same-sex marriage. *See, e.g.*, Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 Fla. Coastal L. Rev. 181, 208 (2005) (rejecting beastial marriages as a bad argument against same-sex marriage); Derek C. Araujo, *A Queer Alliance: Gay Marriage and the New Federalism*, 4 Rutgers J. L. & Pub. Pol'y 200, ___ n. 19 (2006) (distinguishing interspecies marriage); George Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & Pol. 581, 633-37 (1999) (arguing that the logic of same-sex marriage supports interspecies marriage); Justin T. Wilson, Note, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14

marry a corpse or dead person (as reportedly allowed in France).[11] If that person returned to Rhode Island and filed a petition for divorce and incidents of divorce in the Family Court, it is absurd to believe that the Family Court would be compelled to exercise jurisdiction. If the nature of that relationship was not a *marriage* under Rhode Island law the Family Court would properly decline to exercise *divorce* jurisdiction.

There are many other kinds of domestic relationships than marriage. The petitioners' contention that all relationships that some parties or some legal system somewhere wish to treat as marriage must be treated as a marriages for purpose of Rhode Island Family Court jurisdiction is simplistic and false.

In *Lane v. Albanese*, 2005 WL 896129 (Conn. Super. 2005), two Connecticut women traveled to Rhode Island and entered into a same-sex marriage, allegedly unaware

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Duke J. Gender L. & Pol'y 561, 670, n. 570 (2007) (responding to "slippery slope" arguments including inter-species marriage). There still are regular reports of people marrying or seeking to marry animals. *See, e.g.*, Associated Press, *With this herring I thee wed*, msnbc, Jan. 3, 2006, at www.msnbc.msn.com/id/10694972 (seen July 30, 2007) (woman marries dolphin); *Sudan man forced to 'marry' goat*, BBC News, 24 Feb. 2006, at http://news.bbc.co.uk/2/hi/africa/4748292.stm (seen July 30, 2007) (Sudanese man found in beastiality ordered by a council of elders to marry and pay dowry for a goat); Girja Shankar Ojha, *Jharkhand girl married to dog*, India Travel Times, Feb. 25, 2006, available at http://www.indiatraveltimes.com/news/news2006/feb06/feb2506_news3.html#5 (seen 30 July 2007) (Indian girl of the Santhal tribe was formally married to a dog, to ward off a bad omen); *Orissa woman marries snake of her dream*, The Times of India, 2 June 2006, available at http://timesofindia.indiatimes.com/articleshow/1609295.cms (seen 30 July 2007) (30-year old Indian village woman marries poisonous snake; 2,000 witnesses). Historically, the Roman Emperor Caligula reputedly married his horse.

[11] "In France, it is legally possible to marry a corpse but not someone alive and of the same sex!" Daniel Borrillo, *Who Is Breaking With Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity*, 17 Yale J. L. & Feminism 89, 95 (2005). Marriage to a dead person also is possible in jurisdictions where proxy marriages may be performed. (R.I. Gen. Laws§ 15-5-1 addresses divorce in the case of actual, presumed or civil death of a party to the marriage, does not treat as marriage an attempte union with a dead person.)

of the Massachusetts statute prohibiting the marriage of persons from states prohibiting same-sex marriage. Later, they filed suit in Connecticut to annul the same-sex marriage. The Connecticut Superior Court dismissed for lack of subject matter jurisdiction, even though the Connecticut jurisdictional statute was broader than the Rhode Island statute, encompassing "all such other matters . . . concerning . . . family relations . . . ." Conn. Gen. Stat. Annot. § 46b-1 because the relationship was not a marriage; the court noted the public policy against same-sex marriage and absence of express jurisdictional authority to dissolve such unions. *Id.* at *4. The court also cited an earlier appellate court ruling, *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. 2002), cert. granted, 806 A.2d 1066, appeal dismissed as moot (2002), which upheld the dismissal for lack of jurisdiction of a suit to dissolve a same-sex civil union lawfully registered in Vermont -- because it was "not a marriage recognized under § 46b-1(1) because it was not entered into between a man and a woman . . . ." 802 A.2d 174, and because of the legislative intent not to make Connecticut courts a forum for same-sex, foreign civil unions, and because of the state policy against same-sex marriages. *Id.* at 178. Similar considerations apply in the instant case. Rhode Island's unmodified common law policy barring same-sex marriage and the limits of the Family Court's jurisdiction compel dismissal for lack of jurisdiction.

The Family Court's jurisdictional statute also confers on the Family Court jurisdiction over "other equitable matters arising out of the family relations." Rhode Island Gen. Laws. § 8-10-3. Petitioners appear to suggest that this language confers jurisdiction upon the Family Court to hear petitions for dissolution of nonmarital, family-like relationships.

However, the language in that section only applies to matters incidental to claims for "divorce from the bond of marriage." The Rhode Island Supreme Court in *Rubano* unanimously concluded that "the Legislature did not intend for the Family Court to acquire jurisdiction over this type of controversy under the restricted 'equitable matters arising out of the family relationship' jurisdictional provisions of § 8-10-3(a)." *Id.* at 965 (majority opinion). *See also id.* at 979 (concurring in part) (agreeing "that § 8-10-3 does not confer jurisdiction upon the Family Court over all equitable claims arising out of a family relationship . . . .").

The *Rubano* Court held:

> [I]t is immediately apparent to us that this portion of § 8-10-3 does not grant jurisdiction to the Family Court in all "equitable matters arising out of the family relationship," but only in those equitable matters "wherein jurisdiction is acquired by the court by the filing of petitions for divorce, bed and board and separate maintenance." This final limiting clause narrows the class of "equitable matters arising out of the family relationship" that the Family Court may hear under this portion of § 8-10-3(a) to only cases that originate in petitions for divorce, bed and board, and separate maintenance.

Id. at 964-65; *see also* 979 (Bourcier, J, & Weisberger, C.J., concurring in part). Thus, the Family Court lacks jurisdiction to hear petitions to dissolve and resolve the economic consequence of domestic relationships that are not marriages under the "equitable matters" language of § 8-10-3. "[T]he fact that divorce follows the course of equity 'does

not enlarge' its jurisdiction. It necessarily follows therefore that the power to act over the subject-matter of [a divorce] petition, if it exists, must be contained within the family court act. If it cannot be found there, the court [i]s powerless to act . . . ." *Rogers v. Rogers*, 201 A.2d 140, 143 (R.I. 1964) (citing *White v. White*, 36 A.2d 661, 664 (R.I. 1944). By the same token, the Family Court lacks jurisdiction to hear the parties' petitions for "divorce" relationship as an "equitable matter[] arising out of the family relationship" as the parties' relationship is not a marriage in Rhode Island.

The inclusion of "void marriages" in the Rhode Island statutory list of divorce grounds, R.I. Gen. Laws§ 15-5-1, does not give the Family Court jurisdiction over claims for dissolution of any other categories of nonmarital relationships. Historically, proceedings for divorce were separate from proceedings for annulment of marriage. (This goes back to the centuries-long practice of the English Ecclesiastical Courts, which, until the Matrimonial Causes Act of 1857, had jurisdiction over actions regarding marriages such as divorce, separation and annulment. Originally, those courts only could grant (1) divorce *a mensa et thoro* [from bed and board], what we now call legal separation, and (2) divorce *a vinculo matromonii* [from the bond of marriage], which we would call annulment for defects that existed at the time of the marriage, such as bigamy or consanguinity, but had no authority on their own to grant (3) divorces that terminated the marriage for grounds arising after the marriage. *See generally* William Blackstone, Commentaries on the Laws of England *440-41; Joel Prentiss Barlow, Commentaries on the Law of Marriage and Divorce, vol. 2, §§ 224-25 (1881); Joseph Jackson & C.F. Turner, Rayden's Practice and Law of Divorce 2-7 (9th ed. 1964); Homer Clark, The Law

of Domestic Relations in the United States 405-12 (1987). The granting of judicial divorce for causes arising after the marriage (such as adultery, cruelty, etc.) became generally allowed in English law after the adoption of the Matrimonial Causes Act of 1857. Barlow, *supra;* Rayden's, *supra;* Clark, *supra.*

After divorce for post-marriage causes became generally available, some states combined the jurisdiction, procedures and remedies for annulment with those governing divorce, because the relief sought is functionally the same –termination of the legal bonds of the marital relationship, whether for grounds existing at the time of marriage or arising thereafter. *See generally* R.I. Gen. Laws §§ 15-5-1 (divorce available if marriage void or voidable), -3 (divorce for separation), -3.1 (divorce for irreconcilable differences); *id.* § 8-10-3; *Leckney v. Leckney*, 59 A. 311, 312-13 (R.I. 1904). However, all of those authorized divorce claims involve conjugal (male-female) putative marital relationships. Cases involving those provisions regarding void and voidable marriages have involved "de facto" marriages between persons claiming or believed to be "husband and wife." *See, e.g., Leckney* 59 A. at 312-13 ("they became husband and wife de facto").

It also is significant for this jurisdictional analysis that no Rhode Island statute declares same-sex marriages to be "void." *Compare* R.I. Gen. Ls. §§ 15-1-5 (bigamous and incompetents' marriages are void); 15-1-6 (validation of void inadvertent bigamy). Thus, jurisdiction does not lie.

Courts in many states have emphasized that attempted same-sex marriages are not merely invalid or void marriages but are legal nullities, of no legal effect, non-marital relationships. As the California Supreme Court noted:

> [E]very court that has considered the question has determined that when state law limits marriage to a union between a man and a woman, a same-sex marriage performed in violation of state law is void and *of no legal effect*. (See, e.g., *Jones v. Hallahan, supra,* 501 S.W.2d 588, 589 [same-sex marriage "would not constitute a marriage" under Kentucky law]; *Anonymous v. Anonymous*, N.Y.Sup.Ct.1971) 67 Misc.2d 982, 325 N.Y.S.2d 499, 501 [under New York law, same-sex "marriage ceremony was a nullity" and "no legal relationship could be created by it"]; *McConnell v. Nooner* (8th Cir.1976) 547 F.2d 54, 55-56 ["purported" same-sex marriage of no legal effect under Minnesota law]; *Adams v. Howerton, supra,* 486 F.Supp. 1119, 1122 [purported same-sex marriage has "no legal effect" under Colorado or federal law].)"

Lockyer v. City and County of San Francisco, 95 P.3d. 459 1114 (Cal. 2004) (emphasis added). The California Supreme Court specifically emphasized that even the party arguing for validation of same-sex marriages authorized (illegitimately) by the Mayor of San Francisco had "*not cited any case* in which a same-sex marriage, performed in contravention of a state statute that bans such marriages and that has not judicially been held unconstitutional, *has been given any legal effect*." *Id.*

Moreover, the remedy of the California Supreme Court was not to enter individual annulment decrees or to open the California courthouse doors for annulment proceedings, but to order that the relevant county officials who recorded the same-sex marriages to "notify these couples that [the California Supreme Court] has determined

that same-sex marriages that have been performed in California are void from their inception and a legal nullity . . . ." *Id.* at 498. The court further ordered the county officials "to correct their records to reflect the invalidity of these [same-sex] marriage licenses and marriages . . . [and] offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex couples, and . . . make appropriate corrections to all relevant records. *Id.* The official record was wiped clean, the financial fees collected by the officials for the marriage were returned on request, and the individuals who had entered into same-sex marriages did not need to file any legal proceeding to annul, invalidate or void the marriages, as would have normally been appropriate had the marriages been normally void or voidable. That does *not* happen when a conjugal couple enters into a normal "void" or "voidable" marriage – such as a bigamous, consanguineous, or under-age marriage, or a marriage by force and duress. *See also Li v. State*, 110 P.3d 91, 97, 102 (Ore. 2005) (licenses issued to same-sex couples were void and an order requiring official registration of them as marriages is reversed).

Likewise, in *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. 1971), an attempted (mistaken) marriage between two men (one of whom posed successfully for a few days as a woman, and later had a transsexual operation prior to an action to determine marital status being filed) was declared by a New York Supreme Court not to be a marriage in any respect but "a nullity." The New York Supreme Court distinguished that relationship from "one in which a person seeks an annulment of a marriage or to declare the nullity of a void marriage because of fraud or incapacity . . . or some other statutory reason. *Those cases presuppose the existence of two basic requirements for a*

marriage contract, i.e., a man and a woman. Here one of those basic requirement was missing. *No legal relationship* could be created by it." *Id.* at 499 (emphasis added). In a state that does not allow same-sex marriage, such unions are the kind of "nullity from which no rights of any kind spring," to quote another New York Supreme Court in a related context. *Buckley v. Buckley*, 172 N.Y.S.2d 367 (N.Y. Sup. 1958) (effect of Mexican mail order divorce decree). Similarly, in the instant case, the Massachusetts same-sex marriage of the petitioners failed to create any kind of marital relationship and is not a "void" marriage in the normal meaning of the term, but, rather, it is a non-marital relationship from which no rights of any kind relating to marriage spring.

Claims to dissolve such non-marital relationship have not been added to the statutory list of claims for divorce, not have they been referred by the legislature to the Family Court for adjudication. Some plausible policy arguments may be made that claims to dissolve same-sex unions should be referred by the legislature to the Family Court as the experience of the Family Court judges with failed marriages may make them the best suited to decide claims arising out of the break-up of non-marital relationships. But that policy decision is for the legislature to make. In other words, the petitioners' "remedy is to be found in the state house not the courthouse."*Dowdell v. Bloomquist*, 847 A.2d 827, 837 (R.I. 2004) quoting *Malinou v. Board of Elections*, 108 R.I. 20, 35, 271 A.2d 798, 805 (1970). Until such time as the legislature confers such jurisdiction on the Family Court, if the nature of the relationship that the parties actually had or attempted to have is not under Rhode Island law a marriage, the claim to dissolve the relationship is not within the existing statutory jurisdiction of the Family Court. "[I]naction upon the

part of the legislature, however long continued, can not confer legislative functions upon the judiciary." *Henry[v. Cherry & Webb],* 73 A. [97,] 107 [(1909)]. Accordingly, a party seeking [such relief] . . . should petition the Legislature, not this Court, for relief . . . ." *Dowdell v. Bloomquist*, 847 A.2d 827, 837 (R.I. 2004) citing *Rhode Island Federation of Teachers, AFT, AFL-CIO v. Sundlun*, 595 A.2d 799, 802 (R.I.1991). *See further Keenan v. Somberg*, 792 A.2d 47, 49 (R.I. 2002) (man failed to establish fact of "de facto" parenthood," so Family Court lacked jurisdiction; *Rubano* cited). *See also Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (N.J. Tax 2005) (neither Canadian marriage nor Vermont civil union rendered party to same-sex relationship eligible for 100% disabled veteran property tax exemption; but parties were eligible on the basis of recent New Jersey legislation creating domestic partnerships).

Finally, it must be reiterated that since the facts in the instant case are not in dispute, the jurisdictional issue is primarily one of statutory interpretation. The jurisdiction of the Family Court in this case stands or falls depending upon the construction of Rhode Island law. R.I. Gen. Laws §§ 8-10-3 & 15-5-1.

Petitioners must factually establish the existence of jurisdiction, not merely plead it. One reason this Court remanded this case to the Family Court on January 17, 2007, was to develop "a fuller factual record" for purpose of deciding the core jurisdictional issue. *Chambers*, 916 A.2d at 758. It has long been recognized by Rhode Island courts that "jurisdiction is a mixed question of law and fact," *Cassidy v. Lonquist Management Co., LLC.*, 920 A.2d 228, 232 (R.I. 2007) (re: territorial jurisdiction); *Jewell v. Jewell*, 751 A.2d 735, 741 (R.I. 2000) (domicile required for Family Court subject matter

jurisdiction over divorce cannot be waived; facts can be challenged at any time). Thus, petitioners must factually establish the existence of jurisdiction, not merely plead it. In the instant case the parties have filed a petition for divorce and alleged that they had a marriage. Merely labeling a petition as one for divorce, might establish a prima facie case for jurisdiction in the Family Court under R.I. Gen. Laws§§ 8-10-3 and 15-5-1, and may satisfy the pleading prong of *Rubano*. However, if, in fact, the domestic relationship that exists is *not* a marriage, then the Family Court would lack jurisdiction.

In this case, the uncontested facts alleged in the petitions of the parties and other filings below and the findings made by the Family Court clearly establish that both of the parties to the alleged marriage were and are female. Decision, *supra* at 2-3; Joint Memorandum, *supra* at 2-3. If Rhode Island law applies, and if, under Rhode Island law, two women may not marry each other, then the relationship the parties had was not a "marriage" and their petitions for divorce must be dismissed as outside the jurisdiction of the Family Court. As shown *supra* in Part II, Rhode Island law does apply and it does not permit or same-sex marriages. Thus, on their face, the Petitions in this case show a fatal jurisdictional defect.

B. Some Other Court May Have Jurisdiction

If the parties' relationship is not a marriage under Rhode Island law, the Family Court does not have jurisdiction under the Rhode Island statutes. It may be that another Rhode Island court, such as a court of general, common law and equitable jurisdiction, might have jurisdiction. A Rhode Island Superior Court may have jurisdiction to adjudicate issues arising out of the break-up of a same-sex relationship. *Granger v.*

Johnson, 367 A.2d 1062, 1066-67 (R.I. 1977). The Superior Court of Rhode Island is a court of general jurisdiction, not the Family Court. *State v. Day*, 911 A.2d 1042, 1049 (R.I. 2006); *Barone v. O'Connell*, 785 A.2d 534, 535 (R.I. 2001); *Chase v. Bouchard*, 671 A.2d 794, 796 (R.I. 1996).

However, the question now before the Court in this case is not whether some other court may have jurisdiction, but whether the parties' relationship is the specific kind of relationship over which the statutes grant the Family Court jurisdiction – a valid or void marriage under Rhode Island law. It was not. Under the laws of Rhode Island, the same-sex relationship of the parties was a non-marital relationship. Thus, the Family Court does not have jurisdiction.

VI. Federal Law Does Not Require the Family Court of Rhode Island to Exercise Jurisdiction in this Case to Grant a Divorce to Two Rhode Island Women Who Entered Into a Same-Sex Marriage in Massachusetts.

Neither DOMA nor the Full Faith and Credit Clause of the U.S. Constitution changes this the analysis of the justiciability or jurisdictional issues discussed above.

The federal Defense of Marriage Act has little direct bearing upon most jurisdictional issues in this case. However, if an argument is put forth that federal law requires Massachusetts to provide a judicial forum to adjudicate claims arising out of attempted or alleged Massachusetts same-sex marriages, DOMA would apparently refute that claim, since it very broadly provides that no state "shall be required 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," nor is any State required to give effect to any "right or claim arising from such relationship." 28 U.S.C. § 1738C. If Rhode Island is not obliged to give effect to any claims arising out of Massachusetts same-sex marriages, the state certainly cannot be required to provide a judicial tribunal to hear such claims.

The Full Faith and Credit Clause, U.S. Consti., art. IV, § 1, has no direct bearing upon the jurisdictional issues in this case. Generally, the effect of the Full Faith and Credit Clause upon the exercise of state court jurisdiction is quite narrow, and deals mostly with influencing states to exercise proper jurisdiction in order to insure that their judgments are entitled to full faith requiring in other states. Judgments rendered by courts that do not have proper jurisdiction are not entitled to full faith and credit. *See, e.g., Hanson v. Denckla*, 357 U.S. 235 (1958); *Estin v. Estin,* 334 U.S. 541 (1948); *Williams v. North Carolina (II)*, 325 U.S. 226 (1945).

In very rare cases, the U.S. Supreme Court has ruled that under the Full Faith and Credit Clause, a State cannot "escape the constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent." *Hughes v. Fetter,* 341 U.S. 609, 611 (1951); *First Nat. Bank of Chicago v. United Air Lines,* 341 U.S. 396 (1952) (state law forbidding some but not all foreign wrongful death actions violates Full Faith and Credit); *Broderick v. Rosner,* 294 U.S. 629 (1935) (New Jersey must allow New York claim). That narrow principle of those oft-distinguished cases only applies in situations of clear interstate discrimination, such as when the forum state allows certain claims arising under its own laws to be heard in the forum courts but does not allow identical

claims arising under the law of another state, and when the forum "has no real feeling of antagonism" against the policy of the other state. *Hughes,* 341 U.S. 613. *See Caroll v. Lanza,* 349 U.S. 408 413 (1955) (distinguishing *Hughes*); *Watson v. Employers Liability Assur. Corp.*, 348 U.S. 66, 73 (1954) (distinguishing *Hughes*); *Wells v. Simonds Abrasive Co.,* 345 U.S. 514, 518 (1953) (distinguishing *Hughes*). The instant case, however, "is a far cry from what was involved in *Hughes v. Fetter, ...*" *Vanderbilt v. Vanderbilt,* 354 U.S. 416, 425 (1957) (Frankfurter, J., dissenting). Rhode Island has not tried to advance its own policy at the expense of another state by depriving its courts of power to entertain suits based on the other state's laws; rather, the aggressor, if there is one, is Massachusetts. Rhode Island does not permit the very relationship which petitioners seek to bring into the Rhode Island Family Court. The substantive "antagonism" between the policies of Massachusetts and Rhode Island is obvious. The policy of treating marriage as a unique conjugal union clearly divides these states.

Moreover, unlike *Hughes,* it has not been established that no other courts of Rhode Island have jurisdiction to adjudicate claims arising from the break-up of petitioners' relationship. Thus, the courthouse doors are not closed.

Finally, *Hughes* and its line of cases were decided well before the federal Defense of Marriage Act was enacted by Congress under its authority to regulate the "effects" of sister state acts, records and judgments. DOMA prevents any state from having to give effect to claims arising out of same-sex marriages from other states. Thus, it prevents Rhode Island from having to provide a forum to adjudicate such claims.

VII. If the Rhode Island Court Treats this Relationship as a Marriage (valid or void) and Enters a Divorce Decree, the Judgment May not be Recognized by Other States Under Prevailing Conflict of Laws Principles, the federal DOMA, and the Full Faith and Credit Clause of the U.S. Constitution.

If the Rhode Island court enters a divorce judgment, the interstate recognition of that judgment will be seriously problematic. Forty-eight of forty-nine sister states, as well as the federal government, recognize marriages only between a husband and wife. Those states can be expected to try to vindicate their own public policy by resisting the enforcement of and declining recognition of the Rhode Island same-sex marriage "divorce" judgment.

The federal DOMA explicitly authorizes states to decline to recognize "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. § 1728C. Thus, on its face, DOMA allows states to refuse to give recognition to same-sex marriage "divorce" judgments. While most Conflict of Laws scholars (as distinguished from other legal commentators) conclude that DOMA is constitutional, *see* Brilmayer, *supra*, it is certain that angry litigation would result. Regardless of who might win the legal war over recognition or nonrecognition of a Rhode Island same-sex marriage divorce decree, it would be a tragic and divisive battle generating resentment toward Rhode Island and damaging our national union.

On the other hand, if the Rhode Island courts treats the petitioners' relationship as a non-marital relationship, e.g., akin to a civil union or domestic partnership, it would

maximize the likelihood that the judgment would be recognized in neighboring states. While only one state, Massachusetts, recognizes same-sex marriage, many states have recognize same-sex relations as non-marriages.[12] Connecticut, New Jersey and Vermont have already adopted civil union legislation, and New Hampshire's civil union law will take effect in January of 2008. The nation's most populous state, California, has a similar system of domestic partnerships equivalent to civil unions, as does the District of Columbia. Several other states, including Maine, Oregon, and Washington register domestic partnerships with some significant quasi-marital benefits, but not fully equivalent to marriage, as does Hawaii, where they are called "Reciprocal Beneficiaries." Thus, a Rhode Island judgment treating the petitioner's Massachusetts same-sex marriage as a non-marital union would likely be recognized at least ten states but if it is deemed a marriage it will only be recognized in Massachusetts.

Equally significant is the fact that while 27 states have adopted constitutional amendments prohibiting the recognition of same-sex marriages (and 45 states have either statute or amendment explicitly defining marriage only as the union of husband and wife) only 18 states have constitutionally banned civil unions.[13] Thus, while in only 23 states same-sex marriages constitutionally is possible, in at least 32 states (and the District of

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[12] *See, e.g.*, California (Cal. Fam. Code §297); Connecticut (Conn. Gen. Stat. Ann. §46b-38aa); D.C. Code §§ 1-612.31; 16-2701; 32-501; 32-701; 42-1102; Maine (22 Maine Rev. Stat. §2710); New Jersey (N.J. Stat. Ann. §37:1); Vermont (15 Vt. Stat. Ann. §1201); Hawaii (Haw. Rev. Stat. § 572C-1); Oregon (Or. Rev. Stat. §106.010); Washington (2007 Wash. S.B. 5336); New Hampshire (N.H. Rev. Stat. 457-A:6).

[13] *See* this brief page 19, n. 8 *supra* (amendment cites). The states banning civil unions are Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, Wisconsin. *See also* William C. Duncan, *Marriage Amendments and the Reader in Bad Faith* 7 FLORIDA COASTAL LAW REVIEW 233, 233 (2006) (describing law as of 2005).

Columbia) civil unions either exist currently or they could be recognized by legislative action or judicial interpretation without violating the state constitution.

While the interstate recognition of same-sex unions remains an uncertain and often disputed field, in the current legislative and constitutional landscape non-marital unions are both currently recognized in more states than are same-sex marriages, and have greater potential for widespread recognition in the near future.[14] Accordingly, interstate judgment recognition analysis favors not treating the petitioner's same-sex relationship as a marriage.

CONCLUSION

This case raises profound questions of justiciability, jurisdiction, choice of law, and family law, and has significant implications for Rhode Island divorce judgment recognition. Since marriage is required for both Family Court jurisdiction and the substantive relief of divorce and since same-sex marriage is not allowed or recognized in Rhode Island, the solution is to dismiss the petitions for lack of jurisdiction while clarifying that same-sex marriage is prohibited in Rhode Island.

If Petitioners seek to part ways, they already have that status in the eyes of Rhode Island law; petitioners seek a status they already have. No divorce is necessary, and granting one would be an otiose (and ultra vires) act by the court.

[14] For example, the Attorney General of New Jersey recently ruled that both civil unions and same-sex marriages from other jurisdictions will be treated in New Jersey only as civil unions. State of New Jersey, Office of the Attorney General, Formal Opinion No. 3-2007 (Feb. 16, 2007), available at http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf (advising State Registrar of Vital Statistics).

This Court should rule that petitioners' claims for "divorce" are both nonjusticiable and beyond the jurisdiction of the Family Court. The Court should hold that the status of the petitioner's relationship is governed by Rhode Island law, and that Rhode Island law does not allow or recognize same-sex marriages.

Respectfully submitted,

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