SUPREME COURT
OF THE STATE OF RHODE ISLAND

No. 06-340-M.P.

MARGARET CHAMBERS,
Plaintiff

v.

CASSANDRA ORMISTON,
Defendant

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

RESPONSIVE
BRIEF OF AMICUS CURIAE
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Introduction

This responsive brief is intended to address two points.

First, it will address amici curiae Law Professors, *et al.'s* contention that the conflict of laws issues raised by the certified question – themselves not issues that pertain to the subject matter jurisdiction of the Family Court – may nevertheless be addressed sua sponte by the Court because they are "embedded" within the word "marriage" in the Family Court jurisdictional statute, R.I.G.L. §8-10-3.

Second, it will address amici curiae, United Families International, Family Watch International, and Family Leader Foundation's contention that, notwithstanding the fact that the conflict of laws issues raised by the certified question do not pertain to the Family Court's subject matter jurisdiction, and are not in dispute as between the parties, they still may be addressed by the Court sua sponte.

This amicus curiae will argue that subject matter jurisdiction over the divorce petition exists notwithstanding any conflicts of laws issues that could be raised in this action, and that the Law Professors *et al.'s* interpretation of §8-10-3 is both unreasonable and unworkable. He will then argue that the "judicial power" conferred by art. 10, sec. 1 of the state constitution does not contemplate the power of a court to raise and or decide an issue that has not been raised and put in controversy by the parties to the action, notwithstanding the general justiciability of the plaintiff's claim, except for very limited circumstances that are not present here.

Argument

I.) The conflict of laws issues raised by the certified question do not implicate the subject-matter jurisdiction of the Family Court.

A.) Both the certified question, and the Court's questions, correctly presume the Family Court's subject matter jurisdiction over the divorce petitions.

When this Court entered its briefing order with respect to the Family Court's 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?"- it directed the parties and amicus curiae to address "whether or not this case presents an actual case or controversy[.]" The "case or controversy" issue goes to the constitutional authority, or to what this friend of the court has described as, the "constitutional jurisdiction" of this Court, or the Family Court, to decide the certified question. The mere asking of the case or controversy question, however, assumes the existence of jurisdiction over the subject matter of the case – the competing petitions for divorce from the bond of marriage. If no subject-matter jurisdiction existed there would be no need to ask the certified question, or to ask whether the certified question presented a justiciable case or controversy. Moreover, the remaining two issues the Court asked the parties and amici to address, concerning the Full Faith and Credit Clause and the Defense of Marriage Act, 28 U.S.C. §1738C (2000), implicate conflict or choice of law principles. When the law of two or more states potentially apply to a suit or an issue, an analysis of which law should apply is only necessary where subject matter jurisdiction does in fact exist. Like the case or controversy question, the Court's conflict of laws question also

presume subject matter jurisdiction. *See Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 831 n. 4 (10th Cir. 2005); *In re Korean Air Lines Disaster*, 932 F.2d 1475, 1495 (D.C. Cir. 1991).

That is presumably why this Court did not ask the parties and amici to brief whether the Family Court had subject matter jurisdiction over the divorce petitions, and ordered the Family Court to reword its original certified question which specifically formulated the question in subject matter jurisdiction terms. Presumably, that is also why, with one exception, no party and none of the amici have asserted the Family Court lacks subject matter jurisdiction over the "petitions for divorce from the bond of marriage." R.I.G.L. §8-10-3(a).[1]

The issue presented is plainly one of conflict of laws – whether the Rhode Island Family Court will recognize the out-of-state marriage and exercise its jurisdiction to enter a divorce decree declaring the unmarried status of the parties. "Unlike jurisdictional issues, courts need not address choice of law issues sua sponte[,]" *Flying T Inc., supra* at 831 n. 4; *In re Korean Airline Disaster, supra*, at 495, as this Court has at least impliedly recognized. *Compare Tomaino v. Concord Oil of Newport, Inc.*, 709 A.2d 1016, 1021 n. 11 (R.I. 1998) ("The parties have raised no issue in regard to choice of law and in their briefs rely on Massachusetts law as it relates to this substantive issue. We therefore do likewise."); *Vincent Company v. First National Supermarket, Inc.*, 683 A.2d 316, 362 (R.I. 1996) ("Since the parties agree that Massachusetts

[1]Ormiston and six amici, Bender; Gay and Lesbian Advocates and Defenders; the Attorney General; American Civil Liberties Union; the Governor; and Marriage Equality Rhode Island, all affirmatively assert the Family Court had subject matter jurisdiction. Chambers and seven amici; United Families International, *et al.*; Professors of Conflict of Laws and Family Law; Family Research Council and Reverend Lyle Mook; the Most Reverend Thomas J. Tobin,, D.D. Bishop of Providence; the Becket Fund for Religious Liberty; the National Legal Foundation; and Christopher Young, do not specifically address subject matter jurisdiction.

law applies, this Court will interpret the contract under the laws of that commonwealth."), with *Zarrella v. Minnesota Mutual Life Ins. Co.*, 824 A.2d 1249, 1256 (R.I. 2003) ("Subject matter jurisdiction is an indispensable requisite in any judicial proceeding . . . and cannot be waived or conferred by consent of the parties.").

Since a conflict of laws issue is not of jurisdictional dimension, but rather an issue for a party to raise or not raise, and there is no dispute here over the conflicts question as between the parties, this Court has properly acknowledged that it must determine whether the question is a case or controversy upon which it may constitutionally proceed. In this amicus curiae's opening brief, he has asserted it is not.

B.) Amici, Law Professors *et al.'s* suggestion that the conflict of laws question is embedded within the term "marriage" in the Family Court jurisdictional statute would impose an unreasonable burden on Family Court judges, and is inconsistent with the common law presumption of the validity of a solemnized marriage.

Amici, Law Professors, *et al.*, (Wardle Brief), have offered the Court a different perspective. They have in essence asserted that this conflict of laws question *is* a jurisdictional one, because a conflicts analysis is embedded within the jurisdictional statute, §8-10-3. They assert a Family Court justice must engage in a conflicts analysis to interpret what the General Assembly intended by the word "marriage" as it is used in the statute. Their basic argument is in four parts.

First, §8-10-3 only gives the Family Court jurisdiction over "petitions for divorce from the bond of marriage." (Wardle Brief at 27). Second, in order to determine whether the marriage of Chambers and Ormiston is a marriage within the meaning of the statute, the Court must undertake a conflicts analysis. (*Id.*). By engaging in the analysis and examining Rhode Island

common and statutory law, they conclude that, although valid in Massachusetts, the Chambers-Ormiston marriage would be against Rhode Island public policy. Since, their argument goes, the conflicts analysis shows that a same-sex marriage would not be recognized in Rhode Island it is not a "marriage" within the meaning of §8-10-3, and the Family Court has no statutory jurisdiction to adjudicate divorce petitions concerning it. (*Id.*). Fourth, although there may be a constitutional issue under the Full Faith and Credit Clause with a construction of the statute that excludes valid out-of-state same-sex marriages from Family Court jurisdiction, that issue would be obviated by the federal Defense of Marriage Act (if that act is itself constitutional). (*Id.* at 44-45).

One significant drawback to this interpretative analysis, however, is the burden it would place on Family Court justices whenever a divorce petition involves an out-of-state marriage.

"Ensuring the existence of subject-matter jurisdiction is [a] court's first duty in every lawsuit." *McCready v. White*, 417 F.3d 700, 702 (7th Cir. 2005) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)); *accord McCulloch v. Velez*, 364 F.3d 1, 5 (1st Cir. 2004) ("It is black-letter law that a . . . court has an obligation to inquire *sua sponte* into its own subject matter jurisdiction."); *Torres v. Southern Peru Copper Corporation*, 113 F.3d 540, 542 (5th Cir. 1997) ("We have repeatedly instructed that before proceeding with a case, . . . trial and appellate courts have a duty to examine the basis for their subject matter jurisdiction[.]"). An interpretation of §8-10-3 that would require a Family Court justice to engage in a conflict of laws analysis in order to establish its subject matter jurisdiction over an out-of-state marriage, to determine it was not against Rhode Island public policy before proceeding, would make him or her duty-bound to determine in each case that the out-of-state

marriage was not a bigamous marriage,[2] consanguineous marriage,[3] marriage of mentally incompetent persons,[4] a fraudulent marriage,[5] or any other marriage that might strongly offend Rhode Island public policy. That inquiry would often require a factual inquiry as well as a legal one, perhaps into facts existing years or decades earlier, and occurring in another state.

Amici Law Professors' interpretation of §8-10-3 presumes the General Assembly intended that Family Court jurisdiction over divorces would not be triggered until the Family Court justice went behind a marriage certificate and undertook a factual inquiry and a conflicts of law analysis into the *bona fides* of the out-of-state marriage from Rhode Island's public policy perspective. This amici suggests a more reasonable, and likely, interpretation would be that the General Assembly intended that jurisdiction would be triggered on the basis of the well and widely settled rule that "[t]he law presumes that any marriage which has been solemnized in accordance with the laws of the jurisdiction where the ceremony is performed is valid[,]"[6] and evidence that such a solemnization has occurred. *See State v. Sivo*, 925 A.2d 901, 916-17 (R.I. 2007) ("It is well established that the Legislature is presumed to know the state of existing law when it enacts or amends a statute.") (internal quotes omitted). Moreover, that interpretation of §8-10-3 is in *pari materia* with the Legislature's enactment of R.I.G.L. §15-5-1.

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[2] R.I.G.L. §15-1-5.

[3] R.I.G.L. §15-1-1 through 15-1-3.

[4] R.I.G.L. §15-1-5.

[5] *Santos v. Santos*, 80 R.I. 5, 9-11, 90 A.2d 771, 773-74 (1952).

[6] 29 Am.Jur.2d Evidence §214 (2007).

C.) Amici, Law Professors, *et al.*'s interpretation of the Family Court jurisdictional statute is inconsistent with the Family court's authority to decree divorce for void or voidable marriages.

Section 15-5-1 provides that "[d]ivorces from the bond of marriage shall be decreed in case of any marriage originally void or voidable by law[.]" "[A] void marriage is an absolute nullity and is not entitled to any recognition or legal status." C.P. Kindregan, Jr. & M.L. Inker, *Family Law and Practice*, §19.2, at 736 (3d ed. 2002); *see Black's Law Dictionary*, 1604 (8th ed. 2004) ("void" defined as "Of no legal effect; null"); *cf. Guertin v. Guertin*, 870 A.2d 1011, 1021 (R.I. 2005) ("A void judgment is from its inception a legal nullity."). Section 15-5-1 suggests that the General Assembly did not intend that Family Court justices go behind an out-of-state marriage certificate to determine if the out-of-state marriage was in fact a "valid" marriage from the perspective of Rhode Island law, in order to determine if Family Court jurisdiction existed. Instead, it suggests that the General Assembly intended that the Family Court would have subject matter jurisdiction to enter a divorce decree *regardless* of the actual validity of the marriage.

Amici Law Professors, *et al.*, attempt to ameliorate both the burden their statutory interpretation of §8-10-3 would place on Family Court trial justices, and the obstacle §15-5-1 presents to their argument, by asserting that same-sex marriages, even if valid in another state, are *less than* void or voidable marriages under Rhode Island Law. (Wardle Brief at 27, 36-37, 43). Consequently, in their view, the Chambers-Ormiston marriage permitted under Massachusetts law is not a "marriage void or voidable by law" within the meaning of §15-5-1. That argument, however, parses too fine.

An act simply cannot have less than "no legal effect," be less than "null," or less than a "legal nullity." The case authorities they offer that purportedly support this proposition all

involve same-sex marriages performed in states that the court determined prohibited such marriages,[7] and in the case at bar the marriage was in fact valid in the state where it was performed. Not only are the cases distinguishable on that basis, they do not purport to describe how a marriage solemnization can have *less than* no legal effect or be *less than* a legal nullity, or what term would describe such a metaphysical or philosophic legal existence.

Lastly, amici Law Professors, *et al.* resort to the spectre that if the Family Court is found to have subject matter jurisdiction over a divorce petition arising out of a Massachusetts same-sex marriage, the Court will also have jurisdiction over marriages between humans and animals or corpses, or temporary marriages that are functionally an exchange of money for sex. (Wardle Brief at 31-33). They assert that if a marriage of this type was permitted somewhere, and if a live, human party to such a marriage "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." (*Id.* at 33). In the unanticipated and unlikely event that the Rhode Island Family Court is actually presented with a divorce petition arising out of such a marriage, that actually purports to be valid somewhere, the legislative process would presumably remedy that problem in short order by amending the Family Court's jurisdictional statutes. That "prospect" need not be the basis for a contorted interpretation of §8-10-3. And, if the prospect of the Family Court entertaining divorce petitions arising out of same-sex marriages permitted in

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[7] *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976); *Adams v. Howerton*, 486 F.Supp. 1119 (D.C. Cal. 1980); *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 95 P.3d 459 (2004); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (1971); *Li v. State*, 338 Or. 376, 110 P.3d 91 (2005).

another state is as equally disturbing to Rhode Island citizens and their elected representatives, the legislative process will address that too.[8]

Try as they might, amici curiae Law Professors, *et al.* cannot transform the conflict of laws questions that arise from the certified question into a subject matter jurisdiction issues.

II.) Reaching out to decide a non-subject matter jurisdiction issue, not in dispute as between the parties, would exceed the scope of the Court's "judicial power" under Art. 10, sec. 1 of the state constitution.

Amici curiae, United Families International, Family Watch International, and Family Leader Foundation, ("Stewart Brief"), assert this Court may act upon the certified question and hold that the Family Court may not exercise its jurisdiction over the divorce petitions, even though they acknowledge neither party to the action has made that claim and it is not a jurisdictional issue. (Stewart Brief at 22-24). The only authority cited in support of that proposition is a paragraph from a treatise. (Brief at 23-24 citing Charles Alan Wright et al., 13 *Federal Practice and Procedure* §3530). In full the passage provides:

> The presence of parties does not guarantee that all available matters will be argued. The same policies that require the presence of adverse parties ordinarily mean that a court should not pass upon claims that have not been advanced between parties who are in court on other claims. Once a claim is advanced, however, a more complex calculus is needed to determine whether to resolve issues that have not been argued by the parties but that might advance decision. If the issues are not needed to dispose of the case in a way that seems appropriate, they may be put aside. If the court believes that an issue might provide a desirable basis for decision, however, several paths can be followed. One is to raise

[8] Law Professors, *et al.* briefly address the Court's question as to whether an actual case or controversy exists. (Wardle Brief at 24-26). They state only that "[i]t appears that the case presents a proper case or controversy[,]" but that both Chambers and Ormiston lack standing to petition for divorce. (*Id.* at 24, 25). First, there is no case or controversy if the parties do not have standing. Second, their standing argument is predicated on their argument that the Family Court lacks subject matter jurisdiction over the divorce petitions.

> the issue on the court's own motion even if the parties have agreed that the issue is out of the case. Another is to direct the parties to argue the issue; at times this course may be pushed with vigor. Or the court may appoint a friend of the court to argue an issue that the parties cannot be led to argue in a helpful way. None of these actions violates the case or controversy requirement.

13 *Federal Practice and Procedure*, §3530 at p. 323-24. An examination of the authorities cited by the treatise writers that underlie this passage show that a court's authority to advocate an issue not raised by the parties is significantly more limited than the passage might intimate.

Amici's primary theme is that the initial controversy between the parties with respect to the details of the divorce and division of property, liabilities and responsibilities, is sufficient to render any issue related to the case within the authority of the court to decide – whether or not the issue is raised by the parties, and whether or not the parties seek the same outcome with respect to the issue. (Stewart Brief at 22-23).

A generalized adversity, presuming the legal and constitutional standing of the plaintiff, renders the *suit* justiciable. It does not, however, render every conceivable issue related to the suit within the power of the court to decide.

A court has a constitutional and institutional obligation to sua sponte address jurisdictional issues related to its authority and capacity to exercise the judicial power. By definition, however, an issue that is not jurisdictional is waivable, and if it is waived it is not in dispute. If a court were to sua sponte raise and decide a waived issue that was not in dispute, and did no go to its authority to act, it would be advocating not judging. And however it decided the issue, the decision would favor one party and harm the interests of the other, or, where, as here, the parties agree on the issue, it may harm the interests of both. The "judicial power," however,

is not the power to "advocate" on behalf of or against a party by raising issues, sua sponte, but the power to resolve disputes as the parties have brought the dispute to the court.

The only traditional "advocacy" role that a court might play is limited to an appellate court's "defense" of a lower court's judgment. An appellate court reviewing a judgment is not bound by the lower court's reasoning in affirming the judgment, or even the issues or arguments relied upon by the prevailing party. *See Hagenburg v. Avedesian*, 879 A.2d 436, 443 (R.I. 2005) ("This Court long has recognized that we are free to decide a case on grounds other than those relied upon by the trial justice."). Nor is an appellate court bound by the parties' agreement that the lower court judgment is erroneous and should be reversed and vacated. In either case the appellate court may raise an issue on its own to "defend" the lower court judgment, or where the parties agree the lower court judgment was wrong, direct the parties to argue the issue, or failing that, appoint a friend of the court to argue the issue. *See, e.g., Bousley v. United States*, 523 U.S. 614, 618, 118 S.Ct. 1604, 1608-09, 140 L.Ed.2d 828 (1998) (appointed amicus curiae to argue in support of judgment); *Ornelas v. United States*, 517 U.S. 690, 695 n. 4, 116 S.CT. 1657, 1661 n. 4, 134 L.Ed.2d 911 (1996) (same); *Grove City College v. Bell*, 465 U.S. 555, 562 n. 10, 104 S.Ct. 1211, 1216 n. 10, 79 L.Ed. 516 (1984) (respondent's concession that Court of Appeals erred was held to be not binding on Supreme Court). In those circumstances the appellate court is responding to institutional concerns regarding the integrity of the lower court judgment. Those concerns are not present in the trial court where there is virtually no basis for the exercise of judicial power to encompass an advocacy role.

Like the federal courts, the authority of Rhode Island state courts to act is limited to the resolution of cases or controversies. Where there is no dispute on a non-subject matter jurisdiction issue, such as the law that will govern the dispute, the issue is not in controversy, *see*

Moore v. Charlotte-Mecklenberg Board of Education, 402 U.S. 47, 47-48, 91 S.CT. 1292, 1293, 28 L.Ed.2d 590 (1971) ("We are thus confronted with the anomaly that both litigants desire precisely the same result . . . There is, therefore, no case or controversy within the meaning of Art. III of the Constitution.") (citing *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911)), and the court exceeds its constitutional jurisdiction by deciding an issue not in controversy. *Williams v. Zbaraz*, 448 U.S. 358, 367, 100 S.Ct. 2694, 2700, 65 L.Ed.2d 831 (1980) (district court "exceeded its jurisdiction under Art. III" in declaring the Hyde Amendment unconstitutional where none of the parties challenged its validity).

As established in Part I, a conflict of laws issue does not go to the jurisdiction or authority of the court to act. It is a claim that a party can elect to make or not make, either in pursuit of their own claim or in defense of a claim against them, or the parties may even agree on the applicable law. If there is a disagreement or controversy over the applicable law, the court will decide that controversy under the forum's conflict of laws principles. If there is agreement, there is no conflict to decide and the court will apply the agreed upon law. *See, e.g.*, *Tomaino, supra,* at 1021 n. 11; *Vincent Company, supra,* at 362. Whether by agreement or court decision, what law applies does not affect or extinguish subject matter jurisdiction that already exists, nor would it confer subject matter jurisdiction where it does not already exist. It is one of the many questions that may arise in a lawsuit that the parties must determine whether or not to put in issue.

Since the conflict of laws issues posed by the certified questions are not jurisdictional, the Court not only has no duty to decide them, but because the parties have not put them in controversy the Court has no constitutional authority to decide them, or even opine on them, – the Court's "judicial power" being limited to decision on actual cases or controversies.

Conclusion

For the above-stated reasons, and those set forth in amicus curiae Thomas R. Bender, Esq.'s opening brief, this Court should find that the conflict of laws issues implicated in the certified question are not jurisdictional; that the divorce petitions by Chambers and Ormiston are within the Family Court's subject matter jurisdiction; and that answering the certified question is not within the constitutional jurisdiction of this Court or any other Rhode Island state court, because it does not constitute a case or controversy necessary for the constitutional exercise of judicial power.

For these reasons, this Court should not answer or opine on the certified question, and should remand the case back to the Family Court for adjudication of the divorce petitions.

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