No. 06-340-M.P.

RHODE ISLAND SUPREME COURT

Margaret Chambers,

Plaintiff

v.

Cassandra Ormiston,

Defendant

Question Certified from the Rhode Island Family Court

BRIEF OF AMICUS CURIAE GOVERNOR DONALD L. CARCIERI

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Introduction

Before this Court is a certified question inquiring whether the Family Court may properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state. At the Court's request, amicus Governor Carcieri files this brief.

Questions Presented

I. Whether The Certified Question Addresses An Actual Case Or Controversy.

II. Whether the Full Faith and Credit Clause Or the Federal Defense of Marriage Act Demand a Particular Resolution of this Certified Question.

III. Whether Recognizing a Foreign State's Same Sex Marriage Violates Rhode Island's Public Policy Under Its Choice of Law Jurisprudence.

Summary of the Argument

The issue before this Court, presented as a certified question from the Rhode Island Family Court, is whether Rhode Island recognizes same-sex marriage for purposes of granting a divorce petition. As a preliminary matter, this Court should be aware that to grant a divorce petition, whether the marriage is valid in Rhode Island is irrelevant. In Rhode Island, a divorce can be granted even if the marriage is void or voidable. Thus, it is of no consequence to the Family Court whether or not the marriage it is presented with is valid in Rhode Island. Because a false controversy is before this Court, it should defer resolution of such a significant issue to the people of Rhode Island.

Should this Court choose to consider the certified question before it, it must do so against the backdrop of Article IV, Section 1, of the United States Constitution and

subsequent Congressional legislation governing that Article. Article IV, Section 1, commonly referred to as the Full Faith and Credit Clause ("FFCC") states "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." It further states that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." At first blush it would appear that the FFCC requires Rhode Island to recognize same-sex marriage before it, granted in Massachusetts. However, two considerations undermine such a conclusion. First, the issue of recognizing a same-sex marriage is not a judgment of another state but instead reflects another state's law. The United States Supreme Court has stated that such a distinction is critical to analysis under the FFCC. Because same-sex marriage involves another state's laws, issues involving it are not governed by the FFCC. Second, Congress, properly exercising its power under the FFCC, has statutorily created an exception for the states on this precise issue by way of a Defense of Marriage Act ("DOMA"), allowing states to determine for themselves to what degree, if at all, they will recognize same-sex marriages. Consequently, neither the FFCC nor DOMA articulate a policy position this Court must take.

Instead, this certified question is governed by Rhode Island's conflicts of law jurisprudence, which allows an exception to recognizing another state's law if such a law violates Rhode Island's public policy. While Rhode Island does not have an express prohibition on same-sex marriage – the existence of which is neither necessary nor the only means by which to assess Rhode Island's position on this matter –both Rhode Island's statutes and public interest demonstrate a strong public policy against the recognition of same-sex marriages. Domestic relations statutes make clear through

intentional drafting of gender-specific language that marriage is between one man and one woman, and the state's interest in creating stable environments for the raising of children supports the exclusion of same-sex couples from the institution of marriage. Because Rhode Island has strong public policy against the recognition of same-sex marriages, this Court, should it choose to consider the certified question before it, should deny recognition to such marriages.

Argument

Standard of Review

Pursuant to Rhode Island General Laws § 9-24-27, this Court may consider a certified question from a "superior court or [] any district court [regarding] any question of law [that] is of such doubt and importance and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings." General Law § 8-10-43 includes the Family Court within the scope of § 9-24-27. *Pierce v. Pierce* 770 A.2d 867, 870 (R.I. 2001). The certified question must, "in addition to being important and doubtful, [] also 'affect[] the merits of the controversy.'" *State v. MacTavish*, 262 A.2d 383, 383 (1970). Upon determination that the certified question is properly before it, this Court proceeds to the merits of the question before it. *Pierce*, 770 A.2d at 870.

I. The Certified Question Does Not Address An Actual Case or Controversy.

To properly bring a matter before this Court, an actual case or controversy must exist, as the Court "will not . . . function in the abstract." *Rhode Island Ophthalmological Soc. v. Cannon*, 317 A.2d 124, 130-31 (R.I. 1974). A case must "be confined to those appropriate situations where the litigant's concern with the subject matter evidences a real

adverseness, i.e., [an] injury in fact." *Id.* As the Family Court noted in its February 21, 2007, decision, "[t]he basic inquiry in determining justiciability of a case or controversy is whether the conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, with a definite and concrete dispute, not one that is hypothetical or abstract." Family Court, Decision of February 21, 2007, at 3 (*citing* 32A Am. Jur. 2d *Federal Courts* § 674; *Rhode Island Ophthalmological Soc.*, 317 A.2d at 130-31).

The Family Court determined that an actual case or controversy existed, Family Court, Decision of February 21, 2007, at 3-4, a determination this Court reviews *de novo*: "[q]uestions of law and statutory interpretation, however, are reviewed *de novo* by this Court." *Rhode Island Depositors Economic Protection Corp. v. Bowen Court Assoc.*, 763 A.2d 1005, 1007 (R.I. 2001) (*citing Nonnenmacher v. City of Warwick*, 722 A.2d 1199, 1202 (R.I. 1999) (holding that the existence of a contract is a question of law reviewed *de novo* by the Court) *and City of East Providence v. Pub. Util. Comm'n*, 566 A.2d 1305, 1307 (R.I. 1989) (holding statutory interpretation is a question of law that the Court reviews *de novo*)). The Family Court was incorrect in its determination.

The resolution of the divorce petition before the Family Court is not dependent upon a resolution of the certified question it has presented to this Court. Even if the marriage at issue is not valid, a divorce decree may still be issued under Rhode Island law: "Divorces from the bond of marriage shall be decreed in case of any marriage originally void or voidable by law[.]" R.I. Gen. Laws § 15-5-1. The Family Court can thus proceed with the divorce petition without a response from this Court addressing the legality or the validity of the marriage.

If this Court were to answer the certified question, its answer would not dictate the outcome of the divorce petition before the Family Court. There are three possible responses this Court could offer in response to the certified question. First, this Court might recognize the same sex marriage as valid, in which case the Family Court could proceed with the divorce.

Second, this Court could find the marriage void in Massachusetts. Massachusetts' law states that

> [n]o marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

Mass. Gen. Laws ch. 207, § 11 (1913). The Massachusetts Supreme Judicial Court held that this provision precludes the issuance of a marriage license to any nonresident same-sex couple that is prohibited from marrying in their home state pursuant to the home state's laws. *Cote-Whitacre v. Dep't of Pub. Health*, 446 Mass. 350, 363 (2006). It further indicated that "Massachusetts can reasonably believe that nonresident same-sex couples primarily are coming to this Commonwealth to marry because they want to evade the marriage laws of their home States, and that Massachusetts should not be encouraging such evasion." *Id.* at 372-73.

This decision was subsequently interpreted in Massachusetts on remand to require a sister state's law – specifically, Rhode Island's – to "expressly forbid[] by . . . constitutional amendment, statute, or controlling appellate decision" a marriage, *Cote-Whitacre v. Dep't of Pub. Health*, 21 Mass.L.Rptr. 513, 515 (Mass. Super. Ct. Sept. 29, 2006) (*Cote-Whitacre II*), a position that overstates Rhode Island's public policy analysis

standards and, consequently, should be afforded less comity. *See Ames v. Oceanside Welding and Towing Co., Inc.*, 767 A.2d 677, 681 (R.I. 2001) (stating that public policy is "established by statutes, the common law, or otherwise."). The marriage before this Court would be invalid under Massachusetts law.

Third, this Court could – and should – find the marriage void in Rhode Island as a matter of public policy in light of statutory provisions and state interests. *See* this Brief at Part III. Yet, whether the marriage involved is void because of Massachusetts' law or Rhode Island's public policy, a divorce petition can still be entertained in accordance with § 15-5-1. Thus, this certified question presents a false controversy that ultimately seeks this Court to resolve this issue in the abstract without factual grounding or relevance.

While the divorce itself presents a case and controversy, *see* Marriage Law Foundation Amicus Brief at Point 1, the certified question before this Court does not arise out of that controversy and, as such, should not be considered by this Court. Indeed, because of the significance of this issue and the lack of necessity for this Court to consider it, the policy of the State of Rhode Island on the issue of same-sex marriage is most properly left to the people to establish through referendum or, at minimum, through the legislative process.

II. Neither the Full Faith and Credit Clause Nor the Federal DOMA Demand A Particular Resolution of this Certified Question.

Article Four, Section One of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The Full Faith and Credit Clause ("FFCC") ensures that "judgment valid under the laws of one state should have the same credit, validity and effect in every court in the United States that it had in the state where rendered," and thus prevents the states from acting as "independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others." *Williams v. North Carolina*, 317 U.S. 287, 293, 303 (1942) (internal quotations omitted).

While the FFCC requires recognition by a state of another state's judgments, it does not require application of another state's laws. *See Nevada v. Hall*, 440 U.S. 410, 422 (1979) (stating 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."). Instead, states are allowed to apply traditional conflict of law principles in determining whether or not to apply another states' law and may apply their own law so long as sufficient contacts exist between the state and the parties. *See Sun Oil Co. V. Wortman*, 486 U.S. 717 (1988); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). As the Supreme Court noted in *Alaska Packers Assoc'n v. Industrial Accident Comm'n of California*, 294 U.S. 532 (1935), a "rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict

arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Id.* at 545.

The granting of a marriage license is not a judgment under the FFCC, and states need not recognize the marriages of other states as binding for purposes of Rhode Island law, any more than they must recognize another state's validly issued driver's license or gun permit as binding.[1] *See* Patrick J. Borchers, *Baker v. General Motors: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages*, 32 Creighton L. Rev. 147, 167 (1998); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255, 389 (1998).

Congress governs the application of the FFCC. *See* Anita Y. Woudenberg, *Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause*, 38 Val. U. L. Rev. 1509, 1544-49 (2004). In 1996, Congress passed the Defense of Marriage Act ("DOMA"), which provides as follows:

> 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.

28 U.S.C. § 1738C. The federal DOMA does not prevent states from recognizing out-of-state same-sex marriages. It simply codifies the principles already established in case law,

[1] As discussed below, states do recognize out-of-state marriages under conflict of law principles in many circumstances. Apart from these principles, however, they are not required by the FFCC to do so.

making clear that recognition is not required under the FFCC. As such, neither the FFCC nor DOMA dictate a particular result in this case.

III. Recognizing a Foreign State's Same Sex Marriage Violates Rhode Island's Public Policy Under Its Conflicts of Law Jurisprudence.

Should this Court conclude that the same-sex marriage entered into by Ms. Chambers and Ms. Ormiston is valid, the issue remaining before the Court is whether Rhode Island recognizes that marriage for purposes of a divorce petition.

Other states have been similarly faced with decisions regarding the legitimacy of same-sex marriage. The New York Court of Appeals recognized that public policy interests, such as familial stability, offered legitimate reasons to prohibit the recognition of a same-sex marriage. *Hernandez v. Robles*, 7 N.Y.3d 338, 363-65 (2006).[1] Lower New York courts have similarly determined, for purposes of divorce proceedings, that a Massachusetts same-sex marriage was void under New York law. *See Gonzalez v. Green*, 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006). And in Washington State, the Supreme Court held that because there was no historical right to same sex marriage, no marital or individual privacy interest included a right to marry persons of the same sex. *Andersen v. Kings County*, 158 Wash. 2d 1, 47-51 (Wash. 2006).

As a matter of comity, Rhode Island ordinarily recognizes marriages validly entered into in other states, even if the marriage would not have been valid if entered into in Rhode Island. *Ex parte Chace*, 58 A. 978, 980 (R.I. 1904) (internal citations omitted). However, under conflict of laws principles, Rhode Island will not recognize out-of-state

[1] That court also recognized that any changes to the law on such an important issue needed to emanate from the legislature. *Id.* at 366.

marriages that violate Rhode Island's public policy, that is, when "a marriage is odious by the common consent of nations, or its influence is thought dangerous to the fabric of society, so that it is strongly against the public policy of the jurisdiction." *Id.* As the Rhode Island Attorney General has recently noted, a state "need not recognize or apply another state's *laws* if doing so would run contrary to its own 'legitimate public policy'." Official Opinion of the Attorney General at 2 (hereinafter "Opinion") (*quoting Nevada v. Hall*, 440 U.S. 410, 426 (1979); *Vanderbilt v. Vanderbilt*, 77 S. Ct. 1360, 1377 (1957)) (emphasis in original). Consequently, this Court must determine whether this exception applies in light of Rhode Island's public policy.

Public policy is defined as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." Black's Law Dictionary 1245 (8th ed. 2004). Rhode Island has previously applied the public policy exception to such marriages as polygamous marriages and incestuous marriages. *Chace*, 58 A. at 980. In light of Rhode Island's statutes, case law, and interest in stable families and children that collectively establish a strong public policy against recognizing same-sex marriages, the Governor respectfully requests this Court to do the same in this context.

A. Rhode Island's Statutes Evince a Strong Public Policy Against Same-Sex Marriage.

Rhode Island does not have a statutory ban on same-sex marriage.[2] This fact does not mean, however, that Rhode Island public policy is not strongly opposed to same sex

[2] Currently, there are four types of marriage expressly forbidden by Rhode Island positive law: marriages between two persons, at least one of whom is mentally incompetent at the time of the marriage; bigamous marriages; incestuous marriages; and marriages where at

marriage. While the lack of an explicit statutory ban might indicate the lack of a public policy against same sex marriage, it could also indicate that the public policy against same sex marriage is so strong that a statutory ban is not thought necessary. *See Rosengarten v. Downes*, 802 A.2d 170, 182 (Conn. App. 2002) (lack of statutory ban on same sex unions did not require Connecticut to recognize Vermont civil union where "the legislature failed to enact its own version of the Defense of Marriage Act not because it intended to evince a willingness to recognize civil unions but because it thought such an enactment unnecessary"). That the latter is the case here can be seen from Rhode Island's statutory bans on incestuous marriages, which provide that:

> No man shall marry his mother, grandmother, daughter, son's daughter, daughter's daughter, stepmother, grandfather's wife, son's wife, son's son's wife, daughter's son's wife, wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, wife's daughter's daughter, sister, brother's daughter, sister's daughter, father's sister, or mother's sister. . . . No woman shall marry her father, grandfather, son, son's son, daughter's son, stepfather, grandmother's husband, daughter's husband, son's daughter's husband, daughter's daughter's husband, husband's father, husband's grandfather, husband's son, husband's son's son, husband's daughter's son, brother, brother's son, sister's son, father's brother, or mother's brother.

R.I. Gen. Laws §§ 15-1-1; 15-1-2. As can be seen, while Rhode Island's statutory ban on incest prohibits a man from marrying his mother, grandmother, daughter, etc., it does not prohibit him from marrying his father, grandfather, son, or any other male relative. Similarly, while the statute prohibits a woman from marrying her father, grandfather, son, etc., it does not prohibit her from marrying any female relative. If having a strong public policy against a certain type of marriage required a legislative ban, one would have to

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least one party is below the statutory age limitation. R.I. Gen. Laws §§ 15-1-3, 15-1-5 & 15-2-11.

conclude that Rhode Island has a strong public policy against heterosexual incestuous marriages but not homosexual incestuous marriages - an absurd result.[3] The mere lack of a statutory ban on same sex marriage, therefore, does not resolve Rhode Island's public policy on the matter.

Looking to the General Laws, particularly to its domestic relations provisions in Title 15, it is clear that, as a public policy matter, marriage in Rhode Island is limited to the union between one man and one woman. In numerous sections of Title 15, this opposite sex relationship is affirmed through the use of gendered terms such as bride and groom, husband and wife, man and wife, and man and woman.

Numerous sections of Title 15 establish a policy limiting marriage to two opposite sex persons. For example, in establishing the procedural requirements for marriage, § 15-2-1 indicates that "persons intending to be joined together in marriage . . . must first obtain a license from . . . the town or city in which: (1) *The female* party . . . resides; *or* in the city or town in which (2) *The male* party resides" (emphasis added). Section 15-2-7 indicates that in filling out the marriage application, "[b]oth the bride and groom shall subscribe to the truth of the data in the application." In both instances, the words "the female," "the male," and "the bride and groom" strongly support a policy of recognizing

[3] It might be argued that Rhode Island has a stronger basis for rejecting heterosexual incestuous marriages than for rejecting homosexual incestuous marriages because of the risk of the former to produce children with disabilities. Rhode Island's incest ban, however, applies even to relationships that do not carry this risk, such that of a man and his stepmother or a woman and her stepfather. It is implausible to suppose that Rhode Island has a strong public policy against a man marrying his stepmother but not his stepfather.

marriages only between one man and one woman. Parties to a marriage in Rhode Island include one woman, the bride, and one man, the groom – not two brides or two grooms.

In establishing the rights of married women, § 15-4 *et seq.*, the General Laws similarly discuss marital relationship in specifically gendered terms. For example, in regard to agency, "[t]he wife may act as agent or attorney of *her husband*, and the husband may act as the agent or attorney of *his wife*." R.I. Gen. Laws § 15-4-11 (emphasis added). This provision does not countenance a woman having a wife or a man having a husband, nor that either might have multiple wives or husbands: in Rhode Island a woman can only have one, male husband and a man, only one, female wife. This chapter is replete with similar language referencing a woman and her husband and a man and his wife. *See e.g.*, R.I. Gen. Laws §§ 15-4-1, 15-4-4, 15-4-5, 15-4-9, 15-4-12, 15-4-14, 15-4-16.

As discussed above, §§ 15-1-1 to 15-1-4 both explicitly and implicitly prohibit all incestuous relationships as against Rhode Island public policy. *See also* Opinion at 4. Bigamy and incompetency statutes also contain numerous references to "woman," "man," "husband," and "wife," supporting, like the incest prohibition, a policy of only recognizing heterosexual marriage. *See* R.I. Gen. Laws §§ 15-1-5, 15-1-6, 15-3-11 & 11-6-1.

Similar language is found in divorce provisions. Grounds for divorce in Rhode Island include "[n]eglect and refusal . . . on the part of the husband to provide necessaries for the subsistence of his wife." R.I. Gen. Laws § 15-5-2. Upon the granting of a divorce, "the husband or wife" may be awarded "separate maintenance out of the estate or property of the [other]." R.I. Gen. Laws § 15-5-9. In calculating alimony, defined as

"payments for the support or maintenance of either the husband or the wife," the courts shall consider the "ability to pay of the supporting spouse, [including] the supporting spouse's earning capacity," assets, income, etc. R.I. Gen. Laws § 15-5-16. Here, too, the legislature refers to *the* husband and *the* wife – one of each, no more and no less. Such references strongly establish a public policy against anything other than a marriage of one man and one woman.

Laws governing custody also underscore a public policy of marriage between one man and one woman. Section 15-14.1-32 states that a "privilege against disclosure of communications between spouses . . . based on the relationship of husband and wife . . . may not be invoked" in proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act of chapter 14.1. Forms requesting temporary custody of children or seeking temporary orders require an indication that the parties involved are husband and wife. R.I. Gen. Laws § 15-15-6. Section 15-7-4 indicates that a petition to adopt by a "husband or wife shall not be granted unless the husband or wife joins." In each of these circumstances, an underlying marital relationship of a man and a woman is assumed.

Even when non-gendered terms are used, the context makes it clear that opposite sex relationships are meant. Often the term spouse or party (or their plurals) is used alongside the gendered terms to more clearly indicate the parties that the statute is intended to apply to and to avoid redundancy. For example, a "privilege against disclosure of communications between *spouses* . . . based on the relationship of *husband* and *wife* . . . may not be invoked" in child custody proceedings. R.I. Gen. Laws § 15-14.1-32 (emphasis added). Likewise, a petition to adopt by a "*husband* or *wife* shall not be granted unless *the husband* or *wife* joins [but] the petition may be granted although the

spouse of the petitioner is not a party" upon a showing of the best interests of the child. § 15-7-4 (emphasis added). And in calculating alimony, defined as "payments for the support or maintenance of either *the husband* or *the wife*," the courts consider the ability of the "supporting *spouse*" to pay. R.I. Gen. Laws § 15-5-16 (emphasis added). *See also* R.I. Gen. Laws § 15-4-9 (providing that a husband and wife may be business partners); § 15-23.1-316 (providing that spousal communications between husband and wife are not protected under the Uniform Interstate Family Support Act). Rhode Island General Laws, through their gender specific language, presuppose marriage as between one man and one woman to the exclusion of all other types of relationships.

This gender specific language was deliberately chosen. The General Assembly of Rhode Island was and is perfectly capable of using gender neutral language to refer to specific relationships. *See, e.g.*, The Uniform Interstate Family Support Act and various child support acts (Chapters 23.1, 19, 20 & 21).[4] By not doing so in the contexts above, the General Assembly intentionally advanced Rhode Island's public policy of recognizing marriage only between a man and a woman.

In one narrow circumstance – that of paternity – this Supreme Court has interpreted gendered terms to refer to both genders. "Paternity" in the Uniform Law on Paternity (ULP), typically defined as "the state or condition of being a father" (Black's

[4] Indeed, the standards of statutory construction in Rhode Island indicate that gendered terms are frowned upon, and wherever possible, are to be construed as gender neutral. For example, §§ 22-11-3.5 and 43-3-3.2 authorize the "law revision director" and the "secretary of state," respectively, to alter statutes in order to make the statutory language gender neutral, if needed. And § 43-3-3 indicates that "[e]very word importing the masculine gender only may be construed . . . to include females as well as males." However, no court or other official construction of the marriage-applicable sections of Title 15 has so interpreted them.

Law Dictionary (8th ed. 2004)), was redefined in light of statutory language found in § 8-10-3(a) dealing with the Family Court's general jurisdiction over "matters relating to adults who shall be involved with paternity of children born out of wedlock[,]" and in the general statutory wording found in § 15-8-26 of the ULP, which states that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship." *See Rubano v. DiCenzo*, 759 A.2d 959, 966 (R.I. 2000). However, even in this circumstance, this Court has been careful not to broadly apply the *Rubano* interpretation in subsequent cases. In *Keenan v. Somberg*, this Court focused upon the importance of the visitation contract in determining Rubano's *de facto* parental status. *Keenan v. Somberg*, 792 A. 2d 47, 49 (R.I. 2002). In *de Bont v. de Bont*, this Court underscored Rubano's unique paternal involvement as a "psychological parent" who had an "emotional bond" and an "agreement to co-parent." *De Bont v. de Bont*, 826 A. 2d 968, 970-71 (R.I. 2003). Indeed, as the California Court of Appeals noted, *Rubano* merely stands for the proposition that, "absent biological tie, [a] 'parent-like relationship' may be sufficient for standing as [an] interested party in maternity action." *Denis B. v. Susan H.*, 109 Cal. App. 4th 1109, 1115, 1117 (Cal. Ct. App. 2003). Outside this context, the express gendered language adopted in the General Statutes appears to have been followed without comment or debate.

Rhode Island does prohibit discrimination on the basis of "sexual orientation," defined as the state of being or being perceived as heterosexual, bisexual, or homosexual. R.I. Gen. Laws § 11-24-2.1. Sexual orientation cannot be considered in public accommodations, R.I. Gen. Laws § 11-24-2; the availability of health home care, R.I. Gen. Laws § 23-17.16-2; employment, R.I. Gen. Laws § 28-5-5; the functioning of state

services, R.I. Gen. Laws § 28-5.1-7; and housing (including financing), R.I. Gen. Laws § 34-37-1 *et seq*. However, the fact that Rhode Island has banned discrimination on the basis of sexual orientation does not undercut the State's strong public policy against same sex marriage. *See Rosengarten*, 802 A.2d at 179. The statute itself makes clear that prohibiting discrimination based on sexual orientation status, "does not confer legislative approval of that status, but is intended to assure the basic human rights of persons to partake of public accommodations, regardless of that status." R.I. Gen. Laws § 11-24-2.1(k).

Likewise, the fact that Rhode Island has created domestic partnerships, which provide additional rights for same sex couples including various insurance benefits, R.I. Gen. Laws § 36-12-1 *et seq.*; tax benefits, R.I. Gen. Laws §§ 44-1-7 & 44-30-12; and family benefits, R.I. Gen. Laws §§ 8-2-13, 8-10-3 & 45-19-4.3, does not undercut the State's strong public policy against same sex marriage. Indeed, the creation of a non-marital status for homosexual couples is actually further evidence of Rhode Island's strong public policy against same sex marriage, since if same-sex marriage were acceptable in Rhode Island, such domestic partnerships would be unnecessary.

Perhaps more telling of the status and strength of Rhode Island's policy on this matter is that the Rhode Island legislature has had numerous opportunities to legalize same sex marriage and has not done so. Senate Bill 2149 and House Bill 6925, introduced during the 2006-2007 legislative session, would have created same sex marriage in Rhode Island. The bills were referred to the respective judiciary committees and died upon adjournment. Legislation designed to create civil unions in Rhode Island and to create reciprocal beneficiary agreements that extend specific rights and related

responsibilities to either same sex partners or relatives were also introduced during the 2006-2007 legislative session, and met with the same fate. H.B. 5643, Jan. 2007 Leg. Session (R.I. 2007); S.B. 893, Jan. 2007 Leg. Session (R.I. 2007). The failure to legalize same-sex marriage is indicative of Rhode Island's public policy on the issue. *See Rosengarten*, 802 A.2d at 179 n.6.

Marriage as a legal union of one man and one woman is clearly the bedrock of Rhode Island family law. Because of the pervasiveness of this position throughout its family law statutes, Rhode Island has a strong public policy against recognition of any other marriage than that between one man and one woman.

B. Rhode Island's Strong Public Policy In Stable Families and Children Opposes Same-Sex Marriage.

The United States Supreme Court has said that marriage is the "foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). The Supreme Court has since reemphasized this point many times. *See e.g.*, *Mayer v. Nebraska*, 262 U.S. 390, 399 (1923) (marriage and child-rearing are fundamental rights); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the [human] race"); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (reiterating the fundamental rights to marry and procreate); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (same).

Recognizing a same-sex marriage in Rhode Island would not just allow entry of same-sex couples into marriage but would be a wholesale redefinition of marriage. The Massachusetts Supreme Judicial Court recognized this in its recent decision in *Goodridge*

v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003), stating that "our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries." *Id.* at 965 (Marshall, C.J., plurality opinion). Such significant changes could serve to weaken and undermine this important social institution, and must therefore be deemed strongly contrary to Rhode Island's public policy.

The state's interest in marriage is predominantly rooted in addressing the consequences of the biological reality that opposite sex couples will procreate, intentionally or accidentally. *See e.g., Morrison v. Sadler,* 821 N.E.2d 15, 30 (Ind. Ct. App. 2005); *Lofton v. Dep't of Children & Family Serv.,* 358 F.3d 804, 818-19 (11th Cir. 2004), *cert denied*, 125 S.Ct. 869 (2005); *Adams v. Howerton*, 486 F. Supp. 673 F.2d 1036 (9th Cir. 1982). Indeed, the link between marriage and procreation has been underscored by the United States Supreme Court, which "called this right [to marriage] fundamental *because of its link to procreation*." *Dean v. District of Columbia*, 653 A.2d 307, 332 (D.C. App. 1995) (emphasis added).

Marriage is about more than the recognition of a committed relationship between two adults; it is instead "about the well-being of children and society." *Hernandez v. Robles,* 7 N.Y.3d 338, 360 (2006). The state has a "legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents." *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005). *See also Morrison*, 821 N.E.2d at 30 (stating that the state has a legitimate "interest in encouraging opposite-sex couples to enter and remain in, as far as possible, the relatively stable institution of marriage for the sake of

children who are frequently the natural result of sexual relations between a man and a woman."); George W. Dent, Jr., *The Defense of Traditional Marriage* 15 J.L. & Pol. 581, 593-601 (1999); Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 788-90 (2001) (detailing the higher incidents of physical and sexual child abuse, educational failure, and poverty among children born out of wedlock).[5]

Studies have demonstrated that the most stable family arrangement is marriage between a man and a woman and that a child raised in a home headed by a married mother and father is more likely to succeed in life. For example, "[u]nder every standard – educational achievement, drug use, criminal activity, physical and emotional health, social adjustment, and adult earnings – children of intact marriages have fewer problems than children of broken families. . . . Not only do children need two parents [but] ideally a child should have both a mother and a father." George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & Pol. at 594-95. In contrast, children raised in two-parent same-sex homes are on average worse off than those raised in two-parent opposite sex homes in nearly every measure. *See* George W. Dent, *The Defense of Traditional Marriage*, 15 J. L. & Pol. 581.[6]

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[5] Of course, "[m]arriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences. . . . To maintain otherwise is to ignore procreation's centrality to marriage." *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. Super. 2005) (Parillo, J.A.D., concurring).

[6] While many same sex parenting studies allege that children raised in same sex homes do as well as other children, none of these studies are based upon random, representative samples:

> Most studies rely on small-scale, snowball and convenience samples drawn primarily from personal and community networks or agencies.

Recognizing same-sex marriage will only undercut the desired stability the state seeks to promote. Indeed, the effect of such recognition may be likened to that of recognition of no-fault divorce.

No-fault divorce allows one party to leave unilaterally when a disproportionate share of the marital assets exceeds the value of the marriage. Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 Harv. J.L. & Pub. Pol'y 949, 968 (2006). *See also* Margaret F. Brinig & Douglas W. Allen, *These Boots Are Made for Walking: Why Most Divorce Filers Are Women*, 2 Am. L. & Econ. Rev. 126 (2000). The

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> Most research to date has been conducted on white lesbian mothers who are comparatively educated, mature, and reside in relatively progressive urban centers.

Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Amer. Soc. Rev. 159, 166 (2001). Further, the studies supportive of same-sex marriage usually compare children raised by same sex mothers to children raised in single mother homes, a category of children that consistently fall short of their peers raised in homes headed by an opposite sex marriage by almost every measure, including physical health, (Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health*, 29 J. Health & Soc. Behavior 38, 48-49 (1988)), mental health (Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 J. Marr. & Fam. 197, 205 (2001)), substance abuse, (Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Early Adolescence*, 52 J. Marr. & Fam. 171, 175 & Table 2 (1990)), early sexual intercourse & pregnancy, *id.*, risk of suicide, (David M. Cutler, Edward L. Glaeser & Karen Norberg, *Explaining the Rise in youth Suicide*, Working Paper 7713 at 32, National Bureau of Economic Research (May 2000)), and serious crime (Linda J. Waite & Maggie Gallagher, *The Case for Marriage* 134 (2000)). Thus, declaring that children raised in same-sex homes do no worse than the children they were compared to is equivalent to saying these children fall short of their peers raised in homes headed by an opposite sex marriage by almost every measure. *See* Maggie Gallagher, *Why Supporting Marriage Makes Business Sense* 10 (Corp. Res. Council 2002) available at www.corporateresourcecouncil.org/white_papers.html.

parties that bear the brunt of the negative impacts of no-fault divorce are children. Experts indicate that

> if we consider any social pathology (teen pregnancy, criminal activity, divorce, and so on) and control for the demographic characteristics of the child, then the probability that a child participates in one of these activities increases on average by a factor of two if that child comes from a divorced home. Discussions of the effect of divorce on children during the no-fault debate suggested that at worst children would be no better, but no worse off; many argued that children would be better off in single-parent homes rather than in homes with dead marriages. Nothing could have been further from the truth. The real negative impact of the no-fault divorce regime was on children, and increasing the divorce rate meant increasing numbers of disadvantaged children.

Allen, *An Economic Assessment of Same-Sex Marriage Laws* at 969; Donald Moir, *A New Class of Disadvantaged Children, in It Takes Two: The Family in Law and Finance*, 63, 67-68 (Douglas W. Allen & John Richards eds., 1999). Indeed, "the change in divorce law influenced vast segments of the population that did not experience divorce." *Id* at 973.

Perhaps the greatest effect of no-fault divorce was the secondary legal changes stemming from the changed nature of the marital relationship. These changes included the redefinition of marital property, support laws, and custody laws. *Id.* at 974. Stability in marriage is challenging to maintain, as the institution of marriage is "often sensitive to changes in the law." Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 Harv. J.L. & Pub. Pol'y at 954.

While "it is hard to imagine" that allowing a small amount of recognition to a few homosexual marriages could lead to these types of problems, Andrew Koppelman, *The Decline and Fall of the Case Against Same Sex Marriage*, 1 U. St. Thomas L.J. 5, 26

(2004), experience with no fault divorce shows that changes in the fundamental nature of marriage can have profound and often unforeseen consequences. One scholar noted:

> Slightly over thirty years ago, family law went through a conceptual revolution called no-fault divorce, and thirty years later, we know something about the consequences of that paradigm shift. During that debate the case was made that intact marriages would be unaffected by the legal change and the social impact would be minimal. It was hard to imagine how releasing couples from the bondage of a dead marriage could have any negative impact on other loving marriages. . . . In the end, it turned out marriage was much more fragile than anyone publicly thought.

Allen, *An Economic Assessment of Same-Sex Marriage Laws* at 965-66.

Recognizing same-sex marriages may have a similar effect on the law. Many of the legal rules regarding marriage make sense only in a heterosexual context. These include:

> [the application of laws] designed to restrict males from exploiting specific investments women must make in childbearing. For gay men in a same-sex marriage, these institutional rules make no sense. . . . [M]any institutional features of marriage are designed to protect paternity and avoid births out of wedlock. Again, these issues are of little concern to same-sex couples where sex does not lead to children. If these rules restrict behavior in same-sex marriages in ways that gay couples do not like, they too will be challenged in the courts. . . . [G]iven that same-sex relationships are often composed of two financially independent individuals, there will be pressure for even easier divorce, as the problem of financial dependency will be reduced.

Id. at 962-63. In making legal determinations along these lines, and therefore moving away from the "channeling function" of family law, defined as the design of the law that supports social institutions that serve desirable ends, courts will create a new legal framework that may be exploited by those it was not intended for. Linda C. McClain, *Love, Marriage and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 Cardozo L. Rev. 2133, 2151, 2154-63 (2007) (defining the channeling function) (internal citations omitted). *See also Keenan*, 792 A.2d at 49 (holding that the definition

of "any interested party" in the Uniform Law on Paternity (ULP), recently expanded to include same sex domestic partners, did not include a father who neither lived with the child nor reached a parenting agreement with the child's mother); *de Bont*, 826 A.2d at 970-71 (holding that the recently redefined "any interested party" did not include an incarcerated husband who never met the adopted child). Specifically, "giving same-sex unions either marital or quasi-marital legal status and benefits would have profoundly detrimental effects not only upon the institution of marriage, but also families, children, and society." Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. Pub. L. 439, 441 (2006).

These legal changes will go unnoticed at first, but could be disastrous for future generations as the ill-fitting exceptions are applied to heterosexual couples. Lynn D. Wardle, *Counting the Cost of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 Widener J. Pub. L. 401, 449-442 (2002). Construing family law provisions covering heterosexual relationships to cover same-sex relationships will create loopholes and areas of poor fit which will be exploited by heterosexual couples seeking to exit their relationships, which will result in more single-parent homes and more self-protection from marital exploitation. Allen, *An Economic Assessment of Same-Sex Marriage Laws* at 964-65.

It is this feedback loop from same sex marriages and divorces to heterosexual ones that causes the problem. "[The] legal effects of recognizing same sex marriage" would be "negative[b]ecause . . . the law would have good reason not to hold same-sex couples to the same standards as traditional couples concerning such matters as adultery, child support and divorce." George W. Dent Jr., "*How Does Same Sex Marriage*

Threaten You," 59 Rutgers L. Rev. 233, 260 (2006). Recognizing same sex marriage for the purposes of a divorce petition would start a shift in family law, similar to that which followed the no-fault divorce, and leave more children ill-equipped to cope in a world already fraught with problems. Barbara D. Whitehead, *The Divorce Culture* 182 (1997).

Advocates of same-sex marriages point to a growing acceptance of single parenthood and blended families as evidence of a growing acceptance of same sex marriage. *See, e.g.,Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 Harv. L. Rev. 2004, 2006 (2003). Rather, these are, in part, the consequences of legal challenges that have contributed to the divorce culture. Whitehead, *The Divorce Culture* 182. By inadvertently allowing for opportunistic divorce, the law created a whole new class of inequality as many women and children entered poverty through divorce, and the quality of life for the entire family was reduced. Allen M. Parkman, *No-Fault Divorce: What Went Wrong?*, 104 (1992) (arguing that women in no-fault states took steps to protect their human capital by entering the work force and pursuing education upon seeing the effects of divorce on their and others' families). Recognizing same sex marriage for any purpose, especially divorce, would lead to a gradual change in laws that could have profound and unforeseen consequences including an increase in the existence of sub-optimal child rearing conditions and the exploitation of legal loopholes not designed for heterosexual marriages.

Rhode Island's strong public policy interest in preserving marriage for opposite sex couples is not an attempt to treat same-sex couples unequally. Rather, the interest is

in encouraging the optimal and most stable environment for childrearing. Because of this strong public policy interest, this Court should decline to recognize same-sex marriage.

Conclusion

Because it is not necessary that the certified question before this Court be resolved before the Family Court can proceed with the divorce petition before it, this Court should stay its hand and allow this significant policy issue to be weighed and considered by the people of Rhode Island. Should the Court choose to answer it, this Court, in light of Rhode Island's strong public policy against recognizing same-sex marriage, should advise the Family Court in accord with that policy and decline to recognize same-sex marriages in Rhode Island.

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**Pro Hac Vice Motion filed July 25, 2007*

CERTIFICATE OF SERVICE

I hereby certify that I caused the attached Amicus Brief of the Governor to be served upon all known counsel of record herein by overnight mail on August 1, 2007.

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