STATE OF RHODE ISLAND
SUPREME COURT

No. 2006-340
(F.C. 06-2583)

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Margaret Chambers *
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v. *
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Cassandra Ormiston *
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ON A CERTIFIED QUESTION FROM THE SUPREME COURT

BRIEF AMICI CURIAE OF PROFESSORS OF CONFLICT OF LAWS AND FAMILY LAW

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STATEMENT OF INTEREST

The Amici Curiae joining this brief are Professors of Law Ian Ayres, Katherine K. Baker, Carlos A. Ball, Brian H. Bix, Jennifer Gerarda Brown, Naomi R. Cahn, Erwin Chemerinsky, Barbara J. Cox, Joanna L. Grossman, Joan Heifitz Hollinger, Herma Hill Kay, Charles P. Kindregan, Andrew Koppelman, Sylvia Law, Linda C. McClain, Martha Minow, Kermit Roosevelt, Katharine Silbaugh, Joseph W. Singer, Mark Strasser, Dominick Vetri, James D. Wilets, and Jennifer Wriggins. None of the Amici or their counsel is connected to any party or any interest other than that of amicus in this case. A description of each of the Amici is contained in Appendix A to this brief.

The Amici have expertise in a wide range of issues relating to conflict of laws and family law. The Amici submit this brief to bring to this Court's attention the substantial body of law addressing issues related to marriage recognition generally and its support for recognition of the underlying marriage, both in whole and in part, in this case.

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?

STATEMENT OF THE CASE

The Amici adopt the Prior Proceedings and Statement of Facts as articulated by the parties and by the Amicus Gay & Lesbian Advocates &

Defenders. Attached as Appendix B is the Family Court's Decision of February 21, 2007, addressing this Court's prior questions.

POINTS

I. IN THE RICH HISTORY OF MARRIAGE RECOGNITION IN CONFLICT OF LAWS, STATES TRADITIONALLY AND GENERALLY VALIDATE MARRIAGES THAT WERE VALID WHERE CELEBRATED, SUBJECT TO A PUBLIC POLICY EXCEPTION HIGHLY DEPENDENT ON THE FORUM STATUTES.

A. Introduction

Amici offer this brief in order to assist the Court in applying its law on the question of a marriage's "validity" in a multistate dispute. Following the traditional "place of celebration" rule, this state has respected marriages valid where licensed, with an exceedingly narrow exception for marriages that would be "odious" in the state. *Ex Parte Chace*, 26 R.I. 351, 58 A. 978, 980 (R.I. 1904). There is no reason to depart from that rule in this case where – unlike many other states - no positive law expressly prohibits the marriage of the parties in this case, declares such marriages "void," or prohibits or renders void marriages of residents who marry outside of Rhode Island.

Centuries of caselaw in every conceivable category of disputed marriage relationship show that other states have grappled with recognition issues that are much more difficult than the question presented here, such as when local law declared the disputed marriage "void," "absolutely void," or even a criminal offense. The history shows that courts have most often asked nuanced, context-specific questions when confronted with a multistate marriage dispute, even when the relationship was one that caused controversy and raised strong feelings. Time

after time, courts have parsed carefully the relevant statutes bearing on recognition. Courts have concluded that many marriages must be respected despite local law, or alternatively, that different types of family law disputes call for different approaches to the "recognition" of out-of-state marriages, even when legislatures have used language like "absolutely void" to discuss the effect of such marriages when they are performed locally. Only when a legislature has spoken with unmistakable clarity in denying any and all respect for a marriage should courts view themselves as constrained to follow such bad, rigid public policy. The Rhode Island legislature has issued no such statement of policy, and this Court should eschew any approach to the present question that would inflict unwarranted harm upon couples and families. Centuries of well established precedent provide ample basis for avoiding that result.

B. Conflict of Laws Doctrine Provides the Vehicle to Answer the Reported Question.

Each State may decide whether to recognize a marriage of one its domiciliaries that is celebrated in Massachusetts, whether the couple is of the same-sex or a different-sex. As addressed further below at Point IV, to date neither the United States Constitution nor the United States Code has been interpreted by the United States Supreme Court to require a State to recognize a marriage -- of any kind -- celebrated in another jurisdiction. Rather, under existing interpretations of federal law, the decision to recognize a marriage is delegated to the several States, which the States decide by applying their own conflict of laws principles.

The conflict of laws question arises when more than one state is concerned with the marriage. A marriage may be validly licensed and certified in one state, but the married pair are domiciled in another state either at the time of marriage or later, or another state's policies are relevant to the enjoyment of the incidents of the marriage. Eugene F. Scoles, Peter Hay, Patrick J. Borchers, Symeon C. Symeonides, *Conflict of Laws, Hornbook Series,* § 13.2, at 559 (4th ed. 2004) (hereinafter, "Scoles & Hay"). More specifically, the tension in marriage recognition cases is that two states may both have "territorial" and "personal" interests in a marriage. Andrew Koppelman, *SAME SEX, DIFFERENT STATES* (Yale U. Press 2006) at 16-17. *Cf. Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 64 S.Ct 208, 436 (1943) ("[E]ach of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders."). The territorial interest of each state to decide what happens within its borders applies both to the licensing state and the state where the couple makes their home. Koppelman, SAME SEX, DIFFERENT STATES, at 16. As a matter of exercising political authority over its citizens, or the "personal" interest, the licensing state has an interest because the marriage occurred there while the state of domicile has an interest in applying its law to its citizens. *Id.*

This case presents a conventional issue of conflict of laws where residents of one state marry in another state. Both Massachusetts, the marriage licensing state, and Rhode Island, the domiciliary state, are co-equal states in our federal system with authority over domestic relations. *See, e.g., Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) (subject of domestic relations belongs to the states and

not the federal government). This Court is not writing on a blank slate. Not surprisingly, there is a long history of courts applying conflict of laws principles and methodologies to recognize interracial, consanguineous and underage marriages celebrated in a foreign jurisdiction, as well as remarriages following divorce where the remarriage is prohibited in the state granting the divorce, even though by statute the marriage would be void if celebrated in the forum state. S*ee infra*, Point I, (C) – (E). Some states have set aside their public policies specifically prohibiting the marriage and recognized it with respect to a particular "incident" of the marital relationship, such as the right to divorce, the obligation of spousal or child support, or the right to intestate succession. *See* Point II. This history demonstrates that seemingly strong public policies prohibiting marriage may give way to the stronger policies underlying spousal support, intestate succession and equitable property distribution on the termination of a relationship.

C. Under Traditional Principles Of The Conflict of Laws, A Marriage Valid In The State In Which It Was Celebrated Is Presumed To Be Valid Everywhere.

All cases regarding the recognition of foreign marriages begin with the long-standing principle of the conflict of laws that a marriage valid where celebrated is valid everywhere. *Chace*, 58 A. at 980 (R.I. 1904) (establishing place of celebration rule); *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 159 (1819) (respecting marriage of mixed race couple who married in Rhode Island to avoid Massachusetts' longstanding ban on interracial marriage on the "principle … that a marriage, which is good according to the laws of the country where it is entered into, shall be valid in another country.").

The general rule favoring the validity of marriages "has long been one of the staples" of conflict of laws principles, dating back to Joseph Story's first conflicts treatise and the earliest reported decisions. Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition for Non-Traditional Marriages*, 32 Creighton L. Rev. 147, 154 (1998) (hereafter, "Borchers, *Baker v. General Motors*"); *see also* William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* § 119 at 398 (3d ed. 2000) (noting "an overwhelming tendency" in the United States to recognize validity of marriage based upon law where performed). As one commentator explained, "[i]t would be ridiculous to have people's marital status blink on and off like a strobe light" as they move about and live their lives. Koppelman, SAME SEX, DIFFERENT STATES, at 17.

Both the First Restatement and the Second Restatement of Conflict of Laws favor recognition of the validity of marriage. The First Restatement begins with the *lex loci celebrationis* rule, under which a marriage that is valid where celebrated is valid everywhere. *Restatement of Conflict of Laws* § 121 (1934). Likewise, § 283 of the Second Restatement encourages courts to recognize out-of-state marriages, while permitting them to refuse to do so. Under Professor Leflar's choice influencing considerations, validation is the better rule of law in the "bulk of the marriage cases," with balancing of factors only when a forum's governmental interest is "genuinely strong." Robert A. Leflar, Luther L. McDougal III & Robert L. Felix, *American Conflicts Law*, § 220, at 605, and *id.* at 606 (4th ed. 1986).

Many States determine the validity of the marriage by reference to the law of the State of celebration due to the powerful policy justifications supporting such universal recognition. The general validation rule "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." Richman & Reynolds, *Understanding Conflict of Laws* § 119 at 398; *see also* Scoles & Hay, *Conflict of Laws* § 13.2, at 559 (one of the two strongest policies concerning marriage is "to sustain its validity once the relationship is assumed to have been freely created").

The overwhelming preference for validating marriages also appears in the Uniform Marriage and Divorce Act ("UMDA"), promulgated in 1970, which embraced the general rule of marriage recognition. This proposed law followed on the withdrawal of the Uniform Marriage Evasion Act, proposed in 1912, which had allowed states to invalidate marriages by residents undertaken in violation of express prohibitions in forum law and to bar marriages of non-residents in violation of their home state's express prohibitions. *Restatement of Conflict of Laws* § 132(d), comment e (1934) (referencing the Uniform Marriage Evasion Act). The National Conference of Commissioners on Uniform State Laws withdrew the Uniform Marriage Evasion Act in 1943 because it had only been adopted by five states (not Rhode Island). UMDA § 210, 9A U.L.A. 159 (1998). The Uniform Marriage and Divorce Act now provides: "All marriages contracted ... outside this State, that were valid at the time of the contract or subsequently

validated by the laws of the place in which they were contracted or by domicile of the parties, are valid in this State." UMDA § 210, 9A U.L.A. at 194.[1] It has been adopted in twenty three states in some form (not Rhode Island). Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry In Hawaii, Are We Still Married When We Return Home?*, 1994 Wis. L. Rev. 1033, 1066-1067 (1994) (hereinafter, "Cox, *Same-Sex Marriage and Choice-of-Law*").

D. Applying Conflict of Laws Principles, A State May Decline To Recognize An Out-Of-State Marriage If Doing So Would Contravene A Strong, Clearly Expressed Public Policy of the State.

To the general rule favoring the validity of a marriage, however, there is an exception: each State may decline to validate a marriage from another State where the marriage would violate "the strong public policy of the forum." *See generally* Joseph Story, *Commentaries on the Conflict of Laws* § 113 (7th ed. 1972) (recognizing exception to general rule of recognition for marriages "positively prohibited by the public law of a country, from motives of policy").

The public policy exception – however denominated – developed to give some weight to the forum's express legislative policies prohibiting or voiding marriages, particularly where the statutes provided for extraterritorial effect. For example, although a significant minority of states enacted some form of evasion law, Rhode Island declined to do so, indicating that its marriage laws are to be given some measure of extraterritorial effect. Cox, *Same-Sex Marriage and*

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[1] Section 210 expressly failed to incorporate the 'strong public policy' exception of the Restatement [Second] and therefore changed the law by validating marriages that could have been invalidated in the past. UMDA, § 210, Comment.

Choice of Law, 1994 Wis. L. Rev. at 1074-1082 (citing and discussing evasion statutes); and Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 Quinnipiac L. Rev. 61, 93-102 (1996). Yet, so pronounced was and is the tendency to validate marriages – even evasive ones – that a leading treatise suggests "it should take an exceptional case for a court to refuse recognition of a valid foreign marriage of one of its domiciliaries even in the face of a local prohibition." Scoles & Hay, *Conflict of Laws* §13.9, at 575.

Indeed, each of the four dominant theories of conflict of laws -- the First Restatement of Conflict of Laws, the Second Restatement of Conflict of Laws, Professor Brainerd Currie's "governmental interest analysis," and Professor Robert Leflar's "choice-influencing considerations" -- counsel that a State generally should recognize a marriage performed in another jurisdiction, but permit a State to refuse to recognize an out-of-state marriage by that State's domiciliaries if doing so would violate the clear and strong public policy of that State.

Sections 131 and 132 of the First Restatement establish exceptions to the general rule of recognition. *Restatement of the Conflict of Law*s (1934). In particular, §§ 132(a)-(d) provide exceptions to recognition of marriages that may "offend a strong policy of the domicil," such as polygamous marriage, incestuous marriage, marriage between "persons of different races where such marriages are at the domicil regarded as odious," and marriage of a domiciliary which a statute at the domicil expressly declares such a marriage "void." Barbara Cox, *Same-Sex*

Marriage and Choice-of- Law, 1994 Wis. L. Rev. at 1085-1086 (citing and discussing exceptions to validation in First Restatement).

The Second Restatement also provides for a public policy exception to the general rule favoring recognition of marriage. Section 283(2) of the Second Restatement provides, "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." *Restatement (Second) of Conflict of Laws* § 283(2) (1971). In deciding whether to validate a marriage celebrated outside of the State, § 283(1) refers the court to "the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage."[2]

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[2] This section refers to § 6 to determine which state has the most significant relationship to the parties and marriage with respect to that issue. As an initial matter, § 6 in turn instructs a court to use "a statutory directive of its own state on choice of law," subject to constitutional restrictions.

Where no statutory directive exists, § 6(2) directs the court to consider various factors, including: (a) the needs of the interstate and the international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of the parties' justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied. *Restatement (Second) of Conflict of Laws*, § 6.

While some assume this means the domiciliary state is the state with the most significant relationship, *e.g.*, Koppelman, SAME SEX, DIFFERENT STATES at 18-19, 86-88, others disagree. Joseph Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. Civ. Rts. & Civ. Liberties 1, 26-30 (2005) (suggesting that in a marriage conflicts case involving a same-sex couple married in Massachusetts, that state has important interests in applying its law).

Governmental interest analysis, developed by Professor Brainerd Currie in the 1950's and the 1960's, also refers courts to policy considerations to decide conflict of laws issues. *See* Brainerd Currie, *Selected Essays on the Conflict of Laws* 187 (1963). Professor Currie reasoned that the statutory and case law of a state express policy choices, which the state has an "interest" in applying in cases involving that state's domiciliaries. At the same time, in light of another state's interest in an issue, he urged "a moderate and restrained interpretation" of what is necessary to effectuate forum policy. Brainerd Currie, *The Disinterested Third State, 28 Law & Contemp. Prob.* 754, 757 (1963). Some scholars believe that in a case concerning a Massachusetts marriage of a non-resident same-sex couple, Currie would consider the question of which State's law applies to present a "false conflict" situation, because only the couple's common domicile, if one exists, has an interest in applying its law to the case. *See* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 Wash. & Lee L. Rev. 357, 361 (1992). At the same time, it is also plausible that where the place of celebration has an interest in validating the marriage of non-residents celebrated there the forum state would engage in a restrained interpretation of its policy in order to defer to the policies of comity in the place of celebration rule.

Finally, Professor Robert Leflar's "choice-influencing considerations" theory focuses on those factors that influence courts in their choice-of-law analysis. *See* Robert A. Leflar, *Choice-Influencing Considerations in Conflict of Laws*, 41 N.Y.U. L. Rev. 267 (1966). Professor Leflar's considerations include: (1) predictability of result; (2) maintenance of interstate and international order;

(3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Id.* at 282. Leflar expected that judges might be led to use the forum's law, especially if foreign law "would somehow interfere with fundamental local policies." *Id.* at 297. Leflar also believed, however, that judges are "perfectly capable" of realizing when local forum law is not better, and should have the freedom to ignore the disfavored local law that would otherwise control in domestic cases. *Id.* at 299-300.

While some cases may be simple because statutes or precedent clearly point to validation of the marriage, the application of all four approaches to the traditional place of celebration rule can be complex, highly dependent on case and statutory law in the forum State, and heavily influenced by the facts of the case. As the Tennessee Supreme Court stated long ago in an exemplar case disrespecting the remarriage of a divorced adulterous spouse, it is essential to identify which statutes, if any, embody a "distinctive state policy" to be interposed against the rule of recognition. *Pennegar v. State*, 87 Tenn. 244, 10 S.W. 305, 306 (Tenn. 1889). "It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection" or else many marriages would be invalidated. *Id.* Instead, "[e]ach state … has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society, to that degree which will render

it proper to disregard the *jus gentium* of 'valid where solemnized, valid everywhere." *Id.*

Precedents demonstrate that when seeking to deny respect to a foreign marriage, states either invoked their own strong legitimate interests or simply rejected the marriage based on statutes indicating the marriage was repugnant. Koppelman, SAME SEX, DIFFERENT STATES, at 22-26. Vigorously applied to deny respect to remarriages of the guilty party after divorce when such marriages were specifically prohibited – an example of vindicating legitimate forum policy[3] – as well as to "repugnant" interracial marriages (expressed in terms of statutory and/or constitutional prohibitions and declarations of voidness as well as in penal statutes)[4], the public policy exception waned with time and was on the verge of "becoming obsolete" until states began to formally recognize the relationships of same sex couples. Joseph Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. Civ. Rts. & Civ. Liberties 1, 40 (2005); *see also* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2148 (2005) (public policy exception was becoming "archaic").

The identification and weighing of state statutes described in *Penneger* as the task in the more difficult marriage conflicts cases can be exacerbated with respect to

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[3] One noted commentator posits that in the early twentieth century, public policy was most likely to be offended when residents left their states to join in a marriage specifically prohibited (or criminalized) at home and then immediately returned home. Herma Hill Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 King's Coll. Law J. 63, 71 (2004).

[4] Koppelman, SAME SEX, DIFFERENT STATES at 28-50; Andrew Koppelman, Same-Sex Marriage, Choice of Law and Public Policy, 76 Tex. L. Rev. 921 (1998).

marriages of same-sex couples in some states by the variety of the common law, statutory law and constitutional enactments (if any) concerning the marriage of same-sex couples. For example, it may be difficult to ascertain the domicile's public policy, as expressed in both its statutes and its case law, because policies disfavoring recognition of the marriage of a same-sex couple (*e.g.* declaring such marriages void) may conflict with policies in statutes and case law validating foreign marriages (comity, certainty, predictability), policies in favor of providing benefits and protections to married couples, case law recognizing other foreign marriages despite statutory prohibitions, or other expressions of state public policy concerning the rights of same-sex couples in general or with respect to the issue involved in the litigation.

For this reason, inquiry into a state's public policy for these purposes does not begin and end with the mere citation to a type of marriage specifically proscribed by the state, and certainly cannot turn on the fact that a particular marriage is not authorized under the state's licensing laws. If "public policy" were simply synonymous with limitations in the forum's marriage licensing statute, the conflicts issue would always be resolved in favor of forum law, thereby disregarding the powerful interests of marriage validation generally and the particular interests of the couple involved. Koppelman, SAME SEX, DIFFERENT STATES, at 103. *See also Restatement (Second) of Conflict of Laws* § 283, comment k (absent an explicit statute or judicial precedent, the only rules that could embody a strong public policy to overcome validation rule are "rules that prohibit polygamous marriage, certain incestuous marriages, or the marriage of minors below a certain age").

E. Some States, Applying Traditional Conflict of Laws Principles, Will Recognize the Marriages of Same-Sex Couples Celebrated in Massachusetts.

Notably, ten states including Massachusetts now provide for some form of state-wide relationship recognition for same-sex couples. Comprehensive legal statuses for same-sex couples denominated as "domestic partnership" or "civil union" conveying the state-based legal rights and responsibilities of marriage now exist in Vermont, California, Connecticut, New Jersey, and New Hampshire, and are soon to be joined by Oregon.[5] Other states – Maine, Washington, and Hawaii -- have enacted more limited "domestic partnership" statutes conveying a variety of legal protections to registered domestic partners or reciprocal beneficiaries.[6]

Just as there is diversity with respect to states respecting relationships of same-sex couples, there is likely to be diversity with respect to whether and how states respect these legal statuses. Some States likely will recognize foreign marriages of same-sex couples. Non-resident same-sex couples from States that have not enacted statutory or constitutional prohibitions to marriage for same-sex couples – Massachusetts (with respect to marriages licensed in Canada or other countries), New Mexico, New York and Rhode Island -- have reasonable

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[5] *See*: Connecticut, 2005 Conn. Pub. Acts No. 05-10, codified at CONN. GEN. STAT. §§46b-38pp; New Jersey, N.J. STAT. §37:1-28 *et seq.*; Vermont, 15 VT. STAT. ANN. §§ 1201-1207 and 18 VT. STAT. ANN §§ 5160-5169; California, WEST'S ANN. CAL. FAM. CODE § 297.5 (domestic partnership); New Hampshire 2007 N.H. Laws, c.457A; Oregon, 2007 Or. Laws, c.99 (effective in 2008).

[6] *See*: Hawaii, Haw. Stat. § 572C-1 - § 572C-7 (reciprocal beneficiaries); Maine, P.L. 2003, c. 672, codified at 18-A M.R.S.A. §§ 1-201, 2-102, 2-103, 3-203, 5-309, 5-311, 5-404, 5-405, 5-410 (domestic partners); Washington, Laws of 2007, c.156 (domestic partners).

expectations that their domiciles will recognize their marriage since there is no public policy to be interposed against the general validation rule. *See* Koppelman, SAME SEX, DIFFERENT STATES at 102-103 (absent a statute, "it is not clear how public policy could be shown").

New York State officials have already stated they will respect a valid marriage entered into by their domiciliaries outside the State. The New York State Department of Civil Service announced in April 2007 that it will respect out of state marriages of same-sex couples for purposes of extending spousal insurance benefits to current and retired employees of state and local governments.[7] This position is consistent with the position of the New York State Attorney General and Comptroller, both of whom have opined that New York State comity law requires respect to valid foreign marriages. Op. Att'y Gen. 1, 34-35 (Mar. 3, 2004), *available at* http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf; (stating that New York will recognize marriages of same-sex couples legally performed elsewhere); Letter from Alan Hevesi, N.Y. State Comptroller, to Mark Daigneault, (Oct. 8, 2004) (Appendix C) (confirming that state Retirement System will recognize a Canadian marriage as a marriage for purposes of

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[7] *See* Civil Service Recognizes Same-Sex Marriages for Spousal Coverage Under New York State Health Insurance Program, April 27, 2007, *available at* http://www/cs.state.ny.us/pio/pressrel/nyship_samesexspousalcoverage.cfm. Prior to this announcement, a trial court had denied respect to a retired employee's marriage to his same-sex spouse in Canada on the basis of a New York Court of Appeals ruling that same-sex couples may not marry in that state. *See Funderburke v. N.Y.S. Civ. Serv.*, 13 Misc. 3d. 284, 822 N.Y.S. 2d 393, 394 (N.Y. Sup. 2006). After an appeal was filed by the employee, the State announced its position to allow the benefits, consistent with the 2004 opinions of the Attorney General and State Comptroller.

determining eligibility for retirement and pension benefits). Several municipalities have also stated publicly that they will respect valid foreign marriages involving same-sex couples[8], and the Westchester County Executive's Order to do so was upheld as valid by a trial court. *Godfrey v. Spano*, 15 Misc. 3d 809, 836 N.Y.S.2d 813, 818-819 (N.Y. Sup. 2007).[9]

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[8] These municipalities include New York City, the Cities of Albany, Binghamton, Buffalo, Ithaca and Rochester, as well as the Towns of Brighton and Chili and the Village of Nyack. Statements from these municipalities are contained in Appendix D.

[9] To date, there are only two reported cases in which lower courts have addressed jurisdiction for a divorce action for couples married in Massachusetts. In both cases, the courts ruled that the marriages were void as a matter of Massachusetts law based on those trial courts' understanding of Massachusetts law, Mass. Gen. L. c. 207, §§11-12 (barring non-residents from marrying in Massachusetts when their marriages were void or expressly prohibited by their home states). *See Gonzalez v. Green*, 14 misc. 3d 641, 831 N.Y.S.2d 856, 858-859, 861 (N.Y. Sup. 2006); *Lane v. Albanese*, 39 Conn. L. Rptr. 3, 2005 WL 896129, at *4 (Conn. Super., March 18, 2005).

For purposes of this case, those decisions are irrelevant since the Massachusetts Supreme Judicial Court, construing that law, clarified that non-resident couples who are not expressly forbidden to marry in their home state are and have always been eligible to marry in Massachusetts. *Cote-Whitacre v. Dep't of Pub. Health*, 446 Mass. 350, 844 N.E.2d 623, 658-659 (2006) (Marshall, C.J., concurring). Thus, the parties *in this case* were actually eligible to marry when they did and their marriage is valid as a matter of Massachusetts law. *Cote-Whitacre v. Dep't of Pub. Health*, 21 Mass.L.Rptr. 513, 2006 WL 3208758 (Mass. Super. Sept. 29, 2006) (concluding that Mass. Gen. L. c. 207, §§11-12 do not disqualify Rhode Island same-sex couples from marriage in Massachusetts).

Some States will recognize marriages of same-sex couples for certain purposes. *See* Letter from Richard Blumenthal, Conn. Att'y Gen., to Gary J. DeFillipo (Aug. 2, 2004) (Appendix E) (establishing that marriage licenses from Massachusetts would be recognized to change name on driver's license and car registrations); Op. of R.I. Att'y Gen., Letter from Patrick C. Lynch to Comm'r Jack Warner (February 20, 2007) (Appendix G) (opining that state Board of Governors for Higher Education should respect marriages of employees for purposes of employee benefits); Op. of R.I. Att'y Gen., Letter from Patrick C. Lynch to Hon. Paul J. Tavares (Oct. 19, 2004) (Appendix H) (stating that employees with same-sex spouses are eligible to receive spousal benefits under teacher's retirement system). *See also* Michael P. McKinney, *Towns providing benefits to married same-sex couples*, Providence Journal (February 11, 2005) (Tiverton School Committee extending health care benefits to retired teacher with spouse of same sex based on terms of collective bargaining agreement),

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The *Gonzalez* and *Lane* courts had an erroneous view of Massachusetts law. To the extent an out-of-state same-sex couple who married in Massachusetts came from a state that would have declared their marriage "void" if contracted at home, the couples' resulting marriage would violate Mass. G. L. c. 207 §11 and be deemed void as a matter of Massachusetts law. *See Cote-Whitacre*, 844 N.E.2d at 636 & n. 8 (Spina, J., concurring). Connecticut expressly prohibits same-sex couples from marrying, so a Connecticut couple's resulting marriage would violate §12 and be considered "voidable" as a matter of Massachusetts law, not void. *Id.* at 636-637 & nn. 10-11. At the time of the disputed New York marriage in *Gonzalez*, that state had no statute or controlling appellate decision prohibiting marriage for same-sex couples, and thus §§11-12 do not apply to them at all and their marriages are valid in Massachusetts. *See Cote-Whitacre v. Dep't of Pub. Health*, Assented to Motion for Amended and Final Judgment, May 10, 2007, and Final Judgment (Appendix F).

available at:

http://www.projo.com/news/content/projo_20050211_tnmarr11.256127.html.

Unlike Rhode Island, the majority of states now have some sort of positive law addressing marriage of same-sex couples, but have not yet confronted the conflict of laws issue presented by this case. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 Or. L. Rev. 433, (2005) (opining on effect of state statutes and amendments). Even with those positive laws in place, the complexity of conflict of laws principles makes it difficult to know *ex ante* whether a State will recognize a foreign marriage in whole or in part. As to marriages in which the couple leaves the domicile to marry in violation of an express statutory prohibition in their home state, some commentators believe that many of the "mini-DOMA statutes' would prevent recognition of evasive marriages, *see, e.g.,* Koppelman, SAME SEX, DIFFERENT STATES, at 140; Koppelman, *Handbook*, 153 U. Pa. L. Rev. at 2166-2194 (collecting most statutes and constitutional provisions). Other commentators argue those statutes would not condemn all evasive marriages, as the need for a certain status may predominate, or the interests in prohibition may not be so strong, or the state's prohibitory interest may be trumped by other policy concerns such as the need to support children or enforce marital obligations. *See, e.g.,* Singer, *Evasion of Obligation*, 1 Stan. J. of Civ. Rts. & Cv. Liberties, at 41-43. Some statutes merely state that marriage licenses may not be issued to same-sex couples or that such marriages are "void" or "prohibited," but none of these can be certain to reach extraterritorial marriages. Koppelman, SAME SEX, DIFFERENT

STATES, at 140. Still other statutes deem the marriages contrary to the state's public policy, "but it is not so clear whether that public policy is so strong that the state will attempt to apply it to transactions, in or out of the state, involving nondomiciliaries." *Id.* Moreover, all states are "constrained by history" insofar as precedent exists on terminology used in the state anti-marriage laws as well as on the issue of respect for prohibited marriages. *Id.*

The prior experiences of the States regarding the recognition of: interracial marriages, notwithstanding criminal anti-miscegenation penalties in Southern States; remarriage following divorce; consanguineous marriages; underage marriages; and civil unions celebrated in various states demonstrate that even strong public policies against a marital same-sex relationship can yield in some cases.

i. <u>Many State Courts Have Construed Their Prohibitory Statutes As Applying Only To Marriages Celebrated Within The State.</u>

Although some state courts might apply statutory and constitutional prohibitions upon marriage for same-sex couples to render all such foreign marriages void in all respects, it is more likely that state courts will apply such prohibitions only where there is an express statement that the prohibitions apply to marriages celebrated outside of the State. In some States that have enacted statutory and constitutional prohibitions to the marriage of a same-sex couple, the State's public policy pronouncements do not have clear extraterritorial effect, that is, they "do[] not by express terms regulate a marriage solemnized in another State where, as in our present case, the marriage was concededly legal." *In re May's Estate*, 305 N.Y. 486, 491, 114 N.E.2d 4, 6 (1953). *See, e.g.*, Haw. Rev.

Stat. §§ 572-1 and 572-3; Md. Code Ann., Fam. Law § 2-201; Mont. Code Ann. § 40-1-401; S.C. Code Ann. §§ 20-1-10; 15; Vt. Stat. Ann. Tit. 15, § 8; Wyo. Stat. § 20-1-101. Thus, the mere existence of a statutory or constitutional provision expressing a state's disapproval of marriage rights for same-sex couples does not indicate that such policy will be interpreted to deny recognition to the marriages of same-sex couples legally celebrated outside of the State. *But see, e.g.,* Va. Code Ann. § 20-45.2 ("Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.").

Therefore, these States likely will follow, as they have in the past, the "clear statement" canon of statutory interpretation applicable to the recognition of foreign marriages:

> A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such marriages out of the state shall have no validity here.

Commonwealth v. *Lane*, 113 Mass. 458, 464 (1873) (Gray, C.J.). Indeed, absent a "statute expressing clearly the Legislature's intent to regulate within this State marriages of its domiciliaries solemnized abroad," the general rule of recognition applies. *In re May's Estate*, 114 N.E. 2d at 7; *see also Etheridge v. Shaddock*, 288 Ark, 481, 482, 706 S.W.2d 395, 396 (Ark. 1986) (refusing to apply Arkansas ban on first cousin marriages to Arkansas residents who evaded state prohibition on such marriages absent legislative statement that prohibition applied to

extraterritorial marriages); *In re Loughmiller's Estate*, 229 Kan. 584, 590, 629 P.2d 156, 161 (1981) (validating first-cousin marriage, notwithstanding evasive trip to Colorado to celebrate marriage, where Kansas statute prohibiting such marriages did not expressly apply to foreign marriages); s*ee also* Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, (hereinafter, Wolff, *Interest Analysis*") 153 U. Pa. L. Rev. 2215, 2241, 2243 & n. 78 (2005) (discussion of clear statement rule and cases).

The policy underlying the general rule of recognition is so strong that "in the absence of express words, a legislative intent to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus* cannot be inferred." *State* v. *Hand*, 87 Neb. 189, 191, 126 N.W. 1002, 1002-1003 (1910); *see also In re Miller's Estate*, 239 Mich. 455, 214 N.W. 428 (1927) (following general rule of recognition because Legislature did not expressly apply to foreign marriages statute declaring first-cousin marriages void); *Garcia* v. *Garcia*, 25 S.D. 645, 127 N.W. 586 (1910) (noting lack of legislative intent to apply to foreign marriages statute prohibiting first-cousin marriages within State). Therefore, even in States with statutes declaring the marriages of same-sex couples to be void, some of those States will recognize such marriages when valid in another jurisdiction like Massachusetts.

ii. <u>States With Anti-Miscegenation Laws Recognized Marriages Of Interracial Couples Performed In Other States.</u>

Some States, notably some in the South, recognized interracial marriages celebrated in other jurisdictions, notwithstanding their own positive statutes and/or constitutional provisions declaring such marriages void -- and in some

cases, a crime -- if performed within the State. For example, in *State v. Ross*, 76 N.C. 242 (1877), the Supreme Court of North Carolina recognized a marriage celebrated in South Carolina that would not have been valid if celebrated in North Carolina. A white woman who was a resident of North Carolina moved to South Carolina, where she married a black man residing there. *Id.* at 243. At that time, South Carolina did not prohibit interracial marriage. Approximately three months later, the couple moved to North Carolina, where they were charged with illegal fornication and adultery. *Id.*

A divided North Carolina Supreme Court held that the South Carolina marriage was valid and provided a defense to the charges.[10] Although the court conceded that interracial marriages were "revolting to us," it nonetheless recognized the marriage under the general rule that a marriage valid where celebrated must be treated as valid everywhere because the majority felt bound by "obligations of comity to our sister States." *Id.* at 246-247. *See also Bonds v. Foster*, 36 Tex. 68, 70 (1871) (respecting marriage of mixed race couple who relocated from Ohio to Texas for purposes of wife's inheritance despite a Texas statute criminalizing interracial marriages); *Miller v. Lucks*, 203 Miss. 824, 832, 36 So. 2d 140, 142 (Miss. 1948) (allowing a non-resident white husband to keep land of his deceased black wife in Mississippi despite constitutional provision declaring such marriages "unlawful" and "void"); *Caballero v. Executor*, 24 La. Ann. 573, 575 (1872) (recognizing marriage of non-resident for purposes of

[10] The Court rejected the State's argument that the woman had moved to South Carolina to evade North Carolina and concluded that the State had not proven that she left North Carolina solely to evade its law. *Ross*, 76 N.C. at 243.

allowing daughter of marriage to inherit despite local law declaring interracial marriages "forbidden," void, and a nullity); *Whittington v. McCaskill*, 65 Fla. 163-165, 61 So. 236-237 (1913) (allowing nonresident husband to sell deceased wife's land where Florida constitutional amendment prohibited interracial marriages "forever" and statutorily declared them "utterly null and void"). *See generally* Koppelman, SAME SEX, DIFFERENT STATES at 39-46.

Some but not all marriages undertaken in other states to avoid a home state's prohibition or declaration that the marriage was void were invalidated by the domiciliary state. In *State* v. *Kennedy*, 76 N.C. 251, 251-252 (1877), the marriage of North Carolina domiciliaries who traveled to South Carolina "for the purpose of evading the law of North Carolina which prohibited their marriage," was void because North Carolina's prohibition upon interracial marriage "is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina." On the other hand, in *Medway*, the Massachusetts Supreme Judicial Court held that an interracial marriage, "solemnized in Rhode Island, where it was not unlawful," would be recognized in Massachusetts, where such a marriage was unlawful and violated criminal laws, "even when it appears that the parties went into another state to evade the laws of their own country." 16 Mass. at 159. Finally, in *Pearson v. Pearson*, 51 Cal. 120, 125 (1875), California recognized the validity of an interracial marriage celebrated in Utah based upon California's statute requiring recognition of a marriage valid in the State in which it was performed, and despite a California statute declaring such a marriage a nullity if celebrated within the State.

The recognition by States of foreign interracial marriages of their own domiciliaries, notwithstanding statutes and constitutional provisions prohibiting such marriages, demonstrates that some States will again recognize marriages, such as the marriages of same-sex couples, which appear to be contrary to public policy.

iii. Notwithstanding Public Policies Against Other Types Of Marital Relationships, Many States Have Validated Such Marriages Performed In Other Jurisdictions.

In many other types of cases as well, a court has recognized an out-of-state marriage despite a forum statute prohibiting that same marriage within the State.

For example, despite states' concerns about the subsequent marriage of a person forbidden to remarry after divorce, the weight of authority recognized the second marriages. Koppelman, SAME SEX, DIFFERENT STATES, at 31 & n. 15. In *Loughran v. Loughran*, 292 U.S. 216, 222-223 (1934), the United States Supreme Court, applying the general rule validating an out-of-state marriage, recognized a Florida marriage for purposes of alimony and dower rights in the District of Columbia even though the marriage would have been "absolutely void" if performed in the District of Columbia, the relevant domicile. Prohibited from marrying in the District of Columbia due to the putative wife's commission of adultery during a previous marriage, the couple married in Florida. Despite allegations that the couple married in Florida with the intent of evading D.C.'s marital prohibitions, the Supreme Court refused to give extra-territorial effect to the District's prohibitive law: "Such a statute [preventing remarriage upon the commission of adultery] does not invalidate a marriage solemnized in another state in conformity with the laws thereof." *Id*. at 223. Though the District had a

statute declaring evasive marriages illegal and void, the Court refused to apply the evasion law to the couple where the District's evasion law did not specifically reference the marital prohibition that disqualified the putative wife from remarriage within the District. *Id.* at 223-24.

Similarly, many State courts have validated consanguineous marriages notwithstanding strong forum policy to the contrary, including criminal sanctions on the sexual conduct of the parties. In *Etheridge v. Shaddock*, 706 S.W.2d 395, 396 (1986), the Supreme Court of Arkansas upheld the validity of a marriage between first cousins, because such marriages do not create "much social alarm," notwithstanding the couple's evasive trip to Texas to get married. Likewise, in *Staley v. State*, 89 Neb. 701, 701-7-5, 131 N.W. 1028, 1029-1030 (1911), the Supreme Court of Nebraska validated the marriage of first cousins in Iowa, in holding that the husband could be charged with bigamy. *See also In re May's Estate*, 114 N.E.2d at 7 (recognizing as valid, despite contrary statute in New York, marriage in Rhode Island between uncle and niece, because parties' reasonable expectations after 32 years of marriage deserved protection); *Fensterwald v. Burk*, 129 Md. 131, 136-137, 98 A, 358, 360 (Md. 1916) (recognizing an uncle-niece marriage licensed in Rhode Island).

In *McDonald v. McDonald*, 6 Cal. 2d 457, 58 P.2d 163, 164 (1936), the Supreme Court of California upheld the marriage of an underage couple. The Court stated:

> Even though the parties here, resident of and domiciled in California, went to the state of Nevada to be married, and with the avowed purpose of evading our laws relating to marriages, such a motive, if in the minds of the parties, would not change the

> operation of the well-settled rule that a marriage which is contrary to the policies of the law of one state is yet valid therein if celebrated within and according to the laws of another state.

Id.; see also State v. Graves, 307 S.W.2d 545, 549-550 (1957) (affirming the validity of a marriage of two underage residents of Arkansas performed in Mississippi, because the Arkansas policy against underage marriage, expressed in a statute, was not strong enough so as to void the marriage entirely).

iv. <u>Notwithstanding Constitutional And Statutory Prohibitions Upon Marriages Of Same-Sex Couples, Some States Have Recognized Civil Unions.</u>

In 2000, Vermont became the first State to permit civil unions for same-sex couples, although as discussed above at I (E), other states have enacted various forms of relationship recognition measures.

While a civil union or domestic partnership lacks an analogous relationship in most other States, courts in Iowa and West Virginia have recognized civil unions for the limited purpose of entering a judicial decree dissolving the unions. In *Alons v. Iowa Dist. Ct. for Woodbury County*, 698 N.W.2d 858, 874 (Iowa 2005), holding that third parties lacked standing to challenge the trial court's dissolution of a civil union, the Iowa Supreme Court discussed a trial court ruling in that state extending equitable jurisdiction to dissolve a couple's civil union from Vermont. *See also In re M. G. and S. G.*, No. 02-D-292 (Fam. Ct. W.Va., Jan. 3, 2003) (Appendix I). Both courts did this, notwithstanding statutory provision in the States providing that marriages by

same-sex couples would not be recognized for any purpose.[11] The Massachusetts Probate and Family Court dissolves civil unions under that court's broad equity jurisdiction. *See, e.g., Salucco v. Alldredge*, 17 Mass. L. Rptr. 498, not reported in N.E.2d, 2004 WL 864459 (Mass. Super. 2004).[12]

Texas has taken the opposite approach. *In re R.S. and J.A.*, No. F-185063 (Dist. Ct. Jefferson County, Tex., Mar. 3, 2003) (Appendix J), the trial courts refused to recognize the parties' civil union even for the limited purpose of dissolving it. Texas has a statute prohibiting marriage for same-sex couples in the State, *see* Tex. Fam. Code Ann. § 6.204(b)(Vernon 2006). In Connecticut, the Appellate Court denied jurisdiction to dissolve a civil union in *Rosengarten* v. *Downes*, 701 Conn. App. 372, 802 A.2d 170 (Conn. Ct. App. 2002), *cert. granted and dismissed*, 806 A.2d. 1066 (2002), relying on a statement of public policy in its adoption law providing that the state's "current public policy" is that marriage is "limited to marriage between a man and a woman." *Rosengarten*, 802 A.2d at 181, *citing* C.G.S.A. § 45a-727a(4). Due to the death of one of the parties, the state Supreme Court never reviewed the matter. *See generally*, Diana G.

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[11] *See* W. Va. Code Ann. § 43-2-603 (stating that a "public act" or "record" from any other state "respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state.... or a right or claim arising from such a relationship, shall not be given effect by this state"); Iowa Code Ann. § 595.2(1) (stating "Only a marriage between a male and a female is valid") and § 595.20 (recognizing the validity of a legal marriage from another jurisdiction "if the parties meet the requirements for validity pursuant to 595.2, subsection 1").

[12] In *Langan v. St. Vincent's Hospital*, 802 N.Y.S.2d 476, 483, 25 A.D. 3d 90. 99, (App. Div., 2d Dept. 2005), the Appellate Division held that a surviving civil union partner could not be treated as the deceased partner's "spouse" for purposes of filing a wrongful death action because the wrongful death statute spoke of spouses and "they were not joined in marriage."

McShea, *Rosengarten v. Downes: Connecticut Refuses To Dissolve Vermont Civil Union*, 22 QLR 523, 524 (2004). In any event, even if *Rosengarten* were correctly decided, *see id.* at 546-562 (critiquing decision), Connecticut adopted a civil union statute in 2005 and the State Attorney General has opined that civil unions which share the attributes of Connecticut's civil union status will be respected. Op. Att'y Gen., No. 2005-024 (Sept. 20, 2005), 2005 WL 2293060 (Conn. A.G.).

The split among the States concerning the recognition of civil unions entered into by same-sex couples domiciled in other States is an indicator of what is likely to happen to couples from other states who marry in Massachusetts. The already existing conflict of laws system will permit courts in each State to make their own decisions regarding whether, in a specific case, to recognize a marriage of a same-sex couple celebrated in Massachusetts.

II. Many States Will Recognize A Marriage As Valid For Certain Incidents Of Marital Rights And Obligations Even Though the Marriage May Not Be Recognized For All Purposes.

The marriage conflicts question typically arises in a context where a particular right or responsibility flowing from the marriage is at issue. Even though forum law may contain express prohibitions as to the marriage at issue, it may be willing to recognize the marriage for the limited purposes of a particular "incident of marriage" -- a benefit, right, obligation or divorce of a spouse -- without recognizing the validity of the marriage entirely. As the Supreme Court of Tennessee stated, not "every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy" to invalidate the marriage in toto. *Penneger*, 87 Tenn. 244, 10 S.W. at 306.

Courts "have begun to recognize that the enjoyment of different incidents of marriage involves different policies. Consequently, a uniform reference to a single state to resolve all choice-of-law questions involving marriage cannot be expected." Scoles & Hay, *Conflict of Laws* § 13.2 at 561.[13] The *Restatement (Second) of Conflict of Laws* also favors the incidents approach as an alternative to invalidation when the marriage would have been invalidated in the state if contracted there. *Restatement (Second) of Conflict of Laws,* § 284, comment b. *See also* Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns,* 2001 B.Y.U. L Rev. 1235, 1262-1263 (2001) (arguing that under the *Restatement (Second) of Conflict of Laws,* even an evasive marriage made void by the home state would lend itself to an incidents analysis).[14] Therefore, a court in the State of the couple's domicile, instead of recognizing the marriage as valid for all purposes, may hold a marriage to be valid for some of the many incidents of marriage, even where the marriage

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[13] Long before disputes arose about marriages of same-sex couples, some commentators objected to the idea that marital status is "universal" on the basis that one's marital status should be determined on an issue-by-issue basis, after considering the policies behind each particular incident of marriage. Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental Interest Analysis and the Restatement (Second),* 72 Colum. L. Rev. 329, 356-357 (1972); David E. Engdahl, *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law,* 55 Iowa L. Rev. 56, 108-110 (1969); J. David Fine, *The Application of Issue-Analysis to Choice of Law Involving Family Law Matters in the United States,* 26 Loy. L. Rev. 31 (1980); Willis L.M. Reese, *Marriage in American Conflict of Laws,* 26 Int'l & Comp. L. Q. 952, 965 (1977).

[14] Other commentators argue that it is simply too burdensome for same-sex couples to have to litigate the validity of their marriage each time an incident of that marriage is at issue. *See* Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions and Domestic Partnerships,* 13 Widener L. J. 699, 718 (2004).

of a same-sex couple is void within the forum. Courts recognize limited incidents of marriage to avoid the wholesale invalidation of the relationship and the "attendant disruption to property interests, custodial arrangements, and long-term planning" such a refusal would entail. *See* Wolff, *Interest Analysis*, 153 U. Pa. L. Rev. at 2249.

In cases involving both interracial marriage and marriage to more than one person at a time, courts have recognized a particular attribute of the marital relationship, even though the forum State would not have recognized the marriage as an ongoing entity. In *Miller* v. *Lucks*, 203 Miss. 824, 832, 36 So. 2d 140, 142 (Miss. 1948), the Supreme Court of Mississippi recognized an interracial couple's out-of-state marriage for the purposes of intestate succession, even though the Constitution and the statutes of Mississippi prohibited interracial marriage within State. The court concluded that the purpose of Mississippi's anti-miscegenation laws was only "to prevent persons of Negro and white blood from living together in this state in the relationship of husband and wife." *Id.* Because one spouse had died, and the surviving spouse sought only the right to intestate succession, the court held that Mississippi's public policy would not prevent recognition of the marriage for that limited incident, *i.e.*, the surviving spouse's right to intestate succession. *Id.*

Similarly, *In re Dalip Singh Bir's Estate*, 188 P.2d 499, 502 (Cal. App. 1948), a California appellate court recognized California's "public policy" against polygamous marriage, but held that public policy would not prohibit two wives (both residing in India), from inheriting equal shares of their husband's estate

under California probate law. The court found that California's public policy "would apply only if decedent had attempted to cohabit with his two wives in California." *Id.*

In re Lenherr Estate, 455 Pa. 255, 314 A.2d 255 (1974), the Pennsylvania Supreme Court faced the question of whether a widow was entitled to the marital exemption from the property transfer tax permitted under state inheritance law. Each of the spouses, while living in Pennsylvania, had been married previously and each was divorced from their prior spouse based on their adultery with the other. *Id.* at 256-57. They traveled to West Virginia to marry because Pennsylvania prevented those guilty of the crime of adultery from marrying the person with whom the adultery was committed during the life of the former spouse. *Id.* at 257. While the policy behind the marriage prohibition -- protecting the innocent husband or wife's sensibilities and to protect public decency -- would be significant in cases concerning ongoing cohabitation in the state, "denying the marital exemption would be all but fruitless" in achieving that policy in a case where the surviving spouse would not longer be cohabiting with her husband. *Id.* at 259. Therefore, there was no reason to apply Pennsylvania's law to deny the spouse the tax exemption.

Some will use an incidents approach with respect to marriages of same-sex couples. Divorce is one of the areas that particularly lends itself to an incidents analysis when a state's clear and strong public policy forbids respect for the marriage of a same-sex couple. Singer, *Evasion of Obligation*, 1 Stan. J. Civ. Rts. & Liberties at 22 (courts have traditionally recognized marriages created in

another state where the matter at bar relates solely to property disputes incidental to the relationship at divorce); Herma Hill Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 Kings Coll. L. J. 63, 92 (2004) ("The normal conflict of laws rule for marriage recognition permits enforcement of the incidents of marriage – one of which is divorce – even if the status of marriage itself would not be recognized."). Once a marriage has broken down, divorce provides a rules-based system for sorting out conflicting claims of the couple, whether related to property, support or children. *Id.* at 76. As in the other incidents cases, a court need not recognize a marriage in its entirety in order to dissolve it. *Id.* at 71 (pointing to *In re Dalip Singh Bir's Estate*); *Id.* at 68-69 (noting that California's version of the Uniform Interstate Family Support Act allows the state to enforce a support order without inquiring into the validity of the status itself). Even a state with a specific prohibition on marriage for same-sex couples could distinguish "between recognition of the status of the marriage for purposes of its performance … and recognition of the incidents of that status upon its dissolution." *Id.* at 74. For example, confirming ownership of property in one or the other while adjudicating the divorce is not recognition of the marriage, "but merely an enforcement of its financial incidents." *Id.*

Furthermore, as discussed *supra* at Point I (E) (iv), some courts addressing legal issues concerning civil unions entered into by same-sex couples domiciled outside the licensing state have applied this same incident of marriage analysis for the purpose of dissolving the unions. Specifically addressing the Connecticut Appellate Court's decision in *Rosengarten*, a noted commentator suggests that the

court may have reached a different outcome if it had focused on the correct factors, that is: divorce as an incident of marriage rather than respect for the marriage for all purposes; and the fact that the couple did not seek to live together in Connecticut, but to be freed from any such obligation. Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 Kings Coll. L. J. at 88.

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In sum, there are good reasons to expect that some States that do not recognize a marriage of a non-resident, same-sex couple from Massachusetts for *all* purposes may do so for *some* incidents of the relationship. Cases will arise where the incident of marriage at issue is one that the court can recognize because doing so will promote that State's interests in both protecting the expectations of its citizens and providing specific rights to couples who have made legal commitments to each other, without undermining the policies expressed in its anti-marriage statutes. Recognizing access to divorce relates only to the expectations and commitments regarding property interests and will not undermine policies expressed in statutes forbidding marriage for same-sex couples. Again, it is worth noting that Rhode Island has no such prohibitory statutes.

III. A BLANKET NON-RECOGNITION RULE FOR MARRIAGES OF SAME-SEX COUPLES WOULD BE UNPRECEDENTED, UNWARRANTED BY LEGITIMATE STATE INTERESTS, AND SHOULD BE AVOIDED LEST IT RAISE CONSTITUTIONAL CONCERNS.

In some states, including Rhode Island, there is a very strong claim that marriages of same-sex couples are entitled to respect. As addressed by the parties and *amicus curiae* Gay & Lesbian Advocates & Defenders, *Chace* remains the

law in Rhode Island, thereby following the place of celebration rule even with evasive marriages unless the marriage is "odious." 58 A. at 980-981. As to any public policy exception captured by the odiousness exception, Rhode Island has no express prohibitions on marriages of same-sex couples and the legislature has refused to enact such measures. Even in this calendar year, bills aimed at restricting marriage rights for same-sex couples failed to advance. *See,* H6159, 2007 Leg., Reg. Sess. (RI 2007); H5356, 2007 Leg., Reg. Sess. (RI 2007); S0687, 2007 Leg. Reg. Sess. (RI 2007) (Legislative status reports and bill histories for H 6159, H 5356, and S 0687 can be found at http://dirac.rilin.state.ri.us/BillStatus/WebClass1.ASP?WCI=BillStatus&WCE=ifrmBillStatus&WCU). There is no evasion statute to give extraterritorial effect to state marriage licensing laws. As to divorce in particular, Family Court jurisdiction is broad and has been used to allow same-sex couples to sort out their legal affairs at the end of a relationship. *See* R.I.G.L. § 8-10-3; *Doe v. Buckland*, 808 A.2d 1090, 1094 (R.I. 2002) (courts have jurisdiction over contract claim between male partners who separated); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (courts have jurisdiction over de facto parent and contract claims of same-sex couple who separated and had raised a child together).

A. Blanket Non-Recognition Would Be Unprecendented.

While some state legislatures appear determined to impose a blanket rule of non-recognition on marriages of same-sex couples, that result would be unprecedented in American law. Ever since states began licensing marriages, conflicts have arisen between states and have been resolved through application

of the principles discussed in this *amici curiae* brief. Interracial marriage, disapproved of by 94% of Americans even ten years after California became the first state to strike an anti-miscegnation law in 1948[15], provoked intense feelings in some as unsettling as marriage of same-sex couples is to others today.[16] While some of the anti-miscegenation cases are unsettling to read in an era where racial equality ideals prevail, the conflicts decisions in this area of law are "surprisingly fact-dependent" and generally contain regard for "the interests of the parties to the forbidden marriages [and] of the states that recognized such marriages," weighing these interests against "the countervailing interests of the forum." Koppelman, SAME SEX, DIFFERENT STATES, at 36. States "did not make a blunderbuss of their own public policy" in that context, *id.*, and should refuse any temptation to do so in this context as well.

B. A Blanket Non-Recognition Rule Is Unwarranted Upon A Consideration of Legitimate State Interests And Should Be Rejected To Avoid Constitutional Concerns.

The range of interests that a state may put forward for disrespecting a couple's marriage continues to narrow. As one commentator explains, many of the state interests offered in past cases targeting interracial and other disfavored relationships are likely not available to states in marriage recognition cases today.

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[15] *See Perez v. Lippold*, 32 Cal. 2d 711, 198 P.2d 17 (1948). *See also* Gallup Poll News Service, "Gallup Poll Social Series: Minority Rights and Relations" (Gallup Organization, Princeton, N.J.) (June 3-9, 2002) (data from Sept. 24-29l 1958).

[16] A 2006 national poll showed opposition to marriage for same-sex couples at 56% in opposition and 35% in favor. *Most Want Middle Ground on Abortion: Pragmatic Americans Liberal and Conservative on Social Issues*, (Pew Research Center, Washington, D.C.)(August 3, 2006), http://www.people-press.org/reports/pdf/283.pdf at 8.

Wolff, *Interest Analysis*, 153 U. Pa. L. Rev. at 2216. The three public policy rationales most often invoked cases are (1) "a desire to exclude certain sexual couplings or romantic relationships" from the state; (2) "a desire to express the moral disapproval" of the relationship, and related to both of these; (3) a desire to dissuade couples in the disfavored relationship from migrating to the state in the first place. *Id.*

As to the state's legitimate interests about relationships within its borders, *Lawrence v. Texas*, 539 U.S. 558 (2003), vastly undermines and may extinguish any legitimacy in state policies founded on dislike of gay and lesbian relationships. In that case, the United States Supreme Court found a right to liberty in private, consensual sexual relationships between two persons of the same sex in a non-commercial setting. *Id.* at 578-579. The Supreme Court framed that holding in the larger contexts of the equal dignity of gay people as well as "protection of their ability to enter and maintain lasting intimate relationships."[17] *Lawrence* now stands for the proposition that gay people, just like everyone else, have a right to make personal decisions relating to families and

[17] *Lawrence*, 539 U.S. at 567. *See also, id*. at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government").

intimacy without state interference.[18] Since state laws may no longer condemn same-sex sexual activity and cohabitation, states are now unable to claim an interest in excluding the relationships of gay and lesbian couples from the state's borders. Wolff, *Interest Analysis*, 153 U. Pa. L. Rev. at 2228.

As to moral disapproval, states most often invoked this sentiment as a "counterpoint to its use of the criminal code to exclude the relationship from the state," particularly concerning closely consanguineous relationships. *Id.* at 2229. As the foregoing discussion demonstrates, states have no power to criminalize same-sex relationships *per se*, thereby placing the morality policy in a different light.

As unlikely as it is that states will invoke morality as a basis for refusing respect to a validly celebrated marriage of a same-sex couple, it is also unlikely that "bare expressions of animus or disapproval toward homosexuality, without more, could serve as a legitimate basis for subjecting gay people to selectively disfavored treatment." *Id.* at 2231 (discussing *Romer v. Evans*, 517 U.S. 620, 632 (1996)). The state constitutional amendment at issue in *Romer* provided that there could be no claim of discrimination based on a homosexual, bisexual or lesbian sexual orientation. 517 U.S. at 624. As Wolff summarizes,

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[18] The U. S. Supreme Court stated "adults may choose to enter upon this [same-sex] relationship … and still retain their dignity as free persons…. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Lawrence*, 539 U.S. at 576. The Court also identified the relevant legal tradition as one that "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education" and that "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id* at 574. Rhode Island chose to eliminate barriers to same-sex sexual intimacy five years before *Lawrence*. P.L. 1998, c. 24 §1 (amending R.I.G.L. §11-10-1).

> The Court found that the desire to express moral disapproval for homosexuality by making gay people 'unequal to everyone else' did not constitute a 'proper legislative end' that could support such a classification. Seven years later, the Court extended that holding to the state's treatment of gay couples in *Lawrence v. Texas*, overruling its own earlier conclusion in *Bowers v. Hardwick* that moral disapproval of homosexuality could offer a sufficient basis for singling out gay couples for unfavorable legislation. *Lawrence* itself rested on the protection of liberty in the Due Process Clause. In a separate concurrence, however, Justice O'Connor gave the equal protection argument more prominence, explicitly resting her vote for reversal upon the proposition that 'moral disapproval, without any other asserted state interest, is [not] a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons' – a proposition that the majority acknowledged as 'tenable.'

Wolff, *Interest Analysis*, 153 U. Pa. L. Rev. at 2231-2232 (footnotes omitted). The selective imposition of moral disapproval on gay people alone, without any further explanation of the state's interest, and no matter how denominated[19], should be unlikely to stand as legitimate expressions of a state's interest in disrespecting a same-sex couple's marriage. *See id.* at 2232-2233. *See also*, Singer, *Evasion of Obligation*, 1 Stan. J. Civ. Rts. & Civ. Liberties at 23-24 (addressing insufficiency of morality based state interests for denying respect to same-sex couples' marriages); Grossman, *Resurrecting Comity*, 84 Or. L. Rev. at

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[19] Beyond animosity and selective invocation of morality, the Equal Protection Clause invalidates any governmental interest that rests on "fear," *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 at 448-49 (1985); "unease," s*ee O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); "suspicion," *see Guttierez v. Mun. Ct.*, 838 F.2d 1031, 1042-43 (9th Cir. 1988), *vacating as moot*, 490 U.S. 1016 (1989); or generic "negative attitudes." *Cleburne*, 473 U.S. at 448. A line of U.S. Supreme Court cases also forbids the government from acting on such private sentiments indirectly. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (reversing the modification of a child custody order by a trial court that had found that the best interests of the child would be served by placing her with her father, rather than with her mother, while recognizing the "reality of private biases and the possible injury they might inflict," because it was illegitimate for the State to "bow[ ] to the hypothetical effects of private . . . prejudice" or "directly or indirectly, give them effect.") (internal quotations and citations omitted).

480-481 (same); Koppelman, SAME SEX, DIFFERENT STATES, at 76-80 (addressing equal protection problems with blanket non-recognition).

Third, the desire to dissuade couples from migrating to a state was seldom explicit in the older cases. Yet today, it is common to hear those hostile to marriage for same-sex couples claim that if marriages of same-sex couples are given effect, "gay couples will be more likely to relocate or travel to the state and become a visible presence." Wolff, *Interest Analysis*,153 U. Pa. L. Rev. at 2235. To the extent the state's interest is in denying benefits that could induce migration to a state, that interest may be improper under *Saenz v. Roe*, 526 U.S. 489, 492-496 (1999) (striking California's welfare law that deferred a higher level of benefits to residents until they had resided in the state for a year). *See* Koppelman, SAME SEX, DIFFERENT STATES, at 74-76 (discussing both *Sanez* and the right to travel); See also Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 Rutgers L. Rev. 553 (2000) (same); Wolff, *Interest Analysis*, 153 U. Pa. L. Rev. at 2236-2237.

From a different perspective, another conflict of laws scholar argues a state has no legitimate interest in providing refuge to a person seeking to avoid obligations incurred by virtue of the marriage in Massachusetts by failing to respect it. Singer, *Evasion of Obligation*, 1 Stan. J. Civ. Rts. & Civ. Liberties at 30. "If a marriage would create enforceable obligations in Massachusetts, the decision of another state to ignore those obligations could have the effect of helping individuals escape the obligations arising under Massachusetts law"

whether to support each other and each other's children, or as to other matters. *Id.* at 12.

In sum, the landscape of legitimate state interests to be interposed against the couple's marriage is limited in this case, and also informed by the failure of past cases to focus on the evasion of obligations and the serious consequences for the individuals and their children that could flow from non-recognition. Finally, this Court should avoid the constitutional issues that would be raised by imposing a blanket rule of non-recognition on the marriages of same-sex couples. *State v. Lead Indus. Assoc. Inc.*, 898 A.2d 1234, 1239 (R.I. 2006) (noting Court's "reluctance to adjudicate constitutional questions when a case is capable of decision upon other, non-constitutional grounds," and citing cases).

IV. EACH STATE, APPLYING ITS OWN CONFLICT OF LAWS PRINCIPLES, MAY CHOOSE TO RECOGNIZE THE MARRIAGE OF ONE OF ITS DOMICILIARIES CELEBRATED IN MASSACHUSETTS WITHOUT REGARD TO THE FEDERAL "DEFENSE OF MARRIAGE" ACT.

A. The Full Faith and Credit Clause Does Not Compel Rhode Island to Apply Massachusetts Law.

Under existing interpretations of the Full Faith and Credit Clause of the Constitution of the United States, Art. IV, § 1, and the Full Faith and Credit Act, 28 U.S.C. § 1738, no State is required to recognize the validity of a marriage

celebrated in another jurisdiction, whether of a same-sex or different-sex couple.[20] The Full Faith and Credit Clause provides in relevant part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The Full Faith and Credit Act, 28 U.S.C. § 1738, a statutory mirror to the Clause, provides that acts, records, and judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, ... from which they are taken."

The Supreme Court's interpretation of both the Clause and the Act require a State to afford the "exacting" obligations of full faith and credit only to a final judgment from a judicial proceeding issued by a court of competent jurisdiction. *Baker* v. *General Motors Corp.*, 522 U.S. 222, 233 (1998). The Full Faith and Credit Clause "does not compel 'a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent

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[20] Scholars disagree about whether, properly construed, the Full Faith and Credit Clause permits a State to decline to recognize a marriage valid in another State solely on the grounds that the marriage is contrary to the forum State's policy. It is not necessary to resolve that issue where state conflict of laws precedents provide a non-constitutional answer to the question. *Compare* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965, 1986 (1997) (arguing Full Faith and Credit Clause does not permit State to refuse to recognize law of other State, because "the central object of the Clause was, in fact, to eliminate a state's prideful unwillingness to recognize other states' laws or judgments on the ground that these are inferior or unacceptable.") and Singer, *Evasion of Obligations*, 1 Stan. J. Civ. Rts. & Liberties at 35-46 (making the argument for full faith and credit for marriages) *with* Borchers, *Baker v. General Motors*, 32 Creighton L. Rev. 147 (claiming that full faith and credit does not compel respect for marriages based both on law regarding the Clause as well as its relationship to state conflict of laws).

to legislate.'" *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 488-89 (2003).

Apart from the Clause's command to enforce judgments, the Full Faith and Credit Clause "merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state." *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953). Those minimum requirements are that a State may apply its law only if it has "'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co.* v. *Hagu*e, 449 U.S. 302, 312-313 (1981) (plurality opinion). In divorce actions, this generally means the court must have personal jurisdiction over at least one party to grant the divorce, and over both parties to provide support or equitably divide property. *Cf. Sosna* v. *Iowa*, 419 U.S. 393, 407-408 (1975); *Williams* v. *State of North Carolina*, 325 U.S. 226, 229 (1945). Both parties to this divorce action acknowledge a Rhode Island domicile, eliminating any question as to whether Rhode Island may apply its substantive divorce law to this matter.

B. DOMA Is Irrelevant to The Certified Question.

Both proponents and opponents of the so-called DOMA agree that this law did nothing to alter the state's ability to determine for itself whether to validate marriages of same-sex couples. Borchers, *Baker v. General Motors*, 32 Creighton L. Rev. at 180 (favoring the law); Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions and Domestic Partnerships*, 30 Cap. U. L. Rev. 363, 370-371 (2002)(opposing the law).

Title 28 U.S.C. § 1738C provides in part:

> 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 … or a right or claim arising from such relationship.

Defense of Marriage Act, Pub. L. 104-199, § 2, 110 Stat. 2419 (1996). This section expresses the same conclusion articulated in Points I and II of this Brief, *supra*. Conflict of laws theories have ably allowed states to weigh conflicting marriage and related policies for over two hundred years and nothing in DOMA changed that.

CONCLUSION

For the foregoing reasons, this Court should answer the Certified Question "yes" and return the case to the Family Court for a final adjudication of the divorce proceedings between the parties.