

SUPREME COURT
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IN THE
SUPREME COURT OF RHODE ISLAND

Margaret Chambers

Plaintiff

v.

Cassandra Ormiston

Defendant

Brief *Amicus Curiae*
for

The Most Reverend Thomas J. Tobin, D.D.
Bishop of Providence

On Review of a Certified Question from the Family Court

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No. 06-340-M.P.

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Bishop of Providence

I. INTRODUCTION

This is no simple “divorce” case. Though phrased in the argot of jurisdiction and choice of law, the issues presented by the Family Court’s certified question raise profound questions about human nature and fundamental questions about the nature of and extent of representative democracy. Your *Amicus*, The Most Reverend Thomas J. Tobin, D.D., the Bishop of Providence, files this brief *amicus curiae* in order to make a simple, yet fundamental point about the nature of representative democracy and the role that a bishop plays in the “republican form of government” guaranteed to the States and to the *citizens* of each State, by Article IV §4

Constitution of the United States, and Article V of the Constitution of Rhode Island and Providence Plantations [hereafter Constitution of Rhode Island].

This Honorable Court has taken the extraordinary step of inviting argument on several specific questions. Bishop Tobin will, in the interests of clarity and brevity, address only two of them:

Question	Answer
<p>2 (b) Whether or not the Full Faith and Credit clause of the United States Constitution is relevant to this case?</p>	<p>Yes. Article IV §1 explicitly recognizes the right and power of Rhode Island and of every other State to set its own policy. Read together with Art. IV §§2-3, the concept of federalism embodied in Art. IV also recognizes both the sovereignty of each State <i>within its own borders</i> and its territorial integrity. The Guaranty Clause provides that “the United States <i>shall guarantee to every State in this union</i> a republican form of government”. (emphasis added). By doing so, Article VI, read as a whole, protects the voting and other citizenship rights of the People of Rhode Island from those within the states who would infringe them through the imposition of the law of a sister or foreign State, without their consent.</p>
<p>2 (c) Whether or not the Defense of Marriage Act, 28 U.S.C. §1738C (2000), is relevant to this case?</p>	<p>Yes. The Defense of Marriage Act [DOMA] is the means by which the United States guarantees a “republican form of government” with respect to the issue of same-sex marriage. It is a Congressional restatement of the principle that Article IV, the Bill of Rights, and the Fourteenth Amendment guarantee that the People of each State are free to make and enforce laws and to use their powers of self-government “to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to [them]selves and [their] posterity.”</p>

Bishop Tobin files this brief in his official capacity as the Bishop of Providence *and* in his capacity as a citizen of the State of Rhode Island. The Church, married couples, and families in

Rhode Island have a profound stake in the outcome of this case. Each will be affected differently should this Court decide the jurisdictional question posed in a manner that either explicitly or implicitly holds that the relationships of same-sex couples living in Rhode Island are “marriages”. The clear language of Rhode Island law to the contrary virtually guarantees years of litigation and rancorous political dispute as the General Assembly and this Court work out the details.

If the law is to change in so radical a manner, every citizen of Rhode Island is entitled to participate in the debate and every legislator and executive branch official is entitled to solicit the views of the voters who elected them *before* changes are made. Given the teachings of the Church regarding the nature and purpose of marriage and the complementarity of the sexes, Bishop Tobin cannot and will not remain silent.

Here politics and faith meet. The Church cannot and must not take upon herself the political battle to bring about the most just society possible. She cannot and must not replace the State. Yet at the same time she cannot and must not remain on the sidelines in the fight for justice. She has to play her part through rational argument and she has to reawaken the spiritual energy without which justice, which always demands sacrifice, cannot prevail and prosper. A just society must be the achievement of politics, not of the Church. Yet the promotion of justice through efforts to bring about openness of mind and will to the demands of the common good is something which concerns the Church deeply.

Encyclical Letter of His Holiness Pope Benedict XVI, *Deus Caritas Est* (“God is Love”),

December 25, 2005¹ ¶¶ 28a(3, 5)

II. INTEREST OF AMICUS CURIAE

Your *Amicus*, The Most Reverend Thomas J. Tobin, D.D., is the Bishop of Providence. By virtue of his consecration as a Bishop, he serves alongside his brother bishops as one of the

¹ Available online at: http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html

“pastors in the Church, ... teachers of doctrine, priests of sacred worship, and ministers of governance.” Code of Canon Law², Canon 375 §§1-2. As Bishop of Providence he is entrusted with the responsibility to shepherd the “portion of the people of God” who live and work in the State of Rhode Island. *See* Code of Canon Law, Canon 369 (“A diocese is a portion of the people of God which is entrusted to a bishop for him to shepherd with the cooperation of the presbyterium...”). The phrase “Diocese of Providence” thus means simply the particular “portion of the people of God” who live and work in the State of Rhode Island.

As Bishop of Providence, his pastoral function is to sanctify and teach a community of more than 679,000 Roman Catholics in Rhode Island, *see* Code of Canon Law Canon 375 §2, to foster ecumenism, and to bear witness to the charity of Christ to all of the people of Rhode Island, whatever their beliefs. Code of Canon Law Canon 383 §§1-4. As the governor of the Diocese, Bishop Tobin “is bound to promote the common discipline of the whole Church and therefore to urge the observance of all ecclesiastical laws” by the faithful, the teachers and administrators of the 58 elementary and high schools that serve more than 18,600 of Rhode Island’s children, and the 250 individual corporations that the Catholics of Rhode Island have organized to administer the parishes, offices, agencies, ministries, and hospitals to serve the People of this State. *See* CCL Canon 392 §1.

As pastor, teacher, priest, and minister of governance who is entrusted with the spiritual welfare of over 600,000 Rhode Islanders, Bishop Tobin’s “first and foremost ... responsibility” as an individual member of the faithful and as diocesan bishop is to teach, though both word and example, that “love of neighbor, grounded in the love of God” is the foundation of community,

² The Code of Canon Law is available online at: <http://www.vatican.va/archive/ENG1104/INDEX.HTM> (last accessed July 27, 2007).

both civil and religious. See Encyclical Letter of His Holiness Pope Benedict XVI, *Deus Caritas Est* (“God is Love”), December 25, 2005 ¶20. He must be free to remind his parishioners and fellow-citizens, as well as those who hold offices of public trust that, while the “just ordering of society and the State is a central responsibility of *politics*,” not of the Church, “the Church is duty-bound to offer, through the purification of reason and through ethical formation, her own specific contribution towards understanding the requirements of justice and achieving them politically.” *Deus Caritas Est* ¶28(a) (emphasis added).

Bishop Tobin is responsible as shepherd not only for the teaching of his flock, but also for the administration of the many ministries and charities that the Catholic community of Rhode Island has organized to serve the People of our State. Because Bishop Tobin is duty bound “to foster various forms of the apostolate in the diocese and is to take care that ... all the works of the apostolate are coordinated under his direction, with due regard for the proper character of each”, he has a strong and abiding interest in the nature, quality, and “message” conveyed by the work of the 150 ministries and programs that the Catholic community has organized in and around the State. As pastor, teacher, and governor, he is also responsible for the character of the environment in which more than 4,000 Rhode Islanders work as employees of the Church or related institutions.³ Code of Canon Law Canon 394 §1.

The Attorney General has argued that, in his official judgment, *any* opposition to official recognition by the State of Rhode Island of same-sex relationships characterized as “marriages” by other states must be recognized “for what it [is]: ...rejection of the rights of gay and lesbian

³ Official statistics show that the various ministries of the Rhode Island Catholic community employ over 2,800 lay Rhode Islanders. If health care workers are included, the number rises to more than 4,000. The 2003 Financial Summary for Fatima Hospital lists 1,852 full and part-time employees and logged 54,000 volunteer hours. See http://www.fatimahospital.com/about_us/ar2003_financial.asp. Southern New England Rehabilitation Center at St. Joseph's Hospital employs over 100 more professionals. See <http://www.snerc.com/about.asp>.

people in Rhode Island.” Patrick Lynch, “My Ruling on Mass. Same-sex Ties”, *Providence Journal*, Thursday, June 21, 2007, available online at http://www.projo.com/opinion/contributors/content/CT_lynch21_06-21-07_IO61727.130723a.html (last accessed July 29, 2007). *See also* Opinion of the Attorney General to the Rhode Island Board of Governors for Higher Education, February 20, 2007 at 5-6 & nn. 12-18 (interpreting Rhode Island’s public policy as mandating recognition of same-sex relationships as “marriages”). Tribunals in other jurisdictions have come to the same conclusion. *See, e.g.*, *Smith and Chymyshyn v. Knights of Columbus* 2005 BCHRT 544 (British Columbia Human Rights Tribunal, 2005)⁴ (holding that the Knights of Columbus and a Catholic parish were guilty of discrimination under the British Columbia Human Rights Law because they refused to rent a church hall for a same-sex “wedding” reception); BBC News, “Bishop Loses Gay Employment Case”, Wednesday, July 18, 2007, at: <http://news.bbc.co.uk/1/hi/wales/6904057.stm> (last accessed, July 27, 2007) (recounting a decision by the Employment Tribunal of Wales against the Anglican Bishop of Hereford on the grounds that it was unlawful for the Bishop to reject “a person in a committed sexual relationship outside of marriage, whether they were heterosexual, homosexual, bisexual or transgender”). *Cf.*, *Lund v. Boissoin and the Concerned Christian Coalition, Inc.*, Case # S2002/08/0137, Alberta Human Rights & Citizenship Comm’n, May 4, 2006, http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisLund_prehear_may4.pdf (last accessed, July 27, 2007) (rejecting the complaining party’s request to ban the publication of the Human Rights Commission hate-speech complaint against a youth minister).

⁴ The decision of the British Columbia Human Rights Tribunal is available online at http://www.bchrt.bc.ca/decisions/2005/pdf/Smith_and_Chymyshyn_v_Knights_of_Columbus_and_others_2005_BCHRT_544.pdf.

Although the Attorney General has argued that his “legal opinion does not mean that any church or any individual must recognize, accept or approve any union”, these cases and a 2006 resolution by the San Francisco Board of Supervisors condemning the teachings of the Catholic Church as “hateful and discriminatory”, indicate that any attempt to *publicly* question the legitimacy, morality, or equal treatment of such unions will be branded as a symbol of “hate”, a civil rights violation, or both. *Compare* Catechism of the Catholic Church § 2358 (homosexual persons “must be accepted with respect, compassion, and sensitivity and that every sign of unjust discrimination in their regard should be avoided”) *and* Section 2357 (“[u]nder no circumstances can [homosexual acts] be approved.”) *with* Board of Supervisors, City and County of San Francisco, Resolution 060356 (March 21, 2006), *quoted in Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 464 F.Supp.2d 938 (N.D. Cal. 2006) (public condemnation of former San Francisco Archbishop William Levada’s instructions to Catholic Charities of San Francisco regarding placement of children in homosexual households: “Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors.”) *and* James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 Mich. J. Gender & L. 335, 372 (1997)(“ Religion is not merely correlated with homophobia. Rather, religion is responsible for cultivating and encouraging a large portion of our society’s homophobia.”)

It is, therefore, not enough, for individuals to be *personally* “free to accept or reject relationships and to define [their] own morals”, Lynch, *supra*, *Providence Journal*, Thursday, June 21, 2007. Bishop Tobin must be free *as Bishop* to teach and to ensure that the “personnel of every Catholic charitable organization [will] want to work with the Church and therefore with

the Bishop, [in order that they] be witnesses of God and of Christ, and they wish for this very reason freely to do good to all." *Deus Caritas Est*, ¶33. If a court were to rule that either the United States Constitution or the Constitution of Rhode Island requires the organs of government in this State to treat same sex relationships as "marriages", its decision would significantly inhibit the role of any citizen and particularly the role of any religious leader to speak publicly and cogently for a different view. It would virtually end debate. Thomas J. Tobin, both as Bishop of Providence and as a citizen, must have the freedom to speak, literally and symbolically, not only in churches but in all public venues, on this issue. He therefore has a deep and abiding interest in the way in which this Honorable Court decides the jurisdictional question at issue here.

The recognition of same sex relationships as "marriages" would have profound, radical consequences. This issue is too important to be debated only in legal briefs, only by those sufficiently aware of the issue to know about this case and with sufficient resources to enlist counsel. The issue deserves the robust, full ranging debate available in the media and the legislative process.

III. SUMMARY OF ARGUMENT

There are deep divisions within our Rhode Island community over the wisdom of recognizing same-sex relationships as “marriages”, and they cannot be eliminated by accusations that those opposed to such recognition are bigots who “reject the rights of gay and lesbian people in Rhode Island.” Striking the appropriate balance among the interests involved is a question for the General Assembly, Constitution of Rhode Island, art. I §21 (2007) or, when the General Assembly so decides, for the People themselves. Constitution of Rhode Island, art. XIV. Cf., Constitution of Rhode Island, art. V.

Article IV §1 of the Constitution of the United States explicitly recognizes the right and power of Rhode Island and every other State to set its own policy. Read together with Art. IV §§2-3, the concept of federalism embodied in Art. IV also recognizes both the sovereignty of each State within its own borders and its territorial integrity. The Guaranty Clause provides that “the United States *shall guarantee to every State in this union* a republican form of government”. (emphasis added). By doing so, Article IV, read as a whole, protects the voting and other citizenship rights of the People of Rhode Island from those who would infringe them, either internally or through the imposition of the law of a sister or foreign State, without their consent.

The Defense of Marriage Act [DOMA] is the means by which the United States guaranteed a “republican form of government” with respect to the issue of same-sex marriage. It is a Congressional restatement of the principle that Article IV, the Bill of Rights, and the Fourteenth Amendment guarantee that the People of each State are free to make and enforce laws and to use their powers of self-government “to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to [them]selves and [their] posterity.”

IV. ARGUMENT

A. The People of Rhode Island have given Conjugal Marriage Independent Constitutional Significance and Reaffirmed it in the General Laws

The Supreme Judicial Court of our sister-state, Massachusetts, has created a legal status that is a stranger to the laws, history, and traditions of Rhode Island, the United States, and virtually the world at large. That status, which Massachusetts characterizes as a “marriage”, is unlike any marriage ever licensed or performed in Rhode Island, where the text our constitution *presupposes* conjugal marriage between and a man and a woman. The references to “succeeding generations” and “our posterity” imply that our “venerated ancestors” knew and understood the importance of this unique institution for child bearing and child rearing, and that understanding is written into the fabric of Rhode Island law.

B. In Rhode Island “Marriage” is a Relationship Between a Man and a Woman

Marriage in Rhode Island requires a man and a woman. The licensing statute refers to the “female party” and the “male party,” R.I.G.L. 1956, §15-2-1, and requires “[b]oth bride and groom” to subscribe to the truth of the statements in the application, §15-2-7. The Rhode Island General Laws contain hundreds of references to “husband” and “wife,” “bride” and “groom,” “male” and “female,” “man” and “woman,” “mother” and “father,” “widow” and “widower,” and “spouse.” The incest statutes, including R.I.G.L. §15-1-1 & -2, provide that, “No *man* shall marry *his*” 20 closest *female* relatives, and “No *woman* shall marry *her*” 20 closest *male* relatives. These sections also show what a “wife” is, and what a “husband” is. A son, for example, can have a wife, but not a husband. There can be a “son’s daughter’s husband” but

there is no such person as a "son's daughter's wife." This is the "plain meaning" of these statutes.⁵

The fact that Massachusetts uses the word "marriage" to describe both male-female, conjugal marriage *and* an entirely different, sex-segregated social arrangement is of no particular legal consequence in Rhode Island. Rhode Island does not need to bow to the etymological or judicial determinations of its neighbor on this or any other topic. Justice Story's *Commentaries on the Conflicts of Law* (cited in *Chace*) contains the following observation about a polygamy case:

"[T]here is no magic in a name; and if the relation there existing between men and women is not the relation which . . . we recognize and intend by the words *husband* or *wife*, but another and altogether different relation, then use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse a superficial observer." J. Story, COMMENTARIES ON THE CONFLICT OF LAWS §108, nt.(a) (8th ed. 1883).

C. THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF RHODE ISLAND PRESERVE THE RIGHT AND DUTY OF RHODE ISLAND TO SET ITS OWN POLICIES REGARDING MARRIAGE AND FAMILY LAW

1. Rhode Island is not Obligated to Apply the Law of Massachusetts when doing so will Introduce Lack of Uniformity and Discrimination into this State's Marriage Laws.

Article IV §1 of the Constitution of the United States explicitly recognizes the right and power of each state to set its own policy, and to enforce that policy within its own borders. Read together with Art. IV §§2-3, the concept of federalism embodied in Art. IV also recognizes both

⁵ "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Sindelar v. Leguia*, 750 A.2d 967, 970 (R.I. 2000) (quoting *Union Village Development Associates v. Town of North Smithfield Zoning Board of Review*, 738 A.2d 1084, 1086 (R.I.1999) (quoting *Providence & Worcester Railroad Co. v. Pine*, 729 A.2d 202, 208 (R.I.1999)). "Once having done that, our "work of judicial interpretation is at an end."" *Sindelar*, supra, at 970 (quoting *Kelly v. Marcantonio*, 678 A.2d 873, 877 (R.I.1996) (quoting *DeAngelis v. Rhode Island Ethics Commission*, 656 A.2d 967, 969 (R.I.1995)). "Mindful that our assigned task is simply to interpret the Act, not to redraft it, any attempt to create [a statutory] exception 'must take place within a legislative rather than a judicial setting.'" *Sindelar*, supra, at 972 (quoting *Cardi Corp. v. City of Warwick*, 409 A.2d 136, 137 (R.I. 1979)).

the sovereignty of each State within its own borders and its territorial integrity. *See, e.g., Nevada v. Hall*, 440 U.S. 410 (1979) ("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.") (Nevada could be held liable in a California court for torts committed in California by employees of the University of Nevada); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935) ("A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum [State], would lead to the absurd result that, whenever conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."). *Accord* *Erie R. Co. v. Tompkins*, 304 US 64, 78 (1938); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941) (reaffirming "the principle of uniformity within a state upon which the *Tompkins* decision is based). It is well-settled that states need not apply or enforce the laws of a another jurisdiction state when it would "offend our sense of morality or the integrity of our laws and institutions." Willis L. M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUMBIA LAW REVIEW 783, 797 (1950).

In Rhode Island, the public policy of the state regarding the nature of marriage is clearly and unambiguously set forth in the General Laws. This Honorable Court should simply apply it. *State v. Menard*, 888 A.2d 57 (R.I. 2005). To do otherwise would undercut that policy and introduce lack of uniformity and constitutional instability into an otherwise uniform system.

2. The Defense of Marriage Act Reaffirms the Sovereignty of the States over Marriage

The Defense of Marriage Act, 28 U.S.C. §1738C (2007) [DOMA] is the means by which the United States has guaranteed a "republican form of government" with respect to the issue of same-sex marriage. DOMA is a Congressional restatement of the principle that Article IV, the Bill of Rights, and the Fourteenth Amendment guarantee that the People of each State are free to

make and enforce laws and to use their powers of self-government “to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to [them]selves and [their] posterity.”

The Committee Report that accompanied H.R. 3396, which was to become DOMA, defended the need for the legislation as follows:

H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

P.L. 104-199, Defense Of Marriage Act, House Report No. 104-664 (July 9, 1995) at 2

(“Purpose and Summary”): The report speaks specifically to the problem that confronts this

Honorable Court:

Article IV §4 of the United States Constitution (The Guaranty Clause) and Articles V and VI §2 of the Constitution of Rhode Island also support the right of the People of Rhode Island, though their elected representatives, to make laws without fear that they will be imposed without having been tested in the crucible of the legislative process. Under our State’s Constitution, the power of legislation is vested in the General Assembly. Rhode Island Constitution art. VI §2. A ruling by this Honorable Court that Rhode Island courts must recognize such unions as “marriages” will undercut not only the unambiguous policy of the General Assembly, but also its power over the issue in the future. *Cf. Bartlett v. Danti*, 503 A.2d 515 (R.I.1986).

The Committee Report that accompanied H.R. 3396 [DOMA], also underscored the need for Congress to defend the right of the People in the states to sovereignty and democratic self-

governance. Quoting with approval the written testimony of former Representative Terrence Tom of Hawaii, the Committee Report observes that:

If this Congress can act to preserve the will of the people as expressed through their elected representatives, it has the duty to do so. ... Changes to public policies are matters reserved to legislative bodies, and not to the judiciary. It would indeed be a fundamental shift away from democracy and representative government should a single justice in Hawaii be given the power and authority to rewrite the legislative will of this Congress and of the several states Federal legislation to prevent this result is both necessary and appropriate.

P.L. 104-199, Defense Of Marriage Act, House Report No. 104-664 (July 9, 1995) at 16.)

IV. CONCLUSION

Your *Amicus*, Bishop Tobin, respectfully submits that the issues before this Honorable Court should be resolved by the General Assembly or by the People themselves. In his view, the seemingly innocuous jurisdictional question presented here is fraught with difficulty, not only for the State of Rhode Island, but also for the preservation of religious liberty in churches and the lives of myriad individuals throughout the state.

These are important issues that should not be resolved in a dispute between private parties who have no real adverse interest. This is especially true, where, as here, a judicial decree will, for all intents and purposes, preempt the political debate.

One of our greatest blessings in the United States is our right and responsibility to participate in civic life. Everyone can and should participate. Even those who cannot vote have the right to have their voices heard on issues that affect their communities.

The Constitution protects the right of individuals and of religious bodies to speak out without governmental interference, favoritism, or discrimination. Major public issues have moral dimensions. Religious values have significant public consequences. Our nation is enriched and our tradition of pluralism is enhanced, not threatened, when religious groups contribute their values to public debates.

As bishops, we have a responsibility as Americans and as religious teachers to speak

out on the moral dimensions of public life. The Catholic community enters public life not to impose sectarian doctrine but to act on our moral convictions, to share our experience in serving the poor and vulnerable, and to participate in the dialogue over our nation's future.


United States Conference of Catholic Bishops, *Faithful Citizenship: A Catholic Call to Political Responsibility* (2003), available online at: <http://www.usccb.org/faithfulcitizenship/bishopStatement.html#1>

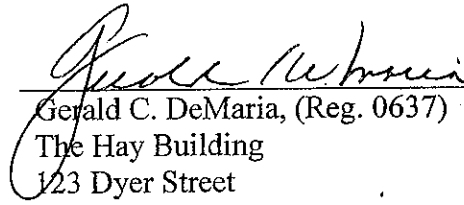
Respectfully submitted,

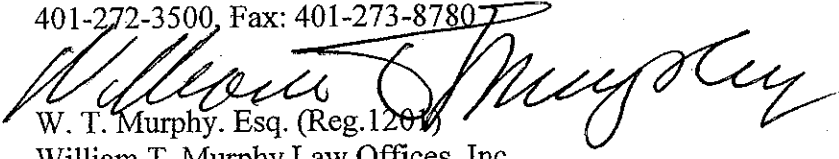
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Certificate of Service

I certify that on August 1, 2007 I served a copy of the above brief upon counsel for the parties in this action: Louis M. Pulner, Esq., 369 South Main Street, Providence, RI 02903; and Nancy Palmisciano, Esq., 665 Smith St., Providence, RI 02908 by regular first class mail.

