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

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

ON A CERTIFIED QUESTION OF LAW
FROM THE FAMILY COURT

RESPONSIVE BRIEF OF *AMICI CURIAE* UNITED FAMILIES INTERNATIONAL, FAMILY WATCH INTERNATIONAL, and FAMILY LEADER FOUNDATION

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I.

THIS COURT HAS BEFORE IT A GENUINE CASE OR CONTROVERSY EXACTLY BECAUSE RESOLUTION OF THE UNAVOIDABLE JURISDICTION ISSUE DEPENDS ENTIRELY ON RESOLUTION OF THE RECOGNITION ISSUE

A. Summary.

The legal analysis of a number of the opening briefs separates and isolates the jurisdiction issue from the recognition issue. The essence of the message is two-fold: that the Family Court has jurisdiction to entertain and act upon the Chambers and Ormiston divorce petitions and that this Court either ought not reach the recognition issue or, if it does, recognize the two women's Massachusetts marriage for Rhode Island purposes.

This legal analysis is fatally flawed. It is fatally flawed in large part because it begins with the presupposition that the Chambers-Ormiston arrangement is a "marriage" for purposes of the Rhode Island jurisdiction statute. From there, not surprisingly, the analysis proceeds to the conclusion that the Chambers-Ormiston arrangement is a "marriage" for purposes of the Rhode Island jurisdiction statute. This legal analysis is also fatally flawed because it proceeds as if the issue is whether the Chambers-Ormiston arrangement is a "valid marriage," a "voidable marriage," or a "void marriage" – each of which the Family Court is statutorily empowered to terminate by divorce. But the real issue, of course, is whether the Chambers-Ormiston arrangement is a "marriage" *at all* for purposes of the Rhode Island jurisdiction statute – because if it is not, under settled Rhode Island law divorce is not an option.

The jurisdiction statute expressly limits the Family Court's divorce jurisdiction to cases seeking termination of "the bond of marriage." What the word "marriage" in that statute *means* is of course for resolution by the Rhode Island courts. Incontrovertibly, the public and legal meaning of "marriage" in Rhode Island, as expressed in statutory and common law for all purposes, has always been "the union of a man and a woman." Quite clearly, to apply that meaning to "marriage" in the jurisdiction statute is to hold that the Family Court does *not* have jurisdiction over the competing divorce petitions of these two women. Putting aside for the moment a direct constitutional attack on Rhode Island's meaning of marriage, the *only* way to hold otherwise is to conclude that this State's common law conflicts-of-laws principles sustain recognition of the Chambers-Ormiston arrangement as a "marriage" within the meaning of the jurisdiction statute. But to do that, of course, is to address and resolve the recognition issue. Thus, under sound and defensible legal analysis, the jurisdiction question cannot be resolved separately from and without regard to resolution of the recognition issue; intelligent resolution of the former depends entirely on resolution of the latter.

Those opening briefs that assert no case or controversy relative to the recognition issue ignore certain unique features of the subject-matter jurisdiction issue. That issue is always "at issue," cannot be agreed to or stipulated away by the parties, and is one that Rhode Island's courts, including this Court in this case, have an affirmative duty to address and resolve. These unique features of the subject-matter jurisdiction issue mean that this Court very much has before it a genuine case or controversy – and one that can be resolved properly only by an answer to the certified question *as this Court ordered*

that it be framed: "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?"[1]

B. The statutory and common law background: the meaning of "marriage" and divorce jurisdiction.

The public and legal meaning of "marriage" in Rhode Island, as expressed in both statutory and common law for all purposes, has always been "the union of a man and a woman." We so demonstrated in our opening brief.[2]

Tellingly, *no* opening brief directly or openly disputes this social and legal reality regarding Rhode Island marriage. A number of the briefs, however, seek traction by arguing that Rhode Island has never expressly prohibited marriage by a same-sex couple or has never expressly stated that marriage here is *only* the union of a man and a woman.[3] But this argument is fundamentally defective. It is defective because it both ignores and proceeds directly contrary to several social and legal realities. The most central reality is this: to establish the social and legal meaning of marriage as "the union of a man and a woman," as Rhode Island has done, is to establish that marriage is *not* "the union of a woman and a woman" or "the union of a man and a man." To say that marriage includes "the union of two women" is to say, unavoidably, that the meaning of marriage is no longer "the union of a man and a woman" but is now "the union of any two persons."

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[1] Supreme Court, Order of May 21, 2007, at 1 (emphasis added).

[2] Opening Brief of United Families International *et al.*, filed 11 July 2007, at 19-20 [hereafter "UFI Brief"].

[3] *See* the opening briefs of Marriage Equality Rhode Island 16 ["MERI Brief"]; of certain "professors of conflict of laws and family law" 15-16 ["Cox Brief"]; of the Attorney General 13 ["Attorney General Brief"]; and of Gay & Lesbian Advocates & Defenders 26-28 ["GLAD Brief"].

And this is true not just at the level of sense and nonsense with words but at the substantive level of powerful social institutions. As has been fully demonstrated[4] and never controverted, marriage, as a vital social institution, is constituted by widely shared and legally reinforced public meanings, with "the union of a man and a woman" being core; the meaning at the core of genderless marriage – "the union of any two persons" – is radically different from the man/woman meaning in both purpose and effects; no society can maintain, at one and the same time, both the institutionalized man/woman meaning and the institutionalized genderless meaning because a society, as a simple matter of reality, cannot, at one and the same time, tell people, and especially children, that *marriage* means "the union of a man and a woman" *and* "the union of any two persons"; the one meaning necessarily displaces the other. "Given the role of language and meaning in constituting and sustaining institutions, two 'coexisting' social institutions known society-wide as *marriage* amount to a factual impossibility."[5]

All these realities render meaningless the "no express prohibition" argument. To establish, as Rhode Island has established, "the union of a man and a woman" as the public and legal meaning of marriage is to choose unequivocally man/woman marriage and to reject unequivocally genderless marriage. And unless and until the "any two persons" meaning displaces the man/woman meaning at the core of Rhode Island marriage, a same-sex couple cannot be married for Rhode Island purposes.

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[4] *See* UFI Brief, at 10-19.

[5] Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision,* 1 DUKE J. CONST. L. & PUB. POL'Y 1, 24 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf.

Regarding divorce jurisdiction under statutory and common law, the statute establishing the Family Court grants the court jurisdiction "to hear and determine all petitions for divorce from the bond of marriage."[6] We hereafter refer to this statute, R.I. G.L. § 8-10-3(a), as "the jurisdiction statute." Thus, for there to be a Rhode Island divorce, the two parties to the Family Court proceeding must first be parties to an arrangement that qualifies as a "marriage" within the meaning of the jurisdiction statute. No opening brief disputes this understanding. Nor does any opening brief dispute that the meaning of "marriage" in the jurisdiction statute is for this Court to decide in an ultimate and conclusive way. Nor does any opening brief dispute that, relative to the word "marriage" in the jurisdiction statute, the courts of this State have always and consistently applied what, for all other purposes, is this State's public and legal meaning of marriage: the union of a man and a woman.

Nevertheless, some of the opening briefs simply presuppose that "marriage" in the jurisdiction statute includes whatever arrangement a court or legislature in another state has chosen to label a "marriage"[7] – no matter how much that arrangement diverges from Rhode Island's public and legal meaning of marriage and no matter how much that arrangement's treatment as a marriage for Rhode Island purposes may contravene this State's important public policies. (We refer to this hereafter as "the whatever-arrangement interpretation.") On the basis of this presupposition, these briefs treat without further analysis the Chambers-Ormiston arrangement – clearly a "marriage" for

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[6] R.I. G.L. § 8-10-3(a).

[7] *See* the opening briefs of Thomas Bender 1-4, 14-16 ["Bender Brief"], of the Governor 1, 4 ["Governor Brief"], of the American Civil Liberties Union 3-6, 10 ["ACLU Brief"], and MERI Brief 15-16.

purposes of Massachusetts law but also clearly *not* a "marriage" in the light of what has always been marriage's public and legal meaning in Rhode Island – as a "marriage" within the meaning of the jurisdiction statute. But this approach is to beg the real question: Is the Chambers' Ormiston arrangement a "marriage" within the meaning of the jurisdiction statute? That real question cannot be answered validly by a mere presupposition that "marriage" in the jurisdiction statute means whatever arrangement a court or legislature in another state has chosen to label a "marriage," that, therefore, Chamber and Ormiston are in "the bonds of marriage" for purposes of the jurisdiction statute, and that, consequently, the Family Court has jurisdiction to grant the two women a divorce. Tellingly, these briefs present no Rhode Island case or statutory law supporting the presupposition's whatever-arrangement interpretation of the jurisdiction statute.[8] And, as shown below, Rhode Island law refutes that interpretation.[9]

These briefs' next step is to build on the baseless presupposition; they note the statute empowering the Family Court to grant a divorce whether the marriage is "voidable" or "void"[10] – which, according to the argument, means that for jurisdictional purposes there is no need to determine whether the presupposed Chambers-Ormiston

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[8] Some of the briefs do present Rhode Island authority in support of recognizing the Chambers-Ormiston Massachusetts marriage as a "marriage" for purposes of the jurisdiction statute. *See infra* note 36. But that authority pertains to this State's well-established common law conflicts-of-laws principles, principally the general rule of validation and its public-policy exception. As we show later, the whatever-arrangement interpretation actually alters and abrogates those principles. *See infra* notes 13-17 and accompanying text.

[9] *See infra* notes 13-17 and accompanying text.

[10] R.I. Gen. Laws § 15-5-1.

"marriage" is "valid," "voidable," or "void."[11] But this next step ignores again the real issue. The real issue is not whether the Chambers-Ormiston "marriage" is valid, void, or voidable but whether it is a "marriage" *at all* for purposes of the jurisdiction statute.[12]

These briefs' presupposition and its whatever-arrangement interpretation of "marriage" in the jurisdiction statute cannot withstand straight-forward legal analysis. First of all, the whatever-arrangement interpretation flies in the face of a bedrock rule of statutory construction. It is that a court will presume a statute to be consistent with the common law and will hold that the statute does not change or abrogate the common law unless the legislative intent in that respect is unequivocal.[13] That rule applies to the jurisdiction statute because, at the time it was enacted,[14] Rhode Island's common law rule on recognition of foreign marriages was settled (and settled in a way consistent with

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[11] *See* MERI Brief 16, ACLU Brief 6, Attorney General Brief 6-9, Governor Brief 1, 4, and GLAD Brief 5-15.

[12] In our opening brief, we were unhelpfully imprecise with our language addressing this point. Although we clearly noted that "this Court must decide" whether Chambers and Ormiston "to use this state's statutory language, are in the 'bond of marriage,'" UFI Brief, at 30, we also used phrases like "validly married" and "valid marriage" as short-hand to capture the distinction between an arrangement qualifying as a "marriage" for purposes of the jurisdiction statute and one that does not. *Id.* at 27-30. We did not intend those phrases as antonyms of the "void" and "voidable" marriage concepts encountered in R.I. Gen. Laws § 15-5-1.

[13] *See, e.g.*, Esposito v. O'Hair, 886 A.2d 1197, 1203 (R.I. 2005) (referring to "this Court's well-established rule that statutes that abrogate the common law must be strictly construed"); State v. Pine, 524 A.2d 1104, 1106-07 (R.I. 1987) ("absent the express intent of the Legislature, a statutory enactment does not abrogate or supersede the common laws"); Town of North Kingstown v. North Kingstown Teachers Ass'n, 297 A.2d 342, 345 (R.I. 1972) ("the rule of strict construction ... justifies the conclusion that the Legislature, by failing to abrogate, either specifically or by clear implication, the common law [rule at issue] ..., is presumed not to have intended a change in that law.").

[14] The jurisdiction statute was enacted in 1961. This State's common law governing recognition of foreign marriages was in place no later than 1904, with this Court's decision in *Ex parte* Chace, 26 R.I. 351, 58 A. 978 (R.I. 1904).

Anglo-American common law generally).[15] As *every* opening brief acknowledges, that common law rule is that this State will recognize as a "marriage" for Rhode Island purposes an arrangement that qualified as a marriage in the state where entered into, *unless such recognition would contravene important Rhode Island public policies.* This is "the general rule of validation" and "the public-policy exception" to it. But note that the whatever-arrangement interpretation *abrogates* the public-policy exception and *alters* the general rule of validation by making it absolute. Under the whatever-arrangement interpretation, the Family Court has and must exercise divorce jurisdiction over every foreign-labeled "marriage" and must in that important way recognize every foreign-labeled "marriage" – *all without regard* to the adverse consequences to important Rhode Island public policies of doing so. (For a court to fully consider the general rule of validation and its public-policy exception and then, on the basis of that full consideration, recognize a foreign marriage for purposes of the jurisdiction statute is a far different judicial task than simply determining whether another state has in fact labeled some arrangement a "marriage.") Those advocating the whatever-arrangement interpretation of the jurisdiction statute present to this Court *no* evidence, let alone unequivocal evidence, that the Legislature enacting the jurisdiction statute intended to alter and abrogate this State's common law in that quite startling way.

Moreover, the whatever-arrangement interpretation must of necessity open the courts of this state to divorce proceedings that no state would or should tolerate. We

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[15] *See* UFI Brief, at 32-33.

return to an example used in our opening brief.[16] It refers to the State of Alpha's prohibition on father-daughter marriage. The State of Beta previously had such a prohibition, but recently in that state a sterile father and his daughter wanted to marry and, when refused a marriage license, initiated state-court litigation, arguing that state constitutional norms of equality, liberty, privacy, personal autonomy, and human dignity invalidated the incest statute as to father-daughter and mother-son couples where one of the parties was sterile. A bare majority of the Beta Supreme Court agreed. After going to and marrying in Beta, the Couple (a sterile father and his daughter) returns to Alpha and some time later seek an Alpha divorce. Our opening brief established that, in such a scenario, *all* American states would *not* recognize the marriage *for any purpose, including divorce*; such a marriage "would be well beyond the pale."[17] Yet under the whatever-arrangement interpretation, Rhode Island courts would be required to exercise divorce jurisdiction over – and in that important way recognize – the father-daughter "marriage."

The fact of the matter, of course, is that the Legislature, in enacting the jurisdiction statute, did not alter or abrogate the common law. Thus, in interpreting the word "marriage" in the jurisdiction statute, this Court will properly do so informed by this State's settled common law, including the public and legal meaning of marriage in Rhode Island and, relative to recognition of foreign marriages, the general rule of validation and its public-policy exception.

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[16] UFI Brief, at 34-35.

[17] *See* RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 309 (5TH ED. 2006). This showing falsifies the assertion that "a blanket non-recognition rule would be unprecedented." *See* Cox Brief 35; GLAD Brief 35-36.

C. The unique features of the subject-matter jurisdiction issue.

Subject-matter jurisdiction in many important respects is an issue much different from all other issues, and those differences matter very much relative to the case-or-controversy question now before this Court. First of all, as litigators and judges are wont to say, "subject-matter jurisdiction is always *at issue*." This means that "[s]ubject matter jurisdiction is an indispensable requisite in any judicial proceeding; it can be raised at any stage thereof either by the parties or by the court sua sponte ...."[18] Second, subject-matter jurisdiction is not an issue that the parties can agree on or otherwise stipulate away.[19] Third, a court always has a duty to determine, even on its own motion if necessary, that it has the requisite subject-matter jurisdiction.[20] Fourth, a court always has jurisdiction to determine its own jurisdiction.[21]

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[18] Zarrella v. Minnesota Mut. Life Ins. Co. 824 A.2d 1249, 1256 (R.I. 2003). *See also* State v. Sivo, 925 A.2d 901, 916 (R.I. 2007) ("Challenges to a court's subject-matter jurisdiction can be raised at any point in the proceedings ...."); Pine v. Clark, 636 A.2d 1319, 1321 (R.I. 1994) ("A challenge to subject-matter jurisdiction questions the very power of the court to hear the case. It is an axiomatic rule of civil procedure that such a claim ... may be raised at any time in the proceedings").

[19] *E.g.,* State v. Sivo 925 A.2d 901, 916 (R.I. 2007) ("Challenges to a court's subject-matter jurisdiction ... may not be waived by any party"); Zarrella v. Minnesota Mut. Life Ins. Co. 824 A.2d 1249, 1256 (R.I. 2003) ("Subject matter jurisdiction is an indispensable requisite in any judicial proceeding; ... it cannot be waived or conferred by consent of the parties."); Pine v. Clark, 636 A.2d 1319, 1321 (R.I. 1994) ("A challenge to subject-matter jurisdiction questions the very power of the court to hear the case. It is an axiomatic rule of civil procedure that such a claim may not be waived by any party ...."); McGann v. Board of Elections, 129 A.2d 341, 348 (R.I. 1957) ("Subject-matter jurisdiction may not be waived and may never be cured by agreement of the parties.").

[20] *E.g.,* Zarrella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1256 (R.I. 2003) ("Subject matter jurisdiction is an indispensable requisite in any judicial proceeding; it can be raised at any stage thereof ... by the court sua sponte ...."); Wachovia Bank v. Schmidt, 126 S.Ct. 941, 950 (U.S. 2006) ("Subject-matter jurisdiction ... concerns a court's competence to adjudicate a particular category of cases; ... subject-matter jurisdiction must be considered by the court on its own motion, even if no party raises an

These uncontroversial legal principles mean that the Family Court, before proceeding to the merits of this case, was faced with the duty to decide whether it had jurisdiction over the competing divorce petitions of Chambers and Ormiston. That decision turns on whether "marriage" in the jurisdiction statute means what the word means in all other areas of Rhode Island statutory and common law or rather, *on some basis or another*, can be interpreted to include "the union of any two persons." As to what such a basis might be, the only responsible basis responsibly advanced in the opening briefs is this State's conflicts-of-law principles, that is, those principles governing recognition or not of a foreign marriage. Here, of course, that means the general rule of validation and its public-policy exception. But that being the only responsible basis means that *to resolve the jurisdiction issue requires this Court to resolve the recognition issue.* The jurisdiction issue simply cannot be resolved in any other way (putting aside for the moment a direct constitutional attack on Rhode Island's meaning of marriage.)

Yet some of the opening briefs assert that the recognition issue – the very certified question carefully reframed by this Court – is not genuinely at issue before this Court,

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objection."); Lewis v. Hunt --- F.3d ----, 2007 WL 2006933 (5th Cir. 2007) ("trial and appellate courts have the duty to examine the basis for their subject matter jurisdiction, doing so on their own motion if necessary."); American Airlines, Inc. v. Cardoza-Rodriguez 133 F.3d 111, 115 (1st Cir. 1998) ("Although neither party has addressed the issue, it is our duty to inquire sua sponte into our subject matter jurisdiction.").

[21] *E.g.*, Smith v. Johns-Manville Corp., 489 A.2d 336, 338 (R.I. 1985) ("It is clearly established that a trial court has jurisdiction to determine its own jurisdiction."); Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 (1998) (Stevens, J., concurring) ("a court always has jurisdiction to determine its own jurisdiction").

does not really need to be resolved, and does not present an actual case or controversy.[22] This assertion is wrong, of course, for a couple of reasons. It is wrong because it ignores the unavoidable link between resolution of the recognition issue and resolution of the subject-matter jurisdiction issue. Other than using the "marriage" presupposition and its whatever-arrangement interpretation, those making this assertion present *no* way to resolve the meaning of "marriage" in the jurisdiction statute *other than by resolving the recognition issue.* They want that word interpreted to include the Chambers-Ormiston arrangement, but they present *no* basis sounding in Rhode Island law for such a result *other than a favorable (to their position) resolution of the recognition issue.*

The "no case or controversy" assertion is also wrong because it ignores the unique features of the subject-matter jurisdiction issue. A court must resolve that issue whether the parties agree on it or not and even if the parties are willing to stipulate that the court has the requisite jurisdiction.[23] Accordingly, on this issue, the court simply does not need a controversy between the parties. *In this context, it is the court's abiding duty to determine, independently if needs be, its own subject-matter jurisdiction that generates and sustains the requisite "case or controversy."* Moreover, a court's first sensible step in any case is to determine whether it has subject-matter jurisdiction.[24] In this case, the Family Court clearly understood that this was so; that is why it certified the "jurisdiction"

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22 *See* Bender Brief 17-40, MERI Brief 17-18, and Governor Brief 3.

23 *See supra* notes 18-21 and accompanying text.

24 *E.g.*, Madu v. United States Attorney General, 470 F.3d 1362, 1365 (11th Cir. 2006) ("Before we address the merits of the parties' arguments, we must first determine whether we possess subject matter jurisdiction over this case."); *see generally* Arena v. City of Providence, 919 A.2d 379, 387 (R.I. 2007).

question to this Court.[25] And, we believe, this Court clearly saw that it could not aid the Family Court in its struggles relative to its own jurisdiction without resolving the truly ultimate and dispositive issue, the recognition issue; hence, this Court's order to reframe the certified question.[26]

We have mentioned before but put aside until now a second possible basis in Rhode Island law for reading "marriage" in the jurisdiction statute as meaning "the union of any two persons" and thereby including the Chambers-Ormiston arrangement. That is the argument (bad in our view) that state or federal constitutional norms mandate the redefinition of "marriage" in this State from "the union of a man and a woman" to "the union of any two persons" – for all purposes. The prudential rule, of course, is that this Court will not reach a constitutional question, especially a weighty one like the permissible meaning of marriage, unless it has to.[27] Thus, this Court will first resolve the jurisdiction issue by resort to its own common-law principles governing recognition or not of foreign marriages. If this Court concludes that those principles allow recognition of the Chambers-Ormiston Massachusetts marriage, it need not proceed to the constitutional question.

As to how to proceed if this Court concludes otherwise (as we argue it should), that is perhaps a bit more difficult question. On one hand, the parties have not directly raised the constitutionality of man/woman marriage. But some briefs argue that, if this Court does not recognize the Chambers-Ormiston arrangement as a "marriage" for Rhode

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[25] *See* Supreme Court, Order of January 17, 2007, at 1.
[26] *See id.* at 3.
[27] *E.g.*, In re Brown, 903 A.2d 147, 151 (R.I. 2006).

Island purposes, it will thereby create an invidiously discriminatory regime subject to serious constitutional (presumably both state and federal) challenges.[28] They give this as another reason why this Court should construe "marriage" in the jurisdiction statute as including the Chambers-Ormiston arrangement – so as to avoid serious constitutional questions.[29] And it is true that the constitutional issue has been exhaustively ventilated in our opening brief,[30] in over 19 American appellate court decisions,[31] and in numerous scholarly articles. Further, in deciding whether to recognize the Chambers-Ormiston arrangement as a "marriage" for Rhode Island purposes, this Court will unavoidably consider the public-policy exception. Certainly the state and federal constitutions are important sources of public policy and therefore, it seems, ought not be left out of the public-policy equation. Nevertheless, that the parties have not directly raised the constitutional issue would appear to weigh against this Court proceeding to *finally* resolve the constitutionality of man/woman marriage; certainly that appears to be the teaching of this Court's most recent pronouncement in this area.[32] But because, relative to interpretation of "marriage" in the jurisdiction statute, the "avoid constitutional issues" argument has been made, it seems that this Court will properly assess the seriousness of

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[28] *See* ACLU Brief 8-14, Cox Brief 36-41.

[29] *See, e.g.,* State v. Almonte, 644 A.2d 295, 304 (R.I. 1994) ("This court has consistently applied rules of statutory construction to avoid constitutional issues ....").

[30] UFI Brief, at 39-43.

[31] These are collected at Monte Neil Stewart, *Marriage Facts and Critical Morality,* at p. 4 n. 7 (2007), *available at* http://www.marriagelawfoundation.org/mlf/publications/Facts.pdf.

[32] In re Brown, 903 A.2d 147, 151 (R.I. 2006).

the argument that man/woman marriage is unconstitutional. Part III below demonstrates the un-seriousness of that argument.

II.

ALL THE OPENING BRIEFS SUPPORTING RECOGNITION OF THE CHAMBERS-ORMISTON MASSACHUSETTS MARRIAGE IGNORE KEY SOCIAL INSTITUTIONAL REALITIES RELATIVE TO RHODE ISLAND MARRIAGE, REALITIES THAT CLEARLY SUSTAIN, ON PUBLIC POLICY GROUNDS, NON-RECOGNITION.

In our opening brief, we set out a number of realities, emerging from social institutional studies, relative to the contemporary American marriage institution in general and Rhode Island marriage in particular.[33] Those realities are a solid foundation to this conclusion: Rhode Island has compelling governmental interests in and important public-policy reasons for preserving for all purposes the man/woman meaning that has always been embedded in the public and legal meaning of marriage in this State.[34]

We also demonstrated that these realities are generally uncontroversial in the scholarly literature and certainly have not been controverted by genderless marriage proponents, who uniformly ignore or otherwise evade them.[35]

Regarding that pattern of ignoring or otherwise evading the social institutional realities undergirding a society's choice of man/woman marriage rather than genderless marriage – that pattern continues in *all* the opening briefs arguing for recognition.[36] (This is so even though the authors of the pro-recognition briefs had before them the

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[33] UFI Brief, at 7-20.
[34] *Id.* at 30-44.
[35] *Id.* at 39.
[36] *See* Chambers Brief, Ormiston Brief, MERI Brief, ACLU Brief, Cox Brief, Attorney General Brief, and GLAD Brief.

social institutional argument for man/woman marriage.[37]) Thus, those briefs, in addressing whether sound public policy sustains or precludes recognition, ignore or otherwise evade all the following:[38] Important social institutions, such as marriage, are constituted by nothing other than widely shared public meanings. When those public meanings become confused or not sufficiently widely shared, the phenomenon is called *de-institutionalization* and the result is loss of the old institution's social goods. Certainly, the law has the power to confuse and even suppress widely shared public meanings constitutive of important social institutions; thus, the law has the power to de-institutionalize man/woman marriage and thereby diminish or even eliminate the valuable social goods materially and even uniquely provided now by the institutionalized man/woman meaning. Those goods include, among others, provision of the most effective (or only) means of supporting a child's right to know and be reared by his or her mother and father (with exceptions only in the best interests of the child, not any adult), of maximizing the private welfare provided to the children conceived by passionate

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[37] Our opening brief sets forth in some detail the social institutional argument for man/woman marriage and was in the hands of the authors of the GLAD, ACLU, Chambers, Ormiston, and Attorney General opening briefs *three weeks* before those briefs were filed. *See* UFI Brief, at "Certificate of Service" (July 11, 2007). More importantly, the social institutional argument has been well elaborated in the scholarly literature and in key court decisions for some time now. *See, e.g.*, Lewis v. Harris, 875 A.2d 259, 275-78 (N.J. Ct. App. 2005) (Parillo, J., concurring); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995-97 (Mass. 2003) (Cordy, J., dissenting); DAVID BLANKENHORN, THE FUTURE OF MARRIAGE (2007); Stewart, *supra* note 5, at 7-28.

The Cox Brief provides a strong example of knowledgeable genderless marriage proponents refusing to acknowledge, let alone engage, the social institutional argument supporting the constitutionality of man/woman marriage. *See* Cox Brief 36-41. That brief's presentation of the argument against man/woman marriage's constitutionality reminds us of a boxing match – with only one boxer in the ring.

[38] Because what follows in the text is a summary of key portions of our opening brief, *see* UFI Brief, at 30-44, it is presented without the footnotes appearing there.

man/woman coupling, of sustaining the optimal child-rearing mode (married mother/father), of bridging the male/female divide, and of furnishing the status and identity of *husband* or *wife*. When marriage is de-institutionalized, what a society has left is a dizzying array of different lifestyles. But a lifestyle is to a social institution what a sheet of plain paper is to a genuine $1,000 bill. Rhode Island has rationally determined to be of great value the social goods uniquely provided by the institutionalized man/woman meaning; that determination is sensibly viewed as the basis for this state's public and legal support for the man/woman marriage institution and its (unavoidably) concomitant rejection of genderless marriage.

It is fair to say that, in their public policy analysis, the opening briefs arguing for recognition proceed on the basis of a rather shriveled and discredited view of what marriage is – merely "a post-institutional private relationship."[39]

> Across history and cultures, marriage is socially approved sexual intercourse between a woman and a man. Marriage is in part a private relationship, but it is also, and fundamentally, a social institution, with rules and forms that create public meaning intended to solve important problems and meet basic needs. The core problem that marriage aims to solve is sexual embodiment – the species' division into male and female – and it primary consequence, sexual reproduction. The core need that marriage aims to meet is the child's need to be emotionally, morally, practically, and legally affiliated with the woman and the man whose sexual union brought the child into the world. That is not *all* that marriage is or does, but nearly everywhere on the planet, that is *fundamentally* what marriage is and does.
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> .... It is *not* true that marriage is only incidentally connected to sex, or to children, or to bridging the male-female dive. Most of all, it is *not* true that marriage in essence is [only] an expression of love, a private relationship of commitment between consenting adults.

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[39] *See, e.g.,* GLAD Brief 9 (asserting that marriage is a contract and a legal status, while ignoring the deep and rich meanings and purposes of marriage extending far beyond the rather sterile contract/status depiction).

> Put somewhat differently, in the United States today, there are two competing and quite different conceptions of what marriage is. One view says that marriage at its core is a pro-child social institution. The other says that marriage at its core is a post-institutional private relationship. The latter view certainly has many advocates, but the former view is, well, correct.[40]

Because they ignore the social institutional realities undergirding a society's choice of man/woman marriage, the pro-recognition briefs' public policy analysis is fundamentally deficient. Certainly that analysis fails to come to grips with the reality of what is at stake in this case relative to the recognition issue. What is at stake is the *institutionalized* – because reinforced by law – public meaning of marriage in Rhode Island. Rhode Island's institutionalized meaning has always been the union of a man and a woman, and that man/woman meaning, exactly because institutionalized, has been productive of valuable social goods. But for Rhode Island law now to recognize the Chambers-Ormiston arrangement as a "marriage" is for Rhode Island law to say that the public and legal meaning of marriage in this State is now radically different; it is now the union of any two persons. This matters very much: "[F]or people interested in institutions and social change, *public meaning is everything. All the rest flows from it.*"[41]

And even if the recognition is for the limited, albeit very important and highly visible, purpose of divorce, still the damage is real. Although such a limited recognition may not in itself displace the institutionalized man/woman meaning with the institutionalized genderless meaning, it must inevitably sow confusion regarding the status of the man/woman meaning. And in that way a limited recognition will diminish

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[40] BLANKENHORN, *supra* note 37, at 175 (emphasis in original).
[41] *Id.* at 139 (emphasis added).

the extent to which the man/woman meaning is widely shared – and therefore institutionalized – in this State and thereby jeopardize the valuable social goods flowing from that meaning. Once marriage is de-institutionalized in this State, all our society will have left is a dizzying array of lifestyles. Those whose project is to "deconstruct hetero-normativity"[42] and enshrine the "equality" of a wide diversity of living arrangements[43] will applaud. Those whose project is to perpetuate the best social institution ever devised for the well-being of children[44] will weep.

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[42] *See, e.g.,* Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition,* 76 CHICAGO-KENT L. REV. 1441, 1459 (2001) (identifying an "important feminist agenda: to deconstruct and deinstitutionalize hetero-normativity").

[43] *Seen generally* BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS (2006), at http://www.beyondmarriage.org/.

[44] *See, e.g.,* BLANKENHORN, *supra* note 37, at 201:

> [S]ame-sex marriage would require us in both law and culture to deny the double origin of the child. I can hardly imagine a more serious violation. It would require us to change or ignore our basic human rights documents, which announce clearly, and for vitally important reasons, that every child has a birthright to her own two natural parents. It would require us, legally and formally, to withdraw marriage's greatest promise to the child – the promise that insofar as society can make it possible, I will be loved and raised by the mother and father who made me. When I say, "Every child deserves a mother and a father," I am saying something that almost everyone in the world has always assumed to be true, and that many people today, I think most people, still believe to be true. But a society that embraces same-sex marriage can no longer collectively embrace this norm and must take specific steps to retract it. One can believe in same-sex marriage. One can believe that every child deserves a mother and a father. One cannot believe both.

See also W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (2005).

III.

EXACTLY BECAUSE RHODE ISLAND HAS COMPELLING GOVERNMENTAL INTERESTS IN SUSTAINING THE MAN/WOMAN MARRIAGE INSTITUTION, THE WARNINGS IN SOME OF THE OPENING BRIEFS ABOUT NON-RECOGNITION RAISING SERIOUS CONSTITUTIONAL PROBLEMS ARE SIMPLY WRONG.

A number of the opening briefs argue that, if this Court does not recognize the Chambers-Ormiston arrangement as a "marriage" for Rhode Island purposes, it will thereby create an invidiously discriminatory regime subject to serious constitutional (presumably both state and federal) challenges.[45] They give this as another reason why this Court should construe "marriage" in the jurisdiction statute as including the Chambers-Ormiston arrangement – so as to avoid serious constitutional questions.[46]

This argument, of course, is no stronger than its foundation – that a good case can be made that laws sustaining the man/woman marriage institution (and thereby precluding genderless marriage) violate constitutional norms of equality, liberty, personal autonomy, human dignity, privacy, and so on. But the pro-recognition briefs do not demonstrate or otherwise prove the existence of such a foundation; they do not do so exactly because of their assiduous avoidance of the social institutional argument for man/woman marriage.[47] And that is so even though the briefs' authors had before them, in this case, a thorough presentation of that argument.[48]

The fact of the matter is as stated in our opening brief:

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[45] *See supra* note 28.

[46] *See, e.g.,* State v. Almonte, 644 A.2d 295, 304 (R.I. 1994) ("This court has consistently applied rules of statutory construction to avoid constitutional issues ....").

[47] *See supra* note 37.

[48] *See supra* note 37; UFI Brief, at 39-43 (footnotes omitted).

> [I]t is fair and accurate to say that the serious debate over the constitutionality of man/woman marriage has been over for some time now, and man/woman marriage is clearly the victor. We say that in part – but only in small part – because of the fact that of the twenty American appellate court decisions to date on the constitutionality of man/woman marriage, nineteen have refused hold it unconstitutional and the further fact that all eight American appellate court decisions on the issue since the SJC's decision in *Goodridge* have refused to follow that case. In much larger part, we say that the debate is over in favor of man/woman marriage because of the nature of the strong arguments sustaining constitutionality and the concomitant on-going failure of genderless marriage proponents to genuinely and seriously engage, rather than evade, those arguments. That thorough-going failure to engage is now well-documented in the scholarly literature and quite simply has not been rebutted.[49]
>
> The man/woman meaning in marriage, the social goods that meaning provides, and the susceptibility to loss of both the meaning and the goods – as described by the broad description of contemporary American marriage and analyzed by the social institutional argument – satisfies [even] strict scrutiny review. The social goods, especially those pertaining to child-bearing and child-rearing and enhancing child welfare, qualify as compelling societal (and hence governmental) interests; "a society without the institution of [man/woman] marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic."[50]

To decline to recognize the Chambers-Ormiston arrangement as a "marriage" within the meaning of the jurisdiction statute is to raise *no* serious constitutional issue. That is because of the compelling reason for such a construction of the statute: to reinforce rather than de-institutionalize the man/woman meaning at the core of the contemporary Rhode Island marriage institution and thereby to perpetuate the valuable social goods materially and even uniquely provided by that meaning.

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[49] UFI Brief, at 39.

[50] Stewart, *supra* note 31, at 94-95 (footnotes omitted).

CONCLUSION

This Court should hold that the Family Court may not recognize, for the purpose of entertaining the Chambers-Ormiston divorce petitions, the Massachusetts marriage of these two Rhode Island women.

Respectfully submitted,

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The undersigned hereby certifies that a true copy of the within has been sent to the above persons by regular mail, postage prepaid, on August 15, 2007.