SUPREME COURT
OF THE STATE OF RHODE ISLAND

No. 06-340-M.P.

MARGARET CHAMBERS,
Plaintiff

v.

CASSANDRA ORMISTON,
Defendant

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

BRIEF OF AMICUS CURIAE
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Issues Presented for Review

1. Whether the certified question arises from a clash of adversary argument between parties with adverse legal interests.

2. Whether the existence of adverse parties with adverse legal interests is an essential requirement for a case or controversy, and the constitutional exercise of judicial power under art. 10, sec. 1 of the Rhode Island Constitution.

Summary of the Argument

The certified question presents the Court with the necessity of determining the nature and limit of "judicial power" under art. 10, sec. 1 of the state constitution. Specifically, the Court must determine whether a dispute between adverse parties asserting adverse legal interests is a prerequisite to the constitutional exercise of judicial power. It presents a question of the "constitutional jurisdiction" of this Court and the Family Court.

On May 26, 2004 two Rhode Island residents, Cassandra B. Ormiston and Margaret R. Chambers, traveled to Fall River, Massachusetts where they were married under the sovereign authority of that Commonwealth. In October, 2006, after their marriage relationship had deteriorated, they each invoked the subject matter jurisdiction of the Rhode Island Family Court for a judgment of divorce from the bonds of matrimony, and related orders regarding the separation and distribution of their marital assets and obligations.

The Family Court has, however, stayed proceedings on the complaint and counterclaim for divorce and certified the following question to this Court under R.I.G.L. §9-24-7:

> 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?

Having subject matter over the complaint for divorce under R.I.G.L. §10-8-3, the Family Court's certified question involves a conflicts of law issue over whether it may exercise its subject matter jurisdiction by recognizing a same-sex marriage approved by another state. Under conflicts of law principles a controversy over that question would involve the Court's determination of Rhode Island's public policy with respect to same-sex marriage – at least with respect to whether it would be against the State's public policy to recognize an out-of-state same-sex marriage for

the purposes of dissolving that legal relationship. The issue presented by the certified question is not whether Rhode Island should, or must, permit same-sex couples to marry in Rhode Island, but rather, whether Rhode Island should recognize such a marriage deemed valid by the Commonwealth of Massachusetts for the purposes of a divorce complaint.

There is, however, no controversy over that question as between the parties to the litigation. Both parties have sought relief from the Family Court concerning their marital relationship. Both parties have asked the Family Court to recognize the marriage for the sole purpose of a divorce, and have affirmatively argued that it should. No party has objected to the Family Court's exercise of its jurisdiction or has asserted that its exercise of jurisdiction would cause them injury-in-fact. Consequently, while the Family Court has subject matter jurisdiction over the complaints for divorce, there is no "constitutional jurisdiction" over the certified question. That is, there is no constitutional authority for addressing that question in the context of this case because it does not present a justiciable case or controversy.

Art. 10, sec. 1 of the state constitution is the original source of the power of this State's courts to govern, and that power is limited to the "judicial power." One hundred and fifty years ago the Court determined that a justiciable "case or controversy" was central to the exercise of "judicial power" under the state constitution, and central to the existence of a case or controversy is a dispute between parties asserting adverse legal interests. It follows that in the absence of parties asserting adverse legal interests there is no case or controversy and no basis for the constitutional exercise of judicial power. Once a court has acquired subject matter jurisdiction, its judicial power is constitutionally confined to adjudicating disputes between parties who have asserted adverse legal interests with respect to the issue in dispute. Without this adversity there is no case or controversy, and "[i]f a dispute is not a proper case or controversy, the courts have

no business deciding it, or expounding the law in the course of doing so."[1] "That there be an actual controversy between parties that appear before a court has from time immemorial been a bedrock judicial principle[,]"[2] and that boundary to the exercise of judicial power is both a recognition and a manifestation of the constitutional separation of governmental power.

Instead of presenting a proper case or controversy historically, traditionally or constitutionally contemplated as within the "judicial power," the certified question presents the quintessential request for an advisory opinion that can only be answered on the basis of a hypothetical dispute. As this Court has recently noted, such opinions are:

> advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests * * *.[3]

The issues embedded in the certified question are neither focused or clear, they have not emerged either precisely framed or necessary for decision from a clash of adversary argument, and they do not embrace any conflicting or demanding interests of the parties to the suit. Consequently this case does not present a proper occasion for the Court to opine on the State's public policy with respect to same-sex marriage. That issue must await resolution by the judiciary when presented in an adversary context in a proper case or controversy, or by the popularly elected legislature determining the scope of the Family Court's subject matter jurisdiction. In the absence of either

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[1] *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1860-61 (2006).

[2] *Ex Parte James*, 836 So.2d 813, 869-70 (Ala. 2002) (Moore, C.J., concurring in the result in part and dissenting in part).

[3] *In re Advisory Opinion to the House of Representatives (Casino II)*, 885 A.2d 698, 714 (R.I. 2005) (quoting *United States v. Fruehalf*, 365 U.S. 146, 157 (1961)).

of those circumstances, this matter should be remanded to the Family Court for that court to adjudicate the complaints for divorce.

Statement of the Case

Massachusetts' Statutory Procedure for Solemnizing Marriages

In the Commonwealth of Massachusetts all applicants for a certificate of marriage, commonly known as a marriage license, must complete a written "notice of intention of marriage" on a form provided by the registrar of vital records and statistics, and submit it to the clerk or registrar of any city or town in the Commonwealth with an appropriate fee. *See* G.L. ch. 207, §19, 20. The notice of intention must include: 1) the residence address of both parties; and 2) a statement under oath by both parties to the intended marriage that there are no legal impediments to the marriage. G.L. ch. 207, §20.

On or after the third day from the filing of the notice of intention – or sooner if the time period is waived by the Commonwealth – the clerk shall deliver the marriage license to the parties, *see* G.L. 207, §§19, 28, 30, and an authorized official may solemnize the marriage. *See id.* at §§28, 38-39. After the marriage is solemnized the officiate completes the portion of the license setting forth the time and place of the marriage ceremony and returns it to the clerk. *See id.* at §40. The clerk then records the certificate of marriage in the appropriate registry, transmits the original record of the marriage and all documentary evidence to the registrar, and retains a certified copy of the certificate of marriage. G.L. ch. 46, §§1-2, 17A. The Commissioner of Public Health then retains custody of the marriage records. *See* G.L. ch. 111, §2.

"Absence of Legal Impediments"

To provide marriage applicants with guidance as to what would constitute a legal impediment to marriage in Massachusetts, the clerks are statutorily required to display a printed notice of the prohibitions to marriage in the Commonwealth. *See* G.L. ch. 207, §37. *See also* G.L. ch. 17, §4 (pertaining to responsibilities of registrar). The notice specifically incorporates the language of G.L. ch. 207, §11, which describes the nonresidents who may not marry in the Commonwealth. It provides:

> No marriage shall be contracted in this commonwealth by a party residing or intending to continue to reside in another jurisdiction *if such marriage would be void if contracted in such other jurisdiction*, and *every marriage contracted in this commonwealth in violation hereof shall be null and void.*

(Emphasis added). To implement section 11 the city and town clerks are provided with a guide setting forth the legal impediments to marriage in the fifty states, the District of Columbia, and various territories of the United States. *See Cote-Whitacre v. Department of Health*, 446 Mass. 350, 355, 844 N.E.2d 623, 633 (2006) (Spina, J. concurring). The guide instructs the clerks that they should not issue a marriage license to an applicant if, "based on a comparison between the factual information set forth on the notice [of intention of marriage] and the list of legal impediments to marriage, there is an impediment to the applicant marrying in Massachusetts or the applicant's home state." *Id.*

The Goodridge Decision

On May 17, 2003, the Massachusetts Supreme Judicial Court issued its decision in *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). In

Goodridge, the court found that the Massachusetts' marriage statute's use of the term 'marriage' was consistent with "the term's common-law and quotidian meaning concerning the genders of the marriage partners." *Id.* at 319, 798 N.E.2d 941. That is, it barred same-sex couples from entering and partaking of civil marriages. The *Goodridge* plaintiffs challenged that ban on various constitutional grounds. Employing a rational basis standard of review, the court held that the Department of Health failed "to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions[,]" *id.* at 341, 798 N.E.2d 941, and therefore barring same-sex couples from civil marriage in the Commonwealth violated the equal protection and due process guarantees of the Massachusetts Constitution. *Id.* at 330-331, 798 N.E.2d 941.

The court determined that banning same-sex Massachusetts couples from marrying "works a deep and scarring hardship on a very real segment of the community for no rational reason," *id.* at 341, 798 N.E.2d 941, and "[l]imiting the protections benefits and obligations of civil marriages to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." *Id.* at 342, 798 N.E.2d 941. Rather than strike down the marriage laws as unconstitutional, however, the court preserved G.L. ch. 207 and instead refined the common law meaning of "civil marriage" to mean "the voluntary union of two persons as spouses, to the exclusion of all others." *Id.* at 343, 798 N.E.2d 941. The *Goodridge* court declared its decision would become effective one year later on May 17, 2004.

The Executive Department Reaction to Goodridge

On April 29, 2004, less than three weeks before the *Goodridge* decision was to take effect, the Massachusetts Governor sent a letter to the Governor and Attorney General of each state. *Cote-Whitacre*, 446 Mass. at 383 n. 1, 844 N.E.2d 623 (Marshall, C. J. concurring). The

letter expressed strong disagreement with the *Goodridge* decision and advised each Governor and state Attorney General of the "void" marriages provision of G.L. ch. 207, §11. The letter stated further:

> It is our view that same-sex marriage is not permitted under the laws of any other state in the nation, including yours. Unless we have an authoritative statement to the contrary from either you or your representative, the Commonwealth of Massachusetts will not issue a Massachusetts marriage license to same-sex couples from your state.

Id. Thereafter, the registrar of vital records and statistics issued a revised List of Impediments to the clerks in May 2004. *Id.* The revised List stated that as to each of the 49 states, the District of Columbia, and the United States territories, marriages between persons of the same sex were either "void," "prohibited," "not permitted," or "invalid." *Id.*

Beginning on May 17, 2004, however, the date *Goodridge* became effective, municipal clerks in several cities and towns began to receive notices of intention of marriage from non-resident same-sex couples. 446 Mass. at 355, 844 N.E.2d 623 (Spina, J. concurring). The Office of Attorney General contacted those cities and towns where marriage licenses had been issued, instructed them to cease and desist from issuing such licenses, and directed the clerks' attention to G.L. ch. 207, §50, setting forth penalties for noncompliance with G.L. ch. 207, §§11 and 12. *Id.* As set forth earlier, section 11 provides that no marriage shall be contracted in Massachusetts by nonresidents if the marriage of the nonresidents "would be *void* if contracted" in the state where the applicant or applicants reside, and if such a marriage was contracted in Massachusetts it would be considered "*null and void*" under Massachusetts law. *See* G.L. ch. 207, §11. Section 12 of G.L. ch. 207, directed at the responsibilities of municipal clerks, provides:

> Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to

> issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person *is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.*

(Emphasis added). The actions of the registrar and the Attorney General gave rise to two suits, both filed on June 18, 2004.

Eight same-sex couples – five of whom had received licenses and had their marriages solemnized and three of whom had been denied marriage licenses – brought an action against the Department of Health and others seeking declaratory, injunctive and mandamus relief. 446 Mass. at 355-356, 844 N.E.2d 623. They claimed that enforcement of §11 and 12 to deny marriage licenses to nonresident same-sex couples violated due process and equal protection principles under the Massachusetts Constitution and the privileges and immunities clause of the United States Constitution. *Id.* at 355, 844 N.E.2d 623. They also alleged the defendants had improperly construed §11 and 12 to deny marriage licenses to nonresident same-sex couples from states that had not declared such marriages void. *Id.* Finally, they asserted the Department of Public Health commissioner failed to execute her duty to bind and index the marriage licenses already issued to nonresident same-sex couples. *Id.* The second suit was brought by thirteen municipal clerks in their official capacities against the Attorney General, the commissioner and the registrar seeking declaratory and injunctive relief. *Id.* at 356, 844 N.E.2d 623. They alleged they were being compelled to selectively enforce §11 and 12 in a manner that unconstitutionally discriminated against nonresident same-sex couples. *Id.* They sought to enjoin defendants from prosecuting them under G.L. ch. 207, §50, or otherwise requiring that they enforce the provisions of §11 and 12. *Id.*

Each group of plaintiffs filed motions for preliminary injunction that were denied by the trial justice on the grounds that the plaintiffs had not demonstrated a likelihood of success on the

merits of the claims. *Id.* at 356, 844 N.E.2d 623. On March 30, 2006, a majority of the Massachusetts Supreme Judicial Court affirmed the denial of the motions for preliminary injunction, and in the process agreed on the proper interpretation of §11, but split 3-3 on the proper interpretation of §12.

With respect to §11 prohibiting marriages of nonresidents if their marriage would be void in the state where the parties resided, and intended to continue to reside, six justices agreed that this prohibition only applied where "the relevant statutory language of the applicant's home state explicitly provides that particular marriages are void." *Id.* at 359, 844 N.E.2d 623 (Spina, J. concurring, with whom Corwin and Sosman, J.J., join); *Id.* at 387, 844 N.E.2d 623 (Marshall, C.J., concurring, with whom Cordy, J., joins and Greaney, J., joins in part). With respect to §12, however, the concurring opinion by Chief Justice Marshall concluded that the phrase "such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides[,]" referred "only to marriages that are *expressly forbidden* by another State's positive law – that is, by constitutional amendment, statute or controlling appellate decision." *Id.* at 385, 844 N.E.2d 623 (Marshall, C.J., concurring) (emphasis added). Justice Spina, on the other hand, expounded a much broader interpretation of §12. In his view, in the absence of an appellate court decision expressly forbidding a same-sex marriage:

> it is necessary to look at the home state's general body of common law and ascertain whether that common law has interpreted the term "marriage" as the legal union of one man and one woman as husband and wife. (citation omitted). If it has, then same-sex marriage would be "prohibited" in that State, and . . . couples from [that State] would not be able to secure a marriage license in Massachusetts. Conversely, if the common law of the home State has not construed "marriage" in such a manner, then it cannot be concluded that same-sex marriage has been prohibited in that State.

Id. at 363 n. 12, 844 N.E.2d 623 (Spina, J., concurring).

On remand the trial court held that Chief Justice Marshall's statutory construction of §12 represented the holding of the court, *Cote-Whitacre v. Department of Public Health*, 2006 WL 4555670 (Mass. Super.) p. 3-4 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977) (when a divided Court provides no majority rationale for its decision, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds[.]")). Applying Chief Justice Marshall's construction of §11 and 12 to the Rhode Island plaintiffs in the case the trial justice determined:

> same-sex marriage is not prohibited in Rhode Island. No evidence was introduced before this Court of a constitutional amendment, statute, or controlling appellate decision from Rhode Island that explicitly deems void or otherwise expressly forbids same-sex marriage; and after an exhaustive search, this Court has found no such prohibitory positive law.

Id. at 5.

The Solemnization of the Chambers-Ormiston Marriage

On May 26, 2004, nine days after the *Goodridge* decision went into effect, 57 year old Cassandra B. Ormiston and 68 year old Margaret R. Chambers, both retired, traveled from the home they shared at 24 Everett Avenue in Providence, Rhode Island to City Hall in Fall River, Massachusetts to get married. They completed a notice of intention of marriage which acknowledged they currently resided in Providence, RI and intended to continue residing in Rhode Island after being married. Under oath both Chambers and Ormiston signed a statement declaring they had "reviewed a list of impediments for my place of residence" and that "there [was] an absence of any legal impediment to the marriage[.]"

They were issued a marriage certificate that same day after the three day waiting period was waived, and the notice of intention of marriage was filed. The marriage was immediately solemnized by the Fall River city clerk, Carol A. Valcourt, who was also a Justice of the Peace, and the marriage certificate was recorded. Chambers and Ormiston returned to their residence in Providence.

The Competing Divorce Petitions and the Certified Question

Unhappily, as is the case with many married couples, the marriage relationship devolved. Two years later, on October 23, 2006, Chambers filed a complaint for divorce in the Family Court on the grounds of irreconcilable differences. She sought a judgment of divorce that would also: 1) award her all right, title and interest in the marital domicile of the parties – at that time at 156 Prospect Street, Providence, RI; 2) award her all right, title and interest in certain real estate in Durango, Colorado; 3) order an assignment of property in accordance with 15-5-16.1; and 4) deny any alimony to Ormiston. Four days later Ormiston filed her own counterclaim for divorce seeking relief from the court regarding certain debts incurred by Chambers since they had separated; enjoining Chambers from incurring any further joint marital debts without her consent; and restraining her from "spending, transferring, withdrawing or secreting any monies in any financial account[.]"

Notwithstanding that both parties invoked the jurisdiction of the Family Court to obtain relief in the form of a divorce from the bond of matrimony, approximately one month later Chambers asked the Family Court judge to certify the following question to this Court:

> Does the Rhode Island Family Court have *jurisdiction to entertain* divorce proceedings between a same sex partner marriage legally

> entered into in the State of Massachusetts, assuming that all jurisdictional requirements are met?

(Emphasis added). Chambers made the request asserting, "it is imperative for all concerned to know whether or not, should this Court grant a divorce – that said divorce will be legal and final." The trial justice agreed to certify a question to this Court concerning the subject matter jurisdiction of the Family Court, in a form slightly different than the question posed by Chambers. On December 11, 2006 he certified the following question to this Court:

> Does the Rhode Island Family Court *have subject matter jurisdiction under R.I.G.L. §8-10-3 (1956) to hear a divorce complaint wherein the plaintiff and defendant are of the same sex,* were lawfully married in the Commonwealth of Massachusetts, are both domiciled inhabitants of the State of Rhode Island for at least one year, having met all other jurisdictional requirements and are seeking a divorce?

(Emphasis added).

This Court, however, remanded the certified question to the Family Court for further proceedings to develop a "fuller factual record" based on factual findings by the trial justice on a series of questions posed by the Court, and for the trial justice's analysis of three questions:

> **1) whether or not the instant case presents an actual case or controversy (and, if not, how this case should proceed);**
>
> 2) whether or not the Full Faith and Credit clause of the United States Constitution is relevant to the instant case; and
>
> 3) whether or not the Defense of Marriage Act, 28 U.S.C. §1738C (2000), is pertinent to the instant case.

(Emphasis added). In addition the Court directed the certifying Family Court justice to:

> reword said Request to make it clear that what is being sought is a ruling from us as to *whether or not the Family Court may properly recognize, for the purpose of entertaining a divorce petition, the*

> *marriage of two persons of the same sex* who were purportedly married in another state.

(Emphasis added).

Upon remand the Family Court trial justice received affidavits and memoranda from the litigants. He made the requested factual findings, addressed the three legal questions, and, using essentially the same language from the Supreme Court order, reformulated the certified question that is now before this Court:

> **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?**

With respect to that specific question, however, both litigants asserted the Family Court could, and should, recognize their marriage for the purpose of their divorce petition. *See* Chambers Mem., 2/8/07 at 9 ("the parties' marriage must be recognized here for purposes of entertaining the competing divorce petitions because the marriage does not fall within the narrow odious exception to Rhode Island's general rule of marriage recognition."); Ormiston Mem., 2/8/07 at 5 ("There is nothing in the statutes or case law of the State of Rhode Island which would render same-sex marriages repugnant to the public policy of the State of Rhode Island."). Consequently, as to the parties to the divorce proceeding, the certified question the Family Court asks this Court to decide is not in controversy. They do not assert or claim opposing claims or legal interests with respect to the legal question posed. Neither litigant claims the Family Court should not grant a divorce because it may not, or should not, recognize a same-sex marriage solemnized in Massachusetts. Chambers and Ormiston are not adverse parties asserting adverse legal interests on the issue presented by the certified question. It is not an issue "in controversy."

Under these circumstances the certified question posed to this Court raises, first and foremost, the issue of the constitutional authority of the courts of this state to adjudicate non-subject matter jurisdiction issues that are not in controversy between the litigants. It requires the Court to address its "constitutional jurisdiction," and the constitutional jurisdiction of all other courts in this state. It not only requires the Court to determine whether the certified question presents an actual case or controversy, it requires the Court to determine whether the "judicial power" conferred by Art. 10, sec. 1 of the Rhode Island Constitution is limited to cases or controversies between parties with adverse legal interests.[4]

Argument

I.) The certified question does not implicate the statutory subject matter jurisdiction of the Family Court but it does implicate the threshold issue of the Court's "constitutional jurisdiction."

Subject matter jurisdiction is an indispensable requirement of any judicial proceeding because it goes to the very authority of the court over the subject matter of the lawsuit, *Zarella v. Minnesota Mutual Life Insurance Company*, 824 A.2d 1249, 1257 (R.I. 2003), and without authority over the lawsuit's subject matter the court cannot lawfully act. The parties cannot confer subject matter jurisdiction by consent where it does not exist, nor can they waive its absence, and the Court itself may *sua sponte* address the Court's subject matter jurisdiction at any stage in the proceedings. The certified question does not, however, raise any issue

[4] Of course, this case does not implicate the separate power of the individual justices of the Court to issue advisory opinions under Art. 10, sec. 3, which is limited by its terms to requests from the Governor or either body of the General Assembly. The justices have no power to give nonjudicial advisory opinions to a private citizen or judicial officer.

concerning the Family Court's subject matter jurisdiction over the divorce petitions. Under R.I.G.L. §8-10-3(a) the Family Court has authority and subject matter jurisdiction over "all petitions for divorce from the bond of marriage[,]" and both Chambers and Ormiston have properly invoked the Family Court's subject matter jurisdiction by filing such petitions.

The existence of a duly executed and recorded marriage certificate evidencing a marriage between Chambers and Ormiston, and the filing of a complaint for divorce, gave the Family Court the requisite authority to hear the case because subject matter jurisdiction is determined by the face of a well-pleaded complaint, *Gibson v. Firestone*, 741 F.2d 1268, 1270 (1st Cir. 1984), and a marriage ceremony is *prima facie* evidence of a marriage's validity. *Veazie v. Staples*, 309 Mass. 123, 126, 33 N.E.2d 262, 264 (1941); *accord, Gomez v. Windows on World*, 23 A.D.3d 967, 969, 804 N.Y.S.2d 849, 852 (2005) ("It has long been the rule that, where a marriage has been proven by the facts adduced, there exists a presumption that such marriage is valid."); *Xiong v. Xiong*, 255 Wis.2d 693, 703, 648 N.W.2d 900, 904 (2002) ("Where there has been a marriage ceremony, it is *prima facie* valid."); 29 Am. Jur.2d Evidence §214 (2007) ("The law presumes that any marriage which has been solemnized in accordance with the laws of the jurisdiction where the ceremony is performed is valid."). Considerations supporting the presumption of the regularity of official acts, coupled with the general public policy to preserve and protect marriage, give rise to the presumption – "one of the strongest known to the law[,]" *Blair v. Blair*, 147 S.W.3d 882, 885 n. 3 (Mo. App. 2004) – that a solemnized marriage was legally and properly performed; that the parties had legal capacity; and that the marriage is valid. 255 Wis.2d at 703, 648 N.W.2d at 905 (citing *In re Estate of Campbell*, 260 Wis. 625, 630, 51 N.W.2d 709 (1952)).

Chambers' petition for divorce, accompanied by *prima facie* evidence of the marriage she sought to dissolve, was sufficient to invoke the Family Court's subject matter jurisdiction where both she and Ormiston satisfied the domicile and residency requirements of R.I.G.L. §15-5-12. Simply put, the Family Court was presented with competing divorce petitions from a relationship the Commonwealth of Massachusetts recognized as a valid civil marriage, and it has the statutory authority to dissolve it just as it would for any heterosexual couple married in Massachusetts. Consequently, the issue posed by the certified question is not whether the Family Court has subject matter jurisdiction and authority to adjudicate the divorce petitions – it plainly does. Instead, the certified question asks whether the Family Court *should* exercise its jurisdiction over divorce petitions concerning a same-sex marriage validly entered into in another state. The answer to that question does not turn on whether Rhode Island statutory or common law permits, will permit, or must permit couples of the same sex to enter the legal relationship of marriage. Rather, the question is a conflicts of law question – whether Rhode Island will recognize a same-sex marriage from a state that does permit same-sex couples to enter that relationship, for the purpose of legally dissolving that relationship. The certified question correctly assumes the validity of the Chambers-Ormiston marriage, and poses a conflict of laws question. *But that conflicts of law question is not a point of contention or dispute between the parties to the litigation.*

The absence of adverse parties asserting adverse legal interests with respect to the certified question thus presents a more fundamental "jurisdictional" question concerning the judicial authority to adjudicate the conflicts of law question that is posed. That is, where a court has subject matter jurisdiction over the type or substance of the lawsuit, does it have the

"constitutional jurisdiction" to decide issues that are not in controversy as between the parties? Would that be the constitutional exercise of judicial power? Amicus curiae asserts it would not.

II.) The certified question does not present a justiciable case or controversy within the "judicial power" conferred by art. 10, sec. 1 of the state constitution.

A justiciable case or controversy is central to the exercise of "judicial power" under the state constitution. A controversy between parties having adverse legal interests is central to the existence of a case or controversy. In the absence of parties having adverse legal interests, therefore, there is no case or controversy and no basis for the exercise of "judicial power."

A.) The exercise of judicial power under the state constitution is confined to actual cases and controversies.

Article 10, sec. 1 of the Rhode Island Constitution states: "[t]he *judicial power* of this state shall be vested in one supreme court and, in such inferior courts as the general assembly may, from time to time, ordain and establish." As a term that defines the role of the judicial branch, the scope of the "judicial power" is a matter of considerable constitutional significance. *National Wildlife Federation v. Cleveland Cliffs Iron Company*, 471 Mich. 608, 613, 684 N.W.2d 800, 806 (2004). Determining whether an act or decision of a court is within the "judicial power" conferred by the constitution necessarily requires reaching an understanding of the contours, boundaries and limits of "judicial power," for those contours, boundaries and limits are the constitutional contours, boundaries and limits on a court's exercise of governmental power.

Although state courts are free to define for themselves the nature of state "judicial power" under their state constitutions, and the contours of their constitutional exercise of judicial power,

without regard to the federal constitutional limitations on those courts, *see Asarco Incorporated v. Kadish*, 490 U.S. 605, 613, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696 (1989), the judicial power assigned to Rhode Island state courts under the state constitution was intended to fundamentally mirror the judicial power assigned to federal courts. *See G.D. Taylor & Co. v. Place*, 4 R.I. 324 (1856). Examining the federal judicial power, therefore, is essential in determining the nature of state judicial power under the Rhode Island Constitution.

Perhaps the most critical element of the concept of "judicial power" under the tripartite system of government in this country has been the requirement of a genuine case and controversy between parties, one in which there is a real, not a hypothetical dispute. 471 Mich. at 614, 684 N.W.2d at 806 (citing *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911)). It is well established that the judicial power of federal courts under the federal constitution is confined to adjudicating actual "cases" and "controversies." *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). The United States Supreme Court has recognized that the case or controversy limitation is crucial in maintaining the tripartite allocation of power and the constitutional principle of separated governmental power. *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1861 (2006) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474, 102 S.Ct. 752, 70 L.Ed.2d 900 (1982) and *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). Determining whether a matter is a proper case or controversy assumes particular importance in ensuring that the judiciary respects "the proper – and properly limited – role of the courts in a democratic society." 126 U.S. at 1860 (quoting *Allen*, 468 U.S. at 750, 104 S.Ct. 3315 and *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government

than the constitutional limitation of federal-court jurisdiction to actual cases and controversies." 126 S.Ct. at 1861 (quoting *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) and *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)).

The contemplated function of the judiciary is that of deciding "cases," and "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so[,]" 126 S.Ct. at 1860-61, because in the absence of a proper case or controversy a court has no constitutional jurisdiction to proceed. *See Ex Parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868). Simply put, the "case or controversy" requirement reflects the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere[.]" *Raines*, 521 A.2d at 820, 117 S.Ct. 2312.

Art. III, sec. 1 of the United States Constitution is similar to art. 10, sec. 1 of the state constitution. It provides that "[t]he *judicial power* of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." (Emphasis added). Unlike art. 10 of the state constitution, however, Art. III contains a second clause describing the types of cases and controversies to which the federal judicial power will apply. *See* U.S. Const., Art. III, sec. 2. Some state courts have pointed to the lack of a similar explicit "case or controversy" clause in state constitutions to assert that state "judicial power" is not limited by the case or controversy requirement.[5] While this Court also has

[5] *See, e.g., Bennett v. Napolitano*, 206 Ariz. 520, 527, 81 P.3d 311, 318 (2003) ("Because the Arizona Constitution does not contain a provision analogous to the case or controversy requirement of the U.S. Constitution, we are not constitutionally constrained to decline jurisdiction based on lack of standing."); *Terracor v. Utah Board of State Lands & Forestry*, 716 P.2d 796, 798 (Utah 1986) ("Unlike federal law where standing doctrine is related to the case or controversy language of Article III of the United States Constitution, our standing law arises

acknowledged that, "[u]nlike the United States Constitution, there is no *express* language in the Rhode Island Constitution which confines the exercise of the Rhode Island Court's judicial power to actual 'cases and controversies'[,]" *State v. Lead Industries Association, Inc.*, 898 A.2d 1234, 1237 (R.I. 2006), it has recently affirmed that the "case or controversy" limitation on judicial power is *implicit* in the very notion of judicial power itself.[6] And the Court's first affirmation that "judicial power" was by its nature limited to deciding cases or controversies was made soon after the state constitution was enacted.

The Court's first exposition on the fundamental structure and meaning of this state's constitution, *G.D. Taylor & Co. v. Place,* addressed the meaning of the term "judicial power" set forth in what is now art. 10. Drawing upon the contours and limitations on judicial power under "the great exemplar of constitutional law, the Constitution of the United States," *id.* at 327, the Court declared:

> The judicial power is exercised in the decisions of cases; * * *
> Indeed, laws and courts have their origin in the necessity of rules

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from general precepts of the doctrine of separation of powers found in Article V of the Utah Constitution.").

[6] The Court is not alone. *See, e.g., Pharmacia Corporation v. Suggs*, 952 So.2d 95, 97 n.4 (Ala. 2005) (Even in the absence of an explicit "case or controversy" requirement the Court is vested "with a limited judicial power that entails the special competence to decide discrete cases and controversies involving particular parties and specific facts.") (quoting *Alabama Power Co. v. Citizens of Alabama*, 740 So.2d 371, 381 (Ala. 1999)); *National Wildlife Federation v. Cleveland Cliffs Iron Company*, 471 Mich. at 615, 628, 684 N.W.2d at 806, 813 (Despite the lack of express case or controversy language, finding the exercise of "judicial power" under the Michigan Constitution requires a genuine case or controversy between parties.); *Yancy v. Shatzer*, 337 Or. 345, 97 P.3d 1161 (2004) (Notwithstanding lack of case or controversy language "we conclude that the framers of the Oregon Constitution, and those who later adopted that constitution, are most likely to have understood the grant of judicial power in the restrained sense espoused in the early Supreme Court cases – that is, an authority limited to adjudication of an existing controversy."). *See also Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 444 (Tex 1993) (Even in the absence of specific "case or controversy" language, "standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law[.]").

> and means to enforce them, to be applied in cases and controversies within their jurisdiction; and *our whole idea of judicial power is, the power of the [courts] to apply the [law] to the decision of those cases and controversies.*

4 R.I. at 327 (emphasis added). In *National Wildlife Federation,* the Michigan Supreme Court concluded that the explicit "case or controversy" clause in the federal constitution "does not *define* judicial power; rather it defines what *part* of the judicial power within the United States belongs to the federal judiciary, with the remaining part belonging exclusively to the state judiciary." *Id.* at 626-27, 684 N.W.2d at 813. The majority concluded, as this Court did in *Taylor*, that the term "judicial power" as used in its state constitution was the same "judicial power" as in the federal constitution – and the same "judicial power" that "has informed the practice of both federal and state judiciaries for centuries." *Id.* at 627-28, 684 N.W.2d at 813. In a similar vein one commentator has asserted that, "[a]lthough the words 'case and controversy' undoubtedly carried the connotation of judicially resolvable disputes, the language in Article III that most directly imposed on the federal courts what we now call the 'case or controversy' requirement *was the phrase 'judicial power.'*" William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal. L. Rev. 263, 267 (1990) (emphasis added). Fletcher argues that "[c]ontemporary authorities saw the need to act 'judicially' as a genuine limitation on the power of the federal courts, performing a role similar to that of the 'case or controversy' limitation today[,]" and contemporary state courts generally shared the federal view of what was, and what was not, an exercise of "judicial power." *Id.*

Since *Taylor* this Court has continued in modern times to embrace the idea that the case or controversy limitation is inherent in "our whole idea of judicial power." *See, e.g., State v. Lead Industries Association, Inc.*, 898 A.2d at 1237; *In re Stephanie B.*, 826 A.2d 985, 989 (R.I.

2003); *Sullivan v. Chafee*, 703 A.2d 748, 752 (R.I. 1997). And the Court has characterized the case or controversy requirement as the "logical underpinning of judicial power" and a "functional limitation" on judicial review. 898 A.2d at 1238. As a limitation on judicial review and the exercise of judicial power, it is a manifestation of the constitutional separation of powers and reflects a cautious limiting of the powers of an essential, but "unelected, unrepresentative judiciary[.]" *Elk Grove Unified School District v. Newdow*, 524 U.S. 1, 11, 124 S.Ct. 2301, 2308, 159 L.Ed.2d 98 (2004) (quoting *Allen,* 468 U.S. at 750, 104 S.Ct. 3315). These precedents establish that the existence of a genuine, actual case or controversy is central, and essential, to the constitutional meaning of "judicial power" under the state constitution, and thus to the constitutional exercise of that power. And the core ingredient of the case or controversy limitation is a litigable dispute between parties asserting adverse legal interests.

B.) A justiciable case or controversy requires a dispute between parties with adverse legal interests.

The "honest and actual antagonistic assertion of a right" is essential to the integrity of the judicial process and "indispensable to adjudication," *United States v. Johnson*, 319 U.S. 302, 305, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943), and the questions historically viewed as capable of resolution by the judicial power are limited to those presented in an adversary context. *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438, 1452 (2006) (citing *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968)). That requirement ensures the "concrete adverseness which sharpens the presentation of issues upon which [a] court so largely depends." *Id.* at 1453 (citing *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed. 663 (1962)); *see also Associated Builders & Contractors of Rhode Island, Inc. v.*

Department of Administration, 787 A.2d 1179, 1185 (R.I. 2002) (requiring "concrete adverseness" to invoke the judicial power); *Vose v. Rhode Island Brotherhood of Correctional Officers*, 587 A.2d 913, 915 n. 2 (R.I. 1991) ("Litigation will be confined to those appropriate situations where the litigant's concern with the subject matter evidences a real adverseness[.]"). Only a dispute that is definite and concrete, because it will affect the legal relations of parties having adverse legal interests with respect to the issue in dispute, constitutes a case or controversy upon which courts are constitutionally empowered to act and exercise "judicial power." *Medimmune v. Genetech, Inc.*, 127 S.Ct. 764, 771 (2007).

While the justiciability of a matter before a court – determining whether it is within the judicial power and appropriate for judicial exposition, *see Yancy*, 337 Or. At 349, 97 P.3d at 1163, involves a host of considerations such as the standing, mootness and ripeness doctrines, *see Lead Industries Association, Inc.*, 898 A.2d at 1238, the single fundamental and unchangeable core element of each of these doctrines, and of justiciability itself, is an "actual and substantial controversy between parties having adverse legal interests." *See Yancy*, 337 Or. at 349, 97 P.3d at 1163. Justiciability and the exercise of judicial power are premised on the core requirement "that there be an actual controversy among parties to the dispute [and] . . . that the interests of the parties be adverse[.]" *Statewide Grievance Committee v. Burton*, 282 Conn. 1, 7, 917 A.2d 966, 971 (2007). *Accord, Ex Parte Bridges*, 925 So.2d 189, 192 (Ala. 2005) ("A controversy is justiciable when there are interested parties asserting adverse legal claims[.]"); *East Beach Properties, Ltd. v. Taylor,* 250 Ga. App. 798, 802, 552 S.E.2d 103, 107-08 (2001) ("[F]or a controversy to justify the making of a declaration, it must include a right claimed by one party and denied by the other[.]"); *Gwin v. Motor Vehicle Administration,* 385 Md. 440, 453, 869 A.2d 822, 829 (2005) ("[T]his Court has defined a justiciable controversy as one wherein

there are interested parties asserting adverse claims[.]"); *Associated Builders and Contractors v. Wilbur*, 472 Mich. 117, 125, 693 N.W.2d 374, 379 (2005) ("[An] issue is not justiciable [if] it does not involve a genuine live controversy between interested persons asserting adverse claims[.]"). That requirement for the exercise of judicial power under the state constitution - a genuine controversy between competing adverse claims - does not exist here.

C.) The Court has no constitutional jurisdiction to resolve the certified question because it does not present a justiciable case or controversy between parties with adverse legal interests.

This Court has been asked to "advise" the Family Court trial justice and the parties to the divorce action whether the Family Court "[m]ay . . . 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[.]" Amicus curiae uses the word "advise" deliberately, because neither Chambers nor Ormiston have "adverse legal interests" with respect to the certified question, and it therefore does not constitute the type of case or controversy that is constitutionally required for the exercise of the "judicial power" conferred by art. 10, sec. 1.

Neither party has argued against nor attacked in any way the authority of the Family Court to recognize the Massachusetts same-sex marriage for the purposes of granting a divorce. Neither party has asserted the Family Court's recognition of the marriage and its exercise of jurisdiction is adverse to their interests or will cause them legal injury. The certified question is, quite plainly, a request for an advisory opinion on whether this Court would, as a conflicts of law and full faith and credit matter, hold that Rhode Island would recognize a same-sex marriage solemnized in Massachusetts for the purpose of a divorce in the Rhode Island Family Court, *if that question were to be raised in some subsequent litigation.* It is the quintessential request for

"an opinion advising what the law would be under a hypothetical state of facts," *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1939), if it were to be litigated in a future case. Its sole purpose is to provide Chambers, who originally requested certification, with advice from this Court that if she obtains a divorce today, it will not be affected or disrupted tomorrow if some other party one day contests whether Rhode Island should recognize such a marriage. That advice, however, is not within the grant of judicial power contemplated by the state constitution. *Lead Industries Association, Inc.*, 898 A.2d at 1238 ("[W]e have concluded that this Court will not issue advisory opinions or rule on abstract questions.").[7]

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[7] Nor is it necessary. Chambers supported certification to this Court by asserting: "An answer to this question would help to *resolve uncertainty that may arise in the future*, in this jurisdiction or elsewhere, as to the Family Court's power to enter the respective decrees of divorce that are sought by the parties." (Chambers Mem. at 15) (emphasis added). Chambers is apparently concerned that the issue might be litigated – by adverse parties – in a later case, and that a decision that Rhode Island would not recognize a same-sex marriage from another state would subject any divorce decree entered for her to collateral attack.

That concern is unwarranted, however, because whether a motion to reopen the judgment is made under Rule 60(b)(6), or in some independent legal action, based on a subsequent change in the law, that change cannot affect a prior final judgment. As the First Circuit has noted "the case law is very hostile to using a mistake of law, still less a *change* in state common law, as grounds for a motion to reopen a final judgment under Rule 60(b)(6)." *Biggins v. Hazen Paper Company*, 111 F.3d 205, 212 (1st Cir.), *cert. denied*, 522 U.S. 952, 168 S.Ct. 373, 139 L.Ed.2d 296 (1997) (emphasis in original); *accord Kansas Public Employees Retirement System v. Reimer & Kogan Associates, Inc.*, 194 F.3d 922, 925 (8th Cir. 1999) ("Generally, a change in the law that would have governed the dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance [sufficient to reopen a judgment under Rule 60(b)(6)].") (numerous citations omitted). The rationale for this rule is that "the common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims. The finality of judgment protects against the kind of retroactive lawmaking." 111 F.3d at 212.

Similarly, a divorce decree finally entered for Chambers and Ormiston would be protected from an independent, non-Rule 60(b) collateral attack by the doctrine of res judicata. "The general rule . . . throughout the nation, is that changes in the law after a final judgment do not prevent the application of res judicata and collateral estoppel, even though the grounds on which the decision was based are subsequently overruled." *Precision Air Parts, Inc. v. Avco*

This Court has always recognized that the judiciary's authority "is limited to resolving clear and imperative issues actually raised by the parties[,]" and courts must act "within the confines and authority that exist for the purpose of deciding *live disputes involving flesh and blood legal problems*[.]" *Santurri v. DiPietro*, 818 A.2d 657, 661 (R.I. 2003) (emphasis added).

> The rationale behind limiting a [court] to consideration of those claims raised by the parties is to ensure that any final judgment will proceed from a factual and legal analysis of the actual *dispute* presented, and to avoid hypothetical rulings on matters extraneous to *the real source of contention between the litigants.*

Id. (emphasis added). Although this Court has not explicitly stated this rule as a constitutional one, it is consistent with the constitutional requirement of a case or controversy involving parties with adverse legal interests. The certified question is not in dispute; it is not "the real source of contention between the litigants"; and it has not been "raised" by the parties in any judicially meaningful way because it has not been raised in an adversarial context.

To answer the question the Court will not have the benefit of adversarial argument, briefing or positions by persons with standing to make the argument here and now, and in this matter. Not only will the Court have to answer the question and address any subsidiary issues without the benefit of adversarial argument by the parties, it will have *to choose what specific*

Corporation, 736 F.2d 1499, 1503 (11th Cir. 1984) (numerous citations omitted); *accord, Lobato v. Taylor*, 70 P.3d 1152, 1166 (Colo. 2003) ("The application of res judicata is not thwarted simply because a prior final ruling was based on law subsequently overruled."); *Gowan v. Tully*, 45 N.Y.2d 32, 36, 369 N.E.2d 177, 179, 907 N.Y.S.2d 650, 652 (1978) ("It is settled law, however, that the conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law."). As the United States Supreme Court has explained: "[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgment, consequences which it was the very purpose of the doctrine [of res judicata] to avert." *Federated Department Stores, Inc. v. Moite*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981).

Nor could the General Assembly enact legislation that would effectively reopen a final judgment previously entered. *See G.D Taylor & Co. v. Place*, 4 R.I. 324 (1856).

issues to raise to properly answer the certified question. That is more akin to giving advice to a client than it is adjudicating a dispute.

If the Court is presented with adversarial position and argument on the question at all, it will come from strangers to the litigation with no direct and immediate legal rights or interests at stake. Indeed, it is likely that precisely because the actual parties to the case do not take adverse positions on the legal issue presented by the certified question, that the Court invited amicus curiae participation, extending specific invitations to several elected officials from the political branches of government – "[t]he Governor, the Attorney General, the Speaker of the House of Representatives, the President of the Senate," – as well as "all interested persons and/or organizations[,]" hoping, or perhaps presuming, that amici would raise issues not raised by the parties and take adverse positions on those issues. That invitation, however, only serves to highlight the lack of adversarial positioning by the parties, and more importantly, amicus curiae cannot transform a non-adversarial proceeding into an adversarial one. As the First Circuit Court of Appeals has recognized:

> Amici are allowed to participate on appeal in order to assist the court in achieving *a just resolution of issues raised by the parties.* We know of no authority which allows an amicus to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore.

Lane v. First National Bank of Boston, 871 A.2d 166, 175 (1st Cir. 1989) (emphasis added).[8]

Simply put, amici cannot raise issues not raised by the parties below, and without the

[8] *Accord, Rhode Island Department of Environmental Management v. United States*, 304 F.3d 31, 40 (1st Cir. 2002) ("As a general matter, we do not consider arguments advanced only by an amicus[.]"); *United States v. Sturm, Ruger & Company*, 84 F.3d 1, 6 (1st Cir. 1996) ("While amicus briefs are helpful in assessing litigants' positions, an amicus cannot introduce a new argument into a case."); *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 n. 22 (1st Cir. 1994) ("According to well established authority, amici can do no more than assist the

presence of adverse parties to raise an issue it is considered waived. *DIRECTV Inc. v. Pepe*, 431 F.3d 162, 164 n.2 (3rd Cir. 2005). A dispute between amicus curiae does not create a case or controversy for constitutional purposes, nor does a dispute between amici and a party.

Answering the certified question in the posture of this case will not be resolving a dispute between the parties to the action but will instead be considering the competing issues and arguments of the political branches of government, and various interest groups and interested persons, as to the public policy of this state concerning the meaning of marriage, the societal purposes served by marriage, and whether those purposes are further served or harmed by recognizing a marriage from a state permitting same-sex couples to enter that legal relationship. That is not dispute resolution, that is public policy-making of the sort the legislative branch might, and should engage in. It is not the exercise of "judicial power," a power intrinsically and implicitly intended to resolving actual disputes between litigants with adverse legal interests. "Unlike their counterparts in the political branches, judges are expected to refrain from . . . committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide 'individual cases and controversies' on individual records[.]" *Republican Party of Minnesota v. White*, 536 U.S. 765, 804, 122 S.Ct. 2528, 2550, 153 L.Ed.2d 694 (2002)

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court in achieving a just resolution of issues raised by the parties."); *State Department of Transportation and Public Facilities v. Fairbanks North Star Borough*, 936 P.2d 1254, 1262 n. 4 (Alaska 1997) ("It is well settled that courts will not consider issues raised by amici curiae which are not raised by the parties."); *Professional Engineers in California Government v. Kempton*, 40 Cal.4th 1016, 1047, 155 P.3d 226, 246, 56 Cal. Rptr. 814, 837 n. 12 (2007) ("[I]t is the general rule that an amicus curiae accepts the case as he finds it and may not launch out upon a juridicial expedition of its own unrelated to the actual appellate record[.]"); *Alliance Home of Carlisle, PA v. Board of Assessment Appeals*, 919 A.2d 206, 221 n. 8 (2007) ("[I]t is settled that an amicus cannot raise issues that have not been preserved by the parties."); 16A *Fed. Prac. & Proc. Juris. 3d* §3975.1 (2007 update) ("In ordinary circumstances, an amicus will not be permitted to raise issues not argued by the parties."). The exception to this rule is where amici have raised an issue of jurisdictional dimensions, 304 F.3d at 40, as this amicus curiae has done here.

(Ginsberg, J., dissenting) (internal citation omitted). The constitutional term "judicial power" as used in art. 10, sec. 1 "limits the business of . . . courts to questions presented in an adversary context and a form historically viewed as capable of resolution through the judicial process." *See Flast v. Cohen*, 392 U.S. at 95, 88 S.Ct. at 1950.

The certified question plainly does not present an individual "case or controversy" as that term has historically and constitutionally been understood. Although this Court has on occasion stated in the context of the question of mootness that "whenever a court acts without the presence of a justiciable case or controversy, its judicial power to do so is at its weakest ebb[,]" *see, e.g.*, *In re Christopher B.*, 823 A.2d 301, 319 (R.I. 2003); *Cicilline v. Almond*, 809 A.2d 1101, 1105 (R.I. 2002); *Sullivan v. Chafee*, 703 A.2d at 752, amicus curiae respectfully suggests that when an issue or matter does not constitute a justiciable controversy at the lawsuit's point of origin, because the parties' legal interests are not adverse and the issue is not in controversy between them, the judicial power is not simply "at its weakest ebb," it is non-existent. With respect to the constitutional exercise of judicial power, former Chief Justice William Rehnquist eloquently wrote of the importance of the cautious and self-aware exercise of that not unlimited power:

> Much as "Caesar had his Brutus; Charles the first his Cromwell," Congress and the States have this Court to ensure that their legislative Acts do not run afoul of the limitations imposed by the United States Constitution. But this Court has neither a Brutus nor a Cromwell to impose a similar discipline on it. While our "right of expounding the Constitution" is confined to "cases of a Judiciary Nature," we are empowered to determine for ourselves when the requirements of Art. III are satisfied. Thus, "the only check upon our own exercise of power is our own sense of self-restraint."

Orr v. Orr, 440 U.S. 268, 300, 99 S.Ct. 1102, 1122, 59 L.Ed.2d 306 (1979) (Rehnquist, J., dissenting (citations omitted)). This Court has itself dutifully noted that when an issue is not

justiciable, "[t]he result is that courts must sometimes forego deciding issues of public import." *See McKenna v. Williams*, 847 A.2d 217, 226 (R.I. 2005) (citing *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301, 2311-12, 159 L.Ed.2d 98 (2004)). This is an occasion for the exercise of such restraint.

III.) The public importance of, or interest in, the certified question should not be a basis for addressing its merits.

A.) The state constitution admits of no public interest or importance exception to the case or controversy requirement of adverse parties with adverse legal interests.

Standing, like a controversy between parties with adverse legal interests, is also an aspect of justiciability, *Lead Industries Association, Inc.*, 874 A.2d at 225 (quoting *Flast v. Cohen*, 392 U.S. at 98, 88 S.Ct. 1942), originating in the case or controversy requirement. *DaimlerChrysler Corp.*, 126 S.Ct. at 1861, 1867. Standing presumes, however, the existence of a controversy between parties with adverse legal interests, and is focused on whether the party raising the issue has a *sufficient* legal interest to invoke the court's judicial power to adjudicate the issue. The test for standing in Rhode Island is the same as it is in the federal system, the party asserting the claim must allege an injury-in-fact to a legally cognizable and protectable interest that is concrete and particularized, and actual and imminent, not conjectural or hypothetical. 874 A.2d at 225. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Neither Chambers nor Ormiston has claimed they will suffer any such injury if the Family Court exercises jurisdiction over their divorce complaints.

In the federal system the requisite elements of standing to invoke the authority of a federal court are "an essential and unchanging part of the case-or-controversy requirement[,]"

126 S.Ct. at 1861 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130), and standing may not be assumed for the purpose of deciding the merits. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 120 (1998) ("We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."). Notwithstanding the seemingly clear language of *Taylor v. Place*, finding that the case or controversy requirement is an implicit and intrinsic characteristic of the judicial power under the Rhode Island Constitution, this Court has historically treated standing as a prudential, rather than constitutional requirement that can be waived or assumed for issues of substantial public interest or immediate and compelling public interest.[9]

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[9] *See, e.g., Meyer v. City of Newport*, 844 A.2d 148, 151 (R.I. 2004) ("We are not persuaded that the issues raised in this case are of sufficient importance to warrant an *exception to the standing requirement*."); *Associated Builders & Contractors of Rhode Island, Inc. v. Department of Administration*, 787 A.2d 1179, 1186 (R.I. 2002) ("Because standing existed 'we need not, as we have done on rare occasions, *relax our standing requirements* because of *substantial public interest* in having a matter resolved.'"); *Retirement Board of Employees' Retirement System of Providence v. City Council of Providence*, 660 A.2d 721, 726 (R.I. 1995) ("Because these consolidated cases address issues of *substantial importance* to the members of the retirement system and, indeed, to all taxpayers, we *overlook* claims concerning the retirement board's lack of capacity as well as the individual plaintiff's lack of standing."); *Burns v. Sundlun*, 617 A.2d 114, 116 (R.I. 1992) ("The plaintiff has failed to allege his own personal stake in the controversy that distinguishes his claim from the claims of the public at large. * * * This conclusion does not, however, require us to dismiss plaintiff's case. On rare occasions this court has *overlooked the standing requirement* to determine the merits of a case of *substantial public interest*."); *Kass v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 567 A.2d 358, 359 n. 1 (R.I. 1989) ("We *assume*, without deciding, that plaintiff-taxpayer Kass has standing to bring this suit owing to the '*substantial public interest*' in resolving this issue."); *Gelch v. State Board of Elections*, 482 A.2d 1204, 1207 (R.I. 1984) ("This conclusion is reached in light of this court's past holdings *conferring standing liberally* when matters of *substantial public interest* are involved."); *Blackstone Valley Chamber of Commerce v. Public Utilities Commission*, 452 A.2d 931, 933 (R.I. 1982) ("This court has, on rare occasions, *overlooked the question of standing* and proceeded to determine the merits of a case because of *substantial public interest* in having a matter resolved before the question presented became moot."); *Berberian v. Solomon*, 122 R.I. 259, 262, 405 A.2d 1178, 1180-81 (1979) ("Although

Exercising "judicial power" under art. 10, sec. 1 in the absence of standing, or without first determining that it exists, however, is incompatible with *Taylor's* conclusion that "our whole idea of judicial power is, the power of the [courts] to apply the [law] to the decision of cases and controversies." 4 R.I. at 327. Nor is the public importance exception to the standing requirement compatible with recent pronouncements of the Court, for example, that the existence of a justiciable case or controversy is a "functional limitation to judicial review" and "a logical underpinning of judicial power[,]" 898 A.2d at 1238; that "[b]y definition, a justiciable [case or] controversy must contain a plaintiff who has standing to pursue the action[,]" *Meyer v. City of Newport*, 844 A.2d 148, 151 (R.I. 2004); and finally that "[s]tanding is a constitutional prerequisite to suit in both federal courts and state courts." *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 792 n. 5 (R.I. 2005).

While the existence of adverse parties asserting legal interests is a basic element of injury-in-fact standing, the Court need not necessarily take this opportunity to expressly declare that injury-in-fact standing is a constitutional prerequisite to, and a limitation on, the exercise of

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in a relatively few instances we have *resolved reservations about standing* in order to *assume jurisdiction* because of serious substantive questions of immediate and compelling public interest, we have generally observed the rule that a justiciable controversy between the parties is basic to the court's assumption of jurisdiction."); *Rhode Island Ophthalmological Society v. Cannon*, 113 R.I. 16, 25, 317 A.2d 124, 129 (1974) ("This court has, on occasion, *overlooked the question of standing* and proceeded to determine the merits of a case because of the *substantial public interest* in having the matter resolved."); *Sennott v. Hawksley* 103 R.I. 730, 241 A.2d 286, 287 (1968) ("Because there was a *substantial public interest* in the adoption or rejection of a new constitution, we felt warranted, *without first resolving the standing question*, to determine whether in enacting the pertinent resolutions, the constitutional convention acted within its authority."); *Lamb v. Perry*, 101 R.I. 538, 540, 225 A.2d 521, 522 (1967) ("We take this occasion to comment on the motivation of this court in answering the questions certified in *Moore v. Langton* and *Sweeney v. Notte*[, n]otwithstanding reservations as to the [standing] of the respective plaintiffs and doubts as to whether those cases were properly before us procedurally, we nevertheless *assumed* jurisdiction because of overriding serious substantive questions being of *immediate and compelling interests*."). (all emphases added).

judicial power under the state constitution. But it should expressly hold that the existence of an actual dispute or controversy between litigants having adverse legal interests is such a prerequisite, because that adversity is "an essential and unchanging part of the case-or-controversy requirement" for the exercise of "judicial power." Even where the Court has acted in the absence of a plaintiff with injury-in-fact standing, the Court has still had before it adverse parties pressing adverse legal interests. Relaxing the requirement of standing to resolve legal questions where there is at least adversity between the parties to the suit, if not injury-in-fact standing, at least resembles the exercise of judicial power in the historical dispute resolution tradition. For a court to "relax" the requirement of a dispute between parties with adverse legal interests, however, is to abandon dispute resolution altogether, and to abandon the core constitutional limitation on the exercise of judicial power designed to separate it from the executive and legislative powers. Amicus curiae asserts the state constitution does not permit a "public importance" exception that forgoes the existence of adverse parties – the very core and premise of a constitutionally required case-or-controversy. To invoke such an exception would dismantle the fundamental and historical underpinning of genuine and constitutionally contemplated judicial restraint, allowing the judicial branch to become involved in an expanded range of public policy disputes, *National Wildlife Federation*, 471 Mich. at 640 n. 28, 684 N.W.2d 820 n. 28, and to "overplay [the Court's] proper role in the theater of Rhode Island government." *DeSantis v. Prelle*, 891 A.2d 873, 881 (R.I. 2006).

B.) Applying a public importance exception to the case or controversy requirement in order to answer the certified question would require the Court to construct a hypothetical dispute.

Consideration of the multiple issues that the Court would have to raise on its own, or permit amicus curiae to raise, and then decide in order to answer the certified question, demonstrates the hypothetical nature of the case or controversy that would have to be constructed to do so.

Since the certified question does not go to the subject matter jurisdiction of the Family Court, but rather to whether the court should be permitted to exercise its jurisdiction, the Court must initially assume a hypothetical argument by the defendant (notwithstanding she filed a counterclaim for divorce) that the Family Court should not grant a divorce, or enter any orders attendant to such a decree, because Rhode Island law should not recognize the Massachusetts marriage.

1.) Answering the certified question would involve the Court in a declaration of the state's public policy on same-sex marriage, not to resolve a dispute between the litigants, but as an abstract matter to resolve a dispute among the political branches of government and various public and private interest groups.

With respect to determining whether to recognize a marriage from another state, Rhode Island presently follows the rule of *lex loci celebrationis* – "the capacity or incapacity to marry depends on the law of the place where the marriage is celebrated, and not on that of the domicile of the parties." *Ex Parte Chase*, 26 R.I. 351, 58 A. 978, 979 (1904); *see First Restatement of Conflicts of Laws*, §121 (1934). Since that rule would defeat the hypothetical defendant's objection to the divorce proceedings, she would have to rely on the exception to that general rule,

which provides that "if a marriage is so odious by the common consent of nations, or if its influence is thought dangerous to the fabric of society, so that it is *strongly against the public policy of the jurisdiction*, it will not be recognized there, even though valid where solemnized." 58 A. at 980.

But the hypothetical defendant might choose a slightly different legal tack. She may advocate a change in state conflicts law. She might assert that Rhode Island should adopt the conflicts rule of the *Restatement (Second) of Conflict of Laws*, §283 (1971), which provides that "the validity of the marriage will be determined by the law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage[.]" Section 283(1). Given the domicile of Chambers and Ormiston both before and after the marriage, that rule would arguably point to application of Rhode Island law. While the Restatement (Second) approach would also call for this Court's determination of Rhode Island law with respect to recognition of same-sex marriage – which would entail an assessment of the state's public policy on same-sex marriage – the hypothetical defendant's burden may be less onerous. She would only have to demonstrate that the state's public policy does not support same-sex marriage to defeat the exercise of jurisdiction, but she would not have to demonstrate it is considered "odious by the common consent of nations" or "strongly against" the State's public policy.

However it is viewed, the initial aspect of the hypothetical controversy would involve the Court assuming certain arguments would be made or not made by the defendant – arguments she has in fact has not made – in order to reach a decision on the state's public policy on same-sex marriage – at least with respect to recognizing such a marriage for the purposes of a divorce complaint. But in the absence of a genuine justiciable case or controversy involving a dispute between parties with adverse legal interests, determining that state public policy is not a

governmental power or responsibility of the judiciary. In the absence of a justiciable case or controversy it is the governmental power and responsibility of the legislature.

2.) The certified question may also involve the Court in addressing premature and abstract questions of constitutional law not raised by the parties to the litigation.

Even if this Court were to make the necessary assumptions concerning claims that might be made by the hypothetical defendant in order to undertake a public policy analysis and conclude Rhode Island would not recognize an out-of-state marriage, in order to provide complete and thorough advice with respect to the certified question the Court would also have to assume the hypothetical plaintiff would counter by asserting an argument she has not made, that failing to recognize the Massachusetts marriage violates the Full Faith and Credit Clause of the United States Constitution. That clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect Thereof." Art. IV, §1.

The Full Faith and Credit Clause substituted a constitutional command for the principle of comity states previously exercised toward one another as a matter of discretion, and altered the prior status of the states as independent sovereigns. *Estin v. Estin*, 334 U.S. 541, 546, 68 S.Ct. 1213, 1217, 92 L.Ed. 1561 (1998). Under that clause the requirement to recognize a *judgment* by a court in one state, with adjudicatory authority over the subject matter and persons governed by the judgment, is exacting, but it is less demanding with respect to recognizing or not recognizing another state's laws under a choice of law decision. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 494, 123 S.Ct. 1683, 1687, 155 L.Ed.2d 702 (2003). Under the Full Faith and

Credit Clause the forum state is not required to apply the foreign state's law if it would violate the forum's own legitimate public policy. *Id.* at 497, 123 S.Ct. at 1689; *accord, Baker v. General Motors Corporation*, 522 U.S. 222, 233, 118 S.Ct. 657, 664, 139 L.Ed.2d 580 (1998) ("A court may be guided by the forum State's public policy in determining the *law* applicable to a controversy.").

With respect to choice of law issues, the United States Supreme Court has recognized that a set of facts giving rise to a particular issue within a lawsuit may justify, in constitutional terms, application of the law of more than one jurisdiction. *Allstate Insurance Company v. Hague*, 449 U.S. 302, 307, 101 S.Ct. 633, 637, 66 L.Ed.2d 521 (1981). A state's choice of its own law in those situations only violates the Constitution if the state has "no significant contact or significant aggregation of contacts, creating state interests with the parties and the occurrence or transaction." *Id.* at 308, 101 S.Ct. at 638. Thus, if this Court determined Rhode Island public policy prevented recognition of the Chambers-Ormiston marriage, and if the hypothetical plaintiff objected to application of Rhode Island public policy as a violation of the Full Faith and Credit Clause, the Court would have to address the constitutional question of Rhode Island's interest in refusing legal dissolution of the out-of-state same-sex marriage.

The Court's resolution of that hypothetical dispute would raise the spectre of a second constitutional issue. The hypothetical defendant may respond to the Full Faith and Credit argument by asserting that, if the Court determined Full Faith and Credit required recognition of the marriage, the federal Defense of Marriage Act (DOMA), 28 U.S.C. §1738(C), relieves the state of any such constitutional Full Faith and Credit obligation. That federal statute provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe

> respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. §1738(C), Section 2. Section 2 of DOMA is effectively a congressional dispensation from the Full Faith and Credit Clause, stating that no state is required to give full faith and credit to another state's determination that "a relationship between persons of the same sex . . . is treated as a marriage." *Smelt v. County of Orange*, 447 F.3d 673, 683 (9th Cir. 2006). It is intended to give states the right "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 of homosexual couples to acquire marriage licenses." *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 101, 637 S.E.2d 330, 337 (2006) (quoting H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.A.N. 2905, 2906) (emphasis added).

The constitutionality of that statute itself, however, has been called into question under a variety of constitutional arguments, including the authority of Congress to "override" the Full Faith and Credit Clause, and the plaintiff in this hypothetical dispute who wants the Family Court to recognize the marriage as a matter of Full Faith and Credit, may raise one or more of those constitutional claims.[10]

If this Court determines to decide whether a decision to apply Rhode Island law over Massachusetts law is constitutional under the Full Faith and Credit Clause, or to determine the

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[10] *See generally* Mark Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 Minn. L.Rev. 915 (2006) (analyzing various constitutional arguments); Stanley E. Cox, *Nine Questions About Same-Sex Marriage Conflicts*,

constitutionality of DOMA under any or all of its alleged constitutional infirmities, it would, however, be violating what it has called a "doctrine more deeply rooted than any other in the process of constitutional adjudication, . . . that we ought not pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Lead Industries Association, Inc.*, 898 A.2d at 1238 (quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 570 n. 34, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947)). This Court has only just recently recognized that, "[i]ndeed in origin and in practical effects, though not in technical function," that rule "is a corollary offshoot of the case and controversy [requirement]" - a requirement that does not exist here. *Id.* at 1239 (quoting *Rescue Army*, 331 U.S. at 572, 67 S.Ct. 1409). And it has also recognized that "a contrary policy favoring hasty review of constitutional questions would be ill-advised, '[f]or premature and relatively abstract decision, which such a policy would be most likely to promote, have their part * * * in rendering rights uncertain and insecure." *Id.* Simply put, this Court has been firmly committed to the proposition that "[n]either this Court nor the Superior Court should decide constitutional issues unless it is absolutely necessary to do so[,]" particularly, and especially, where the issue is not "raised or argued by the parties." *In re Brown*, 903 A.2d 147, 151 (R.I. 2006).

Here neither party has "raised" any constitutional issues in any judicially meaningful way, and the parties have not articulated any adverse legal interests or disputes on any constitutional issue. The constitutional issues that may or may not be implicated by the certified question are not only unnecessary to answer in the context of this case, but because they have not arisen in a

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40 New Eng.L.Rev. 361 (2006); Ralph U. Witten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255 (1998).

live dispute between parties with adverse legal interests, they are, more importantly, not justiciable questions the Court has the power to decide under the state constitution.

Conclusion

To answer the certified question this Court would have to abandon a host of attributes defining judicial power, attributes that flow from the core requirement for its exercise – an actual controversy on an issue between parties with adverse legal interests.

The Court would have to abandon its deeply rooted commitment to avoid unnecessarily deciding constitutional issues; it would have to abandon its commitment to deciding clear and imperative issues actually raised by the parties; and it would have to abandon the adversarial method for judicial decision-making. Any decision by the Court on the certified question would be an "advance expression[ ] of legal judgment upon issues which remain unfocused" and do not arise" from "a clash of adversary argument . . . embracing conflict and demanding interests," *Casino* II, 885 A.2d at 714, and an abandonment of the "logical underpinning of judicial power[,]" *Lead Industries Association, Inc.* 898 A.2d at 1238, that is, a case or controversy between disputing parties with adverse legal interests. That the Court may not constitutionally do.

Nor does the Court need to do it. The Family Court is a statutory court with a subject matter jurisdiction that is legislatively defined. If the democratically elected General Assembly determines that the remedies and protections of the Family Court should not be extended to validly married same-sex couples who are domiciled in this state, it may, subject to the federal and state constitutions, amend the statutory jurisdiction of that court accordingly. And if the General Assembly enacts such legislation, and if a resident and domiciliary of this State, married

to someone of the same sex, is denied access to the Family Court and the remedies of and protections of the State's divorce laws, and if that person claims that denial of access violates certain provisions of the state or federal constitutions, a justiciable case or controversy will be presented and the Court will have the constitutional authority to decide those issues and afford actual relief to the litigant if it is warranted.

Alternatively, some future divorce defendant who is married to a person of the same sex may determine he or she does not want a divorce, or that they want their own complaint adjudicated in another state. That defendant may raise some or all of the issues described here and implicated in the certified question, and those issues will then be presented with the adversity essential to the Court's constitutional authority to decide them.

These two alternate scenarios represent the constitutional design for governing, while the scenario represented by the certified question does not. For all the above-stated reasons, amicus curiae respectfully suggests the Court should hold that a case or controversy between adverse parties asserting adverse legal interests is a constitutional prerequisite to the exercise of judicial power under art. 10, sec. 1 of the state constitution, and that the certified question does not present a justiciable case or controversy that may be adjudicated by this Court or by the lower court. The matter should, therefore, be remanded to the Family Court to adjudicate the parties' complaints for divorce from the bonds of matrimony.

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PROOF OF SERVICE

I hereby certify that this 26 day of July, 2007, I served the within document by mailing copies of same to **Nancy A. Palmisciano, Esq.**, 665 Smith Street, Providence, RI 02908; and **Louis M. Pulner, Esq.**, 369 South Main Street, Providence, RI 02903.

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