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

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

ON A CERTIFIED QUESTION OF LAW

BRIEF OF *AMICI CURIAE* FAMILY RESEARCH COUNCIL AND REVEREND LYLE MOOK

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INTEREST OF AMICI

FAMILY RESEARCH COUNCIL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

REVEREND LYLE MOOK, as a resident and citizen of Rhode Island, is personally committed to strengthening traditional family values, which includes protecting the institution of marriage in Rhode Island as defined as a union between one man and one woman.

INTRODUCTION AND STATEMENT OF FACTS

Marriage, whether in Rhode Island, in the United States of America, or in America's common law heritage stretching back to England and throughout Western civilization, has never included a relationship between persons of the same sex. Marriage developed as a social institution before it became a legal one, arising from the natural complementary and procreative capacity of the two sexes. For any governmental authority - whether this Court or a local government or a state legislature - to recognize same-sex relationships as entitled to bear the name "marriage," is to change the fundamental and commonly-accepted legal meaning of that word. The purported marriage of a man and a woman in another state under conditions which would prevent them marrying in Rhode Island is still structurally a marriage, even if an illicit one. The purported "marriage" of a same-sex couple is simply not a marriage by any recognized definition in Rhode Island law or history.

In its order of May 21, 2007, this Court reiterated the question posed to it by the Family 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?

(Supreme Court Order of May 21, 2007). The question presented is one of comity.[1] The application, or not, of comity is paramount since the Federal Defense of Marriage Act

[1] Comity is generally defined as "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." BLACK'S LAW DICTIONARY 242 (5th ed. 1979). However, as will be explored in this brief, the meaning of comity in Rhode Island goes well beyond this general definition.

does not require that Rhode Island extend full faith and credit to all unions labeled "marriage."[2] Supported by the Rhode Island Attorney General, Chambers and Ormiston contend that comity mandates this Court's recognition of their Massachusetts same-sex "marriage." These *amici* contend that extending comity to a Massachusetts same-sex "marriage," even for the limited purpose of only granting a divorce, will effectively legalize same-sex "marriage" in this state, redefining marriage without appropriate legislative action. Moreover, this Court's adoption of a new choice of law doctrine in 1968 begs the question of whether comity remains as a viable doctrine in Rhode Island, but to the extent that it is, its application is not required and wholly inappropriate in this case.

Massachusetts is a short drive from anywhere in Rhode Island, and Massachusetts courts have specifically authorized the granting of same-sex "marriage" licenses to visiting Rhode Island residents. There is an organized constituency in Rhode Island lobbying to redefine marriage in this state to include same-sex unions.[3] Under these unprecedented circumstances, this Court's extension of comity to a Massachusetts same-sex "marriage" will effectively redefine marriage in Rhode Island without a formal change in Rhode Island law. Rhode Island's single precedent for extending comity to foreign marriages is thoroughly distinguishable from this scenario and cannot responsibly be relied upon to justify legal recognition of the same-sex union sought to be dissolved

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[2] *See* 28 U.S.C. § 1738C (1996).

[3] *See* http://www.marriageequalityri.org/, http://www.glad.org/rights/LGBT_Overview_RI.pdf, and http://www.glad.org/rights/Marriage_Guide_for_RI_Couples.pdf as just a few examples of this coordinated effort.

by the parties here. Unfortunately, this sole authority was incorrectly analyzed by this state's Attorney General, Patrick C. Lynch, in his February 20, 2007 letter to Commissioner Jack R. Warner of the Rhode Island Board of Governors for Higher Education.[4] The Attorney General's February 20, 2007 letter misapplied the precedential value of *Ex Parte Chace* and erroneously concluded that comity to a Massachusetts same-sex "marriage" must be extended. The Attorney General's position should be rejected by this Court.

Recognizing a same-sex union as a "marriage" would be a revolutionary redefinition of the institution, deliberately severing marriage from its accepted meaning in American law and human history. Such a radical judicial redefinition of marriage is not, in any way, required under well-established principles of comity.

[4] *See* http://marriageequalityri.files.wordpress.com/2007/02/2-20-07ag-ltr-to-comm-warner.pdf.

STANDARD OF REVIEW

It is well settled in Rhode Island that questions of law, including questions of statutory interpretation, are reviewed *de novo* by this Court. *Carnevale v. Dupee*, 783 A.2d 404, 408 (R.I. 2001). The interpretation of contracts (*e.g.*, marital contracts) also merits a *de novo* standard of review. *King v. Grand Chapter of Rhode Island Order of Easter Star*, 919 A.2d 991, 999 (R.I. 2007).

ARGUMENT

I. COMITY DOES NOT REQUIRE RHODE ISLAND TO EXTEND THE REMEDY OF DIVORCEMENT TO EVERY RELATIONSHIP LABELED "MARRIAGE."

A. THIS STATE HAS HISTORICALLY EMPLOYED THE LESS RIGOROUS "INTERSTATE GOLDEN RULE" OF COMITY.

Since its early days of existence, the doctrine of comity has contained two primary theories of application—the "interstate golden rule" theory and the theory of vested rights. The theory of vested rights operated as a rigid policy whereby one's laws followed them into other jurisdictions.[5] The operation of this theory gave the host state no discretion or control, oftentimes leaving it impotent to cure injustices. Thus, the theory of vested rights was expressly rejected by this Court[6] in favor of a more flexible, reciprocal rule which provides this Court with broad discretion on its application—the "interstate golden rule." If the doctrine of comity is applicable to the question presented, it is the "interstate golden rule" that will govern this Court's analysis. Both the discretionary and reciprocal nature of the "interstate golden rule" are exclusive and essential factors in this Court's determination of the application of comity.

Centuries ago, a Dutch scholar named Ulrich Huber struggled with what he perceived to be a lack of courtesy among nations and political entities. Huber's primary

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[5] The theory of vested rights bestows vested, transferable rights due to legal occurrences within a sovereign territory. Thereafter, the legal rights and duties thus created followed the parties into whatever forum became the site of the litigation, leaving little room for policy analysis by the situs. Harold G. Maier, THE UTILITARIAN ROLE OF A RESTATEMENT OF CONFLICTS IN A COMMON LAW SYSTEM: HOW MUCH JUDICIAL DEFERENCE IS DUE TO THE RESTATERS OR "WHO ARE THESE GUYS, ANYWAY?", 75 Ind. L.J. 541, 545 (2000).

[6] *See O'Reilly v. New York & N.E.R. Co.*, 19 A. 244, 245 (R.I. 1889).

concern was over private commercialism and international trade.[7] With that in mind, Huber believed that the sovereign acts of one country should be given greater levels of recognition, much like the courtesy that a host would extend to a guest.[8] In other words, legal comity began as a notion which clearly did not offend, but rather enhanced, the policy of the extending jurisdiction. Comity was not mandatory, but more akin to etiquette—a protocol which offended neither the host nor the guest.[9]

Though criticized elsewhere, the concept of comity was employed by Lord Mansfield in the late 1700's and became popular in England,[10] the source of much of our country's jurisprudence, especially amongst its original colonies.[11] In the early 1800's, freshly relieved from its second international war in less than half a century, the United States was quickly faced with issues of international sovereignty and the application of other laws. Apt to addressing these new questions surrounding foreign laws, United States Supreme Court Justice Joseph Story authored *Commentaries on the Conflict of Laws* in 1834. Justice Story's book addressed Huber's theory of comity and etiquette protocol amongst foreign entities. Concerned about whether "justice may be done to us in return," Story's interpretation of comity has been described as an "interstate golden

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[7] Gary B. Born, REMARK, INTERNATIONAL COMITY & U.S. FEDERAL COMMON LAW, 84 Am. Soc'y Int'l L. Proc. 326, 326 (1991); Maier at 545..
[8] Born, at 326.
[9] Joel Richard Paul, IS GLOBAL GOVERNANCE SAFE FOR DEMOCRACY?, 1 Chi. J. Int'l L. 263, 266-67 (2000); Brian Pearce, THE COMITY DOCTRINE AS A BARRIER TO JUDICIAL JURISDICTION: A U.S.-E.U. COMPARISON, 30 Stan. J. Int'l L. 525, 527 (1994).
[10] Paul, at 267.
[11] Maier, at 545.

rule."[12] In other words, do unto the other state regarding their law on X as you would have them do to your law on X.[13]

Not long thereafter, in 1858, this Court first considered the application of comity in Rhode Island. *Olney v. Angell*, 5 R.I. 198 (1858). Comity was not extended in *Olney*, but one year later, this Court adopted the "interstate golden rule" model of comity—that we will extend our courtesies on a particular matter where we want the same courtesies to be reciprocated on the same issue. This was first seen in *In re Jenckes*, 6 R.I. 18 (1859), regarding a statute authorizing a court to hold a material witness for the administration of justice. Though the subject litigation was pending in the State of Massachusetts, not Rhode Island, this Court noted that comity helped "enable [Massachusetts] to administer

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[12] Maier, at 545; Pamela Jones Harbour, DEVELOPMENTS IN COMPETITION LAW IN THE EUROPEAN UNION AND THE UNITED STATES: HARMONY AND CONFLICT, 19-SPG Int'l L. Practicum 3, 9 (2006) ("Comity is the Golden Rule principle applied to sovereigns: do unto others as you would have them do to you."); Steven R. Swanson, ANTISUIT INJUNCTIONS IN SUPPORT OF INTERNATIONAL ARBITRATION, 81 Tul. L. Rev. 395, 404 (2006) ("Comity principles provide pragmatic guidance when the court faces a dispute between two nations; these principles assert the golden rule that states should treat other states as they themselves would wish to be treated."); Harvard Law Review Association, FEDERAL STATUTES AND REGULATIONS, 117 Harv. L. Rev. 439, 447 (2003) ("'grace and comity'--a sort of Golden Rule"); Sharon C. Nelson, TURNING OUR BACKS ON THE CHILDREN: IMPLICATIONS OF RECENT DECISIONS REGARDING THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION, 2001 U. Ill. L. Rev. 669, 691 (2001) ("comity can be analogized to the golden rule—'Do unto others as you would have them do unto you.'").

[13] In its seminal case on federal comity, the United States Supreme Court affirmed the essential aspect of reciprocity in the doctrine of comity:

> [T]here is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

Hilton v. Guyot, 159 U.S. 113, 210 (1895). Reciprocity as an essential aspect of comity was also echoed by Friedrich Juenger and other legal scholars. *See* SUSAN L. STEVENS, COMMANDING INTERNATIONAL JUDICIAL RESPECT: RECIPROCITY AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, 26 Hastings Int'l & Comp. L. Rev. 115, 119-20 (2002).

justice." *In re Jenckes*, 6 R.I. at p. 3. This Court appreciated that, if the roles were reversed, and the litigation was pending in Rhode Island, it would want Massachusetts to hold the witness for Rhode Island's administration of justice. Thus, the application of the "interstate golden rule" was now in full effect in Rhode Island. Subsequently, this Court has consistently applied the "interstate golden rule" of comity, at least up through the early 1900's.[14] The "interstate golden rule" was even codified by the Rhode Island legislature.[15] Thus, Rhode Island has consistently followed the "interstate golden rule" model of comity.

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[14] *Paine v. Schenectady Ins. Co.*, 11 R.I. 411, p. 3 (1877) (extending comity to a New York judgment – Rhode Island wants other courts recognizing its judgments, so Rhode Island will recognize this New York judgment); *Pierce v. Crompton*, 13 R.I. 312, p. 2 (1881) (extending comity to the rights of foreign companies within Rhode Island – Rhode Island wants other courts respecting the rights of its corporations, so Rhode Island will respect the rights of foreign corporations); *Chafee v. Quidnick Co.*, 13 R.I. 442, p. 7 (1881) (extending comity to attorneys from other states, but not expressly licensed in Rhode Island – Rhode Island wants other courts permitting its attorneys the right to be heard, so Rhode Island will extend the same courtesy); *Cross v. Brown*, 19 R.I. 220, 33 A. 147, 153 (1895) (refusing to extend comity to the extinguishment of a debt in another jurisdiction – Rhode Island does not want other courts extinguishing debts owed to its citizens, so Rhode Island will not extinguish debts owed to the citizens of other states); *Mitchell v. People's Sav. Bank*, 20 R.I. 500, 40 A. 502, 504 (1898) (recognizing comity for foreign guardians – Rhode Island wants its guardians to be able to "obtain possession of the estate of his ward without entailing upon that estate the unnecessary expense of a proceeding in equity, or of securing ancillary appointment in the state where the property may be," so Rhode Island will extend the same courtesies here); *Mauran v. Crown Carpet Lining Co.*, 50 A. 387, 388 (R.I. 1901) (discussing comity as between state courts and federal courts – Rhode Island defers to the federal courts on truly federal matters, so the federal courts will defer to Rhode Island courts on truly state matters); *Miller v. Smith*, 58 A. 634, 636 (R.I. 1904) (extending deferential comity to the obligations of corporate stockholders – Rhode Island does not want others treating Rhode Island stockholders unfairly, so Rhode Island will not treat other states' stockholders unfairly); *Hazlett v. Woodhead*, 67 A. 736, 739 (R.I. 1907) (acknowledging the comity extended to a foreign receiver to pursue legal action in Rhode Island – Rhode Island wants its receivers to be able to pursue actions outside of our borders, so Rhode Island will extend the same courtesy).

[15] The two statutes are as follows:

> A nonresident owner . . . owning any foreign vehicle of a type otherwise subject to registration pursuant to this title, may operate or permit the operation of that

B. COMITY IS NOT MANDATORY.

Emphasizing the discretionary nature of comity is important because, in the absence of a genuine Full Faith & Credit argument due to the Federal Defense of Marriage Act,[16] the Appellants push comity as this Court's duty rather than its option.[17] A likely source of the parties' confusion is that this Court has not often exercised its right to refuse comity since most of the outlined comity decisions of this Court (*supra*, n.14) did not involve a circumstance of competing laws. In other words, most of the factual scenarios involving this Court's extensions of comity did not run contrary to established law and, therefore, did not provide this Court with cause to exercise its discretion in the denial of comity. However, such has not always been the case.

> vehicle within this state without registering the vehicle in, or paying any fees to, this state subject to the condition that the vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for that vehicle in the place of residence of that owner.

R.I. GEN. LAWS § 31-7-1(a) (1956).

> The provisions of § 31-7-1 shall be operative as to a nonresident owner or operator only to the extent that, under the laws of his or her residence or licensing country, state, territory, or district, like privileges are granted to motor vehicle owners resident of and registered under the laws of this state or operators licensed under the laws of this state.

R.I. GEN. LAWS § 31-7-4 (1956). Thus, in Rhode Island, the legislature wanted its residents to be able to drive their vehicles in other states without having to jump through hoops and red tape, so the same courtesy was extended to the residents of other states.

[16] *See* Joint Memorandum of the Parties on the Pending Request for Certification at pp. 4-5, 12-14 (clearly conceding that Full Faith & Credit does not mandate recognition of their same-sex "marriage").

[17] *See* Joint Memorandum of the Parties on the Pending Request for Certification at pp. 9, 12 ("the parties' marriage must be recognized" and "the comity law of Rhode Island governs this Court's consideration of out-of-state marriages, and should lead this Court to recognize the present marriage"). Additionally, in his February 20, 2007 opinion letter, the Rhode Island Attorney General also pushes the extension of comity as this Court's obligation in concluding that "Rhode Island will recognize same sex marriages lawfully performed in Massachusetts as marriages in Rhode Island."

From its inception in this state, comity has been an optional doctrine. This is clearly demonstrated in the seminal comity case of *Olney*. In *Olney*, though embracing the doctrine itself, this Court did not extend comity, holding that "every state is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its citizens." *Olney*, 5 R.I. at p. 5 (citations omitted). Thus, this Court clearly recognized the discretionary nature of comity.

As a judicial doctrine, the application of comity rests at all times within the sound discretion of this Court. *O'Brien v. Costello*, 100 R.I. 422, 216 A.2d 694, 699 (1966). Moreover, that discretion should be exercised to protect Rhode Island's best interests:

> Comity is not a positive rule of law but one of practicality based on a proper regard for the law of a foreign state. How far foreign laws should be enforced as a basis for jurisdiction depends on the law of the forum and this rests in turn on the forum's public policy with reference to its own institutions and the interests of its citizens.

O'Brien, 216 A.2d at 699 (citing *Olney*, 5 R.I. at 204). Of course, this Court's citation of *Olney* is a clear reaffirmation of the "interstate golden rule" model of comity—that we will extend our courtesies on a specific matters where we want the same courtesies to be reciprocated on the same specific matters (assuming that those matters do exist under Rhode Island law).

In *Ramunno v. Waterman Ave. Bakery*, 78 R.I. 193, 80 A.2d 426 (1951), this Court addressed a request to enforce a Massachusetts lien against personal property owned by Rhode Island residents. The doctrine of comity and the "interstate golden rule" suggested

that the foreign lien be given effect.[18] However, this Court refused to give effect to the lien because to do so violated the positive law of the land:

> This rule is well set forth in 15 C.J.S., Conflict of Laws, § 4, page 853, as follows: 'In general, it may be said that in the recognition and enforcement of foreign laws and rights based thereon, the courts are slow to overrule the positive law of the forum, it often being said that the doctrine of comity, pursuant to which foreign law or rights are given effect, must yield to the positive law of the land. Thus, foreign law is not enforced when in conflict with the positive or prohibitory statute law of the forum, or the settled current of its judicial decisions.'

Ramunno, 80 A.2d 426, 427-28 (R.I. 1951).[19] *See also Jewell v. Jewell*, 751 A.2d 735, 739 (R.I. 2000) (refusing to extend comity to a "sham" divorce decree from the Dominican Republic – Rhode Island would not grant "fly-by-day" divorce decrees from the marriages of other jurisdictions and, therefore, Rhode Island will not recognize a "fly-by-day" divorce of one of its own marriages).

Thus, comity is a discretionary doctrine and this Court has previously used its discretion to refuse comity. We now explain why comity should be denied in this case.

C. THE "INTERSTATE GOLDEN RULE" OF COMITY IS INAPPLICABLE TO SAME-SEX "MARRIAGE."

This Court's application of the comity doctrine ("interstate golden rule") has been exclusively premised on the availability of reciprocal benefits. In other words, this Court

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[18] The raw operation of the "interstate golden rule" required the following conclusion—Rhode Island want our liens respected and enforced in foreign jurisdictions, so Rhode Island should uphold foreign liens in our forum. However, the public policy exception mandated that comity not be extended.

[19] *See Tillinghast v. Maggs*, 82 R.I. 478, 111 A.2d 713, 716 (1955) (applying Connecticut law under the doctrine of comity "provided it did not contravene an established policy or law of this state"); *Skeadas v. Skeadas*, 84 R.I. 206, 122 A.2d 444, 447 (1956) ("We are not precluded thereunder from giving effect to a statute of Massachusetts by comity, or by adopting its decree thereunder as our own provided there is no contravention of statute or public policy of this state.")

has not extended comity where the expectation of a return benefit was not contemplated. Thus, to determine whether comity should be extended to a Massachusetts same-sex "marriage," this Court must answer whether it reciprocally seeks interstate recognition of Rhode Island's same-sex "marriages." Clearly, this question fails within itself since Rhode Island does not provide for or allow same-sex "marriage." Accordingly, absent this Court's following *Goodridge* to impose same-sex "marriage" on Rhode Island citizens by judicial order, there exists no reciprocal basis for this Court to extend comity to a Massachusetts same-sex "marriage."

To be clear, the issue presented to this Court is not one of marriage, but same-sex "marriage"—two entirely different concepts. Even the Massachusetts Supreme Judicial Court recognized this difference, making it clear that "our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries." *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 965 (2003) (emphasis added). The Massachusetts Supreme Judicial Court understood that "marriage" is and has always been the union of one man and one woman and that adding a same-sex context to that historic word required "a significant change in the definition."[20] Thus, just because

[20] In choosing to redefine "marriage" for the State of Massachusetts, the Supreme Judicial Court adopted the "commitment" rationale. In the United States, no state or federal appellate court, other than *Goodridge*, has adopted this "commitment" view of marriage. Indeed, nearly all appellate decisions since *Goodridge* have either criticized the decision for reliance on the "commitment" rationale, or extensively quoted from the dissenting justices. New York's intermediate appellate court in *Hernandez* repeatedly quoted the reasoning of the dissenting justices in *Goodridge*, sharply disapproving of the assumptions underlying the *Goodridge* decision. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 358, 359-62 (N.Y. App. Div. 2005). *See also Samuels v. New York State Dept. of Health*, 811 N.Y.S.2d 136, 145-46 (3rd Dept. 2006)

Massachusetts redefined "marriage" does not mean that its definition applies to everyone else.[21]

The true definition of matrimony is "the union of man and woman as husband and wife." *See* Merriam-Webster online dictionary at http://www.merriam-webster.com/dictionary/matrimony. Any assertion that the legal definition of "marriage," in the United States or anywhere else in the world, has changed significantly over time is simply false. Some legal incidents of "marriage" may have changed, but the meaning of the term itself has not. "Marriage" has never been defined as something other than the union of a man and a woman at any time in the history of Rhode Island. That specific kind of relationship (one man and one woman) has defined marriage throughout the history of the world. As recognized by the Minnesota Supreme Court, "marriage as the union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." *Baker v. Nelson*, 291 Minn. 310, 191

(recognizing majority view, as opposed to *Goodridge*, that promoting responsible procreation is a legitimate basis for marriage laws).

[21] In point of fact, the *Goodridge* court expressly rejected the notion that its new definition of "marriage" would carry beyond its state lines, stating that:

> We also reject the argument suggested by the department, and elaborated by some amici, that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict. We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

Goodridge, 798 N.E.2d at 967 (emphasis added).

N.W.2d 185, 186 (1971).[22] In the English speaking world, from the oldest English dictionaries in the Library of Congress to modern times, the primary meaning of the term "marriage" has been the legal union of a man and a woman, a husband and wife. *See, e.g.*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1740) (Marriage: "that honourable contract that persons of different sexes make with one another"); JAMES BUCHANAN, LINGUAE BRITANNICAE VERA PRONUNCIATIO (1757) (Marriage: "A civil contract, by which a man and a woman are joined together"); NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 185 (1806) (Marriage: "the act of joining man and woman"); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 518 (1830) (Marriage: "The act of uniting a man and woman"); JAMES KNOWLES, A CRITICAL PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE 425 (1851) (Marriage: "The act of uniting a man and woman"); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY–TENTH EDITION 713 (1993) ("1 a: the state of being married b: the mutual relation of husband and wife: WEDLOCK"). *See also* Merriam-Webster Online Dictionary ("Spouse" means "married person: HUSBAND, WIFE").

Beginning in 1885, the United States Supreme Court noted the importance of marriage as a matter of public policy. In *Murphy v. Ramsey*, 114 U.S. 15 (1885), the Court declared:

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to

[22] The reference herein to the Book of Genesis is intended as a historical reference, not a religious one.

> take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.

Murphy, 114 U.S. at 45 (emphasis added). Thus, marriage as having a meaning of one man and one woman has strong roots in the United States.

"The concept of marriage has traditionally been accepted by courts throughout the United States as the union of a man and a woman. Any change in that frequently articulated heterosexual construct would be a revolution in the law rather than evolution." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 364 (N.Y. App. Div. 2005) (Catterson, J., concurring).

This Court should resist redefining the term "marriage" to a meaning not previously recognized in Rhode Island's history.

D. RHODE ISLAND HAS STRONG AND CLEAR PUBLIC POLICY AGAINST SAME-SEX "MARRIAGE," THEREBY PREVENTING THE APPLICATION OF COMITY IN THIS MATTER.

Clear public policy considerations prevent application of the "interstate golden rule" in this case. "It is well settled that where the lawmaking power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." *Allstate Ins. Co. v. Fusco*, 101 R.I. 350, 223 A.2d 447,

450 (1966) (citing *Chicago, Burlington & Quincy R.R. v. McGuire*, 219 U.S. 549 (1911)).[23]

In Rhode Island, the policy makers have spoken clearly about the meaning of "marriage" as between only one man and one woman. Title 15 of the Rhode Island Code contains a plethora of language affirming marriage. In § 15-1-1, the legislature lists those kindred persons that men are forbidden to marry. R.I. GEN. LAWS § 15-1-1 (1956). Everyone listed in § 15-1-1 is a woman. Thus, if Rhode Island public policy favors same-sex "marriage," as advocated by the Appellants and the Attorney General, a *man* can marry all of the following *men*:

> *His* father, grandfather, son, daughter's son, son's son, stepfather, grandmother's husband, daughter's husband, daughter's daughter's husband, son's daughter's husband, wife's father, wife's grandfather, wife's son, wife's daughter's son, wife's son's son, brother, brother's brother, sister's brother, father's brother, or mother's brother.

(Following the language of § 15-1-1.) Absurdly, a man could marry every man to whom he is related by blood or marriage and Rhode Island law would not only approve of same-sex "marriage," but same-sex incestuous "marriage." The list for women, codified at § 15-1-2, would carry an equally illogical reading.[24] It is unreasonable to conclude that one is prohibited from marrying opposite sex family and in-laws, but that the family and in-

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[23] *See also Lucier v. Impact Recreation, Ltd.*, 864 A.2d 635, 641 n.5 (R.I. 2005); *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1139 (R.I. 1998); *Rueschemeyer v. Liberty Mut. Ins. Co.*, 673 A.2d 448, 450 (R.I. 1996); *State v. Almonte*, 644 A.2d 295, 303 (R.I. 1994); and *Vieira v. Jamestown Bridge Comm'n*, 91 R.I. 350, 163 A.2d 18, 21 (1960).

[24] Both the Rhode Island House and Senate currently have pending bills which reaffirm the above logical interpretation. *See* 2007 RI H.B. 6159 (NS) and 2007 RI S.B. 687 (NS). A single bill has been introduced in the House to radically reword §§ 15-1-1 and 15-1-2 and permit same-sex "marriage." *See* 2007 RI H.B. 6081 (NS).

laws of the same sex are fair game.[25] Thus, these statutes make it clear that same-sex "marriage" is not the law in Rhode Island.

Conveniently, these statutes, and the many statutes to follow, are completely ignored by the Appellants in their Joint Memorandum submitted to the Family Court. Rather, like the Attorney General in his flawed opinion of February 20, 2007, the Appellants focus on statutes primarily addressing sexual orientation—an irrelevant factor in the question of marriage. No person presenting themselves for a marriage license in this state or any other must demonstrate or declare a particular sexual orientation. Moreover, in defining "sexual orientation," the Rhode Island legislature, made it abundantly clear that it was not conferring "legislative approval" of any particular sexual preference or orientation. *See* R.I. GEN. LAWS § 11-24-2.1(k) (1956).

Of course, several other Rhode Island statutes also confirm the state's public policy of marriage as between only one man and one woman. *See* R.I. GEN. LAWS § 15-1-6 (1956) (using "wife" and "husband"); R.I. GEN. LAWS § 15-2-1 (1956) (using "[t]he female party to the proposed marriage" and "the male party"—clearly showing that the marriage involves persons of the opposite sex); R.I. GEN. LAWS § 15-2-7 (1956) ("[b]oth the bride and groom"); R.I. GEN. LAWS § 15-4-1 (1956) (addressing the property of a woman which, after marriage, shall remain "free from control of her husband"); R.I.

[25] This is especially so given that one of the primary policies behind forbidding incestuous relationships is to protect children from sexual over-reaching by more powerful relatives, and the family from internal conflict. *See* CHRISTINE MCNIECE METTEER, SOME "INCEST" IS HARMLESS INCEST DETERMINING THE FUNDAMENTAL RIGHT TO MARRY OF ADULTS RELATED BY AFFINITY WITHOUT RESORTING TO STATE INCEST STATUTES, 10-WTR Kan. J.L. & Pub. Pol'y 262, 263, 276-77 (2000).

GEN. LAWS § 15-4-2 (1956) (addressing the debts of "the wife"—meaning that there can't be two of them); R.I. GEN. LAWS § 15-4-4 (1956) ("married woman may sell and convey directly to . . . her husband" and "transfer made between husband and wife"); R.I. GEN. LAWS § 15-4-5 (1956) (addressing property of a "married woman" and, in part, her interest in "any estate of her husband"); R.I. GEN. LAWS § 15-4-6 (1956) (addressing a "married woman['s]" life estate in "any estate of her husband"); R.I. GEN. LAWS § 15-4-9 (1956) (involving indebtedness between husband and wife and providing that "[a] husband and wife may be partners in a trading or any other type of partnership"); R.I. GEN. LAWS § 15-4-11 (1956) ("The wife may act as agent or attorney of her husband, and the husband may act as the agent or attorney of his wife."); R.I. GEN. LAWS § 15-4-12 (1956) ("husband" and "wife" free from torts and liabilities of the other); R.I. GEN. LAWS § 15-4-14 (1956) ("husband['s]" receipt of and/or payment of medical bills incurred by his "wife"); R.I. GEN. LAWS § 15-4-16 (1956) ("husband" abandoning his "wife").[26]

Rhode Island statutes §§ 15-1-3 and 15-1-5 also merit some scrutiny. As this Court is aware, these statutes expressly list those marriages which are void under Rhode Island law. The list includes incestuous marriages, bigamous marriages, and marriages involving persons who are mentally incompetent. R.I. GEN. LAWS §§ 15-1-3 & 15-1-5 (1956). Although same-sex "marriages" are not included in the list, these statutes are designed to identify those "marriages" which are void. Reference to the unions of same-

[26] Again, these laws are wholly ignored by the Appellants in their Joint Memorandum to the Family Court. Moreover, Rhode Island's divorce laws, codified at § 15-5-1 *et. seq.*, also contain a multitude of references directly acknowledging and affirming marriage as between only one man and one woman.

sex couples is not required since those relationships are not "marriages." In other words, unless this Court (or the legislature) chose to radically redefine the term "marriage," no express exclusion of that union is required. Same-sex "marriage" is clearly excluded by definition and there exists no need for the legislature to state what has been obvious for centuries.

The Appellants cite and argue *Ex Parte Chace*, 26 R.I. 351, 58 A. 978 (1904) as authority which supports their position.[27] This case is also cited by the Attorney General as supporting the notion of same-sex "marriage" in his February 20, 2007 opinion.[28] The Appellants and Attorney General incorrectly rely on *Chace*. *Chace*, in fact, affirms the principles supporting the non-recognition of the same-sex "marriage" at issue. In *Chace*, one man married one woman in Massachusetts. Yet, the man's guardian argued that the Massachusetts marriage was void because the man, at the time of the marriage, was under a Rhode Island guardianship and because his guardian did not assent to the marriage (a requirement under Rhode Island law). *Chace*, 58 A. at 979. But because the marriage alone violated no provision of Massachusetts law, this Court had to resolve whether the marriage violated the public policy of Rhode Island. In other words, this Court had to determine whether the marriage was "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

[27] *See* Joint Memorandum of the Parties on the Pending Request for Certification at p. 4.
[28] http://marriageequalityri.files.wordpress.com/2007/02/2-20-07ag-ltr-to-comm-warner.pdf

public policy of the jurisdiction, it will not be recognized there, even though valid where it was solemnized." *Id.* at 980.[29] It was not.

In ruling on Mr. Chace's marriage, this Court found that it was "not such a union that it can in any sense be considered so subversive of good morals, or so threatening to the fabric of society, as to fall within the exception to the general rule regarding foreign marriages." *Id.* at 981 (emphasis added). Thus, this Court looked specifically at the nature of the union, not any statutory prerequisites, to determine whether it would be extended comity.[30] In comparing its decision, this Court subsequently evaluated *Parton v. Hervey*, 67 Mass. 119 (1854) (where a man married a 13-year-old without her mother's consent), and *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48 (1810) (confirming that a marriage solemnized by a qualified justice or minister would remain valid although the required prerequisites of publication by bans and consent of the parents were lacking). *Chace* is consistent with both *Parton* and *Inhabitants* because the nature of the "union" in question (one man and one woman) did not run contrary to the public policy of the state.[31] Statutory prerequisites aside, the union at issue (one man and

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[29] In arguing that their same-sex "marriage" is not "odious by the common consent of nations," Chambers and Ormiston mention the list of countries (countable on one hand) which currently authorize same-sex "marriage." Yet, they conveniently ignore the wealth of policy to the contrary. Forty-five of the fifty United States have enacted legislation protecting marriage as between one man and one woman. *See* http://www.domawatch.org/stateissues/index.html. Moreover, of the 192 member countries of the United Nations, 187 of them do not recognize same-sex "marriage."

[30] Though this Court never once utters the word "comity" in its decision, *Chace* is generally regarded as an opinion on the doctrine of comity.

[31] Mrs. Chace's primary argument was that there existed the "form of a marriage" which should be given consideration. *Chace*, 58 A. at 981. However, unlike *Chace*, the relationship here does not contain the "form of a marriage," unless this Court chooses to embark upon a radical redefinition of the terms "marriage" and "matrimony" like the court in *Goodridge*.

one woman) fulfilled the essence of marriage in Rhode Island and was significant enough for recognition. The instant case does involve "such a union" that runs contrary to the public policy of the state, so the exception to the general rule must be applied.

The comity arguments put forth by the Appellants have been previously asserted in other courts, but without success. In *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (N.J. Tax Ct. 2005), a same-sex couple acquired a same-sex "marriage" in Canada and subsequently sought a tax benefit for marriage under New Jersey law. The same-sex couple put forth the same argument made here—"that since New Jersey has no law specifically declaring that same-sex marriage is against the State's public policy, their Canadian marriage should therefore be recognized in New Jersey." *Hennefeld*, 22 N.J. Tax at 179. But the New Jersey Tax Court refused to extend comity to the couples' Canadian same-sex "marriage." *Id.* at 184. In reaching this decision, the New Jersey Tax Court specifically considered the statutory scheme of New Jersey. *Id.* at 182-84. This scheme included a Domestic Partnership Act—an express notion of legal accommodation for same-sex couples (something overtly absent from Rhode Island's laws). Yet, comity was still denied. Thus, if comity was not appropriate in New Jersey under these facts, it certainly should not apply in Rhode Island. *See also Funderburke v. New York State Dept. of Civil Serv.*, 822 N.Y.S.2d 393, 394 (N.Y. Sup. Ct. 2006) ("Under current New York law, plaintiff and his partner are not considered spouses"); *Bishop v. Oklahoma*, 447 F. Supp.2d 1239, 1248-49 (N.D. Okla. 2006) (denying comity to a Canadian same-sex "marriage"); and *In re Kandu*, 315 B.R. 123, 133-34 (W.D. Wash. 2004) (denying comity to a Canadian same-sex "marriage").

The policy makers of Rhode Island have designed and implemented a statutory scheme which affirms only one concept of marriage—one man and one woman.[32] While this Court may recognize marriages which do not meet certain statutory or common prerequisites, these relationships maintained the universal prerequisite, having the proper form—one man and one woman. Therefore, the Massachusetts same-sex "marriage" at issue runs afoul of Rhode Island public policy and exempts it from recognition under the doctrine of comity.[33]

E. WHETHER COMITY REMAINS AS A VIABLE DOCTRINE IN RHODE ISLAND IS QUESTIONABLE.

Analyzing comity in this case assumes the existence of comity as a viable judicial doctrine in Rhode Island. However, recent legal developments give rise to this question—is comity still alive in Rhode Island?

Putting aside the above referenced codification of comity in a driving context, following the 1966 *O'Brien* decision, the doctrine of comity has been virtually absent from this Court's jurisprudence.[34] This may be a practical reflection of scholarly

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[32] It is noteworthy that Governor Carcieri, has filed his own brief in this matter also officially confirming Rhode Island's firm policy of marriage as between only one man and one woman.

[33] Though not advocated by the Appellants in the Family Court, it is equally true that, beyond their Massachusetts same-sex "marriage," they would not qualify for a common law marriage under Rhode Island law as such a relationship also expressly requires one man and one woman. *See Holgate v. United Electric Railways Co.*, 47 R.I. 337, 133 A. 243, 244 (1926); *Sardonis v. Sardonis*, 106 R.I. 469, 472, 261 A.2d 22, 24 (1970) (involves the "husband-wife relationship"); *Ibello v. Sweet*, 47 R.I. 480, 133 A. 801, 801 (1926) (involves "the relation of husband and wife").

[34] A minor exception to this statement are multiple examples of comity in one court ceding jurisdiction of a matter to another court or legislature based on timing, jurisdiction, or other considerations. *See, e.g., In re Rule Amendments to Rules 5.4(a) and 7.2(c) of Rules of Professional Conduct*, 815 A.2d 47, 49 (R.I. 2002) and *Barone v. O'Connell*, 785 A.2d 534, 535 (R.I. 2001).

criticism of the doctrine, especially its "interstate golden rule" form, as more of a problem-maker than a problem-solver.[35] In her article AGAINST COMITY, Professor Weinberg argues that the promised reciprocal benefits are lacking when comity is applied.

> Taking on a misty glamour from chic references to game theory, the new reciprocity in choice of law arises from a speculative argument about comparative benefit. This begins with a question. How much better off would a state be if its courts systematically accommodated the policies of other states, abjuring enforcement of its own policies? Professor Larry B. Kramer is a strong proponent of comity and reciprocity. Interestingly, he concedes that the answer to that question is, "Not much." The benefits to the forum from unilateral accommodation of another's substantive policies, he acknowledges, generally would not outweigh the losses to vindication of substantive forum policy (Professor Kramer does not see possible wider losses). That is so even if applying sister state law would advance the forum's procedural policies about the wise administration of law.
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> . . .
>
> Words like comity, reciprocity, and mutuality, have a deceptively right ring, like good breeding and sweet disposition. The alternative is the much less friendly principle that the interested forum should apply its own law. That may help to explain why American courts today, in true conflict cases, are again beginning to depart from their own law. The pied piper seems once again to be leading a dance, and comity theory has its modern judicial converts.

Weinberg, at 54, 59 (citations omitted). Concluding her thoughts, Professor Weinberg challenges this Court, and others, as follows:

> Advice to courts matters, because decisions of courts matter. Some day the world may have wise and effective universal substantive law. Until that millennium, <u>there is no substitute</u> . . . <u>for powerful, independent courts,</u>

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[35] *See* LOUISE WEINBERG, AGAINST COMITY, 80 Geo. L.J. 53 (1991) and HOLLY SPRAGUE, CHOICE OF LAW: A FOND FAREWELL TO COMITY AND PUBLIC POLICY, 74 Cal. L. Rev. 1447 (1986).

determined under the oath of office, when their sovereign interest is invoked, to take unilateral responsibility for the enforcement of law.

Id. at 94 (citation omitted) (emphasis added).

This line of thought put forth by Professor Weinberg reveals, perhaps, the reason that this Court, only two (2) years after deciding the *O'Brien* case, expressly adopted the "interest-weighing" approach to conflicts and choice of law matters. *Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917, 923 (1968), *cert. denied*, 393 U.S. 957 (1968).[36] Thus, the cycle of give-and-take comity was now being replaced by a more conservative approach—one that always considered the best interests of Rhode Islanders.[37] This is the policy today. *See Taylor v. Massachusetts Flora Realty, Inc.*, 840 A.2d 1126, 1128 (R.I. 2004) and *Najarian v. Nat'l Amusements Inc.*, 768 A.2d 1253, 1255 (R.I. 2001).[38]

In a foreign marriage context, the "interest-weighing" approach is not novel and is certainly a worthy consideration given Rhode Island's strong public policy considerations on marriage, *supra*. In *Wilkins v Zelichowski*, 140 A.2d 65 (N.J. 1958), the New Jersey

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[36] It is not the intent of this brief to explore choice of law doctrines, beyond comity, and their potential application to the present case. However, in that this Court's adoption of the "interest-weighing" choice of law doctrine arguably ended and/or severely crippled Rhode Island's use of the doctrine of comity, mention of its advent is appropriate in this context.

[37] An additional theory regarding the decay of the comity doctrine involves the increased speed and frequency of modern transportation and communication. Beginning in the early 1900's, economic and other transactions increasingly crossed governmental boundaries, thereby making it common for more than one state to have a significant interest in a dispute. Thus, rules principled in comity can produce arbitrary and inappropriate results in the modern age. HOLLY SPRAGUE, CHOICE OF LAW: A FOND FAREWELL TO COMITY AND PUBLIC POLICY, 74 Cal. L. Rev. 1447, 1449 (1986). For a state that is situated only a couple hours drive from 8 other states, this theory seems appropriate for Rhode Island.

[38] While taking the time to discuss comity, in his February 20, 2007 opinion on same-sex "marriage," the Rhode Island Attorney General erroneously failed to reference the "interest-weighing" approach to choice of law and its development since this Court's adoption of the doctrine in 1968.

Supreme Court held that, in view of the strong New Jersey public policy against marriage by persons under the prescribed age, an otherwise valid marriage in another state was voidable under New Jersey law. *Wilkins*, 140 A.2d at 69. In *Wilkins*, a female under the age of 18 years, a resident of New Jersey who went to Indiana and married there, as permitted by the law of Indiana. *Id.* at 65. After their marriage, the parties returned to New Jersey immediately and remained therein. In considering the question of annulment, the New Jersey Supreme Court easily dismissed questions of comity:

> We are not here concerned with a collateral attack on an Indiana marriage or with a direct attack on an Indiana marriage between domiciliaries of Indiana or some state other than New Jersey. We are concerned only with a direct and timely proceeding, authorized by the New Jersey statute [], by an underage wife for annulment of an Indiana marriage between parties who have at all times been domiciled in New Jersey. We are satisfied that at least in this situation the strong public policy of New Jersey [on conflict of laws] requires that the annulment be granted.

Id. at 69. The court believed that "if New Jersey's public policy is to remain at all meaningful it must be considered equally applicable though their marriage took place in Indiana." *Id.* at 67-68. While Indiana possessed an interest in the formal and/or ceremonial requirements of the marriage, it had no interest in the ongoing marriage of the parties. The court believed that the purpose of having the ceremony take place in Indiana was to evade New Jersey's marriage policy and, thus, it saw no just or compelling reason for permitting it to succeed. *Id.* at 68. The similarity to the present circumstance is undeniable.

The Court of Appeals of New York also considered this question in *Cunningham v Cunningham*, 99 N.E. 845 (N.Y. 1912). In *Cunningham*, an underage wife (under New

York law) was taken to New Jersey for marriage, with the parties immediately returning to New York following their union. *Cunningham*, 99 N.E. at 846. The New York statute then in force provided that a marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party is "under the age of legal consent, which is eighteen years." *Id.* The court found that:

> the right of a government, as well as that of the several states of the Union, to determine the marital status of its own citizens and prescribe the terms and conditions upon which their relations may be changed is elementary and beyond question.
> . . .
>
> I do not question the validity of marriage contracts made in other states conformatory to the laws of such state, or that they will be recognized as valid in this state, unless they are contrary to the prohibition of natural laws, or to the express provisions of our statute.

Id. at 847-48. Thus, the New York and New Jersey courts are clearly more concerned with their own state's policy than blindly extending comity to other states. Both the *Wilkins* and *Cunningham* courts employed choice of law principles in making their decisions—the same principles available to this Court since its adoption of the "interest-weighing" approach to conflicts and choice of law matters.

Accordingly, with this Court reporting no substantive comity cases in over forty (40) years, coupled with the adoption of the "interest-weighing" approach to conflicts of law, the status of comity regarding foreign marriages and other unions in Rhode Island is questionable. At a minimum, the force and applicability of the doctrine of comity has been drastically minimized through the usage of more modern choice of law principles.

New Jersey and New York have seen fit to protect their own sovereignty and reject the application of comity to foreign marriages. This Court should exercise that same power.

II. DIVORCEMENT IS A REMEDY APPROPRIATE ONLY FOR MARRIAGE AND, THUS, INAPPLICABLE IN THE INSTANT CASE.

Divorce is not a legal vehicle to sever all human relationships, but an important remedy in which this state is an important and necessary party. Yet, for all of their clamoring to the contrary, the case presented by Chambers and Ormiston is not really about divorce. Rather, this matter is an attempt to bootstrap same-sex "marriage" into the laws of Rhode Island against the principles of comity, against the public policy of the state, and against this Court's obligations to consider the best interests of all Rhode Islanders. Divorce, as an important legal remedy, should not be extended in this matter.

As referenced herein, Rhode Island's statutory scheme surrounding divorcement is a specifically designed remedy for those wishing to dissolve a contract of marriage—the one man and one woman who are parties to the contract. Clearly, parties to a contract contrary to public policy cannot avail themselves of a statutory or judicial remedy. *See Gorman v. St. Raphael Academy*, 853 A.2d 28, 38 (R.I. 2004) and *City of Warwick v. Boeng Corp.*, 472 A.2d 1214, 1218 (R.I. 1984). Because the same-sex "marriage" acquired by Chambers and Ormiston runs contrary to the current and historical public policy of Rhode Island, the courts of this state cannot offer them a remedy for their failed contract.

More importantly, in seeking the remedy of divorcement, the Appellants fail to acknowledge that, in every proceeding for divorce, the state is a party. *Frothingham v.*

Anthony, 69 F.2d 506, 510-11 (1st Cir. 1934) (citing *Berger v. Berger*, 117 A. 361, 362 (R.I. 1922). The action is called a "triangular suit" because the state is an interested party under the protection of the court. *Id.* at 511. It is a long and well-established rule in Rhode Island that, unlike other civil actions, the state is an interested party that "seeks the preservation of the marital status." *Rheaume v. Rheaume*, 107 R.I. 500, 268 A.2d 437, 504 (1970).[39] Thus, Chambers and Ormiston are asking Rhode Island to participate and "preserve" a "martial status" that does not exist, and has never existed, in Rhode Island law. Therefore, this state should not authorize a divorce for the sake of governing private, consensual conduct.

However, as an alternate theory, the Appellants argued in the Family Court that, under § 15-5-1 of the Rhode Island code, they are still entitled to a divorce even if their "marriage" is considered void under Rhode Island law.[40] Specifically, § 15-5-1 provides as follows:

> Divorces from the bond of marriage shall be decreed in case of any marriage originally void or voidable by law, and in case either party is for crime deemed to be or treated as if civilly dead, or, from absence or other circumstances, may be presumed to be actually dead.

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[39] *See also Smith v. Smith*, 69 R.I. 403, 34 A.2d 726 (1943); *Parker v. Parker*, 103 R.I. 435, 238 A.2d 57 (1968); *Pate v. Pate*, 97 R.I. 183, 196 A.2d 723 (1964); *Carvalho v. Carvalho*, 97 R.I. 132, 196 A.2d 164 (1964); *Hall v. Hall*, 63 R.I. 148, 7 A.2d 719 (1939); *Puhacz v. Puhacz*, 55 R.I. 306, 180 A. 377 (1935); *Prosser v. Prosser*, 51 R.I. 58, 150 A. 754 (1930); and *McLaughlin v. McLaughlin*, 44 R.I. 429, 117 A. 649 (1922).

[40] The Appellants expressly referenced § 15-5-1 and cited *Leckney v. Leckney*, 26 R.I. 441, 59 A. 311 (1904) in their Joint Memorandum to the Family Court for the proposition that "under no circumstances could this Court consider the marriage unrecognizable for the purposes of dissolving it." *See* page 4 of the Joint Memorandum of the Parties on the Pending Request for Certification.

R.I. GEN. LAWS § 15-5-1 (1956). The seminal case on this statute[41] is *Leckney v. Leckney*, 26 R.I. 441, 59 A. 311 (1904). In *Leckney*, this Court was faced with a bigamous marriage and the question of how to address the second of two marriages entered into by John Leckney. This Court concluded that the second marriage was void under Rhode Island law and, therefore, granted the second wife a divorce under what is now § 15-5-1. *Leckney*, 59 A. at 312. Following the conclusion in *Leckney*, the Appellants argue for a divorce in the instant matter, but they seriously misapprehend both the purpose of § 15-5-1 and this Court's ruling in *Leckney*.

Unlike the relationship presented in *Leckney*, Chambers and Ormiston do not have a "*de facto*" marriage and are not "husband and wife." *Id.* at 311. In *Leckney*, both marriages presented were, in fact, *de facto* marriages—unions between one man and one woman.

> That the parties to this suit entered into a contract of marriage, as above set out and sworn to by the petitioner, is not denied or questioned. By so doing they became husband and wife de facto, at least, and under the statute a decree of this court avoiding said marriage is necessary in order to protect the rights of the wife before the public; and such a decree can only be obtained by prosecuting a petition for divorce, which the petitioner is now proceeding to do. The only remedy which the statute gives her is by way of a petition for divorce from the bond of marriage, and the proceeding which it prescribes is classed as a proceeding for divorce; and hence we are of opinion that the incidents connected therewith, such as temporary support of the petitioner and counsel fees, stand upon the same footing as in other cases.

Id. (emphasis added). Thus, the marriages at issue were "*de facto*" marriages because each marital contract was a facially valid marriage—a union between one man and one

[41] Section 15-5-1 was previously codified as Chapter 195, § 1 of the General Laws of 1896.

woman. Each wife was an appropriate marital candidate for the husband. Moreover, nobody would dispute that the husband could marry both spouses—he just couldn't do so at the same time. Thus, the issue presented was really one of just timing (perhaps the essence of bigamy). Because just the timing was improper, not the nature and essence of the respective marriages/relationships, the otherwise facially valid second "marriage" (union between one man and one woman) needed to be voided. In other words, there were definitely two marriages, but one of them had to be negated for reasons of public policy.

Therefore, in *Leckney*, "divorce" was an appropriate remedy because there was an actual "marriage," albeit an untimely one. This is an extremely important distinction since "the term 'divorce' means primarily the dissolution or partial suspension by law of the marriage relation, and presupposes the existence of a valid marriage." *Id.* at 311-12 (emphasis added). The *Leckney* court never said that wife #2 did not have a "marriage" with the husband. She did. Rather, the "marriage" was merely void.

In the instant case, we have a much different scenario—whether a *de facto* "marriage" ever existed between the parties. There did not. Two persons of the same sex cannot have a "marriage." Thus, the equitable "divorce" remedy discussed in *Leckney* would be inapplicable and the public policy of "protect[ing] the rights of the wife before the public" does not exist. There is a difference between a marriage (a union between one man and one woman), even if void (for timing, incest, or other reasons), and a non-marriage. What Chambers and Ormiston have is not a "marriage." Therefore, it is not subject to divorce, annulment, or any other form of official recognition or remedy in

Rhode Island. For this Court to apply a remedy of any kind would be to recognize a semblance of validity of the relationship to begin with—a declaration contrary to clear public policy.

Another critical distinction between the instant case and *Leckney* involves the fraud committed by Mr. Leckney upon his second wife. It was for this type of circumstance that the Rhode Island legislature had § 15-5-1 in place to do equity and justice to the offended spouse.[42] Yet, the Appellants in this matter fail to recognize the crucial element of fraud in the application of § 15-5-1, something also completely absent from their circumstance. The *Leckney* line of cases, including *Selby v. Selby*, 27 R.I. 172, 61 A. 142 (1905), *Mace v. Mace*, 67 R.I. 301, 23 A.2d 185 (1941), and *Santos v. Santos*, 80 R.I. 5, 90 A.2d 771 (1952), all involve elements of fraud in the formation of the marital contract at issue. In *Leckney*, there was a fraud via a second, bigamous marriage. In *Santos*, there was a fraud in that the wife never intended to consummate the marriage. In *Mace*, the fraud at issue was an undisclosed venereal disease. And, in *Selby*, the issue was some sort of fraud, though this Court did not specify which. Thus, § 15-5-1 should not apply to the case *sub judice* since there does not exist any element of fraud as both Chambers and Ormiston willingly entered into their same-sex "marriage" without any intent to defraud one another.

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[42] This law is not uncommon and exists in several U.S. jurisdictions. *See* CONSTRUCTION OF STATUTE MAKING BIGAMY OR PRIOR LAWFUL SUBSISTING MARRIAGE TO THIRD PERSON A GROUND FOR DIVORCE, 3 A.L.R.3d 1108 (1965) and RIGHT TO ALIMONY, COUNSEL FEES, OR SUIT MONEY IN CASE OF INVALID MARRIAGE, 4 A.L.R. 926 (1919).

Other courts have found that a same-sex "marriage" is neither void nor voidable, but rather no marriage at all. In furtherance of this proposition, and the inapplicability of § 15-5-1, consider *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). In *Anonymous*, the Plaintiff was trying to get a same-sex "marriage" declared void and annulled under New York law. In denying the Plaintiff his requested relief, the court opined as follows:

> The instant case is different from one in which a person seeks an annulment of a marriage or to declare the nullity of a void marriage because of fraud or incapacity to enter into a marriage contract or some other statutory reason. Those cases presuppose the existence of the two basic requirements for a marriage contract, i.e., a man and a woman. Here one of these basic requirements was missing. The marriage ceremony itself was a nullity. No legal relationship could be created by it. Since the action, then, is in actuality not one to annul a marriage or to declare the nullity of a void marriage, but to declare that no marriage could legally have taken place between the plaintiff and the defendant, the court finds that section 144 of the Domestic Relations Law is inapplicable.
>
> Accordingly, the court declares that the so-called marriage ceremony in which the plaintiff and defendant took part in Belton, Texas, on February 22, 1969 did not in fact or in law create a marriage contract and that the plaintiff and defendant are not and have not ever been 'husband and wife' or parties to a valid marriage.

Anonymous, 325 N.Y.S.2d at 501 (emphasis added). *See Funderburke*, 822 N.Y.S.2d at 394 ("plaintiff's union is not a 'marriage'"). The conclusion reached in *Anonymous* is also appropriate here—"that the so-called marriage ceremony in which the [parties] took part in [Massachusetts in 2004] did not in fact or in law create a marriage contract [under Rhode Island law] and that the [parties] are not and have not ever been [wife and wife] or parties to a valid marriage [under Rhode Island law]."

CONCLUSION

For the reasons stated herein, this Court should not extend comity or the benefit of this state's remedies to the same-sex "marriage" contract entered into between Chambers and Ormiston. Comity is not mandatory and, in light of this Court's adoption of choice of law doctrines, whether comity remains in Rhode Island as a viable judicial doctrine is questionable. The State of Massachusetts chose to radically redefine "marriage" for purposes within its own borders and Rhode Island carries strong public policy that runs contrary to the Massachusetts concept of "marriage." Any decree from this Court, or any other Rhode Island court, should mirror that of the court in *Anonymous*—declaring that Chambers and Ormiston have not ever been parties to a valid marriage under Rhode Island law, and may not invoke Rhode Island divorce law.

Dated: August 1, 2007.

Respectfully submitted,

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