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* CHRISTOPHER F. YOUNG

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INTRODUCTION AND INTERESTS OF THE *AMICI*

Margaret Chambers and Cassandra Ormiston, two Rhode Island women and residents who entered into a Marriage, are now seeking a Rhode Island divorce. Their competing petitions for divorce have given rise to this certified question: "May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?"[1]

This Court invited various government officials "and all interested persons and/or organizations ... to file briefs as *amici curiae*."[2] I, Christopher F. Young, resident of Rhode Island and citizen of the United States of America, accept the Court's invitation and with this brief demonstrate why the sound and valid answer to the certified question is "no."

I have campaigned in the state of Rhode Island for local, state and federal offices. I have run for Mayor of Providence and received 26% of the vote in the 2006 election for that office. I have run for the State Senate and House of Representatives and I have run nationally as a United States Senate Candidate. I am currently a candidate for Mayor of Providence in 2010. I have become a candidate to promote the principles of my constituents and approximately 16,000 Rhode Island voters voted for my campaign in the 2006 primary election. These voters have stated that they support the family, with marriage between a man and a woman at its heart, as central to the hope and future of this great nation, peoples, and future generations.

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[1] Supreme Court, Order of May 21, 2007, at 1.
[2] *Id*

I as amici curiae have worked at the international, national, and local levels to protect the United States Constitution and more specifically the first Amendment, Freedom of Religion. In this effort, I recognize the vital importance of defending and promoting fundamental civil rights protections for social and religious institutions such as man/woman marriage.

STATEMENT OF THE FACTS

To repeat the certified question: "May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?"

Three related sets of historical facts together comprise the foundation for resolution of that question. The first is the history of the Chambers-Ormiston relationship, the unconstitutional development of Massachusetts marriage law and the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). The second is the history of the relationship between the State of Rhode Island and the institution of marriage including void marriage based on lack of intent to consummate and void marriage based on a void "Notice of Intention of Marriage." The third is the First Amendment to the Constitution of the United States and it's protections granted to religious terms such as "marriage."

A. The Chambers-Ormiston relationship and Massachusetts/Federal developments

Chambers and Ormiston resided in Rhode Island prior to November 2003.[3] That month, a badly divided (4-3) Massachusetts Supreme Judicial Court (SJC) held that marriage as the union of a man and a woman was irrational and mandated that, effective

[3]Family Court, Affidavit of Margaret R. Chambers, February 8, 2007, at ¶ 3.

May 17, 2004, the legal meaning of marriage in that state would be the union of any two persons.[4] The state's Senate then asked the SJC whether statutory provision of civil unions for same-sex couples would be an adequate remedy, but the SJC (again dividing 4-3) held no, the legal meaning of marriage must be the union of any two persons.[5]

The governor of Massachusetts at the time, Mitt Romney, responded to these developments by directing that state officials comply with a Massachusetts statute prohibiting marriage in that state "by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction" (the 1913 statute).[6]

Law has, from the inception of our nation, recognized that the regulation of marriage is almost exclusively a State matter.[7]

Chambers and Ormiston applied for a Massachusetts marriage License on May 26, 2004.[8] They simply crossed the border, in Fall River, MA, for the necessary paperwork. They used the address of their shared Rhode Island residence in

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[4]Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("we conclude that the marriage ban [i.e., limiting marriage to the union of a man and a woman] does not meet the rational basis test").

[5] In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[6]General Laws c. 207, § 11. *See* Yvonne Abraham, *Romney: gay outsiders can't marry in Mass.*, THE BOSTON GLOBE, April 25, 2004, *available at* http://www.boston.com/news/local/articles/2004/04/25/romney_gay_outsiders_cant_marry_in_mass/.

[7] *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

[8]Technically, Chambers and Ormiston filled out a written "notice of intention of marriage" on forms provided by the registrar of vital records and statistics. The details of the technical aspects of marrying in Massachusetts are set out in Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 632-33 (Mass. 2006) (Spina, J., concurring). A certified copy of the Chambers-Ormiston "Notice of Intention of Marriage" is attached to this brief as Exhibit A.

their "Notice of Intention of Marriage"[9] and stated their intention to reside in this state.[10] They received and then used the marriage license by going to a Fall River justice of the peace who solemnized the marriage.[11] The couple then returned to their Providence residence.[12]

In a Massachusetts state court in June 2004 a number of out-of-state, same-sex couples (including two couples from Rhode Island) challenged the 1913 statute, its constitutionality, and its application.[13] In March 2006, at the SJC, one justice believed the 1913 statute unconstitutional,[14] one appeared to say both that the statute was constitutional and that it was not,[15] while five said the statute was constitutional.[16] Regarding application, three (the Spina concurrence) believed that the 1913 statute applied to residents of all states where the public and legal meaning of marriage was the union of a man and a woman.[17] The Spina concurrence based this conclusion on the simple and plain reality that where a state's "law has interpreted the term 'marriage' as the legal union of one man and one woman as husband and wife ... then same-sex marriage would be 'prohibited' in that State ...."[18] If the man/woman meaning is the public and legal norm in Rhode Island and New York, then same-sex "couples from

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[9] *See* attached Exhibit A.
[10] *See* attached Exhibit A.
[11] Family Court, Affidavit of Margaret R. Chambers, February 8, 2007, at ¶¶ 5-7.
[12] *Id.* at ¶¶ 4, 8.
[13] Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 632-33 (Mass. 2006) (Spina, J., concurring). Some Massachusetts clerks also initiated an action challenging the 1913 statute, Johnstone v. Reilly, Civil Action No. 04-2655-G; this action was consolidated with the action initiated by the out-of-state, same-sex couples.
[14] Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 660-72 (Ireland, J., dissenting).
[15] *Id.* at 659-60 (Greaney, J., concurring).
[16] *Id.* at 645, 651-52 (Spina, J., concurring); *id.* at 652 (Marshall, C.J., concurring).
[17] *Id.* at 639 n. 12 (Spina, J., concurring).
[18] *Id*

Rhode Island and New York would not be able to secure a marriage license in Massachusetts."[19] In this way, the Spina concurrence acknowledged that each of the two possible legal meanings of marriage – "the union of a man and a woman" or "the union of any two persons" – necessarily displaces the other. But three other justices (the Marshall concurrence) said that the 1913 statute did not apply to out-of-state couples from states that had no law saying *both* "marriage is the union of a man and a woman" and "marriage is not the union of a man and a man or a woman and a woman"[20] – even though, of course, the second legal idea is entirely present within the first legal idea.

The case went back to the trial court to determine whether the one New York plaintiff-couple and the two Rhode Island plaintiff-couples could marry in Massachusetts.[21] On September 29, 2006, the trial court elected to follow the Marshall concurrence relative to the Rhode Island question.[22] On that basis, the trial court found

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[19] *Id.*

[20] *Id.* at 652-59.

[21] 19 *Id.* at 658 (Marshall, C.J., concurring). Interestingly, one of the two Rhode Island couples had received a Massachusetts marriage license and had the marriage solemnized in Massachusetts, although government officials thereafter refused to register the completed marriage certificate. *Id.* at 659 n. 12.

[22] Cote-Whitacre v. Dep't of Pub. Health, 2006 WL 3208758 at *4 (Mass. Super. 2006) ("this Court will apply Chief Justice Marshall's construction of [the 1913 statute] to determine whether same-sex marriage is prohibited in Rhode Island.")

The trial court found that, under either the Spina concurrence or the Marshall concurrence, the New York same-sex couple could not marry in Massachusetts. *Id.* at *2. The basis of the finding relative to New York was that state's Court of Appeals decision of July 6, 2006, holding that the man/woman meaning of marriage was constitutional. *Id.; see* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006). The trial court did not explain why or how that holding is somehow to be equated with the *affirmative* expression, so important in the view of the Marshall concurrence, that marriage is *not* the union of two persons of the same sex. Perhaps the trial court was (consciously or otherwise) accepting the reality accepted by the Spina concurrence, that each of the two possible legal meanings of marriage – "the union of a man and a woman" or "the union of any two persons" – necessarily displaces the other. Or perhaps the trial court was reading (correctly or otherwise) the Marshall concurrence as an invitation to other state

that no "constitutional amendment, statute, or controlling appellate decision from Rhode Island ... explicitly deems void or otherwise expressly forbids same-sex marriage."[23] In this way, the trial court effectively blocked application of the 1913 statute to Rhode Island same-sex couples. The trial court made no reference to the fact that the public and legal meaning of marriage in Rhode Island is the union of a man and a woman, even though the trial court had that fact before it.[24] The Massachusetts Attorney General took no appeal.

Meanwhile, back in Rhode Island, Chambers and Ormiston decided to divorce, and each hired lawyers. The resulting "competing petitions for divorce"[25] caused the Family Court in December 2006 to certify to this Court the question of the Family Court's subject-matter jurisdiction to hear such.[26] Obviously well versed in the nuances of the recent Massachusetts developments, this Court directed the Family Court to address a number of questions relative to the Chambers-Ormiston marriage in Massachusetts, in order to compile "an appropriate factual record."[27] And apprehending a key and threshold issue in this case, this Court also directed the Family Court to reword the certified question "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

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supreme courts to "refine" the meaning of marriage in their respective states, as four of the SJC had done to Massachusetts with *Goodridge*.

[23]Cote-Whitacre v. Dep't of Pub. Health, 2006 WL 3208758 at *4 (Mass. Super. 2006)

[24]That fact was before the trial court in Cote-Whitacre v. Dep't of Pub. Health, Civil Action No. 04-2656-H, by way of both Defendants' Opposition to Clerks' and Couple's Motions for Preliminary Injunction 30-31, July 12, 2004, and Defendants' Memorandum of Law Regarding Rhode Island Law 7-9, May 30, 2006; both are available at http://www.glad.org/marriage/Cote-Whitacre/cote_documents.shtml.

[25]Family Court, Joint Memorandum of the Parties on the Pending Request for Certification of February 8, 2007, at 3.

[26] Supreme Court, Order of January 17, 2007, at 1.

[27]*Id.* at 2.

who were purportedly married in another state."[28] The Family Court then complied with both directives.[29]

The Defense of Marriage Act, DOMA, in 2000 provided a Federal definition of the terms "marriage" and "spouse" as follows:

Cite as 23 I&N Dec. 746 (BIA 2005) Interim Decision #3512

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.[30]

DOMA § 3(a), 110 Stat. at 2419 (codified at 1 U.S.C. § 7 (2000)).

B. Rhode Island and the institution of marriage and Void Marriage

In Rhode Island, the public and legal meaning of marriage is the union of a man and a woman. This marriage is void under the terms of the "Notice of Intent of Marriage," signed by Ormiston and Chambers. The notice clearly states at the bottom:

> "Please note that if you are not a Massachusetts resident and you enter into a marriage in Massachusetts that would be void if contracted for in the state where you reside and intend to continue to reside, your marriage 'shall be null and void" (G.L. c.207 § 11)"[31]

Rhode Island's statutes reflect repeatedly the man/woman meaning. For example, "[p]ersons intending to be joined together in marriage in this state must first obtain a license from the clerk of the town or city in which: (1) *the female party to the proposed marriage* resides; or in the city or town in which (2) *the male party resides*, if the female

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[28]Supreme Court, Order of January 17, 2007, at 3.
[29] Family Court, Decision of February 21, 2007.
[30] The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), DOMA § 3(a), 110 Stat. at 2419 (codified at 1 U.S.C. § 7 (2000)).
[31] *See* attached Exhibit A.

party is a nonresident of this state ...."[32] Further, "[b]oth *the bride and groom* shall subscribe to the truth of data in the application" for a marriage license.[33] Other Rhode Island marriage statutes refer to "husband" and "wife."[34] And, tellingly, in listing kindred persons a man cannot marry in this state, the statute describes only females, from "mother" through "wife's daughter's daughter" to "mother's sister."[35] For those kindred a woman cannot marry, the statute describes only males.[36]

Rhode Island's common law also defines marriage as the union of a man and a woman. Thus, in *State v. Downing*, 175 A. 248, 249 (R.I. 1935), this Court said: "'Marriage' is a status which determines the relations between husband and wife."[37] And in *DeMelo v. Zompa*, 844 A.2d 174, 177 (R.I. 2004), this Court said: "Although common-law marriages have long been recognized as valid in this state, ... the existence of a common-law marriage must be 'established by clear and convincing evidence that the parties seriously intended to enter in the husband-wife relationship.'"

The classic common-law statement is: "marriage [is] ... defined as the voluntary union for life of one man and one woman to the exclusion of all others."[38]

What is also clear is that both parties to this action are both female. This clearly indicates that both parties had no intent from the beginning to consummate the marriage, or to engage in normal sexual intercourse, or to live up to the marriage covenant, and they

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[32]R.I. G.L. § 15-2-1 (emphasis added).
[33]*Id.* at § 15-2-7 (emphasis added).
[34]*E.g., id.* at § 15-1-5 & 6.
[35]*Id.* at § 15-1-1.
[36]Id. at § 15-1-2.
[37]Strong contemporary work regarding social institutions in general and marriage in particular reaffirms the validity of this focus on the statuses of *husband* and *wife*. *See, e.g.,* DeCoste, *Transformation, supra* note 28, at 625-27.
[38] Hyde v. Hyde, L.R. 1 Prob. & Div. 130, 133(1866) (Lord Penzance)

knowingly and deliberately concealed their intent not to consummate the marriage from this court since no evidence has been presented by defendant or plaintiff indicating they intended to consummate this marriage. Also, both parties engaged in conduct repugnant to the proper consummation of marriage. The Rhode Island Supreme Court has held that a valid contract and marriage never came into existence under these circumstances and under statute the marriage was originally void. G. L. 1938, c. 416, § 1.[39]

C. The First Amendment to the Constitution of the United States

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .". The Fourteenth Amendment to the Constitution makes this provision applicable to the states.[40] Article I § 3 of the Rhode Island Constitution provides:

> § 3. *Freedom of religion.* Whereas Almighty God hath created the mind free; and all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend to beget habits of hypocrisy and meanness; and whereas a principal object of our venerable ancestors, in their migration to this country and their settlement of this state, was, as they expressed it, to hold forth a lively experiment, that a flourishing civil state may stand and be best maintained with full liberty in religious concernments: We, therefore, declare that no man shall be compelled [*7] to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of his own voluntary contract; nor enforced, restrained, molested, or burdened in his body or goods; nor disqualified from holding any office, nor otherwise suffer on account of his religious belief; and that every man shall be free to worship God according to the dictates of his own conscience, and to profess and by argument to maintain his opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect his civil capacity.[41]

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[39] Santos v. Santos, [NO NUMBER IN ORIGINAL], SUPREME COURT OF RHODE ISLAND, 80 R.I. 5; 90 A.2d 771; 1952 R.I. LEXIS 2, July 30, 1952, Decided

[40] *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

[41] Article I § 3 of the Rhode Island Constitution.

Therefore the term marriage, that is part of the faith of many religions and allows for government enforcement as the union between man and women, may not be redefined by any court. Marriage is solemnized by religious officials in Rhode Island under state law.[42] This has occurred since the very foundation of many of the world's religions, as quoted in the Bible in the book of Genesis.

> **Genesis 34:9:**
> You give us your daughters for our sons, and we will give you our daughters for your sons.

This court may not redefine such religious terms that are part of the foundation of our society. This court clearly would not have the power to redefine the term "God" to mean or be anything or anyone they choose. Although many judges might like such a power, the first amendment protects the people from such a decision.

Marriage has been defined as:

". . .the state of being united to a person of opposite sex as husband or wife. . ." Merriam Webster's Dictionary of Law 1996.

It is no business of the courts to say that what is a religious practice or activity for one group is not a religion under the protection of the First Amendment.[43]

The Establishment Clause does prohibit state establishments, it is necessary then to know what would constitute such an establishment. Justice Thomas supposes that the clause means no coercion of religious belief or practice "by force of law and threat of penalty"[44]

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[42] R.I. G.L. § 15-3-5
[43] *Fowler v. State of Rhode Island*, 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953).
[44] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1; 124 S. Ct. 2301; 159 L. Ed. 2d 98 (2004).

Clearly, redefining the term marriage would have both force of law and threat of penalty. Marriage has important consequences in many areas of the law, such as torts, criminal law, evidence, tax law, debtor-creditor relations, property, and contracts. This would also force the marriage union to be redefined for common law marriage, which many states enforce. Many same sex individuals may not want to be coerced into a religious belief that they may see as marriage or common law marriage. Likewise many religious married couples may see their union as void since it no longer conforms to their religious beliefs. Marriage, as already established as the union between a man and woman, has a history, character, and context within both state and federal constitutions.

The current religious definition of marriage as the union between man and woman is constitutional and is best understood by Justice O'Connor who gave explicit approval to ceremonial deism in Newdow, which stated:

> "most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of [the Supreme] Court opens each of its sessions ("God save the United States and this honorable Court"). These references are not minor trespasses upon the Establishment Clause.... Instead, their history, character, and context prevent [these references] from being constitutional violations at all."[45]

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The three related sets of historical facts set forth in the preceding sub-sections, when clearly apprehended, are the solid foundation for good legal analysis in this important case.

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[45] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1; 124 S. Ct. 2301; 159 L. Ed. 2d 98 (2004)

QUESTIONS AND STANDARD OF REVIEW

The certified and fundamental question is: "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?"

I agree with the Marriage Law Foundation, who have also filed an amici curiae to this case, that from that question flow, necessarily and logically, a number of questions subsidiary to it:

> 1. Does this case present an actual case or controversy? (The Court specified this question.[46])
> 2. What is the relationship, if any, between Rhode Island recognition of a marriage as valid, on one hand, and, on the other hand, the granting of a Rhode Island divorce?
> 3. Does Rhode Island's judge-made law best serve the interests of this state by altering the state's public and legal meaning of marriage from the union of a man and a woman to the union of any two persons, even for the limited purpose of granting a divorce?
> 4. Is the federal Defense of Marriage Act, 28 U.S.C. § 1738C, relevant to this case? (The Court also specified this question.[47])
> 5. Is the Full Faith and Credit clause of the United States Constitution relevant to this case. (The Court also specified this question.[48])
> 6. Does Rhode Island's public and legal meaning of marriage (the union of a man and a woman) violate state or federal constitutional norms of equality, liberty, privacy, personal autonomy, human dignity, and so forth?[49]

Considering the standard of review, because the certified question (and the questions subsidiary to it) present issues of law, this Court will employ a de novo standard of review in resolving all those questions, giving great weight and deference to the findings of historical fact made by the Family Court.[50]

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[46] Supreme Court, Order of May 21, 2007, at 2.
[47] *Id.*
[48] *Id.*
[49] See Brief of Amici Curiae United Families International, Family Watch International, and Family Leader Foundation.
[50] *See* City of Providence v. Employee Retirement Bd. of City of Providence, 749 A.2d

DISCUSSION OF THE QUESTIONS

Point 1

This case qualifies as a fully justiciable case or controversy.

The Family Court found, based on "the pleadings, exhibits and affidavits," that the conflicting contentions of Chambers and Ormiston present a real and substantial controversy between those two; their dispute (the terms of the divorce) is definite and concrete, not hypothetical or abstract.[51] As just noted, under the applicable standard of review, this Court will give great weight and deference to the Family Court's findings of historical fact, including the factual findings embedded in its ultimate conclusion of "an actual case in controversy."[52]

The section of the Administrative Procedures Act which establishes the jurisdiction of this Court to review the determinations of a governmental agency also defines the extent and scope of review proceedings. *General Laws of Rhode Island § 42-35-15(g)* mandates that the reviewing Court's inquiry shall be confined to the record of the proceedings below. This section of the statute also prevents this Court from substituting its judgment for that of the agency and limits the authority of the Court to overturn an agency decision to those instances where the agency action is:

> "(1) in violation of constitutional or statutory provisions (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[53]

1088, 1096 (R.I. 2000).

[51] Family Court, Decision of February 21, 2007, at 3-4.

[52] *Id.* at 4.

[53] CHURCH OF PAN, INC. v. NORBERG, C.A. No. 80-1505, SUPERIOR COURT OF RHODE ISLAND, PROVIDENCE, 1981 R.I. Super. LEXIS 81, June 18, 1981

Here, of course, the legal issue reflected in the certified question is more than one "needed to dispose of the case in a way that seems appropriate" and even more than one that "might provide a desirable basis for decision." Here the legal issue reflected in the certified question is absolutely essential to and unavoidable in any sensible resolution of the Chambers-Ormiston divorce proceeding. If the certified question is not answered – one way or the other – the divorce proceeding is dead in the water. Accordingly, it was wise and proper for the Family Court "to raise the issue on the court's own motion" in the form of a certified question to this Court. Likewise, it was wise and proper for this Court to invite "friend[s] of the court to argue an issue that the parties [perhaps] cannot be led to argue in a helpful way." This amicus brief and others filed present to this Court a negative answer to the certified question and do so to a high level of professionalism. Because that is so, a fundamental purpose of the justiciability requirement is now satisfied in this proceeding: "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[54]

The family court had the authority to raise a certified question to this Court. As long as the findings of the agency are supported by any legally competent evidence, the Court will not second guess the family court as to why certain evidence was found credible or not credible.[55] If competent evidence exists on the record to support an agency

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[54] 55 Baker v. Carr, 369 U.S. 186, 204 (1962).

[55] *Lemoine v. Department of Mental Health, Retardation and Hospitals*, 113 R.I. 285, 288, 320 A.2d 611, 613 (1974), *Domestic Safe Deposit Co. v. Hawksley*, 111 R.I. 224, 232, 301 A.2d 342, 346 (1973), *Millerick v. Fascio*, 120 R.I. 9, 384 A.2d 601, 603-604 (1978).

decision the Court is then limited to making a determination of what law governs the matter and whether the agency properly applied that law to the facts.[56]

Section 42-35-15(g) provides in pertinent part that the Superior Court shall not "substitute its judgment for that of the agency as to the weight of the **evidence** on questions of fact." Ordinarily, then, a reviewing court may not substitute its own judgment for factual determinations made by an administrative agency.[57] Questions of law, however, are not binding upon the court and may be reviewed to determine what the law is and its applicability to the facts.[58]

In all the circumstances, this case presents an actual case or controversy.

Point 2

The marriage is void in this case and Rhode Island will grant a divorce *only* to a couple whose marriage *this state* deems valid.

Rhode Island will grant a divorce *only* to a couple in a valid marriage. This fundamental rule appears both in statute and case law. Thus, the statute establishing the Family Court grants the court jurisdiction "to hear and determine all petitions for divorce from the bond of marriage."[59] And, as this Court has said, "the term 'divorce' ... presupposes the existence of a valid marriage."[60] All the other 49 states appear to follow this rule as well,[61] and the New Hampshire Supreme Court has stated it particularly well:

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[56] Narragansett Wire Co. v. Norberg, 118 R.I. 596; 376 A.2d 1; (1977)
[57] *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Lemmon Transport Co.* v. *United States*, 393 F. Supp. 838 (W.D. Va. 1975); *In re Pell* v. *Board of Education*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974).
[58] *Retail, Wholesale and Dep't Store Union, AFL-CIO* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972); *Ridgely* v. *Secretary of Dep't of HEW*, 345 F. Supp. 983 (D.Md. 1972); *Blue Earth County Welfare Dep't* v. *Cabellero*, 302 Minn. 329, 225 N.W.2d 373 (1974).
[59] R.I. G.L. § 8-10-3(a).
[60] Leckney v. Leckney, 59 A. 311, 311-12 (R.I. 1904).

"The right to a divorce is predicated upon the existence of a valid marriage between the parties. ... In the absence of a valid marriage, the court may not exercise its statutory powers incident to a divorce."[62] Thus, this state will not grant a Rhode Island divorce to end an arrangement between two Rhode Island people that, in Rhode Island's view, is not a valid marriage. For there to be a Rhode Island divorce, there must first be a marriage deemed valid by this state – at least for the purpose of the divorce proceeding.
The fundamental issue is the validity in Rhode Island's eyes of the Chambers-Ormiston marriage. Hence, this Court ordered a reworking of the certified question to its present form, with its emphasis on judicial recognition or not of such a marriage.[63]

The correlative fundamental and uncontroversial point is that, before granting a divorce (or even entertaining a divorce proceeding), a Rhode Island court determines the existence of a marriage for *Rhode Island's* purpose, and that determination is an expression of *Rhode Island* law, not the law of any other jurisdiction. This understanding accords with the bedrock conflict-of-laws principle that even when a court in the forum state elects to give effect to foreign law, that foreign law is not then operating of its own force but instead has force only as an expression of the forum state's power; it becomes, in this way, the forum state's law. In the words of the United States Supreme Court: "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.... 'All the effect which foreign laws can have in the territory of a

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[61] *E.g.,* 27A C.J.S. § 1 ("the term 'divorce,' in its strict and legal sense, signifies the dissolution of a valid existing marriage"); *id.* at § 2 ("divorce is predicated on, and presupposes the existence of, a valid marriage, which it operates to dissolve, or suspend, from the date of the decree"); *id.* at §3 ("the marriage relation constitutes the foundation of the action" for divorce).

[62] Joan S. v. John S., 427 A.2d 498, 499-500 (N.H. 1981).

[63] *See id.* at 3

state depends absolutely on the express or tacit consent of that state...."'[64]

This concept of *Rhode Island law* recognizing a marriage as valid (or not) *for Rhode Island's purpose* should not be confused or obscured by the modes of analysis that Rhode Island courts apply in resolving the recognition issue. For example, if a Rhode Island couple seeks a Rhode Island divorce to end their marriage validly entered into in the State of Alpha, the court may decide to apply this rule: a marriage which is valid under the law of the "marrying" state will generally be recognized as valid by the "divorcing" state.[65] But in applying that rule and proceeding to grant a Rhode Island divorce to the Rhode Island couple, the Rhode Island court's ultimate determination is *not* that the marriage is valid in Alpha; rather, the court's ultimate determination is that *the marriage is valid in Rhode Island, in this state's view, and for this state's purpose.* If the court cannot make that ultimate determination, then, as already seen, it cannot and will not grant a Rhode Island divorce.

As to the question if this marriage was void to begin with. Clearly as defined above and throughout this brief marriage in Rhode Island is defined as the union between a man and a woman. Both parties voided their original "Notice of Intention of Marriage" by getting married in a state that same sex marriage is void.[66]

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[64] Hilton v. Guyot, 159 U.S. 113, 162-166 (U.S. 1895). *See also* 12 CORPUS JURIS, *Conflicts of Law* § 5. ("It is obvious that no law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. Conversely, every person who is found within the limits of a government, whether for temporary purposes or as a resident, is bound by its laws so far as they are applicable to him.")

[65] *See* AMJUR, *Marriage* § 63. Of course, a Rhode Island court may apply a different rule: The validity of a marriage is determined by the law of the state with the most significant relationship to the spouses and the marriage. *See, e.g.,* Fungaroli v. Fungaroli, 280 S.E.2d 787 (N.C. App. 1981).

[66] See Exhibit A.

In addition, the parties lack of intent to consummate this marriage is grounds to void this marriage. There appears to be authority at common law for the rule that lack of consummation does not void a marriage *if* the petitioner relies on lack of consummation *in and of itself.* However, there is un-contradicted positive evidence that both parties had no intent to consummate this marriage under the peculiar circumstances, in that they are both female, as recorded on the record. The family court record here does not evidence a mere failure of consummation *in and of itself.* This failure to consummate a marriage, together with other evidence as to their conduct and lack of intent has been described by the Rhode Island Supreme Court in the past in *Santos* as:

"wholly repugnant to and destructive of the marriage covenant,"[67]

And this was such as to amount to a fraudulent concealment from the beginning of essential facts, thus preventing the contract from ever having any valid existence. In this connection, as in certain others, this case is unusual and also has special and peculiar circumstances. I state that Margaret Chambers and Cassandra Ormiston had no intention to consummate their marriage because both parties are both female. The testimony of the amici curiae, myself, is frank, explicit, and contains no inherent improbabilities or inconsistencies. Such testimony is nowhere contradicted or explained by Margaret Chambers and Cassandra Ormiston nor by any other facts in the record. There is no evidence or even a suggestion of fraud or collusion on the part of myself as amici curiae, and this court has not made a decision on any lack of my credibility. In these

[67] Santos v. Santos, 80 R.I. 5; 90 A.2d 771; (1952)

circumstances, my testimony, together with reasonable inferences therefrom, are entitled to be followed.[68]

The family court, however, apparently misconceived or overlooked some of this evidence, or at least they failed to evaluate it and to give the court record the benefit of the reasonable inferences therefrom. The parties' marriage documents show more than a mere lack of consummation. It also establishes in substance and effect that from the beginning parties willfully, without reason, and without any fault on the family court's part had no intention to consummate the marriage because such consummation is impossible.

The general rule is well established, apart from cases under the workmen's compensation statute, that this court may draw its own inferences from undisputed and uncontradicted evidence.[69] In the absence of contradiction or explanation, I as amici curiae believe the above-mentioned evidence, which is not inherently improbable or inconsistent, and the fair inferences therefrom lead to only one reasonable conclusion. It establishes that respondent had no intent from the beginning to consummate the marriage, to engage in normal sexual intercourse, or to live up to the marriage covenant.

As stated in *Santos:*

> "Nor can we believe that such a repugnant intent could come into existence merely after a ceremony entered into with good faith and that it did not exist before the marriage was contracted and solemnized."[70]

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[68] *Enterprise Garnetting Co.* v. *Forcier,* 67 R.I. 336, 23 A.2d 761; *Burr* v. *Fall River News Co.,* 75 R.I. 476, 480, 67 A.2d 694.
[69] *Correia* v. *McCormick,* 51 R.I. 301; *St. Goddard* v. *Potter & Johnson Machine Co.,* 69 R.I. 90, 31 A.2d 20; *Wilson* v. *Ollman,* 74 R.I. 358, 60 A.2d 728.
[70] Santos v. Santos, 80 R.I. 5; 90 A.2d 771; (1952)

On the contrary it seems that the only reasonable inference from the un-contradicted and unexplained evidence of their own conduct on the very day of the marriage and continuously thereafter is that from the beginning they had not intended to enter into a "true marriage;"[71] that they had a contrary intent that was destructive of any mutuality and "were repugnant to the existence, terms and obligations of a valid marriage contract."[72]

In such circumstances we are not dealing with a case of physical impediment between a man and a woman or condition making consummation impossible between a man and a woman or dangerous to the parties health. Nor is it a question of ordinary fraud and concealment with reference to some mere incidental matter, or of a condition that came into existence or became known to both parties only after the marriage was contracted in good faith.

Again in *Santos*:

> "Here the question goes to the root of the existence of a valid marriage contract and status. In effect respondent from the beginning by her own fraudulent concealment of her intent not to consummate the marriage and by her conduct which at all times was repugnant to a proper consummation thereof, made it impossible for her to contract a marriage in good faith, destroyed in fact any possibility of mutuality, and therefore prevented a valid contract and marriage from ever coming into existence."[73]

For these reasons the family court erred in not voiding this marriage upon knowing such a marriage existed on the grounds that the marriage was originally void under the statute.

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[71] *Id.*
[72] *Id.*
[73] *Id.*

In addition, other Federal statutory provisions outlaw certain types of marriage and recognize consummated marriage and are found at section 101(a)(35) of the Act, 8 U.S.C. § 1101(a)(35) (2000), which, in defining the terms "spouse," "husband," and "wife" for purposes of the Act, specifically excludes recognition of so-called proxy marriages:

> "where the contracting parties thereto are not physically in the presence of each other, unless the marriage shall have been consummated"[74]

Thus, before Chambers and Ormiston can receive a Rhode Island divorce, this Court must decide that, *in Rhode Island's view and for this state's purpose*, the two are validly married or, to use this state's statutory language, are in "the bond of marriage."

Point 3

This state's public and legal meaning of marriage is in harmony with state and federal constitutional norms.

The constitutionality of man/woman marriage is part of this nation's history. There have been twenty American appellate court decisions to date on the constitutionality of man/woman marriage, nineteen have refused to hold it unconstitutional and the further fact is that all eight American appellate court decisions on the issue since the SJC's decision in *Goodridge* have refused to follow that case.[75] Man/woman marriage has strong arguments sustaining constitutionality. The failure of genderless marriage proponents to genuinely and seriously engage those arguments

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[74] 8 U.S.C. § 1101(a)(35) (2000).

[75] The cases are collected at Stewart, *Marriage Facts, supra* note 28, at 4 n.7.

should cause this court to reject genderless marriage. This failure to engage is now well-documented in the scholarly literature and quite simply has not been rebuted.[76]

The arguments for the constitutionality of man/woman marriage are based on the reality that marriage is a vital social institution with a history, character, and context within both state and federal constitutions and societies. This is best understood and argued in section C., above, by the statement of Justice O'Connor who spoke on religious terms associated with government, "their history, character, and context prevent [these references] from being constitutional violations at all."42

Point 4

The federal Defense of Marriage Act reinforces a decision by this Court to not recognize the Chambers-Ormiston marriage, while the federal constitution's Full Faith and Credit Clause clearly does not require Rhode Island recognition of that marriage.

This court must consider federal Defense of Marriage Act (DOMA)[77] and the federal constitution's Full Faith and Credit Clause.[78] Discussion of the connection

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[76] *See, e.g.,* Stewart, *Judicial Elision, supra* note 28, at 28-78; Stewart, *New York,supra* note 28, at 231-59; Stewart, *Washington and California, supra* note 28, at 516-46.

[77] In 1996, Congress enacted and President Clinton signed the Defense of Marriage Act, Pub L No 104 -199, 110 Stat 2419 (1996) (codified at 28 USC § 1738C and 1 USC § 7). It has two provisions. One defines marriage for all federal statutory purposes as the union of a man and a woman. 1 U.S.C. § 7. The other says that each State need not to "give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." 28 U.S.C. § 1738C.

[78] 104 U.S. Const. art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."
As to the volume of print regarding the matter, *see* Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 353 & nn.1-3. (2005).

between the two generates a lot of passion, not because the principles of the conflicts of law. When a court resorts in a sober and deliberate way to the principles of the conflicts of law, the conclusions come rather easily and are quite clear and straightforward. As stated in my fellow brief of amici curiae filed by United Families International, Family Watch International, and Family Leader Foundation, there is the solid, lucid, and straightforward work of Patrick J. Borchers, dean and professor of law at the Creighton University School of Law, appearing in his article *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate.*[79]

As to the Full Faith and Credit Clause's meaning for and relevance to this case, after reviewing the "full faith and credit basics," Dean Borchers explains:

> Consequently, it is hard to imagine a case of a state applying its own marriage law [to not recognize a same-sex couple's out-of-state marriage] that presents a close constitutional question. Probably the most commonly hypothesized case is one in which a couple lives in a state which does not allow same-sex marriage, but gets married in a state that allows it, and then returns home and becomes involved in litigation in which the couple's marital status is crucial. But under the *Allstate* test, the domiciliary connection to the forum state is easily sufficient to justify application of the forum state's law. Perhaps the best case that could be made for a constitutional duty to apply the celebration state's law would involve a couple genuinely domiciled in a state allowing same-sex marriages and then becoming involved in litigation in a state that does not allow them. Suppose, for example, a same-sex couple is married and living in Massachusetts and one of them is injured in Nebraska and a loss of consortium claim is brought by the other spouse in Nebraska, a state whose constitution prohibits recognition of same-sex marriages. Would Nebraska be required to treat the couple as married? Admittedly, this is a closer question than the first hypothetical, but the answer is still in the negative. The public policy exception is a deeply ingrained feature of traditional choice-of-law principles, and recall that the Supreme Court held in *Wortman* that such principles are constitutional even if they do not meet the *Allstate* test. State courts have long refused to recognize marriages that violate their public policy even if the marriage was validly

[79] Borchers, *supra* note 104.

celebrated elsewhere.

> So why all the confusion over this relatively straightforward matter? A good deal of it stems from the confusion of the two branches of the Supreme Court's full faith and credit jurisprudence. As we have seen, while the Supreme Court's constitutional review of state choice of law has been deferential, its review of full faith and credit as to judgments has been "exacting." Much of the commentary has wrongly assumed that a marriage license is the functional equivalent of a judgment for full faith and credit purposes. This, however, is obviously incorrect. A judgment requires the adjudication of a controversy or at least a potential controversy. A marriage license (or a fishing, hunting or law license for that matter) lacks this character. Marriage is not a matter of one potential spouse wanting to get married, the other not wanting to get married, and then heading to the courthouse to resolve the dispute. The superficially appealing analogy to divorces is therefore wanting, because divorce decrees involve controversies (or at least the potential therefor) that involve opposing positions of the parties requiring a court's resolution. Thus, whichever branch of the full faith and credit jurisprudence is followed, the ultimate result is that states are free to recognize or not recognize same-sex marriages celebrated in other states.[80]

As to DOMA's meaning for and relevance to this case, there is this expression of clear thinking:

> In large part, DOMA simply states what the law would be without it, a point made by some who testified in opposition to it. As we have seen, DOMA or no DOMA, full faith and credit principles do not require one state to give effect to a marriage celebrated in another state. For the most part, therefore, the arguments against the constitutionality of DOMA are fanciful. The common mistaken premise of these attacks is that DOMA engaged in a radical revision of the accepted understanding of full faith and credit principles when, in fact, it did not.[81]

DOMA is relevant to this case in one important way, however. It is yet another expression – in this instance, one with nationwide scope – of the strong public policy in favor of man/woman marriage and the perpetuation of both that institution and its valuable social goods.

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[80] *Id.* at 357-58 (footnotes omitted).
[81] *Id.* at 358-59 (footnotes omitted).

The Defense of Marriage Act, DOMA, has provided a Federal definition of the terms "marriage" and "spouse" as follows:
Cite as 23 I&N Dec. 746 (BIA 2005) Interim Decision #3512

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.[82]

DOMA § 3(a), 110 Stat. at 2419 (codified at 1 U.S.C. § 7 (2000)).

Other Federal statutory provisions outlaw certain types of marriage are found at section 101(a)(35) of the Act, 8 U.S.C. § 1101(a)(35) (2000), which, in defining the terms "spouse," "husband," and "wife" for purposes of the Act, specifically excludes recognition of so-called proxy marriages "where the contracting parties thereto are not physically in the presence of each other, unless the marriage shall have been consummated."

DOMA is constitutional and expresses the same public policy reflected in Rhode Island's marriage laws, laws in favor of man/woman marriage. The Full Faith and Credit Clause leaves this Court entirely free to resolve the recognition issue as a matter of state law and in furtherance of this state's marriage policy, a policy centered on this state's public and legal meaning of marriage as the union of a man and a woman.

Point 5.

The Free Exercise Clause and the Establishment Clause reject a redefining of the religious term "marriage" from anything other than the union of a man and woman.

The government may only let stand the historical definition of the term marriage as the union between a man and a woman. The government is not taking a religious

[82] The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), DOMA § 3(a), 110 Stat. at 2419 (codified at 1 U.S.C. § 7 (2000)).

position when it defines marriage as the union between a man and a woman. It is merely setting the historical terms for a contract. To be sure, such an affirmation is not religious, and I admit that this might be a significant distinction. Yet if the government were to change it's position and redefine marriage as the union between two females or two males, the government or court would be stepping into the religious term "marriage" and profess to disbelief the belief of many religions, who believe that marriage is the union between man and woman under "God." But the Court has squarely held that the government cannot require a person to "declare his belief in God."[83]
As a matter of our precedent, to alter the term marriage is unconstitutional.

Redefining the term "marriage" would force "coercion." The kind of coercion implicated by the Religion Clauses is that accomplished "***by force of law and threat of penalty.***"[84] But the rejection of *Lee*-style "coercion" does not suffice to settle this case. Many currently married religious couples may be coerced into remaining in a religious union that no longer has the same meaning and same sex couples would be legally

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[83] *Torcaso* v. *Watkins,* 367 U.S. 488, 489, 6 L. Ed. 2d 982, 81 S. Ct. 1680 (1961); *id.,* at 495, 6 L. Ed. 2d 982, 81 S. Ct. 1680 ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'"); see also *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U.S. 872, 877, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990) ("The government may not compel affirmation of religious belief"); *Widmar* v. *Vincent,* 454 U.S. 263, 269-270, n. 6, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981) (rejecting attempt to distinguish worship from other forms of religious speech). And the Court has said, in my view questionably, that the Establishment Clause "prohibits government from appearing to take a position on questions [**2330] of religious belief." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 594, [*49] 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989). See also *Good News Club* v. *Milford Central School,* 533 U.S. 98, 126-127, 150 L. Ed. 2d 151, 121 S. Ct. 2093 (2001) (Scalia, J., concurring).

[84] 505 U.S., at 640, 120 L .Ed. 2d 467, 112 S. Ct. 2649 (Scalia, J., dissenting); see *id.,* at 640-645, 120 L. Ed. 2d 467, 112 S. Ct. 2649. Peer pressure, unpleasant as it may be, is not coercion.

coerced in common marriage law states.[85] Because what is at issue is a state action, the question becomes whether the redefining of the term "marriage" implicates a religious liberty right protected by the Fourteenth Amendment.

Clearly, redefining the term marriage would have both force of law and threat of penalty. Marriage has important consequences in many areas of the law, such as torts, criminal law, evidence, tax law, debtor-creditor relations, property, and contracts. This would also force the marriage union be redefined for common law marriage, which many states enforce. Many same sex individuals may not want to be coerced into a religious belief that they may see as marriage or common law marriage. Likewise many religious married couples may see their union as void, if it is no longer solely the union between man and woman, since it no longer conforms to their religious beliefs. This would prevent them from practicing their religious belief. Marriage, as already established as the union between a man and woman, has a history, character, and context within both the state and federal constitutions.

The Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment.[86] The text and history of the

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[85] Cf., *e.g., Schempp, supra*; *Engel* v. *Vitale,* 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962). In *Barnette*, the Court addressed a state law that compelled students to salute and pledge allegiance to the flag. The Court described this as "compulsion of students to declare a belief." 319 U.S., at 631, 87 L. Ed. 1628, 63 S. Ct. 1178. The Pledge "require[d] affirmation of a belief and an attitude of mind." *Id.,* at 633, 87 L. Ed. 1628, 63 S. Ct. 1178. In its current form, reciting the Pledge entails pledging allegiance to "the Flag of the United States of America, and to the Republic for which it stands, one Nation under God." 4 U.S.C. § 4 [4 USCS § 4]. Under *Barnette*, pledging allegiance is "to declare a belief " that now includes that this is "one Nation under God." It is difficult to see how this does not entail an affirmation that God exists. Whether or not we classify affirming the existence of God as a "formal religious exercise" akin to prayer, it must present the same or similar constitutional problems.

Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. The Free Exercise Clause does protect an individual right to keep marriage as the union between a man and woman. Marriage, defined as the union between a man and a woman, does not infringe any religious liberty right that would arise from either Clause. Marriage also does not infringe any free-exercise rights and it is therefore constitutional.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[87]

The Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress from "abridging [particular] *freedom[s]*." (Emphasis added.) This textual analysis is consistent with the prevailing view that the Constitution left religion to the States.[88]

The Establishment Clause is best understood as a federalism provision--it protects state establishments from federal interference but does not protect any individual right. By disabling Congress from establishing a national religion, the Clause protected an individual right, enforceable against the Federal Government, to be free from coercive federal establishments. ("States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights *or any other individual liberty*

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[86] See *Zelman*, 536 U.S., at 679, 153 L. Ed. 2d 604, 122 S. Ct. 2460 (Thomas, J., concurring)

[87] Amdt. 1.

[88] . See, *e.g.,* 2 J. Story, Commentaries on the Constitution of the United States § 1873 (5th ed. 1891); see also Amar, The Bill of Rights, at 32-42; *id.,* at 246-257.

interest" (emphasis added)).[89] Redefining the term marriage to mean same sex unions pertains to an "establishment of religion."

The traditional "establishments of religion" to which the Establishment Clause is addressed necessarily involve actual legal coercion:

> "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support ***by force of law and threat of penalty.*** Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, The Establishment Clause 4 (1986). Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches. *Id.,* at 3-4."[90]

Even if "establishment" of marriage between same sex partners has a broader definition to include all forms of marriage, even one that includes support for religion generally through taxation, the element of legal coercion (by the State) would still be present.[91]

It is also conceivable that a government could "establish" a religion by imbuing it with governmental authority,[92]or by "delegat[ing] its civic authority to a group chosen according to a religious criterion,"[93] A religious organization that carries some measure

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[89] See *Zelman, supra*, at 679, 153 L. Ed. 2d 604, 122 S. Ct. 2460 (Thomas, J., concurring)
[90] *Lee* v. *Weisman,* 505 U.S., at 640-641, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (Scalia, J., dissenting).
[91] See *id.,* at 641, 120 L. Ed. 2d 467, 112 S. Ct. 2649.
[92] See, *e.g., Larkin* v. *Grendel's Den, Inc.,* 459 U.S. 116, 74 L. Ed. 2d 297, 103 S. Ct. 505 (1982),
[93] *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U.S. 687, 698, 129 L. Ed. 2d 546, 114 S. Ct. 2481 (1994); *County of Allegheny,* 492 U.S., at 590-591, 106 L. Ed. 2d 472, 109 S. Ct. 3086.

of the authority of the State begins to look like a traditional "religious establishment," at least when that authority can be used coercively.[94]

It is difficult to see how government practices that have nothing to do with creating or maintaining the sort of coercive state establishment described above implicate the possible liberty interest of being free from coercive state establishments. The state or federal government can not prohibit those who were, are, or going to be married for religious purposes from doing so by redefining the term "marriage" to no longer be the union between a man and woman under "God."

> In addressing the constitutionality of voluntary school prayer, Justice Stewart made essentially this point, emphasizing that "we deal here not with the establishment of a state church, . . . but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so."[95]
> It is the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause, further calling into doubt the utility of incorporating the Establishment Clause.[96]
> To be sure, I find much to commend the view that the Establishment Clause "bar[s] governmental preferences for *particular* religious faiths." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 856, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995) (Thomas, J., concurring). But the position I suggest today is consistent with this. Legal compulsion is an inherent component of "preferences" in this context. James Madison's Memorial and Remonstrance Against Religious Assessments (reprinted in *Everson* v. *Board of Ed. of Ewing*, 330 U.S. 1, 63-72, 91 L. Ed. 711, 67 S. Ct. 504 (1947) (appendix to dissent of Rutledge, J.)), which

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[94] See also *Zorach* v. *Clauson*, 343 U.S. 306, 319, 96 L. Ed. 954, 72 S. Ct. 679 (1952) (Black, [*53] J., dissenting) (explaining that the Establishment Clause "insure[s] that no one powerful sect or combination of sects could use *political or governmental power* to punish dissenters whom they could not convert to their faith" (emphasis added)).

[95] *Engel*, 370 U.S., at 445, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (dissenting opinion).

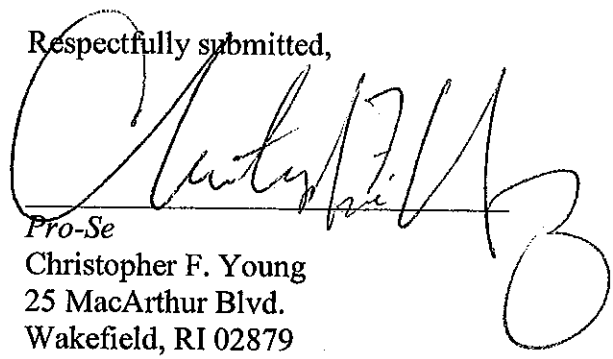
[96] See, *e.g.*, A. Amar, The Bill of Rights 253-254 (1998). *Lee* v. *Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992), could be thought of this way to the extent that anyone might have been "coerced" into a religious exercise. Cf. *Zorach* v. *Clauson*, 343 U.S. 306, 311, 96 L. Ed. 954, 72 S. Ct. 679 (1952) (rejecting as "obtuse reasoning" a free-exercise claim where "[n]o one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools"); *ibid.* (rejecting coercion-based Establishment Clause claim absent evidence that "teachers were using their office *to persuade or force* students to take religious instruction" (emphasis added)).

extolled the no-preference argument, concerned coercive taxation to support an established religion, much as its title implies. And, although "more extreme notions of the separation of church and state [might] be attribut[able] to Madison, many of them clearly stem from 'arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society,' [R. Cord, Separation of Church and State: Historical Fact and Current Fiction 22 (1982)], rather than the principle of nonestablishment in the Constitution." *Rosenberger*, *supra*, at 856, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (Thomas, J., concurring). See also Hamburger, Separation of Church and State, at 105 (noting that Madison's proposed language for what became the Establishment Clause did not reflect his more extreme views).[97]

CONCLUSION

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

Respectfully submitted,



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Pr -Se for Amici Curiae

Date: Wednesday, August 1, 2007

[97] Elk Grove Unified Sch. Dist. v. Newdow, No. 02-1624, SUPREME COURT OF THE UNITED STATES, 542 U.S. 1; 124 S. Ct. 2301; 159 L. Ed. 2d 98; 2004 U.S. LEXIS 4178; 72 U.S.L.W. 4457; 17 Fla. L. Weekly Fed. S 359, March 24, 2004,

EXHIBIT A

Form R-202 m 05/04

Intention No. 228 V

The Commonwealth of Massachusetts
DEPARTMENT OF PUBLIC HEALTH
REGISTRY OF VITAL RECORDS AND STATISTICS

NOTICE OF INTENTION OF MARRIAGE

The following notice of intention of marriage is hereby given in compliance with law.

1. 5/26, 20 04

2. TO THE CLERK OF FALL RIVER, MA, MASSACHUSETTS

PARTY A (Please Print)	PARTY B (Please Print)
3. PRESENT NAME: (First, Middle, Last) Cassandra B. Ormiston	11. PRESENT NAME: (First, Middle, Last) MARGARET R. CHAMBERS
3A. SURNAME TO BE USED AFTER MARRIAGE: Cassandra B. Ormiston	11A. SURNAME TO BE USED AFTER MARRIAGE: MARGARET R. CHAMBERS
4. DATE OF BIRTH: (Month,Day,Year) 2-26-47	4A. AGE: 57
12. DATE OF BIRTH (Month,Day,Year) 3-3-36	12A. AGE: 68
5. OCCUPATION: retired	13. OCCUPATION: Retired
6. RESIDENCE: 24 Everett Ave (Number and Street) Providence Rhode Island 02906 (City/Town, State/Country, Zip Code)	14. RESIDENCE: 24 EVERETT AVE (Number and Street) Providence, RI 02906 (City/Town, State/Country, Zip Code)
6A. If not a Massachusetts resident, I intend to reside in: (State/Country) Rhode Island	14A. If not a Massachusetts resident, I intend to reside in: (State/Country) Rhode Island
7. MARRIAGE NO. (1st, 2nd, 3rd): 1	7A. If not 1st, status of last marriage: ☐Widowed ☐Divorced
15. MARRIAGE NO. (1st, 2nd, 3rd): 2nd	15A. If not 1st, status of last marriage: ☐Widowed ☒Divorced
7B. Am/was member of: ☐ Civil Union ☐ Domestic Partnership (State/Country) no	15B. Am/was member of: ☐ Civil Union ☐ Domestic Partnership (State/Country) No
7C. If so, dissolved? ☐Yes ☐No	15C. If so, dissolved? ☐Yes ☐No
8. BIRTHPLACE: (City/Town) Flint (State/Country) Michigan	16. BIRTHPLACE: (City/Town) Grafton (State/Country) North Dakota-USA
9. NAME MOTHER/PARENT (First, Middle, Last) (Surname at birth or adoption) Lila M. Baker | Schultz	17. NAME MOTHER/PARENT (First, Middle, Last) (Surname at birth or adoption) Grace E. Chambers | Forbes
10. NAME FATHER/PARENT (First, Middle, Last) (Surname at birth or adoption) James D Baker | Baker	18. NAME FATHER/PARENT (First, Middle, Last) (Surname at birth or adoption) Ralph E. Chambers | Chambers
22. SEX ☐ Male ☒ Female	23. SEX ☐ Male ☒ Female
24. RELATED by blood or marriage to Party B? ☐ Yes ☒ No If yes, how?	25. RELATED by blood or marriage to Party A? ☐ Yes ☒ No If yes, how?

PENALTY: G.L. c.207 §52 "...whoever falsely sweats or affirms in making any statement required...shall be punished by a fine..."

I have reviewed a list of impediments to marriage for my place of residence and hereby state that there is an absence of any legal impediment to the marriage and do hereby depose and say that all of the statements as set forth in the above notice whereof I could have knowledge are true and are made under the penalties of perjury (c.4 §6, Rule 6 General Laws).

Party A (Signature) Cassandra B Ormiston | Party B (Signature) Margaret R. Chambers

Subscribed and sworn to, before me, this 26 day of May, 20 04

Registrar, Clerk, or Assistant Clerk designated to administer oaths: Theresa Richard

Marriage Certificate Issued: 5/26, 20 04 Not Valid After: 7/25, 20 04
(60 days from date intention is filed. c.207 §20)

Please note that if you are not a Massachusetts resident and you enter into a marriage in Massachusetts that would be void if contracted for in the state where you reside and intend to continue to reside, your marriage "shall be null and void" (G.L. c.207 §11)

TRUE COPY

ATTEST:

Cassandra B. Ormiston

CITY CLERK

CERTIFICATION OF SERVICE

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The undersigned hereby certifies that a true copy of the within has been sent to the above persons by regular mail, postage prepaid, on August 1, 2007.

Pro-Se
Christopher F. Young
25 MacArthur Blvd.
Wakefield, RI 02879
401-477-6178