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

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

ON A CERTIFIED QUESTION OF LAW

BRIEF OF *AMICUS CURIAE* NATIONAL LEGAL FOUNDATION

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae The National Legal Foundation (NLF) is a 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has filed numerous briefs in important cases pertaining to the sanctity of marriage. The NLF has an interest, on behalf of its constituents and supporters, particularly those in Rhode Island, in arguing to protect the sanctity of marriage.

The National Legal Foundation is fully aware of the vast diversity of Rhode Island's families. We are especially cognizant of the grandparents, single parents, adoptive parents, and foster parents who are helping to rear the next generation, often under difficult circumstances. We know there are same-sex couples raising children in Rhode Island and elsewhere. These facts do not lead us to conclude that conjugal marriage should be reconstituted. Instead, they help persuade us that conjugal marriage must be reaffirmed and reinvigorated.

STATEMENT OF THE FACTS

Amicus adopts the facts and procedural history contained in the court's order.

QUESTIONS AND STANDARD OF REVIEW

The certified question of law presented to the Supreme Court is: "Whether or not the Family Court may properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state." (Order of May 21, 2007, at 3.)

As the issues in this case present certified questions of law and not of fact, the applicable standard of review is *de novo*. *Arena v. City of Providence*, 919 A.2d 379, 384 (R.I. 2007).

SUMMARY OF ARGUMENT

Man-woman marriage is the law of Rhode Island, and it is the law of the species. Marriage has been present in virtually every culture in every age. A stable, complementary union of the sexes has the sanction of nature, and it is grounded in our sexual and social behavior. Children yearn for a stable home with mother and father present, and societies and states – including the government of Rhode Island – strive to provide it.

Across the border in Massachusetts, the word "marriage" is wrongly being applied to sex-*segregated* dyads that are missing either a man or a woman, a husband or a wife. If boys or girls are added to these Massachusetts twosomes, either their father or their mother is missing.

No court has a rightful power to redefine, to deconstruct, or to dismantle the venerable institution of marriage – or, having ostensibly done so in Massachusetts, to export that wrong into Rhode Island.

David Blankenhorn, President of the Institute for American Values, says in his essential new book, THE FUTURE OF MARRIAGE (Encounter Books, 2007) that redefining marriage to include what Massachusetts calls same-sex "marriage" would communicate the following ideas: (1) Marriage is not connected with sex. (2) Marriage is not connected to bridging the sexual divide between male and female. (3) Marriage is not

connected to rearing children. (4) Marriage is not connected to legal and biological parenthood. (5) Children do not need a father and a mother.

If Blankenhorn is right, and *Amicus* believes he is, then the stakes in this and related cases could hardly be higher.

The first two paragraphs of Rhode Island's Constitution express the People's devotion to "succeeding generations," "venerated ancestors," and "our posterity." The Constitution *presupposes* conjugal marriage between and a man and a woman. The references to "succeeding generations" and "our posterity" surely refer to that unique institution for child bearing and child rearing that was known and esteemed by Rhode Island's "venerated ancestors."

Petitioners in this case can receive lawful justice without Rhode Island having to jettison sexually integrated marriage. In *Doe v. Burkland*, 808 A.2d 1090 (R.I. 2002), a same-sex couple was given access to both equitable relief and enforcement of contracts when their relationship ended. Petitioners are not, however, entitled to a *divorce* because they have not been, and cannot be, lawfully *married* under the laws of Rhode Island.

This brief focuses on the important case of *Ex parte Chace*, 58 A. 978 (R.I. 1904), and on the Massachusetts Evasion of Marriage Act. We trust our analysis of these two important matters will be an aid to this Court.

ARGUMENT

I. THE MEANING OF "MARRIAGE" IN THE *CHACE* CASE

Rhode Island is not Humpty Dumpty's Wonderland where words mean whatever a speaker says they mean. In Rhode Island, some words have a detectable meaning. "Marriage" is one of them.

As pointed out in other briefs, Rhode Island's marriage statutes require a man and a woman. When the *Chace* Court used the terms "marriage," "husband," and "wife" – which it did more than 90 times – it was using words that had, and still have, a discernable meaning.[1]

Chace is about 100 years old, but the key words that were used in that opinion go back to the beginnings of the English language. The OXFORD ENGLISH DICTIONARY (2d ed.) contains the following entries:

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[1] Justice Tillinghast wrote the opinion in *Chace*. With him were Justices Blodgett and Douglas. We have searched for any inkling that any of them might have conceived of a "marriage," or a "husband," or a "wife" in the terms in which Massachusetts now uses those words. Of course, we found just the opposite. See, *e.g.*, *Cranston v. Cranston*, 53 A. 44 (R.I. 1902) (Blodget, J.), and *Radican v. Radican*, 48 A. 143 (R.I. 1901) (Blodget, J.); *Angell v. Reynolds*, 58 A. 625 (R.I. 1904) (Tillinghast, J.), and *Odd Fellows' Beneficial Ass'n of R.I. v. Carpenter*, 24 A. 578 (R.I. 1892) (Tillinghast, J.); and *Wrynn v. Downey*, 63 A. 401 (R.I. 1906) (Douglas, J.), and *Cannon v. Beaty*, 34 A. 1111 (R.I. 1896) (Douglas, J.).

We know that these jurists served a century ago. Much has changed. Much needed to change. Much remains to be changed. The concept of *marriage* as understood in *Chace* is not one of the errors or injustices that Rhode Island needs to fix, however. If the People of Rhode Island hold a different view, let them redefine marriage. It is decidedly not a job for Massachusetts judges.

Marriage. 1a. The condition of being a husband or wife; the relations between married persons; spousehood; wedlock. [earliest known citation in the English language, the year 1297]

Husband. 2a. A man joined to a woman by marriage. Correlative of *wife.* [earliest known citation in the English language, the year 1290]

Wife. 2a. A woman joined to a man by marriage; a married woman. Correlative of *husband*. [earliest known citation in the English language, the year 888 (sic)]

A conjugal marriage of an XY-man and an XX-woman is unlike a same-sex union, even if someone slaps the same moniker on both. A hydrogen-1 atom consists of a single proton fused with a single electron, and our refusal to call two protons or two electrons "hydrogen" is not an act of discrimination that needs to be a remedied. These different combinations are not entitled to the same name because they are distinct and different forms.

Our points about the English language must be coupled with English Common Law, which is the law of Rhode Island until changed.[2]

Petitioners want this Court to employ a definition of "marriage" that is foreign to the language,[3] foreign to the Common Law, and foreign to the laws of Rhode Island – but

[2] "In all cases in which provision is not made herein, the English statutes, introduced before the Declaration of Independence, which have continued to be practiced under as in force in this state, shall be deemed and taken as a part of the common law of this state and remain in force until otherwise specially provided." R.I.G.L. 1956, §43-3-1

[3] We recognize that future dictionaries will include a definition of "marriage" that will include the new meaning from Massachusetts and elsewhere. However, Rhode Island's constitution, its statutes, and the *Chace* decision were not written in the future. They were written in the past, when "marriage" only meant a union of a man and a woman. Dictionaries will have to include the Massachusetts example because they are

recently invented by a Massachusetts court. Your *Amicus* urges this Court to consider what "marriage," "husband," and "wife" have meant in the English language for hundreds of years – and what those words meant in *Chace*. We need hardly add that *sex-integrated marriage* itself far predates the origins of the English language.

II. THE LAW OF *EX PARTE CHACE*

This case will be decided under the laws of Rhode Island, not Massachusetts, and in Rhode Island marriage requires a man and a woman.

But, it is said, under this Court's 1904 *Chace* decision, Rhode Island must recognize a marriage lawfully performed in Massachusetts even if the marriage would not have been lawful in Rhode Island.

Chace is still good law, we agree, but it is a precedent only for subsequent cases having comparable facts. This case is not one of them.

To begin with, *Ex parte Chace*, 58 A. 978 (R.I. 1904), involved a man and a woman who had entered a genuine *marriage* as husband and wife as those terms were and are understood in the State of Rhode Island. The relationship between today's petitioners, Ms. Chambers and Ms. Ormiston, no matter how loving and intimate it might once have been, is *not* a *marriage* under Rhode Island law irrespective of what Massachusetts calls it.

The definition and nature of marriage are far from the only differences between *Chace* and this case. Table 1, *infra*, lists 10 differences between the two cases. If this

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compilations of how the language is being used. They even report on muddled usage, such as when a user equates an "uninterested" jurist with a "disinterested" jurist.

Court accounts for those differences, it will find against petitioners while still adhering to *Chace*. The law of *Chace* should not be disturbed, it was applied to a guardianship/marriage case as recently as 1962, *Pearce v.* Cochrane, 186 A.2d 68 (R.I. 1962), but neither should it be mauled beyond recognition.

In *Chace*, a Rhode Island man and a Rhode Island woman went to Massachusetts, got married, and immediately returned to Rhode Island. The marriage was lawful and valid under the laws of Massachusetts, but not under the laws of Rhode Island because Mr. Chace was under guardianship, and he had not obtained permission to marry. The question for the Rhode Island Supreme Court in 1904 was, is the Massachusetts marriage valid in Rhode Island? It answered in the affirmative, saying that Rhode Island would apply the law of the jurisdiction where the marriage was celebrated.

Chace has a superficial resemblance to the case now pending. Likewise, "The Breakers" has a superficial resemblance to a tiki hut. Both might loosely be described as "beach houses," but beyond that the comparison fails. This case is not *Chace* for the following reasons, and perhaps others:

Table 1. Comparing *Ex parte Chace* to the Case Now Before the Court

	Ex parte Chace, 58 A. 978, decided by this Court in 1904	***Chambers v. Ormiston*** (2007)
Is there a *bona fide marriage* as that term has always been understood in Rhode Island?	Yes. "Soon after the marriage, Mr. and Mrs. Chace returned to this state, and lived together as husband and wife…." P. 979.	No. The parties are both women.
Did the couple purposely evade the laws of Rhode Island?	No. "[I]t nowhere appears . . . that the marriage involved here was entered into in evasion of the laws of the domicile [Rhode Island]…." P. 979; also see concurring op.	Yes. The couple surely knew they had to leave R.I.
Was the couple's act contrary to the public policy of Rhode Island?	No. "[I]t nowhere appears . . . that the marriage involved here was entered into contrary to the public policy [of Rhode Island]." P. 979	Yes. R.I.'s law and practice are against it.
Could the couple have married in Rhode Island if the disability had been waived?	Yes. Mr. Chace was under a statutory disability because he was a ward. He had mismanaged his estate, and the State feared he might "bring himself to want." P. 979. Spendthrifts can marry, so long as they choose a person of the opposite sex.	No. The parties are under more than a statutory caveat; they face a legal impossibility.
If the couple had married in R.I., notwithstanding the legal prohibition, would the marriage be void?	No. "[I]t is not clear that, even if the marriage had been solemnized in this state [Rhode Island], it would have been void." P. 979	Yes. Void and impossible, both.
Was the case decided *before* MA adopted its evasion-of-marriage act?	Yes. *Chace* was handed down in 1904, and the Massachusetts law was enacted in 1913.	No.

Is it clear that the marriage was lawfully performed in Massachusetts?	Yes. "As to its validity in Massachusetts, no authorities were cited by counsel, and we have not succeeded in discovering any Massachusetts statute or decision which would tend to show that the marriage is not valid there." P. 981	No. The MA evasion-of-marriage act casts strong doubt on the legality.
Is the marriage of the type that all nations allow, so that its legitimacy is universally recognized?	Yes. The *Chace* court said, "In *Medway v. Needham*, 16 Mass. 157 [1819], a statute made a marriage between a negro or mulatto and a white person void. A couple, one of whom was a mulatto and the other white, in order to evade the [Massachusetts] statute, came into Rhode Island, where such connections were allowed, were there married, and immediately returned. And the marriage, being good in Rhode Island, was held to be good in Massachusetts. The reasoning upon which these cases proceed is well stated by Sir Edward Simpson in *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 395 [1752]. He says on page 417: 'All nations allow marriage contracts. They are "juris gentium," and the subjects of all nations are equally concerned in them....'" P. 980.	No. The formal relationship between Ms. Chambers and Ms. Ormiston is not a *marriage* under the laws of R.I. or the vast majority of other jurisdictions throughout the world. Their relationship is not *juris gentium*, *i.e.*, common to all nations.
On its face, is the case a marriage case?	Yes, and "[I]t is clear that different considerations apply to the determination of the validity of divorces than to the validity of marriages procured in evasion of the law of domicile." Pp. 980-81	No. This is a divorce case.
Does the case involve a foreign court's interpretation of R.I. law?	No. The only interpretation of Rhode Island law in *Chace* was made by this Rhode Island Court.	Yes. Central to their case is a MA interpretation of R.I. law.

III. THE PRECEDENTS THAT *CHACE* WAS BUILT UPON

In addition to the definition of marriage and the differences shown in the chart, the law and rationale of *Chace* are entirely contrary to what today's parties are attempting. To demonstrate this, we have reviewed two treatises and one case that were key sources for the law that was declared in *Chace*. *Chace* rests upon understandings and principles that are only just below the surface:

A. Bishop's Treatise on Marriage

The *Chace* Court cited seven times to Joel Prentiss Bishop's book NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION. The Court did not say which edition it was using, so we have gone to the latest edition that would have been available to that Court, the two-volume edition of 1891, published in Chicago by T.H. Flood & Co.

The *Chace* Court cited Professor Bishop's treatise on four subjects: the presumption that a marriage is lawful and valid (§77 & §836); the law to be applied when the marriage was celebrated in a foreign jurisdiction ("§843 and cases cited"); the public policy exception to the standard rule of recognizing marriages ("§858 et seq." & §827); and the distinction between laws involving divorce and laws involving marriage (§836 & §837). 58 A. at 979-81. By going to the original source we can see what Professor Bishop meant when he used the word "marriage." Sections 11 and 7 of his treatise read as follows:

> "11. *Marriage . . . is the civil status of one man and one wo*man legally united for life, with the rights and duties which, for the establishment of

families and the *multiplication* and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony." (§11, emphasis added)

"7. The foundation of marriage law is the doctrine of ethics and of social science, that the sexes should not associate promiscuously, but 'pair off,' to use an expression applied to the birds of the air. This opinion is universal; to be deemed, therefore, as proceeding from the nature of man, and voicing the wisdom of God. Even under polygamy, fidelity to and among the family of wives is enjoined the same as is the more restricted fidelity in monogamy. A Christian *marriage is the union of one man and one woman*; outside of which, all commerce of the sexes is forbidden, though, like other admitted evils, it is less severely dealt with in some countries than in others." (§7, emphasis added)

These underlying principles and understandings form the superstructure of *Chace*. When the *Chace* Court cited Bishop on marriage, it was citing to an authority who meant something particular by the term "marriage." He meant "the civil status of one man and one woman." That is what the *Chace* Court meant, too.

B. Story's Treatise on Conflicts

Five sections of Justice Joseph Story's famous work on the conflict of laws, COMMENTARIES ON THE CONFLICT OF LAWS (8th ed. by M. Bigelow) (Boston: Little, Brown, & Co. 1883) are cited by the *Chace* Court on the bottom of page 979. But, what did Story mean by "marriage"? His treatise tells us:

*"*108. *Legal Aspect of Marriage*.—Marriage is treated by all civilized nations as a peculiar and favored contract. [Footnote] (*a*) It is in its origin a contract of natural law. *It may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind.* It is the parent and not the child of society. . . . In civil society it becomes a civil contract regulated and prescribed by law, and endowed with civil consequences. In many civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. *It then becomes a religious, as well as a natural, and civil, contract; for it is a great mistake to suppose*

that, because it is the one, therefore it may not likewise be the other. The common law of England (and the like law exists in America) considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to ecclesiastical and religious scrutiny. In the Catholic countries, and in some of the Protestant countries, of Europe, it is treated as a sacrament."

> "[Footnote](*a*) <u>*Marriage*</u>, as understood in Christendom, *means 'the voluntary union for life of one man and one woman*, to the exclusion of all others.' The term is therefore not applicable to the union of a man and a woman as practiced among the Mormons, by whose faith polygamy is lawful. Persons so united will not be considered husband and wife, although both were single at the time of their union, and they are not entitled to the benefit of the laws providing for the dissolution of marriage or the enforcement of its duties in a country where polygamy is not lawful. [Numerous citations omitted.] '*It may be, and probably is, the case that the women [in polygamous countries] there pass by some word or name which corresponds to our word* <u>*wife*</u>*. But there is no magic in a name; and if the relation there existing between men and women is not the relation which in Christendom we recognize and intend by the words* <u>*husband*</u> *or* <u>*wife*</u>*, but another and altogether different relation, then use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse a superficial observer*.' *Hyde v. Hyde*, L. R. 1 P. & M., p. 134." (§108, emphasis added; underlined words are in italic in the original; numbered footnotes omitted)[4]

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[4] The treatises used the "Christian marriage" to distinguish marriage in the West from marriage in Muslim and other cultures where polygyny was permitted. Rhode Island forbids bigamy, R.I.G.L. 1956 §§ 15-1-5, 15-1-6, 15-3-11, & 11-6-1 (and the sex-specific terms of those prohibitions help emphasis the man-woman requirement of marriage), and the laws against bigamy are relevant to the case now pending because the parties here are alleging that they have a "marriage" with *two wives*. Massachusetts has abolished the *gender* requirement for marriage. Is it only a matter of time until the *number* requirement is abolished, too? Earlier this year a Canadian court declared that a child has three parents: his biological mother; the biological father who is a friend of his mother's but was never her husband; and the mother's same-sex partner. *A.(A.) v. B.(B.)*, 2007 WL 13114, 2007 CarswellOnt 2 (Ontario Ct. App. Jan. 2, 2007).

C. The Massachusetts Case of *Medway v. Needham*.

The *Chace* Court cited approvingly the Massachusetts case of *Medway v. Needham*, 16 Mass. 157 (1819). In *Medway*, a mixed-race couple went into Rhode Island to wed because interracial marriage was unlawful in Massachusetts. They then returned to Massachusetts where they lived together for some 50 years until the towns of Medway and Needham got into a squabble over their care. The Supreme Judicial Court of Massachusetts held that the marriage was lawful in Massachusetts because it was lawful in Rhode Island where the marriage took place.

Then, 85 years later, this Rhode Island Court cited approvingly *Medway v. Needham* in its *Chace* opinion of 1904, and said, "The reasoning upon which these cases [*Medway* and others] proceed is well stated by Sir Edward Simpson in *Scrimshire v. Scrimshire*":

> "All nations allow marriage contracts, they are 'juris gentium,' and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. * * * By observing this law, no inconvenience can arise; but infinite mischief will ensue if it is not."[5]

[5] This quotation from *Scrimshire* was not used in the Massachusetts case of 1819, but only in the Rhode Island case of 1904. It is Rhode Island's explanation of the result in *Medway v. Needham*, not Massachusetts's. The quotation is at *Ex parte Chace*, 58 A. 978, 980 (1904), citing *Scrimshire v. Scrimshire*, 2 Haggard's Consistorial [sic] Rpts. 395, 417, 161 English Repts. 782, 790 (1752).

The *Scrimshire* case was never again cited by a Rhode Island court. In the English cases, the expansive observation of *Scrimshire* seems to have been narrowed:

The "juris gentium," as the author of *Scrimshire* himself says just a few sentences before the lines quoted, is "the law of every country." We ask this Court to consider whether the "law of every country" can be considered to encompass what Massachusetts is calling "marriages." *Scrimshire* could be written and decided as it was, and *Chace* could cite it, because there was universal agreement, at least in the West, on the meaning of marriage.

Today, five of 194 countries permit persons of the same sex to "marry." Massachusetts is alone among the 50 States, and the law of Massachusetts is contrary to the law of the United States which defines "marriage" as "only a legal union between one man and one woman as husband and wife," and defines "spouse" as "a person of the opposite sex who is a husband or a wife." 1 U.S.C. §7.

> "References to cases like *Brook v. Brook*; *Sottomayor (otherwise De Barros) v. De Barros*; and *Ogden v. Ogden*, show that the consent to Sir Edward Simpson's proposition in *Scrimshire v. Scrimshire* is less general that the language of his judgment suggests. Lord Cranworth in *Brook v. Brook* expressed the principle of the rule under our own law in these words:
>
> > "'Though in the case of marriages celebrated abroad the lex loci contractus must quoad solennitates determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, beings subjects of Her Majesty domiciled in this country, might lawfully make.'"

Mitford v. Mitford and Von Kuhlmann, [1923] P. 130, 1923 WL 17961 (PDAD) (footnotes with case citations omitted).

We do not urge this Rhode Island Court to apply any law but Rhode Island's own. However, if *Chace* made the "juris gentium" relevant for the marriage-recognition law of Rhode Island, then it is clear to us that the parties now before the Court cannot prevail. The relationship they seek to have recognized is not a relationship found in the "law of every country." Indeed, just the opposite – beginning with the parties' own country and State.

IV. WHAT MASSACHUSETTS IS TRYING TO DO, AND WHAT SOME IN RHODE ISLAND WOULD SUBMIT TO

Why did the parties in this case have to go to Massachusetts? B*ecause there is no such thing in the State of Rhode Island as a "marriage" between two persons of the same sex*. If such a union is impossible under Rhode Island law, then under operation of the Massachusetts evasion-of-marriage statute (quoted below) there can be no lawful marriage in Massachusetts between two Rhode Island domiciliaries.

Massachusetts came to a different conclusion, of course, a conclusion that this Court must reject in applying the law of Rhode Island. This Court has freely disagreed with Massachusetts decisions before,[6] and it must do so again.

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[6] *E.g.*, *Chavers v. Fleet Bank*, 844 A.2d 666 (R.I. 2004) (interpreting Deceptive Trade Practices Act), disagreeing with *Raymer v. Bay State National Bank*, 424 N.E.2d 515 (Mass. 1981) (interpreting a similar statute); *Volpe v. Gallagher*, 821 A.2d 699 (R.I. 2003) (fixing the duty of care that a mother of a mentally-ill son owes her neighbors), disagreeing with *Andrade v. Baptiste*, 583 N.E.2d 837 (Mass. 1992); *Toste Farm Corp. v. Hadbury, Inc*., 798 A.2d 901 (R.I. 2002) (maintaining an action for maintenance, *i.e*. the unlawful helping of another to bring a lawsuit), disagreeing with *Saladini v. Righellis*, 687 N.E. 2d, 1224 (Mass. 1997); *Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1997) (damages in tort when sterilization procedure is negligently done and pregnancy results), disagreeing with *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990); *Kleczek v. Rhode Island Interscholastic League, Inc*., 612 A.2d 734 (R.I. 1992) (boy not entitled to play on girls'

In 1913 (*after* this Court's decision in *Chace*), Massachusetts adopted an evasion-of-marriage statute which is still in force. It reads:

> No marriage shall be contracted in this commonwealth 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, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

Mass. Ann. Laws ch. 207, § 11 (LexisNexis 2007).

When that Massachusetts statute is coupled with Rhode Island's marriage laws there is a sufficient and certain answer to the issues facing this Court.

The Massachusetts decisions in *Cote-Whitacre v. Dept. of Public Health*, 844 N.E.2d 623 (Mass. 2006) (no majority opinion), and *Cote-Whitacre v. Dept. of Public Health*, 2006 WL 3208758 (Mass. Superior Ct., Sept. 2006) (on remand from the Massachusetts high court), do allow two Rhode Islanders of the same sex to go to Massachusetts and enter into what that State calls "marriage" and then return to Rhode Island.

In *Cote-Whitacre*, three justices of the Supreme Judicial Court said that in deciding about Rhode Island law, a Massachusetts court could look at Rhode Island's Constitution, statutes, and "the home State's general body of common law [to] ascertain

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field hockey team even though State constitution forbids gender discrimination), disagreeing with *Attorney General v. Massachusetts Interscholastic Athletic Assoc*., 393 N.E.2d 284 (Mass. 1979); *Pimental v. Dept. of Transportation*, 561 A.2d 1348 (R.I. 1989) (sobriety checkpoint unconstitutional under State constitution), disagreeing with, *Commonwealth v. Sheilds*, 521 N.E.2d 987 (Mass. 1988); *Constant v. Amica Mutual Ins. Co*., 497 A.2d 343 (R.I. 1985) (limiting uninsured motorists coverage did not contravene State's public policy), disagreeing with *Cardin v. Royal Insurance Co. of America*, 476 N.E.2d 200 (Mass. 1985); *State v. Burbine*, 451 A.2d 22 (R.I. 1982) (allowing admission of defendant's statement to police), disagreeing with *Commonwealth v. McKenna*, 244 N.E.2d 560 (Mass. 1969).

whether that common law has interpreted the term 'marriage' as the legal union of one man and one woman as husband and wife." 2006 WL 3208758 at *2, quoting 446 Mass. at 363 (Spina, J., concurring). Another three justices, led by Chief Justice Marshall, said that in deciding about Rhode Island law, a Massachusetts court must find that "the relevant statutory [or constitutional] language of the applicant's home State *explicitly* provides that particular marriages are void." 2006 WL 3208758 at *2, quoting 446 Mass. at 387-88 (Marshall, C.J., concurring) (emphasis added).

The lower court applied Chief Justice Marshall's position which, in our view, is just a power grab that ought to be opposed by every State in the Union – although, as it turns out, it appears that Massachusetts is exporting that particular product to only one State, Rhode Island.

In the *Goodridge* cases Chief Justice Marshall said that same-sex couples could not be excluded from what Massachusetts calls and licenses as marriage. That was bad enough, but it was limited to Massachusetts. Now, she uses *Cote-Whitacre* to compound her error by holding that the 49 other States cannot be said to genuinely oppose that oxymoron "same-sex 'marriage'" unless they have explicitly and recently responded to her decision in *Goodridge*.

The fallacy of Marshall's view is highlighted by the view of a co-equal branch of Massachussetts's government: Massachusetts's governor came to the exact opposite conclusion about Rhode Island law. In a document issued to county clerks and loaded onto the website of the Massachusetts Registry of Vital Records and Statistics, "impediments" to marriage under the marriage evasion law were listed for each state. Mary L.

Bonauto, *Goodridge in Context*, 40 Harv. C.R.-C.L. L. Rev. 1, 60 & note 330-31 (2005) (cited document now available at http://www.mass.gov/Eeohhs2/docs/dph/vital_records/impediment.pdf).

Nonetheless, Rhode Island and her sister States cannot just ignore Massachusetts, they must respond affirmatively, explicitly, and promptly.

In Marshall's view, Rhode Island cannot continue to rely on generations of positive law and millennia of natural law but must act anew and explicitly or she will authorize the "marrying" of same-sex couples from Rhode Island who have gone to Massachusetts to evade Rhode Island's laws.

CONCLUSION

Marriage in Rhode Island requires a man and a woman. Any other combination of the sexes is incapable of contracting marriage. Additionally, marriages entered into in Massachusetts by same-sex couples from Rhode Island are void *ab initio* in Rhode Island because of the Massachusetts Evasion of Marriage Act.

Wherefore, in light of the foregoing, we respectfully urge this Court to hold that the Family Court may not recognize, for the purpose of entertaining a divorce petition or otherwise, the purported Massachusetts "marriage" between Margaret Chambers, a woman, and Cassandra Ormiston, a woman.

Respectfully submitted,
This 31st day of July, 2007

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Chambers v. Ormiston*, No. 06-340 on all required parties by delivering copies to Federal Express on July 31, 2007, for next day delivery, addressed as listed below.

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