To Be Argued By:
ALPHONSO B. DAVID
Time Requested: 30 minutes

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

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CASE NO. 2006-7589

DUKE L. FUNDERBURKE,

Plaintiff-Appellant,

—against—

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, DANIEL E. WALL in his official capacity as PRESIDENT OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, ROBERT W. DUBOIS in his official capacity as DIRECTOR OF THE EMPLOYEE BENEFITS DIVISION OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, UNIONDALE UNION FREE SCHOOL DISTRICT, WILLIAM K. LLOYD, in his official capacity as SUPERINTENDENT OF THE UNIONDALE UNION FREE SCHOOL DISTRICT, LAWRENCE D. BLAKE, in his official capacity as ASSISTANT SUPERINTENDENT FOR BUSINESS AFFAIRS FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT, MYRTLE E. DICKSON, in her official capacity as DIRECTOR OF PERSONNEL FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT,

Defendants-Respondents.

BRIEF OF PLAINTIFF-APPELLANT

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
Telephone: (212) 809-8585
Facsimile: (212) 809-0055

KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

Attorneys for Plaintiff-Appellant

Nassau County Clerk's Index Number 05/006186

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

DUKE L. FUNDERBURKE,

Plaintiff-Appellant,

- against -

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, DANIEL E. WALL in his official capacity as PRESIDENT OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, ROBERT W. DUBOIS in his official capacity as DIRECTOR OF THE EMPLOYEE BENEFITS DIVISION OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, UNIONDALE UNION FREE SCHOOL DISTRICT, WILLIAM K. LLOYD, in his official capacity as SUPERINTENDENT OF THE UNIONDALE UNION FREE SCHOOL DISTRICT, LAWRENCE D. BLAKE, in his official capacity as ASSISTANT SUPERINTENDENT FOR BUSINESS AFFAIRS FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT, MYRTLE E. DICKSON, in her official capacity as DIRECTOR OF PERSONNEL FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT,

Defendants-Respondents.

Nassau County Clerk's Index No. 05/006186

STATEMENT PURSUANT TO CPLR 5531

1. The index number of the case in the court below is 05/006186.

2. The full names of the original parties are as captioned. There have been no changes in the parties subsequent to the filing of the amended complaint on July 21, 2005.

3. The action was commenced in the Supreme Court, Nassau County.

4. The action was commenced by the filing of a summons and complaint on or about April 20, 2005. An amended complaint was filed on July 21, 2005. Defendants-respondents New York State Department of Civil Service, *et al.* served their answer on or about September 14, 2005, and defendants-respondents Uniondale Union Free School District, *et al.* served their answer on or about September 15, 2005.

5. This is an action for declaratory, injunctive, and compensatory relief. Plaintiff-appellant contends that defendants-respondents' refusal to provide health insurance and dental insurance to plaintiff-appellant's spouse, as required by New York common law, violates New

York common law, the New York Civil Service Law, and plaintiff-appellant's right to equal protection under the New York State Constitution, and represents a breach of defendant Uniondale Free School District's collective bargaining agreement with the Uniondale Teachers' Association. Plaintiff-appellant seeks a declaration that his marriage is legally entitled to respect under New York law, an injunction directing all defendants-respondents to cease denying plaintiff-appellant the spousal coverage to which he is entitled, compensatory damages caused by defendants-respondents' breach of their obligations to him, attorneys' fees and costs, and such other relief as the Court deems just and proper.

6. Plaintiff-appellant appeals from an Order of the Supreme Court, Nassau County (Hon. Edward W. McCarty, III, J.S.C.), entered on July 12, 2006, granting defendants-respondents' motions for summary judgment and denying plaintiff-appellant's cross-motion for summary judgment.

7. The appeal is on a reproduced full record.

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CONSTITUTIONAL PROVISIONS

STATUTES, RULES & LEGISLATIVE MATERIALS

QUESTIONS PRESENTED

Question 1: Did the motion court err in failing to apply the long-standing marriage recognition rule to find that plaintiff-appellant's valid Canadian marriage must be respected for purposes of determining eligibility for retiree spousal health benefits?

Answer: Yes.

Question 2: If the judgment below is not reversed based on the issue raised in Question 1, did the motion court err in failing to find that defendants-respondents' discrimination for purposes of determining eligibility for retiree spousal health insurance benefits between the valid out-of-state marriages of same-sex couples and all other out-of-state marriages subject to the marriage recognition rule violates the State Constitution's guarantee of equal protection?

Answer: Yes.

Plaintiff-appellant Duke L. Funderburke respectfully submits this memorandum of law in support of his appeal of the order of the Supreme Court, Nassau County (McCarty, J.S.C.), dated July 11, 2006 and entered July 12, 2006 (the "Order"), granting defendants-respondents' motions for summary judgment and denying plaintiff-appellant's cross-motion for summary judgment. Defendants-respondents include the New York State Department of Civil Service and officers sued in their official capacities (collectively, "DCS"),[1] along with the Uniondale Union Free School District and employees sued in their official capacities (collectively, "the District").

PRELIMINARY STATEMENT

Over a century of settled common law, repeatedly reaffirmed by the Court of Appeals and this Court, requires that a marriage validly and legally entered into in another state or country be respected in New York State *even if* the same marriage would be prohibited *within* this State. This "marriage recognition rule" is based on principles of interstate and international comity, but, in consideration of the unique importance of the marriage contract, creates an even stronger presumption for recognition than is required by ordinary comity analysis. Valid marriages *must* be respected in New York unless a statute specifically bars

[1] The New York State Attorney General's Office declined to defend DCS, which instead has retained private counsel in this litigation.

their recognition or the marriage is of a type, such as close incest or polygamy, as to which there is a shared social consensus of abhorrence.

There is no dispute in this case that plaintiff-appellant validly married his partner of 43 years in Canada, after such marriages became legal in 2003. All he seeks in this suit is to have this valid marriage recognized for the purpose of obtaining retiree spousal health care benefits that he earned through 25 years of service to the Uniondale, New York schools and that would come automatically to any other retired schoolteacher who married. New York has no statute barring recognition of plaintiff-appellant's marriage, and the parties and motion court all agreed that there is no social consensus of abhorrence towards the marriages of same-sex couples. Indeed, couples validly married in Canada and Massachusetts have been recognized as married by public and private authorities throughout the State, and the State has a long history of supporting and respecting same-sex relationships in a variety of settings.

The motion court did not hold, nor could it have, that the marriage recognition rule is no longer the law in New York, but nevertheless rejected plaintiff-appellant's claim based on a fundamental misreading of *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), in which the Court of Appeals recently denied a constitutional challenge to the exclusion of same-sex couples from entry into civil marriage *within* New York State. *Hernandez* held only (1) that New York's

Domestic Relations Law ("DRL") does not permit same-sex couples to marry in the State and (2) that this exclusion is not unconstitutional. The case did not even mention, much less decide, the entirely distinct question whether valid out-of-state marriages of such couples must be respected within the State.

The motion court offered little explanation for its holding but seemed to assume that *Hernandez* automatically, if implicitly, decided the separate recognition question. This was fundamental error. Indeed, Attorney General (now Governor) Eliot Spitzer recently asserted in a memorandum of law filed in another state court action in which the Attorney General's Office is *defending* application of the marriage recognition rule to same-sex married couples that "*Funderburke* . . . was wrongly decided."[2]

It is only *because* the DRL does not permit same-sex couples to marry within New York State, as *Hernandez* confirmed, that the choice of law question even arises. By suggesting that anyone who cannot marry within the State is not entitled to respect for a valid foreign marriage, the motion court's decision effectively eviscerates the marriage recognition rule as it applies to *any* extra-territorial marriage not available in this State, whether of a same-sex or a different-sex couple.

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[2] *See Godfrey v. Hevesi*, Index No. 5896/06 (Sup. Ct. Albany Cty. filed Sept. 7, 2006), Mem. of Law In Supp. of Def.'s Mot. To Dismiss the Compl. dated November 10, 2006 at 23 ("A.G. *Godfrey* Br.").

These questions require fundamentally different analyses. In *Hernandez*, the Court of Appeals accorded significant deference to the Legislature's decision not to permit same-sex couples to marry. Here, the Legislature has chosen *not* to bar recognition for valid foreign marriages of same-sex couples, as many other states have, and thus the opposite presumption in *favor* of recognition provided by the common law rule governs decision of this case. For the courts to decide to bar recognition for valid marriages where the Legislature has chosen not to overrule centuries of Court of Appeals rulings would in fact be judicial overreaching.

This Court should instead correct the error of the motion court and eliminate the inconsistency it has created with the well-settled law and declarations of the Attorney General and other public officials and private entities confirming that valid foreign marriages of same-sex couples are entitled to legal respect. Any other holding would give rise to significant equal protection concerns. While *Hernandez* rejected an equal protection challenge to the general exclusion of same-sex couples from civil marriage, the discrimination created by the ruling below is distinct and palpably unconstitutional. It is irrational and unconstitutional to deny retiree spousal health care benefits to validly married same-sex couples while granting them to other retirees who enter into foreign marriages likewise unavailable in New York — an issue this Court need not address if it simply

applies well-settled common law to hold that plaintiff-appellant's marriage must be respected.

Accordingly, the Order should be reversed and the case remanded with instructions to grant plaintiff-appellant's motion for summary judgment.

STATEMENT OF FACTS

Plaintiff-appellant Mr. Funderburke served defendant-respondent Uniondale Union Free School District as a certified teacher for twenty-five years of his life, from 1963 until his retirement in 1988. (R. 89, 168, 269).[3]

As a retired employee of the District, plaintiff-appellant receives health insurance coverage through the New York State Health Insurance Program ("NYSHIP"), which is established and governed by the Civil Service Law ("CSL") and administered by defendant-respondent DCS. As enrollees in NYSHIP, retired District employees are entitled to choose from a variety of health plans. One of these is the Empire Plan, which is available exclusively to public employees in New York. Among other benefits, enrollees in the Empire Plan are covered for hospital services, physician's bills, prescription drugs, and other covered medical expenses. These benefits are available under the terms of the Empire Plan to both active and retired District employees, and to their spouses. (R. 84-85, 167-68).

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[3] Citations to the Record on Appeal are denominated "(R. __)."

In addition to NYSHIP, the District provides its active and retired employees with several other forms of health coverage. These include supplemental medical insurance benefits, which are available from the District's provider of group excess medical insurance, The First Rehabilitation Life Insurance Company of America ("First Rehab."), and dental benefits through the District's self-insured dental plan (collectively, the "District Supplemental Health Plans"). Enrollees in the District Supplemental Health Plans are entitled to extend coverage to their spouses. (R. 84, 88, 406-33).

Throughout his years as a teacher, and continuing to this day, plaintiff-appellant has lived together with Bradley Davis in New York in a permanent, committed relationship. The two have provided for each other as best they can throughout their relationship. They have continually had joint bank accounts since 1963, and Mr. Davis has always been plaintiff-appellant's life insurance beneficiary. Since preparing wills in the early 1970s, they have been each other's primary beneficiary. For the past twenty-five years, they have named each other in their respective health care proxies and have given each other reciprocal powers of attorney in the event of incapacity. (R. 269). When New York City adopted a Domestic Partnership registration law, plaintiff-appellant and Mr. Davis were among the first to register. (R. 269).

Although plaintiff-appellant and Mr. Davis desired to be married during the course of their long-term partnership, only recently could they make that dream a reality. In 2003, Ontario, Canada announced that same-sex couples could enter into civil marriage, followed swiftly by other Canadian provinces and then by nationwide law. *See Halpern v. Attorney General*, 172 O.A.C. 276 ¶ 71 (June 10, 2003); S.C. 2005 c. 33 (2005); (R. 280-81). The requirements and process to enter into civil marriage in Canada are indistinguishable for same-sex and different-sex couples. (R. 281). Furthermore, Canada has no residency or citizenship requirements to marry there, permitting foreign nationals, including U.S. citizens, to marry in Canada. (R. 281). In keeping with the longstanding marriage recognition rule, Attorney General Spitzer issued an advisory opinion in March 2004 confirming that if same-sex couples validly marry in Canada or one of the other jurisdictions conferring marriage on such couples, "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." (R. 327). The New York State Comptroller similarly issued an opinion on October 8, 2004 confirming that the marriage recognition rule requires legal respect to be accorded to same-sex married spouses for purposes of public employee retirement and pension benefits administered through the New

York State Retirement System. (R. 364).[4]

At the end of October 2004, Messrs. Funderburke and Davis traveled from New York to Niagara Falls, Ontario, where they were legally married on October 27, 2004. (R. 270, 272).

On October 29, 2004, plaintiff-appellant provided the District with proof of his Canadian marriage and requested that his coverage under the Empire Plan and the District Supplemental Health Plans be amended to include spousal coverage for Mr. Davis. (R. 90-91, 270, 273-76).

On December 20, 2004, the District denied plaintiff-appellant's application. The District claimed that "the Empire Plan, the provider of health benefits to District retirees, does not recognize same-sex marriages for the purpose of spousal coverage. As a result, we cannot provide you with the requested medical coverage." (R. 91, 270, 277). The District based its denial on advice provided by DCS. Specifically, DCS advised the District "that since same-sex marriages are not statutorily permitted in New York State, . . . DCS would not provide dependent spousal coverage in NYSHIP to same-sex spouses of eligible employees and retirees." (R. 91).

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[4] That statement is currently being challenged through a lawsuit, which relies heavily on the motion court's erroneous decision, initiated by a conservative religious policy group. The Comptroller, and the principle that the marriage recognition rule commands respect for the valid out-of-state marriages of same-sex couples, is being defended by the Attorney General. *See Godfrey*, Index No. 5896/06 (Sup. Ct. Albany Cty.). *See* p. 22-23 below.

PROCEDURAL HISTORY

Plaintiff-appellant commenced this action in Supreme Court, Nassau County, naming only the District and its employees as defendants. (R. 44-52). Subsequently, the District moved to dismiss or, in the alternative, for the joinder of additional parties, including DCS. (R. 54-56). Plaintiff-appellant then filed an Amended Complaint, naming DCS as well. (R. 130-39).

The parties cross-moved for summary judgment. (R. 165-66, 266-67, 469-71). At oral argument, the motion court recognized that *Hernandez* was pending and asked the parties about its relevance. All parties agreed, as did the court, that the outcome of *Hernandez* would not resolve the dispute before the court. In the words of the motion court, "in *Hernandez* there is no issue or principal issue of cross-border recognition . . . [s]o it's going to be something that I will have to decide." (R. 27).

On July 11, 2006, within a few days of the *Hernandez* decision, the motion court granted defendants-respondents' motion for summary judgment and denied plaintiff-appellant's cross-motion. The court's holding was grounded entirely on its reading of *Hernandez*, which the court pronounced itself "constrained to follow." (R. 8). The court determined that, after *Hernandez*, "plaintiff's union is not a 'marriage' as same has now been defined by the Court of

Appeals. Under current New York law, plaintiff and his partner are not considered spouses and therefore spousal insurance benefits are unavailable to them." (R. 9).

Plaintiff-appellant thereafter filed a motion for leave to reargue. (R. 535-36). By order dated September 7, 2006, the motion court granted the motion to reargue but adhered to its prior determination. (R. 662-63).

Plaintiff-appellant filed a timely notice of appeal on August 3, 2006, (R. 1-2), and now appeals from the motion court's original July 11, 2006 Order.

ARGUMENT

I.

UNDER NEW YORK'S LONG-SETTLED MARRIAGE RECOGNITION RULE, DEFENDANTS-RESPONDENTS MUST RESPECT PLAINTIFF-APPELLANT'S VALID CANADIAN MARRIAGE

The marriage recognition rule is a straightforward and firm choice of law rule that has been applied consistently by New York to recognize marriages validly entered into in other states and countries, even when such marriages could not be entered into under New York law. Here, plaintiff-appellant's marriage to Mr. Davis is indisputably valid under Canadian law. Furthermore, neither exception to the marriage recognition rule applies here: The Legislature has not enacted a positive prohibition against recognizing foreign marriages of same-sex couples in New York, and there certainly is no settled public consensus that such marriages are morally abhorrent. Therefore, plaintiff-appellant's marriage to Mr.

Davis must be respected under the marriage recognition rule. Contrary to the lower court's erroneous holding, *Hernandez* does not change this result.

A. Under The Marriage Recognition Rule, A Marriage That Is Valid Where Contracted Must Be Respected As Valid In New York

For nearly two centuries, New York law has required that marriages validly executed in other jurisdictions be respected for all purposes in this State. *See Van Voorhis v. Brintnall*, 86 N.Y. 18, 25 (1881) ("[T]he [common law] rule recognizes as valid a marriage considered valid in the place where celebrated."); *Decouche v. Savetier*, 3 Johns.Ch. 190, 211 (N.Y. Ch. 1817) ("There . . . [is] no doubt of the general principle that the rights dependent upon nuptial contracts are to be determined by the *lex loci*."). As the Court of Appeals has stated the rule, "the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated." *In re Estate of May*, 305 N.Y. 486, 490 (1953).

This rule, which dates back centuries, *see Scrimshire v. Scrimshire,* 161 ER 782, 790 (Consistory Ct. 1752), is predicated on the unique personal nature of the marital contract: "[M]arriage is of a nature . . . widely differing from ordinary contracts . . . producing interests, attachments and feelings, partly from necessity, but mainly from a principle in our nature, which, together, form the strongest ligament in human society . . . ." *Dickson v. Dickson's Heirs*, 1 Yer. 110, 1826 WL 438, *2 (Tenn. Err. & App. 1826), *cited in Van Voorhis*, 86 N.Y. at 26.

Given the weighty personal commitment that marriage entails, the marriage recognition rule promotes certainty and stability for the parties who choose to marry and avoids the necessity for intrusive, case-by-case evaluations of the validity of marriages.

The marriage recognition rule remains vital today — repeatedly reaffirmed by the Court of Appeals and, of course, honored in the different Departments of this Court. *See, e.g., Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289 (1980); *In re Estate of Watts*, 31 N.Y.2d 491 (1973); *People v. Haynes*, 26 N.Y.2d 665 (1970); *Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44 (1970); *In re Catapano*, 17 A.D. 3d 672, 672 (2d Dep't 2005); *Katebi v. Hooshiari*, 288 A.D.2d 188 (2d Dep't 2001); *Black v. Moody*, 276 A.D.2d 303 (1st Dep't 2000); *In re Estate of Yao You-Xin*, 246 A.D. 2d 721, 721 (3d Dep't 1998); *Hulis v. M. Foschi & Sons*, 124 A.D.2d 643 (2d Dep't 1986).

Under the marriage recognition rule, a marriage must be recognized in New York if valid where performed, *even if it would have been invalid if performed in New York. See, e.g., Thorp v. Thorp*, 90 N.Y. 602, 605 (1882) ("[T]he validity of a marriage contract is to be determined by the law of the State where it is entered into. If valid there, it is to be recognized as such in the courts of this State."). For example, pursuant to DRL Section 5(3), a marriage between an uncle and niece is invalid and void if celebrated in New York. Nevertheless, if an

uncle and niece legally marry in another state or country, their marriage will be deemed valid in New York. *See May*, 305 N.Y. at 492. Similarly, although a proxy marriage — that is, one concluded at a ceremony attended by only one of the parties — cannot be contracted in New York, such a marriage will be honored under the marriage recognition rule if valid where performed. *See Fernandes v. Fernandes,* 275 A.D. 777, 777 (2d Dep't 1949); *In re Will of Valente*, 18 Misc. 2d 701, 705 (Sur. Ct. Kings Cty. 1959). Likewise, common-law marriages, although not permitted under New York law, are respected from other jurisdictions. *See Mott*, 51 N.Y.2d at 293 ("It has long been settled law that although New York does not itself recognize common-law marriages . . . a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted.") (internal citations omitted); *Katebi v. Hooshiari*, 288 A.D.2d 188, 188 (2d Dep't 2001) ("[T]he plaintiff demonstrated that as a result of the parties' sojourns in Pennsylvania and family vacations in Georgia, a valid common-law marriage existed under the laws of those states which was deserving of recognition . . . in New York."); *see also Coney v. R.S.R. Corp.*, 167 A.D.2d 582, 583 (3d Dep't 1990); *Dozack v. Dozack*, 137 A.D.2d 317, 318 (3d Dep't 1988). And New York will respect an out-of-state marriage of parties too young under DRL Section 7(1) to marry here. *See Hilliard v. Hilliard*, 24 Misc. 2d 861, 863 (Sup. Ct. Greene Cty. 1960).

The marriage recognition rule is stronger than ordinary comity principles, although it shares common roots in respect for other jurisdictions. *See Van Voorhis*, 86 N.Y. at 25 ("By the universal practice of civilized nations the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated.") (*quoting Cropsey v. Ogden*, 11 N.Y. 228, 236 (1854)). Under a standard comity analysis, New York courts "apply the laws of other States where the application of those laws does not conflict with New York's public policy." *Crair v. Brookdale Hosp. Med. Ctr.*, 94 N.Y.2d 524, 528-29 (2001). In assessing New York's public policy in the general comity inquiry, courts "look to the law as expressed in statute and judicial decision and to the prevailing attitudes of the community." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980).

In contrast, the marriage recognition rule — rooted as well in the paramount importance of the marriage contract to individuals and society — permits no such comparative policy analysis. The rule *requires* recognition of marriages valid where contracted *regardless* of whether the DRL would permit such marriages or whether New York's law or public policy (with only two narrow exceptions, discussed below) otherwise coincides with that of the foreign jurisdiction. *See Mott*, 51 N.Y.2d at 292-93; *May*, 305 N.Y. at 491-93; *Bronislawa K. v. Tadeusz K.*, 90 Misc. 2d 183, 184-85 (Fam. Ct. Kings Cty. 1977) (contrasting

"sophisticated" principles considered in comity or full faith and credit analysis with clear "*lex locus*" rule requiring recognition of marriages valid where contracted).

Consistent with the long-standing marriage recognition rule, Attorney General Spitzer and the New York State Comptroller issued their opinions confirming that the valid marriages of same-sex couples are entitled to legal respect in New York. (R. 322-27, 364-69). Moreover, a number of New York municipalities, including New York City, Albany, Buffalo, Ithaca, Nyack, Rochester, and Brighton, along with Westchester County, have issued similar public statements that, consistent with the marriage recognition rule, these municipal governments will respect marriages of same-sex couples validly performed outside the State. (R. 282, 370-85). Finally, public and private employers and unions across the State are respecting marriages of same-sex couples, as are numerous corporations that conduct business in New York. (R. 283-84, 386-89).[5]

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[5] For example, the Local 295/Local 851 Welfare Fund of the International Brotherhood of Teamsters provides spousal benefits to the same-sex spouses of married members. *See* Press Release, Empire State Pride Agenda, Teamsters at JFK Provide Spousal Benefits to Long Island Member Who Married Same-Sex Partner, http://www.prideagenda.org/pressreleases/2005/pr-09-15-05.html (last visited January 10, 2007). Further, the City University of New York, with campuses in all boroughs of New York City, provides spousal health insurance and other benefits to same-sex spouses of employees. *See* Letter from Frederick P. Schaffer, General Counsel, City Univ. of N.Y., to Anthony W. Crowell, Special Counsel to the Mayor (June 17, 2005), http://www.prideagenda.org/pdfs/CUNY%20-%20Frederick%Schaffer.pdf (last visited January 10, 2007).

B. Plaintiff-Appellant's Valid Canadian Marriage Triggers The Marriage Recognition Rule, And Neither Exception To The Rule Applies

There is no dispute that plaintiff-appellant and Mr. Davis were legally married in Canada. A marriage validly executed in a foreign nation — such as the Canadian marriage at issue here — is entitled to the same presumption of validity in New York as one contracted in another of the several states. *See, e.g., Van Voorhis*, 86 N.Y. at 24 ("[I]t is a general rule of law that a contract entered into in another State *or country*, if valid according to the law of that place, is valid everywhere.") (emphasis added). For example, in *In re Will of Valente*, the court held that a legally constituted Italian proxy marriage was valid in New York. "[It is] settled law that the legality of a marriage between persons . . . is to be determined by the law of the place where it is celebrated." 18 Misc. 2d at 704. *See also Bronislawa K.*, 90 Misc. 2d at 184 (Polish marriage); *In re Sood*, 208 Misc. 819, 821 (Sup. Ct. Onondaga Cty. 1955) (Indian marriage). In particular, Canadian marriages have for decades been recognized as valid in New York. *See In re White*, 129 Misc. 835, 836 (Sur. Ct. N.Y. Cty. 1927) ("[V]alidity of the [marriage] ceremonial must be tested, not by . . . the laws of this state, but by the laws of the place where the ceremony took place, which was the province of Ontario . . . ."); *Donohue v. Donohue*, 63 Misc. 111, 112 (Sup. Ct. N.Y. Cty. 1909) ("The parties were competent to contract a lawful marriage in the Province of

Ontario, Canada; and the marriage was lawful there, and, therefore, is valid in this State.").

Plaintiff-appellant's valid Canadian marriage thus must be respected unless it comes within one of the two narrow exceptions to the marriage recognition rule. Neither of these exceptions applies to plaintiff-appellant's marriage, and indeed the motion court did not invoke either exception in its decision.

First, the rule will not apply if a statute *explicitly* declares that a given class of marriages, when concluded in another jurisdiction, will be considered void and thus not respected in New York. *See May*, 305 N.Y. at 491 ("prohibition by positive law" constitutes exception to marriage recognition rule); *Van Voorhis*, 86 N.Y. at 26 (same). While, as *Hernandez* confirmed, the DRL does not permit marriages of same-sex couples within New York, *Hernandez*, 7 N.Y.3d at 357, the statute notably *does not* preclude recognition of such marriages validly performed elsewhere. Although other state legislatures have passed laws explicitly banning recognition of out-of-state marriages between same-sex couples, our Legislature has declined to do so, even though the positive law exception would be triggered *only* by the enactment of an express prohibition on recognizing out-of-state marriages of same-sex couples. *See May*, 305 N.Y. at 492-93. Nor, as addressed below, was this exception in any way triggered by *Hernandez's* holding that the

DRL's prohibition on marriages in-state between same-sex couples does not violate the New York Constitution.

Second, the rule may not apply if an out-of-state marriage is "offensive to the public sense of morality to a degree regarded generally with abhorrence." *Id.* at 493. This abhorrence exception requires an overwhelming social consensus that a marriage is patently repugnant to the morality of the community. *See id.* The exception is so narrow that, throughout the lengthy history of the marriage recognition rule, only polygamous and closely incestuous marriages have been held to meet its stringent criterion. *Van Voorhis*, 86 N.Y. at 26 (exception applies in cases "of incest or polygamy coming within the prohibitions of natural law"); *Earle v. Earle*, 141 A.D. 611, 613 (1st Dep't 1910) ("The *lex loci contractus* governs as to the validity of the marriage, unless the marriage be odious by common consent of nations, as where it is polygamous or incestuous by the laws of nature.").

This exception too is not remotely implicated here. Significantly, defendants-respondents did not even suggest below that the abhorrence exception could be invoked in this case. Indeed, the motion court properly acknowledged at oral argument that the abhorrence exception could not possibly apply here, observing that any argument that marriages between same-sex couples are repugnant to New York's public policy "itself is repugnant." (R. 38).

Far from there being any social consensus against same-sex partnerships in New York State, our public policy, laws, and judicial decisions demonstrate that such relationships are regarded with respect and tolerance. For example, as discussed above, New York's Attorney General (now Governor) and many other State and local officials and private entities have confirmed that the out-of-state marriages of same-sex couples should be afforded legal respect in New York. *See* above at 16. Moreover, all three branches of State government provide health insurance benefits to domestic partners of State employees. (R. 285, 390-93). The State Legislature has enacted, with executive approval, a number of measures to provide same-sex domestic partners with legal rights and benefits otherwise reserved to spouses. *See, e.g.*, McKinney's 2005-2006 N.Y. Sess. Laws Ch. 768, S1924A/A1238 (granting domestic partners ability to make decisions about funerals of their partners); McKinney's 2003 N.Y. Sess. Laws Ch. 679, S5590/A5342 (enabling same-sex domestic partners of credit union members to become members and have full access to banking services). *See also* 9 N.Y.C. R.R. §§ 525.1, 525.2 (2004) (extending equal eligibility to Crime Victims Board benefit to all domestic partners of crime victims). Numerous municipal and county governments — including New York City, Albany, Rochester, and Westchester County — have created "domestic partner registries," which afford registered same-sex partners some of the same benefits spouses would receive. *See, e.g.*,

N.Y.C. Admin. Code § 3-241 (2000); Albany, N.Y. Code ch. 245, art. V, § 245-12 *et seq.*; City of Rochester Admin. Code 47B-1 (2000); Westchester County Admin. Code ch. 550, § 550 *et seq.*[6]

New York's growing acceptance of same-sex unions has also been manifested in the decisions of its courts, which, in a variety of contexts, have interpreted statutes and legal rules to afford lesbian and gay couples benefits akin to those received by spouses. *See, e.g., Levin v. Yeshiva*, 96 N.Y.2d 484 (2001) (same-sex couple could bring claim for violation of N.Y.C. Human Rights Law for being denied married student housing); *In re Jacob*, 86 N.Y.2d 651, 656, 661 (1995) (allowing life partner of child's biological parent to adopt under DRL with "second parent" status, underscoring "fundamental changes that have taken place in the makeup of the family"); *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 211 (1989) (same-sex "lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence" qualify as "family members" for purposes of state rent control law); *East 10th Street Assocs. v. Estate of Goldstein*, 154 A.D.2d 142, 145 (1st Dep't 1990) (extending *Braschi* to rent-

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[6] In the private sector, same-sex relationships are also recognized and respected, especially for health insurance purposes. Employer benefits for same-sex partners of employees are now a common part of the economic landscape in New York and nationwide. For example, by the end of 2006, 51 percent of Fortune 500 companies offered benefits to same-sex partners of employees. Employers offering these benefits report that they result in little or no cost increase. *See* The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans 2005-2006 at 3, http://www.hrc.org/Template.cfm?Section=Get_Informed2&CONTENTID=32936&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited on January 10, 2007).

stabilized apartments); *Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, Inc.*, 159 Misc. 2d 884, 888 (Sup. Ct. Queens Cty. 1993) (surviving same-sex partner had standing to assert his deceased partner's final wishes because of their "spousal-like relationship").

Whatever disagreement still exists within the State over extending full equality to same-sex couples, it cannot seriously be argued that there is a *consensus* of abhorrence, such as could trigger this narrow exception to the marriage recognition rule.

C. The Motion Court Erroneously Read *Hernandez* As Precluding Application Of The Marriage Recognition Rule

The motion court disregarded the settled law discussed above and rejected plaintiff-appellant's claim based solely on the holding in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), that same-sex couples could not marry *within* New York. The court held that it was "constrained to follow" *Hernandez* and that, consequently, plaintiff-appellant's "union is not a 'marriage' as same has now been defined by the Court of Appeals." (R. 8-9). This holding fundamentally misconstrues *Hernandez* and represents clear error.

The motion court's decision has already been criticized by the Attorney General as inconsistent with New York law. In defending the Comptroller's proper application of the marriage recognition rule to pension and retirement benefits for public employees against a meritless challenge relying on

the *Funderburke* decision, the Attorney General stated that the decision "was wrongly decided." *See* A.G. *Godfrey* Br. at 23. The Attorney General further explained that the "*Funderburke* court's reliance on *Hernandez* is entirely misplaced" and that "the *Hernandez* decision simply did not deal with the issue of the recognition of same-sex marriages considered valid in the jurisdiction where executed." *Id.* at 25-26. Instead, *Hernandez* determined only (1) that the DRL does not on its face allow same-sex couples to marry *within* this State and (2) that this restriction is not so irrational as to be unconstitutional. *See Hernandez*, 7 N.Y.3d at 357, 360. The decision did not address or apply the entirely separate body of law used to determine whether a marriage that is permitted and valid in another jurisdiction must be recognized in New York.

Further, neither of the holdings in *Hernandez* triggered either the positive law or abhorrence exception to the marriage recognition rule or otherwise suggested that the well-settled common law rule should not be applied to accord respect to out-of-state marriages of lesbian and gay public employees. While the plurality and concurring opinions in *Hernandez* concluded that any changes in New York's own marriage rules had to be made by the Legislature, there is nothing in either opinion to suggest that the Court of Appeals was reading the current DRL "definition" of marriages allowed *within* the State as a positive prohibition on

respect for valid *out-of-state* marriages between same-sex partners. *See, e.g., id.* at 366 (plurality op.); *id.* at 379 (Graffeo, J., concurring).

Nor is there anything in either opinion suggesting that marriages of same-sex couples are "abhorrent" to public policy and thus exempted from the marriage recognition rule. In fact, all of the judges of the Court of Appeals agreed that the Legislature could or perhaps *should* change the DRL to permit same-sex couples to marry. *See id.* at 358-59 ("The question is not, we emphasize, whether the Legislature must or should continue to limit marriage in this way; of course the Legislature may . . . extend marriage or some or all of its benefits to same-sex couples.") (plurality op.); *see id.* at 379 ("It may well be that the time has come for the Legislature to address the needs of same-sex couples and their families, and to consider granting these individuals additional benefits through marriage . . . .") (Graffeo, J., concurring); *see id.* at 396 (Kaye, C.J., dissenting).

The motion court seemed to believe that *Hernandez* declared a "definitional" aspect of gender difference in marriage somehow so basic and fundamental that it bars the State from recognizing the marriage of a same-sex couple even if permitted by a respected sister jurisdiction. But any such declaration of a universal "definition" of marriage would be factually faulty. Massachusetts, Canada, Spain, the Netherlands, Belgium, and South Africa all permit same-sex couples to marry, demonstrating that *same-sex couples can and*

do legally marry. (R. 279-80). Simply saying these are not marriages "by definition" does not make it so.

And *Hernandez* says no such thing. The "definition" of marriage upheld in *Hernandez* is no more than the requirement embodied in the DRL for what types of marriages may be solemnized within New York. *See* 7 N.Y.3d at 357. The New York Legislature has not spoken on the question of what foreign marriages must be *respected* in New York under the common law marriage recognition rule. The Court of Appeals' deference to the Legislature in "defining" marriages to be performed within the State thus offers no ground to ignore the settled body of law governing recognition of marriages performed out of the State. Indeed, if constitutional challenges were brought to the exclusion of common-law, proxy, under-age, or uncle-niece marriages from the "definition" of who may marry within New York State, such claims would likely be rejected in light of the deference accorded the Legislature in this regard. *See, e.g., Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir.) (rejecting constitutional challenge to DRL § 15's restrictions on under-age marriages), *cert. denied*, 459 U.S. 827 (1982). But such marriages still are respected, under the marriage recognition rule, if validly entered into out-of-state.

The Court of Appeals' decision simply confirms that there is a difference between New York and Canadian law, a situation that New York law

addresses through the marriage recognition rule. Indeed, it is necessary to invoke the marriage recognition rule only *because* of a difference between New York's marriage rules and those of other jurisdictions. To conflate the DRL's restriction of marriage to different-sex couples with the separate question of whether an out-of-state marriage of a same-sex couple must be respected would literally eliminate the marriage recognition rule. Under such reasoning, any out-of-state marriage not affirmatively *permitted* by the DRL would, by definition, not be *recognized* in New York. That is simply not the law.

The motion court's error is well illustrated by *May*. There, the Court of Appeals held that the marriage between an uncle and a niece who traveled to Rhode Island to marry must be respected in New York, their home state, even though uncle-niece marriages are *expressly prohibited, deemed void*, and *subject to criminal penalty* under New York DRL Section 5(3). Despite these positive prohibitions — none of which have been enacted in New York in connection with marriages between same-sex couples — the Court of Appeals nonetheless concluded that the marriage recognition rule must still apply to grant legal respect to the Rhode Island marriage:

> As section 5 of the New York Domestic Relations Law . . . does not expressly declare void a marriage of its domiciliaries solemnized in a foreign State where such marriage is valid, the statute's scope should not be extended by judicial construction. . . . Indeed, had the Legislature been so disposed it could have declared by

> appropriate enactment that marriages contracted in another State — which if entered into here would be void — shall have no force in this State. . . . [A]bsent any New York statute expressing clearly the Legislature's intent to regulate within this State marriages of its domiciliaries solemnized abroad, there is no 'positive law' in this jurisdiction which serves to interdict the . . . marriage in Rhode Island . . . .

May, 305 N.Y. at 492-93.

While some other states have enacted positive laws prohibiting recognition of out-of-state marriages between same-sex couples, New York, significantly, has not. The Legislature has not elected to "interdict" out-of-state marriages between same-sex couples; the courts are not empowered to do so. *Id.* at 493. *See also Hilliard v. Hilliard*, 24 Misc. 2d 861, 863 (Sup. Ct. Greene Cty. 1960) (though under-age marriage would be void under DRL § 7(1) if entered into in New York, such marriage entered into in Georgia must be respected here in absence of express statutory prohibition against recognizing out-of-state marriage of under-age partners).

This principle is also illustrated by the historical respect accorded in New York to extra-territorial marriages obtained to avoid this State's one-time restriction on remarriage after divorce. Until its repeal by the New York Legislature in 1966, DRL Section 8 severely restricted the ability of an adulterous spouse to remarry following a divorce. *See, e.g., Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44, 48-49 (1970); A. Scheinkman, Practice Commentaries, McKinney's

Cons. Laws of N.Y., DRL § 6, C6:2, at 33 (1999). Many New Yorkers barred under this provision from remarrying in New York traveled to other jurisdictions to avoid DRL Section 8 and enter into a new marriage. A long string of New York cases upheld these extra-territorial marriages as valid in New York, notwithstanding that the parties to them had evaded an express New York prohibition on the marriages within the State. The courts concluded that under the marriage recognition rule, because the Legislature had not provided by positive law that such marriages when obtained *out-of-state* were prohibited, they were required to be respected here. *See, e.g., Farber*, 26 N.Y.2d at 55 (upholding validity in New York of Florida common-law marriage of divorcee prohibited from remarrying under New York law); *Moore v. Hegeman*, 92 N.Y. 521, 524-25 (1883) ("The statute . . . prohibiting the marriage of the guilty party can have no effect beyond the territorial limits of this State. Where the laws of another State do not prohibit such marriage by a party divorced its validity cannot be questioned in this State."); *Thorp v. Thorp,* 90 N.Y. 602, 606 (1882) (marriage validly obtained in Pennsylvania in evasion of New York law must be regarded as valid in New York); *Van Voorhis*, 86 N.Y. at 32-33 (marriage of divorcee who traveled to Connecticut to evade remarriage prohibition held valid in New York; DRL "does not in terms prohibit a second marriage in another State, and it should not be extended by construction" of courts to forbid its recognition here); *In re Peart's*

Estate, 277 A.D. 61, 69 (1st Dep't 1950) (noting line of cases recognizing validity of second marriages obtained out-of-state to evade New York prohibition on remarriages); *Almodovar v. Almodovar*, 55 Misc. 2d 300, 301 (Sup. Ct. Bronx Cty. 1967) (Spouse barred by DRL § 8 from remarrying in New York "with impunity could go to a foreign jurisdiction — as countless have in the past — and there remarry. . . . [I]f the remarriage would be valid there, it would be valid here.").

In overruling the Legislature's judgment not to bar recognition for valid out-of-state marriages, the decision below violates the Court of Appeals' admonition in *May* that "the statute's scope should not be extended by judicial construction." 305 N.Y. at 492-93. While the Legislature's judgment in defining marriages to be allowed *within* New York is entitled to deference, controlling precedent creates a presumption here exactly the opposite of that adopted by the motion court — one in *favor* of recognition.[7] Such recognition would not represent an "expansion" of the definition of marriage within New York, but simply a recognition that each jurisdiction defines for itself who may marry and that New

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[7] The presumption in favor of the validity of an existing marriage is supported by the need to maintain the emotional and financial stability marriage provides to the married family. *See, e.g., Amsellem v. Amsellem*, 189 Misc. 2d 27, 29 (Sup. Ct. Nassau Cty. 2001) ("[T]he presumption of marriage . . . is one of the strongest presumptions known to the law.") (citing *In re Estate of Lowney*, 152 A.D.2d 574, 576 (2d Dep't 1989)) (internal citation omitted). Where, as here, the "party actually challenging the validity of the marriage is a total stranger to the marital relation, the presumption becomes even stronger." *Seidel v. Crown Indus.*, 132 A.D.2d 729, 730 (3d Dep't 1987). "[A] stranger to the marital relationship has a heavy burden to establish its invalidity." *Meltzer v. McAnns Bar & Grill*, 85 A.D.2d 826, 826 (3d Dep't 1981).

York's settled law is to defer to the definitions adopted by sister jurisdictions with respect to marriages performed there. The motion court's erroneous holding to the contrary should be reversed.

D. The Arguments Relied On Below By Defendants To Justify Denying Plaintiff-Appellant Spousal Benefits Are Likewise Without Merit

Defendants-respondents advanced a plethora of meritless arguments below as to why the marriage recognition rule should be deemed inapplicable here or, failing that, overturned. None of these arguments was adopted by the motion court; plaintiff-appellant addresses their main contentions only briefly here.

1. This Court's ruling in *Langan v. St. Vincent's Hospital of New York* has no bearing on the marriage recognition rule, which controls here.

Defendants-respondents argued below that *Langan v. St. Vincent's Hospital of New York*, 25 A.D.3d 90 (2d Dep't 2005), a case involving not a marriage but a Vermont civil union, should be read to abrogate the centuries-old marriage recognition rule. But *Langan* concerned a wrongful death claim brought by a party to a *civil union* — not, as here, a marriage — who sought to bring such a claim as a spouse of his deceased partner. This Court declined to extend the marriage recognition rule to treat parties to a civil union as "married." The Court reasoned that equating a civil union with a marriage would "create a relationship never intended by the State of Vermont in creating civil unions or by the decedent or the plaintiff in entering into their civil union." *Id.* at 479. The Court

specifically noted that "the Vermont Legislature went to great pains to expressly decline to place civil unions and marriage on an identical basis," an action "the import of [which was] of no small moment" in the Court's decision. *Id.* *Langan* did not reject the common law rule that a marriage valid where entered will be recognized here, even if the marriage would have been invalid if performed in New York. Unlike in *Langan*, here plaintiff-appellant *is* married and asks that his marriage be respected by a straightforward application of this State's settled common law rule.

2. The choice of law test used in tort cases and other contexts has no bearing on the marriage recognition rule.

Defendants-respondents argued below that the marriage recognition rule is no longer applicable in New York due to changes in this State's choice of law rules in completely different contexts, and that instead an "interest analysis" determines whether plaintiff-appellant's marriage is to be respected in this State. However, that framework has no application to a dispute concerning the recognition of an out-of-state marriage. While the Court of Appeals has employed an "interest analysis" test in tort cases and other contexts, when the issue is whether an out-of-state *marriage* should be respected under New York law, the *only* applicable test is the marriage recognition rule. That rule has been steadfastly employed by the Court of Appeals, including in cases post-dating the shifts in conflicts law in the realms of torts and contracts. *See Mott v. Duncan Petroleum*

Trans., 51 N.Y.2d 289 (1980); *In re Estate of Watts*, 31 N.Y.2d 491 (1973); *People v. Haynes*, 26 N.Y.2d 665 (1970); *Farber v. U. S. Trucking Corp.*, 26 N.Y.2d 44 (1970). In fact, this very Court has repeatedly employed the rule in recent years to recognize out-of-state marriages. *In re Catapano*, 17 A.D.3d 672 (2d Dep't 2005); *Katebi v. Hooshiari*, 288 A.D.2d 188 (2d Dep't 2001); *Tornese v. Tornese*, 233 A.D.2d 316 (2d Dep't 1996). Absent a pronouncement by the Court of Appeals to the contrary, this Court continues to be bound by the controlling precedent.[8]

Even if ordinary comity principles rather than those specific to recognition of marriages applied, out-of-state marriages between same-sex partners would still be required to be respected in New York. Under the comity standard articulated in *Ehrlich-Bober*, a court must compare New York's public policy with

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[8] There are compelling public policy reasons why the marriage recognition rule continues to be the required choice of law rule in New York. *See* above at 12-13. With marriage comes emotional and financial stability for spouses and any children, which supports a presumption of the validity of a marriage to preserve these family ties. The marriage recognition rule gives voice to that presumption, honoring the expectations of parties who take on the weighty commitment of marriage and providing certainty and predictability without the need for fact-specific litigation. As the Attorney General has explained, "New York's rule of recognizing as valid a marriage . . . if validly executed in another State, regardless of whether the union is allowed in New York under the Domestic Relations Law, provides continuity and certainty to New York citizens, as well as to all other parties whose rights and duties are affected by the legal status of that relationship." Brief of the Attorney General of the State of New York as *Amicus Curiae* in Support of Plaintiff-Respondent, *Langan v. St. Vincent's Hospital of New York*, 25 A.D.3d 90 (2d Dep't 2005), No 203-04702, Dated Jan. 20, 2004, at 2 (R. 328-63). In contrast, applying "interest analysis" to determine the validity of every out-of-state marriage on a case-by-case basis would undermine these goals by creating tremendous uncertainty and confusion. It is therefore not surprising that New York courts have consistently applied a single, clear, and predictable choice of law rule based on the place of celebration to minimize uncertainty as to the validity of marriages. These sound policy reasons in support of the clear-cut marriage recognition rule also explain why the rule has not been modified by New York's Legislature.

that of the foreign jurisdiction to determine which conflicting law should control. *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980). This approach does not mean, however, simply disregarding the foreign law if inconsistent with New York's. "[I]f New York statutes or court opinions were routinely read to express fundamental policy, choice of law principles would be meaningless. Courts invariably would be forced to prefer New York law over conflicting foreign law on public policy grounds." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 79 (1993).

In determining whether recognition of valid foreign marriages would violate New York's public policy, a court would apply a standard similar to the "abhorrence" exception: whether respect for the foreign law would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (1918). As this Court has explained, "Judge Cardozo's language in the *Loucks* case lay down the proposition that the courts should be righteously indignant and withhold their aid whenever the Plaintiff's right to recover is founded upon proof that Plaintiff has committed acts which are *patently violative* of public policy, or which constitute an *obvious menace to the public welfare.*" *Barker v. Kallash*, 91 A.D.2d 372, 377-78 (2d Dep't) (emphasis added), *aff'd*, 59 N.Y.2d 602 (1983); *see also Greschler v. Greschler*, 51 N.Y.2d 368, 377 (1980)

("public policy should be predicated upon 'the prevailing attitudes of the community.'") (citation omitted). In light of New York's long-standing respect for same-sex relationships (*see* above at 20-22), coupled with its exceptionally strong public policy calling for recognition of valid out-of-state marriages, defendants-respondents cannot show that respecting plaintiff-appellant's out-of-state marriage for Retirement System purposes would be contrary to public policy.

II.

WITHHOLDING GOVERNMENT BENEFITS FROM SAME-SEX COUPLES WHO COULD NOT MARRY HERE BUT ENTERED INTO VALID MARRIAGES OUT-OF-STATE, WHILE CONFERRING SUCH BENEFITS ON SIMILARLY SITUATED DIFFERENT-SEX COUPLES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE STATE CONSTITUTION

The State Constitution's Equal Protection Clause, Art. I, § 11, provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." New York's equal protection guarantee "imposes a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment." *Brown v. State*, 89 N.Y.2d 172, 190 (1996). While the Court need not reach the constitutional issue if it reverses based on the marriage recognition rule (Point I, above),[9] defendants-respondents' refusal to extend health insurance benefits to Mr. Funderburke's spouse clearly

[9] "It is hornbook law that a court will not pass upon a constitutional question if the case can be disposed of in any other way." *People v. Felix*, 58 N.Y.2d 156, 161 (1983).

discriminates on the basis of sexual orientation in contravention of plaintiff-appellant's right to equal protection under law.

In refusing to recognize plaintiff-appellant's marriage, defendants-respondents have drawn an arbitrary line between out-of-state marriages involving different-sex couples and those involving same-sex couples for purposes of providing health insurance under CSL Section 164. Under the marriage recognition rule, defendants-respondents are required to respect an out-of-state common-law marriage, uncle-niece marriage, proxy marriage, or under-age marriage, even though those marriages are prohibited in New York. Singling out for unfavorable treatment the out-of-state marriages of lesbian and gay New Yorkers, while simultaneously respecting other out-of-state marriages that likewise could not be obtained in New York, violates equal protection.

The relevant question here is whether even a legitimate and rational goal is served by discriminating for the purpose of providing government spousal insurance coverage between same-sex and different-sex couples who may not marry in New York but have been validly married elsewhere. Even under the lowest level of constitutional scrutiny, such discrimination must at minimum "rationally further some legitimate, articulated state purpose." *Doe v. Coughlin*, 71 N.Y.2d 48, 56 (1987) (quotations and citation omitted). A justification that fails to explain why one group was singled out for adverse treatment fails rational review.

See, e.g., *City of Cleburne v. Cleburne Liv. Ctr.*, 473 U.S. 432, 446 (1985) (equal protection will not permit "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"); *Eisenstadt v. Baird*, 405 U.S. 438, 447-55 (1972) (permitting married but not unmarried couples to receive contraceptives violates equal protection). Further, justifications that reflect disapproval of one group — as appears to be the case here — are illegitimate. *See Romer v. Evans*, 517 U.S. 620, 624 (1996); *People v. Onofre*, 51 N.Y.2d 476, 490-92 (1980).

Significantly, the rationales relied on by the *Hernandez* plurality relating to procreation and childrearing to justify excluding same-sex couples from marriage within the State (*see* 7 N.Y.3d at 359-60) have no bearing on the rationality of defendants-respondents' decision to disrespect the out-of-state marriage of this employee while simultaneously respecting other out-of-state marriages unavailable here. Indeed, the procreation-based rationales of *Hernandez* are particularly inapt to what is at issue in this case — dental and medical benefits due the elderly spouse of a retiree pursuant to the Civil Service Law and a collective bargaining agreement. *See, e.g., McMinn v. Town of Oyster Bay,* 66 N.Y.2d 544, 549 (1985) (rational review requires "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end").

Instead, the legislative priorities underlying CSL Section 164 — primarily (1) providing health care for State workers to be competitive with the private sector and (2) avoiding dependence on public medical assistance — bear no rational relationship to the discrimination imposed here.[10] With respect to the objectives of CSL Section 164, same-sex and different-sex spouses in a valid out-of-state marriage not available in New York stand in precisely the same position. *See, e.g., Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (striking down statute treating legitimate and illegitimate children differently for purposes of right to maintain action for wrongful death of parent). To single out same-sex couples and refuse recognition only to *their* marriages for this purpose violates the guarantee of equal protection.

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[10] *See* Letter from Governor Averell Harriman to Legislature, dated February 16, 1956 ("In recent years employers and unions in private industry have found it possible to conclude agreements which provide substantial health protection to employers . . . . In the majority of cases, the employer also contributes to the cost of similar protection for the employee's dependents. It is high time [that] the State's employees enjoyed similar opportunities."); Letter from State Senator George R. Metcalf to Daniel Gutman, dated March 31, 1956 ("As a legislative proposal, it is to be commended for the inclusion of retired state employees; the placing of these persons and their dependents under a program of health insurance is a rather advanced step. A majority of men and women, as you know, are dropped from insurance rolls when they reach age 65, and this is the precise time when the need can be greatest.").

CONCLUSION

For the foregoing reasons, plaintiff-appellant respectfully requests that this Court (i) reverse the Order of the court below granting defendants-respondents' motions for summary judgment, and (ii) remand with instructions to grant summary judgment for plaintiff-appellant.

Dated: New York, New York
January 12, 2007

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND

By: _____
Alphonso B. David
Susan L. Sommer

120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

KRAMER LEVIN NAFTALIS
& FRANKEL LLP

By: _____
Jeffrey S. Trachtman
Norman C. Simon

1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Attorneys for Plaintiff

APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

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Dated: New York, New York
January 12, 2007

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND

By: _____
Alphonso B. David
Susan L. Sommer

120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

KRAMER LEVIN NAFTALIS
& FRANKEL LLP

By: _____
Jeffrey S. Trachtman
Norman C. Simon

1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
Attorneys for Plaintiff