SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 16

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MARTIN J. GOLDEN, SERPHIN R. MALTESE, JAMES N. TEDISCO, DANIEL J. BURLING, BRIAN M. KOLB, MICHAEL R. LONG, SHAUN MARIE LEVINE, DUANE MOTLEY, JASON MCGUIRE, STEPHEN P. HAYFORD, WILLIAM C. BANUCH, SR., ANGEL D. RODRIGUEZ, PIYALI DUTTA, WILLIAM CARLSON, NICOLE CARLSON, FRANCES VELLA-MARRONE, MICHAEL J. FITZPATRICK, and MICHAEL W. COLE,

Index No. 260146/2008

Petitioners,

- against -

DECISION AND ORDER

DAVID A. PATERSON, in his official capacity as Governor of the State of New York,

Respondent

PERI RAINBOW and TAMELA SLOAN,

Respondent-Intervenors

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APPEARANCES:

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

In this proceeding New York State taxpayers, including state legislators, once again seek the same ruling state taxpayers have sought and been denied in prior proceedings: that marriages validly entered outside New York State between partners of the same sex not be recognized in this state. Here, petitioner taxpayers challenge New York State Governor Paterson's Executive Directive dated May 14, 2008, and ask the court to declare that the Directive contravenes New York law and permanently enjoin the Directive's enforcement, because it exceeds the Governor's lawful authority. C.P.L.R. §§ 7803(2) and (3), 7806; N.Y. State Fin. Law § 123-e.

Relying on Martinez v. County of Monroe, 50 A.D.3d 189 (4th Dep't 2008), leave to appeal denied, 10 N.Y.3d 856 (2008), and consistent lower court decisions, the Directive instructs all executive agencies that:

> [A]gencies that do not afford comity or full faith and credit to same-sex marriages that are legally performed in other jurisdictions could be subject to liability. In addition, extension of such recognition is consistent with State policy. . . . .
>
> . . . [I]t is now timely to conduct a review of your agency's policy statements and regulations, and those statutes whose construction is vested in your agency, to ensure that terms such as "spouse," "husband" and "wife" are construed in a manner that encompasses legal same-sex marriages, unless some other provision of law would bar your ability to do so.

Ver. Petition, Ex. A (emphases added). Petitioners claim this Directive violates New York State Finance Law § 123-b and the separation of powers under the New York Constitution.

Respondent, Governor Paterson, moves to dismiss the amended petition. C.P.L.R. §§ 406, 409(b), 3211(a), 3212(b), 7804(d) and (f). Respondent-Intervenors, Peri Rainbow and Tamela Sloan, two women married in Canada, move to intervene as respondents to protect their interests in this proceeding, C.P.L.R. §§ 401, 406, 409(b), 1012, 1013, 7802(d), and likewise move to dismiss the amended petition. The court grants their motion to intervene without opposition. After oral argument, for the reasons explained below, the court also grants respondents' motions to dismiss the amended petition. The Governor's Directive is an incremental but important step toward equality long denied, even if, according to the New York Court of Appeals, full equality is not constitutionally mandated. Hernandez v. Robles, 7 N.Y.3d 338, 356, 361, 366 (2006).

II. STATE FINANCE LAW

New York State Finance Law § 123-b(1) provides that:

> [A] citizen taxpayer, whether or not such person may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state . . . about to cause a wrongful expenditure . . . of state funds . . . .

A. COLLATERAL ESTOPPEL

In three recent proceedings, other New York taxpayers have invoked State Finance Law § 123-b seeking an adjudication that New York law does not require, but instead bars recognition of same sex marriages legally performed in other jurisdictions. In each proceeding, the court decided that issue against the petitioner taxpayers. Lewis v. New York State Dep't of Civil

Serv., 2008 N.Y. Misc. LEXIS 1623 at *5-7 (Sup. Ct. Albany Co. Mar. 3, 2008); Godfrey v. Hevesi, 2007 N.Y. Misc. LEXIS 6589 at *3, *6 (Sup. Ct. Albany Co. Sept. 5, 2007); Godfrey v. Spano, 15 Misc. 3d 809, 810 (Sup. Ct. Albany Co. 2007). Respondents now maintain that under State Finance Law § 123-b, petitioners here must be considered in privity with the taxpayers in those prior actions and collaterally estopped from relitigating that issue. See David v. Biondo, 92 N.Y.2d 318, 324 (1998); Juan C. v. Cortines, 89 N.Y.2d 659, 667 (1995); Energy Assn. of N.Y. State v. Public Serv. Commn. of State of N.Y., 273 A.D.2d 708, 710 (3d Dep't 2000); Landmark West! v. City of New York, 9 Misc. 3d 563, 567 (Sup. Ct. N.Y. Co. 2005).

Petitioners dispute not that they are in privity with those other taxpayers, but that the issue decided against them is the same issue petitioners present to the court here. Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001); Juan C. v. Cortines, 89 N.Y.2d at 667. This proceeding, however, does present the identical issue whether New York law bars, permits, or requires recognition of same sex marriages legally performed in other jurisdictions. Resolution of that issue is central to the May 2008 Directive's legality. Whether or not the prior decisions against other taxpayers on that issue now bars its relitigation in this proceeding, this court is in any event bound by the controlling authority on that issue. Martinez v. County of Monroe, 50 A.D.3d at 192. See Tzolis v. Wolff, 39 A.D.3d 138, 142 (1st Dep't 2007), aff'd, 10 N.Y.3d 100 (2008); Nachbaur v.

American Tr. Ins. Co., 300 A.D.2d 74, 76 (1st Dep't 2002).

Insisting once again that New York law bars recognition of same sex marriages performed in other jurisdictions, this proceeding challenges the Governor's Directive of May 14, 2008, on the same grounds as prior challenges to other state action. Insofar as this proceeding is the first, however, to challenge this Directive, which requires all state agencies to recognize same sex marriages for a full range of statutory and regulatory purposes, rather than the action of a single public entity or official for a limited purpose, this court concludes, for the reasons explained below, that the Directive is entirely lawful.

B. STANDING TO SEEK JUDICIAL REVIEW AND RIPENESS FOR REVIEW

Petitioners maintain that the Directive's implementation inevitably will cause the expenditure of state funds through same sex spouses' eligibility for insurance benefits, other benefits, and financial assistance to the needy, for which only one partner previously was eligible. The implementation of any state policy surely causes the expenditure of state resources, but standing under State Finance Law § 123-b does not accommodate challenges to non-fiscal activities with a fiscal by-product. Saratoga County of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 813 (2003); Rudder v. Pataki, 93 N.Y.2d 273, 281 (1999); Public Util. Law Project of N.Y. v. New York State Pub. Serv. Commn., 263 A.D.2d 879, 881 (3d Dep't 1999); Gerdts v. State of N.Y., 210 A.D.2d 645, 647-48 (3d Dep't 1994). In determining whether petitioners' claims have a close enough nexus to state fiscal activities, the

court must determine whether the challenge to expenditures is but a pretense for a challenge to a governmental decision. Saratoga County of Commerce, Inc. v. Pataki, 100 N.Y.2d at 813; Rudder v. Pataki, 93 N.Y.2d at 281; Transactive Corp. v. New York State Dept. of Social Servs., 92 N.Y.2d 579, 589 (1998); Kennedy v. Novello, 299 A.D.2d 605, 607 (3d Dep't 2002). On the one hand, a claim, as petitioners maintain, that it is illegal to spend any funds at all for the challenged activity, may provide a close enough nexus to fiscal consequences. Saratoga County of Commerce, Inc. v. Pataki, 100 N.Y.2d at 813-14. On the other hand, such a claim may readily reveal that the root of the challenge is the activity and the decision to carry it out, which inevitably have fiscal consequences.

Petitioners have provided few specifics to quell skepticism that their challenge falls in the former rather than the latter category, perhaps because, as yet, neither the immediate nor the ultimate and full ramifications of the Directive's implementation are ascertainable. Consequently, petitioners do not specify what identifiable funds will be spent, the size of the affected populations, or whether counting spouses' income and assets in determining eligibility for benefits, for example, will render both spouses ineligible and actually save state funds. Without tracing the Directive to specific disbursements of state funds, petitioners fail to demonstrate that linkage essential to standing under State Finance Law § 123-b. Schulz v. State of New York, 217 A.D.2d 393, 395 (3d Dep't 1995); Schulz v. Cobbleskill-

Richmondville Cent. School Dist. Bd. of Educ., 197 A.D.2d 247, 251 (3d Dep't 1994).

While the Directive's issuance does not implicate the expenditure of state funds, its imminent implementation will, albeit in a still unspecified way, Community Serv. Socy. v. Cuomo, 167 A.D.2d 168, 170 (1st Dep't 1990); Childs v. Bane, 194 A.D.2d 221, 225 (3d Dep't 1993), and petitioners claim that each expenditure, whatever it is, will be an unconstitutional disbursement. The Directive itself is a final document, bearing the Governor's imprimatur, already issued and effectuated; it is not a draft or prospective proposal, yet to be approved by the issuer or issued. Cuomo v. Long Is. Lighting Corp., 71 N.Y.2d 349, 354-56 (1988); Joint Queensview Hous. Enter. v. Grayson, 179 A.D.2d 435, 437 (1st Dep't 1992). See New York Pub. Interest Research Group v. Carey, 42 N.Y.2d 527, 531 (1977). Not only has its issuance occurred, but nothing suggests the actions it requires will not also occur, see Cuomo v. Long Is. Lighting Corp., 71 N.Y.2d at 354; Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 518 (1986); American Ins. Assn. v. Chu, 64 N.Y.2d 379, 385 (1984); New York State Inspection, Security & Law Enforcement Employees v. Cuomo, 64 N.Y.2d 233, 240 (1984); they are "realistic," not "hypothetical" or "wholly speculative and abstract." Id. See New York Pub. Interest Research Group v. Carey, 42 N.Y.2d at 530-31. Although it may be questionable what harm will ensue from the actions initiated by the Directive, that question pertains to wrongfulness, State Finance Law § 123-b(1),

not petitioners' standing to seek judicial review or the controversy's ripeness for review.

Concomitantly, this case is not one in which the court's decision will have no effect or never resolve anything. C.P.L.R. § 3001. See Cuomo v. Long Is. Lighting Corp., 71 N.Y.2d at 354; New York Pub. Interest Research Group v. Carey, 42 N.Y.2d at 531. The court may determine the parties' rights in the event of future actions by respondent Governor's agents now contemplated by the parties, on the assumption that they will act according to the law, as set forth in the court's decision. C.P.L.R. § 3001; New York Pub. Interest Research Group v. Carey, 42 N.Y.2d at 530-31. The decision will either allow the Governor's initiative to proceed or, as petitioners seek, halt it in its tracks, saving the expense that is involved and that otherwise would be wasted, were the Directive and agencies' amended regulations and policy statements later declared unlawful and enjoined. Id. at 532; Godfrey v. Spano, 15 Misc. 3d at 812. Thus the decision will have an immediate and practical effect on the conduct of the Governor and his agents and will compel and ensure compliance with the law. C.P.L.R. § 3001; New York Pub. Interest Research Group v. Carey, 42 N.Y.2d at 530-31; Godfrey v. Spano, 15 Misc. 3d at 812.

In sum, under State Finance Law § 123-b(1), petitioners' standing may be tenuous, and as taxpayers they may be collaterally estopped from relitigating a core issue in this proceeding, but the parties and the public are best served by a

decision on the merits of the Governor's action. His action undoubtedly will cause an expenditure of state funds in the immediate future, which undoubtedly would bring petitioners back to court. A decision on the full parameters of this dispute will estop petitioners from relitigating all the issues involved.

Particularly in separation of powers disputes as here, where few persons ordinarily suffer concrete injury from a breach of that "constitutional division of authority," yet the issues are fundamental and of public significance, a strict test for standing may yield to an adjudication of the constitutional and institutional issues, Saratoga County of Commerce, Inc. v. Pataki, 100 N.Y.2d at 814; see Korn v. Gulotta, 72 N.Y.2d 363, 369, 372 (1988), rather than foreclose it by procedural barriers. Saratoga County of Commerce, Inc. v. Pataki, 100 N.Y.2d at 815. Assuming these important considerations allow petitioners to maintain this proceeding, any expenditure of state funds caused by the Directive's implementation, in any event, is not wrongful because, as articulated below, the Directive's implementation itself is not wrongful, but entirely lawful. Kennedy v. Novello, 299 A.D.2d at 607. See Community Serv. Socy. v. Cuomo, 167 A.D.2d at 170.

III. SEPARATION OF POWERS

A fundamental principle of government underlying the United States and New York Constitutions is the distribution of governmental power into three branches, executive, legislative, and judicial, "to prevent too strong a concentration" in one

body. Under 21, Catholic Home Bur. for Dependent Children v. City of New York, 65 N.Y.2d 344, 355 (1985). See N.Y. Const. arts. III (legislative power), IV (executive power), VI (judicial power); Saratoga County of Commerce, Inc. v. Pataki, 100 N.Y.2d at 821. The separation of powers doctrine requires not that each branch of government be insulated from the others, but only that no one branch arrogate to itself the powers conferred exclusively on another branch. Id. at 822; Bourquin v. Cuomo, 85 N.Y.2d 781, 784-85 (1995); Under 21, Catholic Home Bur. for Dependent Children v. City of New York, 65 N.Y.2d at 356; Nicholas v. Kahn, 47 N.Y.2d 24, 30-31 (1979).

As between the legislative and the executive branches, the separation of powers "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." Saratoga County of Commerce, Inc. v. Pataki, 100 N.Y.2d at 821-22; Bourquin v. Cuomo, 85 N.Y.2d at 784. This allocation of power and responsibility does not mean executive agencies never make policy. "The . . . Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib., 2 N.Y.3d 249, 254 (2004); Medical Socy. of State of N.Y. v. Serio, 100 N.Y.2d 854, 865 (2003); Nicholas v. Kahn, 47 N.Y.2d at 31. See Raffellini v.

State Farm Mut. Auto. Ins. Co., 9 N.Y.3d 196, 201 (2007); Bourquin v. Cuomo, 85 N.Y.2d at 785. A legislative enactment may rely on agency expertise, delegate broad authority to an agency to implement regulations prescribing the details and fulfilling the goals of the policy embodied in the statute, and vest the agency with reasonably wide discretion to make decisions consistent with those prescriptions. Raffellini v. State Farm Mut. Auto. Ins. Co., 9 N.Y.3d at 201; General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib., 2 N.Y.3d at 258; Big Apple Food Vendors' Assn. v. Street Vendor Review Panel, 90 N.Y.2d 402, 407-408 (1997); Bourquin v. Cuomo, 85 N.Y.2d at 785. Only when an executive branch's action conflicts with the Legislature's action or usurps its prerogative, does the executive branch violate the separation of powers doctrine.

The Governor's Directive is entirely consistent with this doctrine's principles. In fact, it recognizes that the policy decisions have been made, implements them, and refrains from anything but "fill[ing] in the interstices" in agency regulations and other policy statements to make them consistent with those decisions. General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib., 2 N.Y.3d at 254; Medical Socy. of State of N.Y. v. Serio, 100 N.Y.2d at 865; Nicholas v. Kahn, 47 N.Y.2d at 31. See Raffellini v. State Farm Mut. Auto. Ins. Co., 9 N.Y.3d at 201; General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib., 2 N.Y.3d at 258; Big

Apple Food Vendors' Assn. v. Street Vendor Review Panel, 90 N.Y.2d at 407-408; Bourquin v. Cuomo, 85 N.Y.2d at 785. Pursuant to the Directive, where any state statute or controlling court decision construing a state statute already defines terms such as "spouse," "husband," and "wife," a state agency may not interpret the statute, promulgate or interpret a regulation, or enforce a policy that defines such terms inconsistently with that binding definition.

A. DOMESTIC RELATIONS LAW

Nonetheless, petitioners contend that the Directive conflicts with the New York Domestic Relations Law's definition of marriage, which the New York Court of Appeals has interpreted as including only unions between one man and one woman. N.Y. Dom. Rel. Law §§ 12, 15(1)(a); Hernandez v. Robles, 7 N.Y.3d at 357. As held by one of the prior decisions against taxpayers on whether New York law bars recognition of same sex marriages legally performed in other jurisdictions, the Court of Appeals in Hernandez dealt only with "intrastate licensing of same-sex marriage, not with interstate or foreign recognition of such marriages." Godfrey v. Spano, 15 Misc. 3d at 816. See Beth R. v. Donna M., 19 Misc. 3d 724, 727-28 (Sup. Ct. N.Y. Co. 2008). The Directive implements not the Domestic Relations Law (DRL), but New York's marriage recognition rule, as interpreted and applied to same sex marriages by the New York Appellate Division, in a decision binding on this court. Martinez v. County of Monroe, 50 A.D.3d at 192. See Tzolis v. Wolff, 39 A.D.3d at 142,

aff'd, 10 N.Y.3d 100; Nachbaur v. American Tr. Ins. Co., 300 A.D.2d at 76. Hernandez v. Robles, 7 N.Y.3d at 356-57, in holding that the New York Constitution does not mandate intrastate licensing of same sex marriages, did not touch on whether New York recognizes those marriages if legally performed outside New York.

The State Legislature may have plenary power to regulate marriage within New York, id. at 356, 361, 366, and has exercised that power through the DRL, which, as interpreted by the Court of Appeals, currently limits marriage and all its protections, benefits, and privileges to unions between a man and a woman. Id. at 357. Recognizing same sex marriages performed outside New York neither encroaches on that power, nor conflicts with Hernandez's holding that New York is not required to license same sex marriages within the state.

As discussed more fully below, the Legislature also may have plenary power to regulate the recognition of marriages entered outside New York, but, conspicuously, has not exercised that power. Applying the default rule, the marriage recognition rule, unless and until the Legislature does alter the rule, does not in any way encroach on that power. Martinez v. County of Monroe, 50 A.D.3d at 193. New Yorkers retain the opportunity, through their elected representatives, to decide whether New York will prohibit recognition of same sex marriages or any other class of marriages, Hernandez v. Robles, 7 N.Y.3d at 366, or permit same sex marriages to be entered in New York, id. at 356, 361, 366,

either of which would resolve petitioners' claim.

B. OTHER APPELLATE AUTHORITY

Petitioners further contend that other Appellate Division decisions, equally binding on this court, dictate a result contrary to Martinez v. County of Monroe, 50 A.D.3d 189. Each of those decisions, however, refused to recognize civil unions or life partnerships of same sex couples for purposes of conferring New York statutory rights or benefits limited to spouses. Langan v. State Farm Fire & Cas., 48 A.D.3d 76, 78-79 (3d Dep't 2007); Langan v. St. Vincent's Hosp. of N.Y., 25 A.D.3d 90, 94-95 (2d Dep't 2005); Matter of Cooper, 187 A.D.2d 128, 131-32 (2d Dep't 1993). Both the courts and the other state legislatures, in providing for civil unions, took pains to distinguish a civil union or life partnership from marriage. Governor Paterson's Directive, by contrast, applies only to same sex marriages and not to civil unions or life partnerships.

C. COMITY

A determination of whether New York is to give effect to other jurisdictions' governmental acts is based on whether they are consistent with New York's public policy. If not, New York's policy prevails. Crair v. Brookdale Hosp. Med. Ctr., 94 N.Y.2d 524, 528 (2000); Ehrlich-Bober & Co., Inc. v. University of Houston, 49 N.Y.2d 574, 580 (1980).

New York's public policy regarding valid marriages entered in New York is embodied in its DRL. New York's public policy regarding which marriages entered in other jurisdictions will be

recognized in New York is embodied in its marriage recognition rule. Mott v. Duncan Petroleum Transp., 51 N.Y.2d 289, 292 (1980); Cross v. Cross, 102 A.D.2d 638, 640 (1st Dep't 1984). If under that rule same sex marriages entered in other jurisdictions are to be recognized, then giving effect to those marriages does not conflict with New York's public policy. Crair v. Brookdale Hosp. Med. Ctr., 94 N.Y.2d at 531.

As required by New York's marriage recognition rule, a determination of whether a marriage entered in another jurisdiction is valid is based on that jurisdiction's law. Mott v. Duncan Petroleum Transp., 51 N.Y.2d at 292; Black v. Moody, 276 A.D.2d 303, 304 (1st Dep't 2000); Lancaster v. 46 NYL Partners, 228 A.D.2d 133, 141 (1st Dep't 1996); Cross v. Cross, 102 A.D.2d at 639-40. The rule applies even where the purpose of entering the marriage in another jurisdiction was to evade New York's law proscribing those marriages. Godfrey v. Spano, 15 Misc. 3d at 813, 816. Martinez v. County of Monroe, 50 A.D.3d at 191, simply follows this rule as set forth by the Court of Appeals and First Department. Thus, even if Martinez did not bind this court, the rule set forth by the Court of Appeals and First Department does, and the court's application of the rule here leads to the same conclusion as in Martinez.

The marriage recognition rule's exceptions, delineating which marriages entered outside New York will not be recognized, are narrow. The first exception pertains where the New York Legislature expressly has prohibited, by statute, recognizing a

defined class of marriages validly entered outside New York. The second pertains where the marriage entered outside New York is abhorrent to public morality. Mott v. Duncan Petroleum Transp., 51 N.Y.2d at 292; Martinez v. County of Monroe, 50 A.D.3d at 191-92; Beth R. v. Donna M., 19 Misc. 3d at 728; Lewis v. New York State Dep't of Civil Serv., 2008 N.Y. Misc. LEXIS 1623 at *5.

1. Legislative Prohibition

The Legislature has not exercised its power to prohibit recognition of same sex marriages validly entered outside New York. Those marriages are not among the classes of marriages the Legislature has determined to be void or voidable, DRL §§ 5-7, or criminal offenses, which are limited to polygamous and closely incestuous marriages. N.Y. Penal Law §§ 255.20, 255.25.

The Legislature's refusal to enact a statute prohibiting recognition of same sex marriages validly performed in other jurisdictions, Martinez v. County of Monroe, 50 A.D.3d at 192-93; Godfrey v. Hevesi, 2007 N.Y. Misc. LEXIS 6589 at *4-5; Godfrey v. Spano, 15 Misc. 3d at 814, 816, thus belies petitioners' basic contention: that the Legislature has made a policy determination to limit recognition of marriages performed elsewhere to unions between a man and a woman. In fact, federal law expressly authorizes states to enact such legislation. 28 U.S.C. § 1738C. Even so, New York has declined this opportunity.

This authorizing federal law, alongside the DRL and Penal Law provisions cited above, demonstrate compellingly that the Legislature's failure to prohibit recognition of same sex

marriages, expressly and specifically, is not through legislative oversight, but is through legislative design: an intended exclusion. N.Y. Statutes § 74; Pajak v. Pajak, 56 N.Y.2d 394, 397 (1982); Bay Shore Family Partners v. Foundation of Jewish Philanthropies of Jewish Fedn. of Greater Fort Lauderdale, 239 A.D.2d 373, 374-75 (2d Dep't 1997). Any other construction of the DRL or legislative intent or policy would amount to "judicial legislation," a result petitioners surely would eschew. Pajak v. Pajak, 56 N.Y.2d at 397.

A "fundamental canon of statutory construction" is that the court is not to review the Legislature's discretion to refrain from exercising its power. Id. See N.Y. Statutes § 73. Nor is the court to step in and exercise its power where, in its view, the Legislature should have exercised what constitutionally was within the Legislature's power. Id.; Pajak v. Pajak, 56 N.Y.2d at 397. A companion principle of statutory construction is that nothing short of an express and specific statutory provision may override the common law, expressed in the marriage recognition rule; abolish or limit its application; and preempt the rights under that common law that intervenors seek to vindicate in this action. Hechter v. New York Life Ins. Co., 46 N.Y.2d 34, 39 (1978); Tzolis v. Wolff, 39 A.D.3d at 142, 144, aff'd, 10 N.Y.3d 100; Rabouin v. Metropolitan Life Ins. Co., 307 A.D.2d 843, 844 (1st Dep't 2003).

As set forth above, the New York Legislature has not spoken in the unambiguous, "unmuted strains necessary" to displace the

common law rule, the marriage recognition rule, and intervenors' rights under it. Hechter v. New York Life Ins. Co., 46 N.Y.2d at 39. The court may not avoid its obligation to ensure compliance with the current, applicable rule, on the speculation that the Legislature intends otherwise. Therefore the court declines any invitation by petitioners to construe the DRL or the Legislature's intent or policy as prohibiting New York's recognition of same sex marriages validly entered outside New York. Pajak v. Pajak, 56 N.Y.2d at 397; Hechter v. New York Life Ins. Co., 46 N.Y.2d at 39.

2. New York Public Policy

The very fabric of New York's laws and other expressions of policy, reflecting community attitudes, negates the second exception's applicability to same sex marriages as abhorrent to public policy. Beth R. v. Donna M., 19 Misc. 3d at 729-30; Godfrey v. Spano, 15 Misc. 3d at 816-17. The DRL does not set the parameters New York's public policy regarding which marriages entered in other jurisdictions will be recognized in New York. New York's marriage recognition rule would have no purpose or meaning if New York's recognition of marriages entered in other jurisdictions conflicted with New York's public policy when the DRL did not permit those marriages to be entered in New York.

While the most fundamental and far reaching protections and benefits to same sex couples are through marriage, New York Law does offer protections to same sex couples: prohibitions against discrimination based on sexual orientation, N.Y. Civ. Rights Law

§ 40-c(2); N.Y. Exec. Law § 296; N.Y. Educ. Law § 313(1)(a); N.Y. Ins. Law § 2701(a), increased criminal penalties for offenses involving animus based on sexual orientation, N.Y. Penal Law §§ 240.30(3), 240.31, 485.05(1), visitation rights in medical facilities, N.Y. Pub. Health Law § 2805-q, the right to decide the disposition of a partner's remains upon death, N.Y. Pub. Health Law § 4201, access to a partner's credit union services, N.Y. Banking Law § 451, protection from eviction, 9 N.Y.C.R.R. § 2204.6(d); Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 211-13 (1989), and adoption of a partner's biological child, 18 N.Y.C.R.R. § 421.16(h)(2); Matter of Jacob, 86 N.Y.2d 651, 656, 668 (1995), to list but a few. See Godfrey v. Spano, 15 Misc. 3d at 817. Surely the Legislature, the majorities of the Court Appeals in Braschi and Jacob, and its Chief and Associate Judges, albeit in dissent, in Hernandez were not so out of the mainstream as to contradict New York's public policy and morality. These expressions of New York's public policy are only consistent with a tradition of affording equal rights to all New Yorkers, a tradition not to be abandoned lightly, without an unmistakable expression of legislative purpose.

Furthermore, when partners manifest the commitment to their relationship and family, see Braschi v. Stahl Assocs. Co., 74 N.Y.2d at 211, 213, East 10th St. Assocs. v. Estate of Goldstein, 154 A.D.2d 142, 145 (1st Dep't 1990), by solemnizing that commitment elsewhere, through one of life's most significant events, and come to New York, whether returning home or setting

down roots, to carry on that commitment, nothing is more antithetical to family stability than requiring them to abandon that solemnized commitment. It is both a personal expression of emotional devotion, support, and interdependence and a public commitment. Turner v. Safley, 482 U.S. 78, 95-96 (1978); East 10th St. Assocs. v. Estate of Goldstein, 154 A.D.2d at 143, 145. With that validity, they expect equal treatment with other married couples in legal protections and economic benefits for the couples and for their children: owning property as a unit, insurance, workers' compensation, health benefits, medical decisionmaking, wrongful death claims, intestacy, inheritance, and spousal privilege, for example. The emotional, familial, financial, and legal stability that accompanies marriage establishes a strong presumption in favor of the marriage's continued validity. See Matter of Lowney, 152 A.D.2d 574, 576 (2d Dep't 1989); Seidel v. Crown Indus., 132 A.D.2d 729, 730 (3d Dep't 1987); Amsellem v. Amsellem, 189 Misc. 2d 27, 29 (Sup. Ct. Nassau Co. 2001).

For all these reasons, New York's recognition of same sex marriages legally solemnized in other jurisdictions is consistent with New York policy regarding recognition of marriages legally solemnized outside New York. Martinez v. County of Monroe, 50 A.D.3d at 192; Beth R. v. Donna M., 19 Misc. 3d at 729; Lewis v. New York State Dep't of Civil Serv., 2008 N.Y. Misc. LEXIS 1623 at *6-7. The policy change that petitioners suggest is not the Governor's Directive. A policy change would be the failure to

recognize same sex marriages legally solemnized outside New York. Only the New York Legislature may legislate such a change. Absent such a change, the Governor's Directive is another permissible, if not mandated, step toward the objective of equality for a group for whom legal as well as practical barriers to equality persist.

D. Application of the Marriage Recognition Rule

Petitioners urge the court to ignore all these principles because the marriage recognition rule simply does not apply to same sex marriages--because they are not marriages. Petitioners premise this contention on the assumption that, when the marriage recognition rule first evolved, same sex marriages were not contemplated, even though same sex couples may have been as known, perhaps not as publicly, as other unmarried couples.

Petitioners point to the Court of Appeals's reliance on the premise that, when DRL §§ 12 and 15(1)(a) first were enacted, same sex marriages were not contemplated. Hernandez v. Robles, 7 N.Y.3d at 357, 361. Petitioner's very rationale points up the distinction between the DRL and the marriage recognition rule: the DRL was enacted by the Legislature; the marriage recognition rule is a common law rule that has evolved and continues to evolve through judicial decisions over time. In interpreting the DRL, the court looks to the legislative intent when the statute was enacted. In interpreting and applying the marriage recognition rule, the court looks to the rule's current meaning and application in today's world.

Accepting the premise that same sex marriages were not contemplated when the marriage recognition rule first evolved hardly leads to the conclusion that they are not contemplated now. The stark fact that they are legal in several jurisdictions completely undermines such a conclusion. Even if, historically, such a conclusion might have been viable, in the United States Supreme Court's words, "times can blind us to certain truths and later generations can see that laws once thought . . . proper in fact serve only to oppress." Lawrence v. Texas, 539 U.S. 558, 579 (2003). The marriage recognition rule's virtue is that, like our federal or state Constitution, as it endures, "persons of every generation can invoke its principles in their own search for greater freedom." Id. The rule retains the adaptability to recognize that the definition of marriage has evolved from an institution of women's subordination to men, to a more equal partnership, without gender based roles. See Godfrey v. Spano, 15 Misc. 3d at 817.

Other jurisdictions have cast off the constraints that exclusion from marriage licenses imposes on same sex couples. Intervenors have freed themselves from those constraints imposed by New York's DRL. Even in New York, nothing indicates a majority of New Yorkers disapprove of same sex marriages. Such a proposition is refuted by the New York Assembly's passage of a bill approving same sex marriages and is currently untested in the full Legislature. 2007 NY Assembly Bill A 08590. Such disapproval, in any event, or even the prevalence of restrictions

on same sex marriages in most jurisdictions would not substitute for the grounds required to intrude on the common law, particularly a rule that applies "in an area of important personal decision." People v. Onofre, 51 N.Y.2d 476, 490 (1980). See Lawrence v. Texas, 539 U.S. at 571, 577-78.

While same sex couples currently may be excluded from marriage licenses issued in New York, because "marriage" under the DRL as interpreted does not include same sex couples, the marriage recognition rule does not define marriage by the classes of couples to whom it historically or traditionally has been accessible, either in New York or elsewhere. Nor would such a definition justify exclusion now of persons to whom marriage historically or traditionally has been inaccessible. E.g., Matter of Raquel Marie X., 76 N.Y.2d 387, 397 (1990); Rivers v. Katz, 67 N.Y.2d 485, 493, 495 (1986).

IV. VIOLATION OF NEW YORK EXECUTIVE LAW § 296 AND THE STATE CONSTITUTION'S EQUAL PROTECTION GUARANTEE

Intervenors urge the court to hold, as in Martinez v. County of Monroe, 50 A.D.3d at 193, that, were the Governor to deny benefits to married couples of the same sex while conferring those benefits on other couples who entered a marriage that was permitted to be entered only outside New York, he would violate New York Executive Law § 296's prohibition against discrimination on the basis of sexual orientation. Executive Law § 296 applies only to employment, education, public accommodations, housing, and commercial space; the Executive Directive encompasses these spheres as well every other sphere the state regulates. The

prohibited discrimination would be only in the spheres Executive Law § 296 encompasses, but they are far reaching. To address the spheres beyond Executive Law § 296's scope, intervenors urge the court to hold that, again, were the Governor to deny benefits to couples who entered a marriage that was permitted to be entered only outside New York, only if they are the same sex, he would violate the New York Constitution's prohibition against discrimination without a rational basis. N.Y. Const. art. I, § 11.

The difference between Martinez and this proceeding for purposes of addressing these issues is that in Martinez the Monroe County defendants did deny spousal benefits to a married couple of the same sex. In so doing, the county's rejection of the plaintiff's marital status, because the plaintiff married a partner of the same sex, was based on the plaintiff's sexual orientation. N.Y. Exec. Law § 296(1)(a); Martinez v. County of Monroe, 50 A.D.3d at 193.

Fortunately for intervenors here, the Governor has taken contrary action and directed his agencies to confer spousal benefits on intervenors and all other couples similarly situated. Therefore he has done nothing to declare unlawful or to enjoin. Nor is he in a position to defend and provide a non-discriminatory reason for intervenors' or other persons' different treatment, since it has not occurred. Nor are petitioners in a position to supply a rationale for an opposing party's action, even had it occurred.

The obstacles to addressing the equal protection issue are similar, if not more obvious. For a challenge to different treatment to succeed on the ground that the classification has no rational basis and thus violates equal protection, intervenors would have to show that the state's classification does not "rationally further a legitimate state interest." Affronti v. Crosson, 95 N.Y.2d 713, 718 (2001). To survive such a challenge, the state would have to show both a legitimate state interest and that the classification rationally advances that interest. Because the Governor's action is not challenged as discriminatory, no facts are presented to show either a classification; or a legitimate state interest, other than treating similarly situated couples equally; or an irrational or a rational basis for treating them differently. Again, petitioners are not in a position to express New York State's interests.

The Executive Directive's text suggests that the potential liability for discrimination in violation of Executive Law § 296 and the State Constitution's equal protection guarantee, had the Governor not taken the action he took, may have motivated the Directive. The court need not speculate as to his motives or the legal consequences were he to take contrary action, because he has treated married couples of the same sex equally with married couples of different sexes and preserved the rights of intervenors and other couples similarly situated.

V. CONCLUSION

Governor Paterson's Executive Directive dated May 14, 2008, requiring state agencies to recognize same sex marriages legally solemnized in other jurisdictions is consistent with New York's common law, statutory law, and constitutional separation of powers regarding recognition of marriages legally solemnized outside New York. N.Y. Const. arts. III, IV, and VI; C.P.L.R. § 7803(2) and (3); Martinez v. County of Monroe, 50 A.D.3d at 193; Lewis v. New York State Dep't of Civil Serv., 2008 N.Y. Misc. LEXIS 1623 at *6-7. See C.P.L.R. § 409(b); City of New York v. State of New York, 94 N.Y.2d 577, 588 & n.3 (2000); Montes Waste Sys. v. Town of Oyster Bay, 150 Misc. 2d 109, 114 (Sup. Ct. Nassau Co. 1991). The court therefore denies the declaratory and injunctive relief sought by the amended petition and grants respondents' motions to dismiss this proceeding. C.P.L.R. §§ 7803(2) and (3), 7806. This decision constitutes the court's order and judgment on the petition. C.P.L.R. §§ 409(b), 7806.

DATED: September 2, 2008

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.