*To Be Argued By:*
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*Time Requested: 30 minutes*

# New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

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**DOCKET NO. 2007-4303**

MARGARET GODFREY, ROSEMARIE JAROSZ, AND JOSEPH ROSSINI,

*Plaintiffs-Appellants*,

—against—

ANDREW J. SPANO, in his official capacity as the Westchester County Executive,

*Defendant-Respondent*,

—and—

MICHAEL SABATINO and ROBERT VOORHEIS,

*Defendants-Intervenors-Respondents*.

## BRIEF OF DEFENDANTS-INTERVENORS-RESPONDENTS


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Westchester County Clerk's Index Number 06/16894

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### MISCELLANEOUS

## QUESTIONS PRESENTED

Question 1: Does the first cause of action in the Amended Complaint, alleging that the Westchester County Executive acted illegally by issuing an Executive Order confirming that valid out-of-state marriages of same-sex couples are subject to recognition for Westchester County governmental purposes, fail to state a claim under Section 51 of the New York General Municipal Law?

Answer: Yes. The Supreme Court correctly dismissed the first cause of action for failure to state a claim.

Question 2: Does the second cause of action in the Amended Complaint, alleging that the County Executive violated home rule provisions by issuing the Executive Order, fail to state a claim?

Answer: Yes. The Supreme Court correctly dismissed the second cause of action for failure to state a claim.

Defendants-Intervenors-Respondents Michael Sabatino and Robert Voorheis, a Westchester same-sex couple who validly married in Canada ("Defendants-Intervenors"), submit this brief in opposition to the appeal of Plaintiffs-Appellants ("Appellants") from the Amended Decision of the Supreme Court, Westchester County dated April 16, 2007.

## PRELIMINARY STATEMENT

This action is a meritless attack on the rights of same-sex couples in Westchester County and a public official who is simply doing his job in confirming that New York law requires him to uphold these rights. The Alliance Defense Fund ("ADF"), an Arizona-based religious advocacy organization,[1] brought this action on behalf of Appellants, three purported New York taxpayer plaintiffs. Appellants sought to enjoin Defendant-Respondent Westchester County Executive Andrew J. Spano (the "County Executive") from complying with the controlling New York marriage recognition rule requiring that the County accord legal respect to valid out-of-state marriages of same-sex couples. The Supreme Court properly dismissed Appellants' baseless claims.

Appellants allege in the first claim of the Amended Complaint that the County Executive's actions are illegal pursuant to New York General Municipal Law Section 51 ("Section 51"). The Supreme Court properly dismissed this claim

[1] *See* Alliance Defense Fund website, http://www.alliancedefensefund.org (last visited Dec. 21, 2007).

because, as a matter of law, the County Executive did not act illegally. New York law provides that validly performed out-of-state marriages, such as Defendants-Intervenors', should be respected in New York, even if those marriages cannot be performed in the State. Indeed, in issuing his Executive Order, the County Executive was specifically following legal opinions of the New York State Attorney General and New York State Comptroller confirming that New York law requires legal respect for valid extra-territorial marriages of same-sex couples. Rejecting another meritless challenge launched by the same Appellants and the ADF, the Supreme Court for Albany County upheld the Comptroller's opinion as "legal and not contrary to law." *Godfrey v. DiNapoli*, Index No. 5896-06, slip op. at 5 (Sup. Ct. Albany Cty. Sept. 5, 2007) (McNamara, J.) (attached in Addendum hereto), *notice of appeal filed,* County Index No. 5896-06 (3d Dep't Oct. 17, 2007). The County Executive thus did nothing more than confirm that he will comply with controlling State law.

As Defendants-Intervenors argued below, the Section 51 claim is subject to dismissal on yet another basis. It is well established that allegations of illegality alone, even if true — which, as the Supreme Court held, is not the case here — are insufficient to maintain a claim under Section 51. That statute provides taxpayers with a cause of action against a government official only where the challenged official conduct constitutes fraud, collusion, bad faith, or corruption.

The Amended Complaint nowhere alleges that the County Executive engaged in such malfeasance by respecting valid out-of-state marriages between same-sex couples, nor could Appellants possibly substantiate such an allegation. Dismissal of the first cause of action may thus be affirmed on this basis as well.

Appellants' second cause of action has no more merit than the first and also was properly dismissed by the Supreme Court. Appellants claim that the Executive Order is "legislation" inconsistent with and preempted by the New York Domestic Relations Law (the "DRL"), in purported violation of the restrictions on home rule proscribed in New York Constitution Article IX, Section 2(c) and New York Municipal Home Rule Law Section 10(1)(i) (collectively, the "home rule provisions"). Since Appellants allege no way in which the Executive Order injures them, they lack standing even to bring this claim. And not only is the Executive Order not "legislation" subject to the home rule provisions, but even if it were, it *follows*, rather than runs afoul of, the controlling State law requiring legal recognition of valid out-of-state marriages. In fact, what is inconsistent with State law is the position Appellants assert — that local governments may contravene the governing marriage recognition rule and disrespect valid out-of-state marriages for no reason other than that the spouses are of the same sex. Nor is there any merit to Appellants' arguments, made for the first time on appeal, that the County

Executive violated the separation of powers doctrine merely by carrying out his responsibility to implement and enforce State and County law.

This action should be recognized for what it is — a bald maneuver to impair the rights of lesbian and gay New Yorkers by ideologically motivated plaintiffs and counsel who cannot countenance that government officials are applying New York law evenhandedly to these residents. The Supreme Court's decision dismissing the Amended Complaint should be affirmed.

## STATEMENT OF FACTS

### A. County Executive Spano's Executive Order Confirming That County Agencies Must Respect Valid Out-Of-State Marriages Of Same-Sex Couples

The County Executive's Order follows and is consistent with the determination by many New York public and private officials and entities that the valid out-of-state marriages of same-sex couples must be given legal respect in New York under the governing marriage recognition rule. Lesbian and gay couples have been legally permitted to wed in Canada since 2003, when Ontario began according same-sex partners the right to marry, followed swiftly by other Canadian provinces and then by nationwide law. *See* Record on Appeal ("R.") at 654-55. The requirements and process to enter into marriage in Canada are identical for same-sex and different-sex couples. R.655-56. Furthermore, Canada has no residency or citizenship requirements to marry there. Thus, U.S. citizens

like Defendants-Intervenors may legally marry their same-sex (or different-sex) partners in Canada, and many have. R.656. Same-sex couples also may marry in Massachusetts, Spain, Belgium, the Netherlands, and South Africa. R.656-57.

As discussed in Point I below, pursuant to longstanding common law principles, validly performed out-of-state marriages between same-sex couples are widely respected in New York, even though such couples are not permitted to marry here. Indeed, then Attorney General Spitzer issued an advisory opinion to that effect in March 2004, confirming that "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." R.771.

Many other government officials in New York have reached the same conclusion that New York law requires the jurisdictions over which they preside to respect out-of-state marriages of same-sex couples. The New York State Comptroller announced in October 2004, in an opinion upheld as legal in the *DiNapoli* case, that the New York State and Local Retirement System would recognize valid out-of-state marriages between same-sex couples. *See* R.773-78.

Since the court's decision below, the New York State Department of Civil Service ("DCS") likewise issued a policy directive confirming that valid out-of-state marriages of public employees to same-sex spouses are entitled to be respected for purposes of eligibility for spousal health insurance in the New York

State Health Insurance Program ("NYSHIP").[2] That policy directive applies to the more than 800 State and local public employers participating in NYSHIP.[3]

Many New York municipalities, including New York City, Albany, Buffalo, Binghamton, Nyack, Rochester, and Brighton, have similarly publicly confirmed that, consistent with the marriage recognition rule, they will respect marriages of same-sex couples validly performed outside the State. *See* R.658. Public and private employers across the State are likewise respecting extra-territorial marriages of same-sex couples in New York, as are numerous corporations that conduct business in New York. *See* R.658-59.

Acknowledging binding law and following the opinions of the Attorney General and State Comptroller, the County Executive issued Executive Order No. 3 of 2006 on June 6, 2006, confirming the County's legal obligation to respect marriages of same-sex couples lawfully entered into in other jurisdictions.

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[2] *See* New York State DCS, Employee Benefits Division Policy Memorandum revised May 1, 2007, http://data.lambdalegal.org/pdf/DCS%20Policy%20Memo.pdf (last visited Dec. 21, 2007).

[3] *See* New York State DCS, Directory of Health Benefits Administrators - Participating Agencies, http://www.cs.state.ny.us/ebd/ebdonlinecenter/pamarket/directory.cfm (last visited Dec. 21, 2007); New York State DCS, Participating Employer, http://www.cs.state.ny.us/ebd/welcome/pe.cfm (last visited Dec. 21, 2007).

The ADF is challenging DCS's policy directive in yet another purported taxpayer action. Cross-motions to dismiss and for summary judgment in that case are pending before the same State Supreme Court justice who has already dismissed the ADF's very similar action against the State Comptroller in *DiNapoli*. *See Lewis v. New York State Dep't of Civil Service,* Index No. 4078-07 (Sup. Ct. Albany Cty.) (McNamara, J.).

*See* R.67. The Executive Order first notes (a) the County's longstanding provision of health benefits to qualifying domestic partners and its support for their families through enactment of Westchester's Domestic Partnership Registry Law; (b) the opinions of the Attorney General and Comptroller, which other local governments publicly confirmed they are following, that New York law requires recognition of valid out-of-state marriages of same-sex couples even if New York does not permit such marriages here; and (c) the County Executive's responsibility under County law to supervise, direct, and control, subject to law, the administrative services and departments of the County. *Id.* The Executive Order then provides "that every department, board, agency, and commission of the County of Westchester" under the jurisdiction of the County Executive must "recognize same sex marriages lawfully entered into outside the State of New York in the same manner as they currently recognize opposite sex marriages for the purposes of extending and administering all rights and benefits belonging to those couples, to the maximum extent allowed by law." *Id.*

The effect of the Executive Order is to ensure that validly married lesbian and gay Westchester public employees and residents receive County benefits afforded on the basis of marital status. As a practical matter, County benefits provided on that basis already have been offered by the County to couples who are financially interdependent and residing together as domestic partners,

regardless of whether they are married. *See* R.339-41. Thus, even if a same-sex couple applies for benefits based on their out-of-state marriage, the same benefits would be available to them as domestic partners. As a result, the County Executive's recognition of the validity of such marriages does not result in any fiscal impact on County taxpayers. *Id.*

**B. The Defendants-Intervenors**

Defendants-Intervenors Michael Sabatino and Robert Voorheis were married in Ontario, Canada on October 4, 2003. R.502. They have been in a committed, loving relationship for more than 28 years. *Id.* Mr. Sabatino is the regional sales manager for LEAP Technologies, which makes and distributes automated instruments for analytical research laboratories. R.501. Mr. Voorheis is an interior designer at a Manhattan firm. *Id.* The couple lives in Yonkers, in a house they jointly own. R.502.

After they married in Canada, Mr. Sabatino and Mr. Voorheis notified their employers, homeowner and automobile insurance carriers, and financial advisors of their marriage and were recognized as married by these and other third parties. R.502-03. Their marriage was announced by the *New York Times* in the Sunday "weddings" section, which reported that the couple married in Ontario, Canada. R.762. They receive and expect to continue to receive recognition of and benefits for their marriage. R.502-04. For example, they receive comprehensive

automobile insurance coverage, including uninsured motorist coverage, which is available only to a spouse and would not be available to an additional driver. R.502-03. During a recent medical emergency, they saw how important it is for their marriage to be respected, when Mr. Sabatino was able to be at Mr. Voorheis's side and help make medical decisions as his spouse after Mr. Voorheis was rushed to the hospital with chest pains. R.503.

Defendants-Intervenors intervened in this action to protect the recognition and concomitant rights and benefits owed them as a validly married couple. R.440.

## PROCEDURAL HISTORY

Appellants filed a summons and verified complaint on August 23, 2006, along with a request for an order to show cause and preliminary injunction enjoining enforcement of the Executive Order. R.54-81. The original complaint alleged only one cause of action, a claim for relief under Section 51 of the Municipal Law. R.75. On November 30, 2006, Defendants-Intervenors moved to intervene, without opposition from the parties, and the Supreme Court granted the motion. R.26; R.354-445. On December 15, 2006, the County Executive and Defendants-Intervenors opposed the preliminary injunction and moved to dismiss the complaint for failure to state a cause of action. R.82-203; R.476-643. Appellants responded by filing the Amended Complaint, adding a second cause of

action alleging violations of home rule law. R.36-51. The County Executive and Defendants-Intervenors moved on January 26, 2007 to dismiss the Amended Complaint. R.204-353; R.644-826.

The Supreme Court ruled in a decision dated March 12, 2007, amended on April 16, 2007, that the Amended Complaint fails to state a cause of action. R.9-19; R.25-35. By final judgment dated April 16, 2007, the court declared that the Executive Order "is a valid exercise of the County Executive's power, not an illegal act, and does not violate the State Constitution or the Municipal Home Rule Law." R.8. The court also denied the motion for a preliminary injunction. R.7. Appellants then appealed the dismissal of their complaint.

## ARGUMENT

The Amended Complaint fails to state a cause of action on its face, justifying the Supreme Court's dismissal under CPLR 3211(a)(7). *See, e.g.*, *Rosner v. Paley*, 65 N.Y.2d 736, 738 (1985) (motion to dismiss properly granted where complaint fails to state cause of action as matter of law); *Betters v. Knabel*, 288 A.D.2d 872, 873 (4th Dep't 2001) (motion to dismiss properly granted for failure to state cause of action under Section 51).

## I.

## THE COURT BELOW PROPERLY HELD THAT APPELLANTS FAIL TO STATE A CAUSE OF ACTION UNDER THE GENERAL MUNICIPAL LAW

Settled New York common law requires that the valid out-of-state marriages of couples like Defendants-Intervenors be accorded legal respect in this State. In confirming that the Westchester County government will respect such marriages, the County Executive has done no more than acknowledge what New York law demands and what Defendants-Intervenors and other married same-sex couples deserve. Appellants' contention that the marriage recognition rule does not apply when the rights of these families are at stake contravenes longstanding New York principles of common law and State anti-discrimination guarantees.

Appellants do not dispute that New York law requires recognition of validly performed out-of-state marriages unless recognizing those marriages is prohibited by an express statute or abhorrent to New York by shared public consensus. Nor do Appellants deny that same-sex couples can and do enter into valid civil marriages in Canada and a growing number of other countries around the world, as well as in Massachusetts. Further, Appellants do not dispute that Defendants-Intervenors are a same-sex Westchester couple who were legally married in Ontario, Canada and have a valid marriage under Canadian law.

Appellants nevertheless ask the Court to ignore decades of binding precedent in order to serve their ideological mission to deny same-sex couples rights they are entitled to as spouses. Appellants repeatedly declare that New York limits recognition of out-of-state marriages to different-sex couples. But they cannot establish that either of the two exceptions to the common law rule leads to that result. Unable to reconcile the outcome they seek with the existing marriage recognition rule, Appellants advance a series of baseless arguments as to why the rule should simply be ignored in this case. Defendants-Intervenors address these additional points below, but the short answer is that they conflict with governing law.

The marriage recognition rule itself, not the alternate theories cobbled together by Appellants, supplies the analysis the courts must follow to determine whether a marriage unavailable here must still be respected in New York. The rule specifies how to analyze whether the Legislature has prohibited recognition of the out-of-state marriage — that is, by asking whether the Legislature has *enacted an explicit statutory prohibition barring recognition*. Contrary to Appellants' suggestion, the Legislature's limitation of marriages entered into within the State to different-sex unions does *not* constitute a ban on recognition of out-of-state marriages of same-sex couples. Instead, unlike a number of others states, New York's Legislature has chosen *not* to take that step.

The marriage recognition rule also supplies the analysis the courts must follow to determine whether respecting an out-of-state marriage would violate New York public policy — that is, by considering whether the marriage is so objectionable as to be "abhorrent" in New York. No legal authority supports Appellants' arguments that the historical unavailability of a category of marriage changes the applicable analysis: the stringent "abhorrence" exception is the sole operative standard for determining whether a valid out-of-state marriage is so offensive that it cannot be respected in New York. Appellants' attempts to end-run these clear and longstanding principles for evaluating out-of-state marriages should not divert the Court from applying the sole controlling test — the marriage recognition rule.

That test yields only one result: the valid out-of-state marriages of same-sex couples are entitled to legal respect in New York, and thus the County Executive did not act contrary to law in issuing the Executive Order. Furthermore, as explained below, even if that were not the case, Appellants still could not state a claim under Section 51, which confers taxpayer standing only where serious malfeasance like fraud or corruption by a public official has occurred, something not at all alleged or demonstrable here.

## A. The Court Below Correctly Held That The County Executive Did Not Engage In Illegality By Confirming That Valid Out-Of-State Marriages Between Same-Sex Couples Must Be Respected For County Purposes

### 1. The Marriage Recognition Rule Requires That Marriages Valid Where Performed Must Be Respected In New York

For at least the past two centuries, New York has required that marriages validly executed in other jurisdictions be respected for all purposes in this State. *See 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"); *Van Voorhis v. Brintnall*, 86 N.Y. 18, 25 (1881); *Decouche v. Savetier*, 3 Johns. Ch. 190, 211 (N.Y. Ch. 1817). 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).

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.[4] Under the rule, a marriage must be recognized in New York if valid where performed, *even if it would have been invalid if performed in*

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[4] *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 (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 (3d Dep't 1998); *Hulis v. M. Foschi & Sons*, 124 A.D.2d 643 (2d Dep't 1986).

*this State*. *See, e.g.*, *Thorp*, 90 N.Y. at 605 ("[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.").

Thus, for example, a marriage between an uncle and a niece prohibited under DRL Section 5(3) is nonetheless deemed valid here if celebrated in another state or country in which it is lawful. *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 prohibited by the Legislature since 1933, 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*, 288 A.D.2d at 188. New York also respects the out-of-state marriages of parties too young under DRL § 7(1) to marry here. *See Hilliard v. Hilliard*, 24 Misc. 2d 861, 863 (Sup. Ct. Greene Cty. 1960). And the out-of-state marriages of countless couples who traveled to other jurisdictions to avoid New

York's (now repealed) statutory restriction on remarriage after divorce have consistently been respected in New York. *See Farber*, 26 N.Y.2d at 55; *In re Estate of Peart*, 277 A.D. 61, 64, 69 (1st Dep't 1950).

Moreover, a marriage validly executed in a foreign nation that could not be obtained here — such as the Canadian marriage of Defendants-Intervenors — is entitled to the same strong presumption of validity in New York as one contracted in another state. *See, e.g., Van Voorhis v. Brintnall*, 86 N.Y. 18, 24 (1881) ("it 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). *See also Valente*, 18 Misc. 2d at 702 (Italian proxy marriage); *Bronislawa K. v. Tadeusz K.*, 90 Misc. 2d 183, 184 (Fam. Ct. Kings Cty. 1977) (determining validity of Polish marriage under laws of Poland).

In particular, New York courts have for decades recognized Canadian marriages as valid. *See In re White*, 129 Misc. 835, 836 (Sur. Ct. Erie Cty. 1927) ("validity 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. Erie Trial Term 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.").

With marriage comes emotional and financial stability for spouses and any children, which supports a strong presumption of the validity of a marriage to protect these family ties. *See, e.g., Amsellem v. Amsellem*, 189 Misc. 2d 27, 29 (Sup. Ct. Nassau Cty. 2001) ("The 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). Appellants, complete strangers to the couples whose marriages they gratuitously attack, cannot meet this heavy burden.

Moreover, the marriage recognition rule does not differentiate between marriages of different-sex and same-sex couples, despite Appellants' efforts to suggest otherwise. Instead, only two narrow exceptions limit the rule, neither of which applies here.

### a. New York has not enacted any positive law precluding recognition of out-of-state marriages of same-sex couples

Under the first exception, the marriage recognition rule will not apply if a New York 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 492-93; *Van Voorhis*, 86 N.Y. at 26 ("prohibition by positive law" constitutes exception to marriage recognition rule). Significantly, New York has no such statute withholding recognition here for out-of-state marriages of same-sex couples. *Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006), confirmed that the DRL does not permit marriages of same-sex couples *within* New York. But the DRL notably does not preclude recognition of such marriages validly performed elsewhere. In the absence of a specific legislative prohibition to the contrary, the common law marriage recognition rule is the governing law that must be applied statewide.

The Court of Appeals made unmistakably clear in *May* that, short of the exceptional situation where a marriage is "abhorrent" (described below), *only* the Legislature through an express statutory enactment — not the courts, and certainly not a County Executive — may stop operation of the marriage recognition rule and deny respect to a category of extra-territorial marriages. *May* 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 DRL Section 5(3) and the predecessor to Penal Law Section 255.25. 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.

The Legislature has not elected to "interdict" out-of-state marriages between same-sex couples; neither the courts — nor a county government — is empowered to do so. *Id.* at 493. *See* Stat. Law § 301(b) ("The common law is never abrogated by implication, but on the contrary it must be held no further changed than the clear import of the language used in a statute absolutely

requires."). So long as the Legislature has chosen not to overrule the common law marriage recognition rule as applied to same-sex couples, it remains the default and controlling test in New York.

**b. Marriages by same-sex couples do not trigger the abhorrence exception to the marriage recognition rule**

Under the rule's second exception, an out-of-state marriage will not be recognized in New York if it is "offensive to the public sense of morality to a degree regarded generally with abhorrence." *May*, 305 N.Y. at 493. The abhorrence exception sets an exceptionally high bar for withholding recognition to a valid out-of-state marriage. It requires an overwhelming social consensus that a marriage is patently repugnant to the community, a criterion so stringent that, throughout the lengthy history of the marriage recognition rule, only polygamous and closely incestuous marriages have been held to meet it. *See id.*; *Van Voorhis*, 86 N.Y. at 26; *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"); *Bronislawa K.*, 90 Misc. 2d at 185 (marriage recognition rule gives way to "assert [New York's] strong public policy of condemnation" of incestuous and polygamous marriages).

This exception too is not remotely applicable here. As evidenced by its laws and judicial decisions, New York State increasingly regards same-sex partnerships with respect and tolerance, negating the consensus of abhorrence the ADF would have to demonstrate to invoke this narrow exception to the marriage recognition rule. *See* R.660-63. The same-sex relationships of lesbian and gay New Yorkers are already respected and accorded protection in a variety of ways throughout the State and in Westchester County. This includes, for example, recognition of out-of-state marriages by the Governor, Attorney General, State Comptroller, DCS, other public officials, municipal and County governments, unions, and private entities around the State. R.657-59; *see also* pp. 6-7, above. One need only open the marriage announcements section of the *New York Times* for evidence of the widespread social acceptance of marriage between same-sex couples in this State. Indeed, Defendants-Intervenors' marriage was itself announced in the *Times*. R.762.

Same-sex relationships have long been accorded respect and protections in New York in many other contexts as well. For example, all three branches of State government provide benefits to domestic partners of State employees, as do numerous local governments, including Westchester. R.660-61. Westchester County, along with a number of other municipal and county governments, provides an official domestic partner registry for same-sex couples.

R.661; Laws of Westchester County ch. 550, § 550.01 *et seq.* *See also Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 496 (2001) (same-sex partners entitled to pursue claim under New York City Human Rights Law to receive same student housing as married couples); *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 212-13 (1989) (same-sex life-partners entitled to same protections under rent control laws as spouses and other family members). In an unmistakable statement that marriages of same-sex couples are far from "abhorrent" to New York public policy, on June 19, 2007, the New York State Assembly passed by an 85-61 vote legislation initiated by the Governor that would grant same-sex couples the right to marry here in New York. *See* New York State Assembly, Bill Summary - A08590, http:// assembly.state.ny.us/leg/?bn=A+8590 (last visited Dec. 21, 2007). Clearly there is no social consensus in New York that same-sex relationships are abhorrent.

In the face of overwhelming proof that this stringent standard could not possibly be met in New York, Appellants have abandoned any effort to do so. Given Appellants' inability to demonstrate that the positive law or abhorrence exceptions to the marriage recognition rule apply here, the Supreme Court correctly held that the Executive Order is lawful and does not give rise to a claim for relief under Section 51. R.33.

### 2. The ADF Cannot Evade The Governing Marriage Recognition Rule Merely By Proclaiming That "By Definition" A Civil Marriage Of A Same-Sex Couple Is Not A "Marriage"

Confronted with the inevitable conclusion that the marriage recognition rule compels dismissal of the Amended Complaint, Appellants resorts to the *ipse dixit* that marriage, by "definition," cannot include same-sex couples and so the marriage recognition rule does not even come into play. This contention takes different forms in their brief, ranging from arguments that historical conceptions of marriage found in entirely different contexts foreclose application of the marriage recognition rule here (*see, e.g.,* Plaintiffs-Appellants' Brief ("App. Br.") at 33-34), to the insulting assertion that granting legal respect to marriages of same-sex couples is like calling a "giraffe" a "zebra" (*id.* at 35), to dire warnings that the County Executive is "bulldoz[ing] social engineering" (*id.* at 39). These belittling claims are an injustice to families like the Sabatino-Voorheis's, who are not "giraffes" but committed life partners, long-time Westchester residents and taxpayers, and indisputably spouses in a legally valid *marriage* under Canadian law.

Furthermore, none of Appellants' contentions displace the guiding legal principle here: that because the out-of-state marriages of same-sex couples like Defendants-Intervenors (a) are legally valid in sister jurisdictions, (b) not barred from recognition in New York by a positive legislative prohibition, and (c)

not abhorrent by shared public consensus, they are indeed entitled to legal respect here. Appellants' lengthy discussion of the purportedly universal and fundamental "definition" of marriage as limited to different-sex couples (App. Br. at 31-37) ignores the indisputable reality that same-sex couples can and do legally marry in numerous jurisdictions (R.654-57), as well as the widespread consensus within New York among both public and private actors that these valid out-of-state marriages are entitled to be respected (R.657-59).

The Court of Appeals has instructed that judicial interpretations of legally significant terms must keep pace with "contemporary realities." *See, e.g., Braschi,* 74 N.Y.2d at 211-12 (defining "family member" in rent control provision to include same-sex partner in light of contemporary realities, even though enacting Legislature in 1946 would not have contemplated this definition); *In re Jacob*, 86 N.Y.2d 651, 668-89 (1995) (construing adoption statute to allow second parent adoptions by "unmarried person[s]" in same-sex relationships, notwithstanding that "[t]o be sure, the Legislature that last codified [the statute] in 1938 may never have envisioned [such] families'"). Thus the marriage recognition question cannot be answered by consulting antique dictionaries, published in an

age when same-sex couples could not marry, that describe "marriage" as involving a "husband and wife." App. Br. at 32.[5]

Nor can it be answered by the cases cited by Appellants having nothing to do with the marriage recognition rule or New York's treatment of out-of-state marriages. For example, *Hernandez*, heavily relied on by the Appellants, addressed the entirely distinct question of who may marry *within* New York. Both the court below and in *DiNapoli* rejected Appellants' contention that *Hernandez* dictates disrespect for out-of-state marriages of same-sex couples. *See* R.32 (*Hernandez* "dealt with the subject of intrastate licensing of same-sex marriage; not with interstate or foreign recognition of such marriages."); *DiNapoli,* slip op. at 4 ("[T]he determination in Hernandez did not answer the question raised here. Rather, the question of whether same-sex marriages valid in the jurisdiction where performed should be recognized in New York is an outgrowth of the determination that the law in New York does not compel the State to sanction same-sex marriage."). Likewise, *Murphy v. Ramsey,* 114 U.S. 15 (1885), and *Fearon v.*

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[5] Although legal standards and precedents, not dictionary definitions, govern this case, the contemporary dictionary Appellants themselves cite as an authority on the definition of "marriage" actually *supports* application of the marriage recognition rule in this context. *See* App. Br. at 32. Appellants misleadingly quote only selectively from the Merriam-Webster Online Dictionary, which goes on to define "marriage" as "the state of being married *to a person of the same sex* in a relationship like that of a traditional marriage" (emphasis added), as well as in entirely gender-neutral terms, as "the mutual relation of married persons, . . . the institution whereby individuals are joined in a marriage." *See* Merriam-Webster Online Dictionary, Definition of marriage, http://www.m-w.com/dictionary/marriage (last visited on Dec. 21, 2007).

*Treanor*, 272 N.Y. 268 (1936), also relied on by Appellants, had nothing to do with the common law marriage recognition rule.

Appellants cite *Funderburke v. New York State Dep't of Civil Serv.*, 13 Misc. 3d 284 (Sup. Ct. Nassau Cty.), *appeal docketed*, No. 2006-7589 (2d Dep't Aug. 3, 2006), a decision that wrongly rejected the claim of a retired public employee denied spousal health coverage for his same-sex married spouse under an earlier DCS policy refusing to recognize such marriages. With virtually no analysis, *Funderburke* conflated *Hernandez*'s ruling denying an affirmative constitutional right to marry in New York State with the distinct issue of application of the marriage recognition rule to valid out-of-state marriages. *Id.* at 286. *Funderburke* has been widely criticized, including by the court below (R.32-33), the State Attorney General (R.720-23; R.819), and, implicitly, DCS itself, which, citing "legal and policy concerns" with its prior policy, has changed course to recognize out-of-state marriages of lesbian and gay public employees and extend coverage to their spouses (*see* p. 7 n.2, above). *Funderburke* should be reversed outright; its errors certainly should not be repeated here.[6]

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[6] *Martinez v. Monroe Community College*, Index No. 00433/05 (Sup. Ct. Monroe Cty. July 13, 2006), *appeal docketed*, No. 06-02-591 (4th Dep't Sept. 6, 2006), also cited by Appellants, shared *Funderburke*'s flawed analysis and has been similarly criticized and implicitly repudiated by the government defendant, which has since extended the health coverage at issue to same-sex domestic partners. *See, e.g.*, R.32-33; R.724 n.13; R.819. It offers no basis for Appellants' attack on the County Executive.

Finally, Appellants rely on an inapposite case involving a same-sex couple who were never married in *any* jurisdiction. *See Langan v. St. Vincent's Hospital of N.Y.*, 25 A.D.3d 90, 94-95 (2d Dep't 2005) (surviving party to Vermont civil union could not bring New York wrongful death action because not considered married under Vermont law), *appeal dismissed*, 6 N.Y.3d 890 (2006). This Court specifically noted in *Langan* 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. *Langan*, 25 A.D.3d at 94-95. *See also DiNapoli,* slip op. at 5 ("the issue of recognition of a foreign same-sex marriage was not raised or addressed" in *Langan*). The result in a case like *Langan* would have been the same had an unmarried *different*-sex couple similarly sought to invoke the benefits or protections of marriage. *See, e.g., In re Huyot*, 245 A.D.2d 513, 514 (2d Dep't 1997) (different-sex parties who never married "were not each other's spouse," so survivor could not claim spouse's right of election under New York law).

The issue then is not whether same-sex couples like Defendant-Intervenors have "marriages," but whether their marriages, undeniably valid under the laws of many sister jurisdictions, must be respected in New York. Now that many jurisdictions offer civil marriage to same-sex couples, the term "spouse"

must be interpreted under New York's marriage recognition rule, just as has been done by the County Executive, to apply to these legally married couples.

### 3. The Marriage Recognition Rule Remains Vital To This Day And The Controlling Standard Governing The Legal Respect Due To Out-Of-State Marriages Of Same-Sex Couples

In another variation on their theme, Appellants claim that since the common law marriage recognition rule first evolved when there were not yet marriages of same-sex couples, the rule can have no currency now. According to Appellants, the policy rationales underlying the rule — to avoid the conflicts that arise when the marital status of a couple is uncertain — do not apply if the marriage is between spouses of the same sex. *See* App. Br. at 38. In an effort to confuse the analysis further, Appellants claim that general comity principles, not the rule evolved by the courts specifically to deal with precisely the question here, should govern. *See id.* at 40-41. These arguments, however, do not change the fact that the marriage recognition rule remains the governing legal standard, regardless of whether the marriage's availability in other jurisdictions is of recent or older vintage.

#### a. Application of the marriage recognition rule here is consistent with the policy rationales underlying it

The marriage recognition rule is a firmly embedded common law principle, dating back centuries, *see Scrimshire v. Scrimshire,* 161 ER 782, 790

(Consistory Ct. 1752), yet still vital today. It 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 20. *See also Persad v. Balram*, 187 Misc. 2d 711, 715 (Sup. Ct. Queens Cty. 2001) ("[W]hile a marriage 'is declared a civil contract for certain purposes . . . it is not thereby made synonymous with the word contract, employed in the common law or statutes.'. . . A marriage, because of its unique status and substance, differs significantly from ordinary contracts. . . . It is an 'institution' about which the state is 'deeply concerned' and takes a profound interest in protecting.") (citations omitted). 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 across state or national lines.

Appellants emphasize the marriage recognition rule's connection to the policy preference for rearing children within a marital setting. *See* App. Br. at 34. But concerns for promoting childrearing within marriage only *support* applying the marriage recognition rule to same-sex married couples, many of who

are raising children.[7] The personal attachments and commitment underlying marriage and need for family stability and certainty are no less weighty for same-sex married couples than for others. Whether New York allows a particular couple to marry here or not, the State recognizes the great importance of treating those married elsewhere as married in New York through the common law marriage recognition rule, subject only to the rule's narrow exceptions.[8]

It is thus immaterial that same-sex couples only recently have been able to enter into valid marriages in other jurisdictions, calling for application of a common law rule that has evolved to apply in many contexts to many kinds of marriages. "[I]t is the strength of the common law to respond, albeit cautiously and intelligently, to the demands of commonsense justice in an evolving society." *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 291-92 (2007) (holding that

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[7] The 2000 United States Census identified 46,490 households of same-sex partners in New York State, with over 34% of lesbian couples and 21% of gay male couples raising children in their homes. *See* Tavia Simmons and Martin O'Connell, *U.S. Census Bureau, Married-Couple And Unmarried Partner Households: 2000* 2, 9 (2003). These figures no doubt under-represent the numbers of same-sex households in New York, given that some lesbian and gay couples were reluctant to self-report as such in the census. M.V. Lee Badgett & Marc A. Rogers, *The Institute for Gay and Lesbian Strategic Studies, Left Out of the Count: Missing Same-sex Couples in Census 2000*, at 1.

[8] It would in any event be a fallacy to suggest that the marriage recognition rule hinges entirely on policy concerns about children born to couples whose marital status would otherwise be uncertain. The courts routinely apply the rule without reference to whether the couple in question has children. *See, e.g., In re Estate of Catapano*, 17 A.D.3d 672 (2d Dep't 2005) (holding that petitioner was entitled to letters of administration as surviving spouse in Pennsylvania common law marriage despite no indication that couple had children together); *Coney v. R.S.R. Corp.*, 167 A.D.2d 582 (3d Dep't 1990) (holding that common law marriage obtained during 3-day sojourn in Georgia gave rise to entitlement to spousal workers' compensation benefits, with no indication that couple had children together).

"[common law] tort of conversion must keep pace with the contemporary realities of widespread computer use") (citations omitted).

Appellants' claim that the rule was never intended "as a conduit for far-reaching social change" is yet another red herring. App. Br. at 38. Already built into the rule itself is the method for taking such concerns into account and, in rare situations, overriding the State's very strong policy preference for respecting out-of-state marriages. First, the Legislature remains free to make the policy determination that a particular type of extra-territorial marriage should not be respected in this State and then (subject to constitutional constraints) to pass legislation prohibiting recognition. In that case, the explicit statutory prohibition overrides the marriage recognition rule. *See* Point I.A.1.a. above. Second, even in the absence of such a clear Legislative pronouncement, the courts still may decline to accord respect to a marriage if it is of a type deemed abhorrent by shared social consensus. As discussed above, marriages of same-sex couples do not meet this stringent requirement for non-recognition. *See* Point I.A.1.b. above.

In fact, the rule contemplates that even those marriages entered into in other jurisdictions by New Yorkers intentionally *evading* even *criminal* prohibitions on marriage in this State will be accorded comity. New York's leading precedent, *May,* involved just such a situation, yet the Court of Appeals nonetheless held in no uncertain terms that the marriage recognition rule must still

apply to grant legal respect to the Rhode Island marriage. *See May*, 305 N.Y. at 492-93.

This principle is particularly illustrated by the respect accorded in New York to extra-territorial marriages obtained to avoid this State's now-repealed restriction on remarriage after divorce. While other jurisdictions had liberalized their divorce laws, New York until the 1966 amendment of DRL Section 8 continued to restrict the ability of spouses divorced for adultery to remarry. *See, e.g., Farber*, 26 N.Y.2d at 48-49; 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 evade the restriction and enter into a new marriage. A long string of cases nonetheless upheld these extra-territorial marriages as valid in New York. Thus a spouse barred by DRL Section 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." *Almodovar v. Almodovar*, 55 Misc. 2d 300, 301 (Sup. Ct. Bronx Cty. 1967).[9]

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[9] *See also 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*, 90 N.Y. at 606 (marriage validly obtained in Pennsylvania in evasion of New York law

This case law illustrates New York's strong public policy favoring stability and predictability in determining marriage validity even when the marriage in question is expressly barred within the State and the couple acts to evade the restriction. Thus, application of the marriage recognition rule here does not impose "social change" — it merely follows the State's long-held policy as embodied in the common law and not altered by the Legislature.

**b. Although the marriage recognition rule, not a general comity test, specifically governs here, the out-of-state marriages of same-sex couples are entitled to respect regardless of the rule applied**

Grasping at yet another straw, Appellants claim that the Court of Appeals has abandoned the marriage recognition rule altogether in favor of a general comity rule that, as Appellants would have it, pays no deference to other jurisdictions. Appellants contend that the Court of Appeals effected this dramatic departure from the centuries-old rule with *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574 (1980). But that case concerned application of general comity principles in the context of "a wholly commercial transaction." *Id.* at 582. *Ehrlich-Bober* did not even mention the longstanding distinctive doctrine that

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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); *Estate of Peart*, 277 A.D. at 69 (noting line of cases recognizing validity of second marriages obtained out-of-state to evade New York prohibition on remarriages).

applies in the marriage context, much less purport to supplant it with a newly developed comity rule.

Notably Appellants disregard the controlling cases specifically applying the marriage recognition rule *after Ehrlich-Bober*. Indeed, subsequent to *Ehrlich-Bober*, the Court of Appeals confirmed the vitality of the distinct marriage recognition rule, holding that "[t]he law to be applied in determining the validity of . . . an out-of-state marriage is the law of the State in which the marriage occurred." *Mott*, 51 N.Y.2d at 292. In the years since, this Department, along with other Appellate Division Departments, has reiterated and applied the rule numerous times. *See, e.g., Catapano*, 17 A.D.3d at 672; *Katebi*, 288 A.D.2d at 188. *See also, e.g., You-Xin*, 246 A.D.2d at 721; *Lancaster v. 46 NYL Partners*, 228 A.D.2d 133, 141 (1st Dep't 1996); *In re Estate of Gates*, 189 A.D.2d 427, 432 (3d Dep't 1993); *Coney*, 167 A.D.2d at 583; *Dozack v. Dozack*, 137 A.D.2d 317, 318 (3d Dep't 1988).

In any event, even if the general, non-marital comity principles of *Ehrlich-Bober* rather than those specific to recognition of marriages were applicable, respect for out-of-state marriages between same-sex partners would still be required in New York. Appellants grossly mischaracterize how New York's general comity standards operate. Under the comity standard articulated in *Ehrlich-Bober*, a court must compare New York's public policy with that of the

foreign jurisdiction to determine which conflicting law should control. *Ehrlich-Bober*, 49 N.Y.2d at 580. This approach does not permit 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).

Instead, in determining whether recognition of valid foreign marriages would violate New York's public policy, even under general choice of law rules, a court still would apply a standard similar to the "abhorrence" exception: "In view of modern choice of law doctrine, resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious." *Id.* at 79. *See also Welsbach Elec. Corp. v. MasTec North America, Inc.*, 7 N.Y.3d 624, 628-29 (2006) (following *Cooney*). In light of New York's longstanding respect for same-sex relationships, coupled with its exceptionally strong public policy calling for recognition of valid out-of-state marriages, Appellants could not possibly demonstrate that Westchester County's respect for the marriages of same-sex couples would be "obnoxious" to public policy.

### 4. The County Executive Avoided A Discriminatory Result By Following The Marriage Recognition Rule And Confirming That Out-Of-State Marriages Of Same-Sex Couples Are Respected For County Government Purposes

Far from acting *ultra vires*, as Appellants claim, the County Executive merely confirmed that County agencies would abide by what New York law requires — that the marriages of couples like Defendants-Intervenors be respected for purposes of County benefits. Defendants-Intervenors and other couples like them are married spouses entitled to have their marriages respected under New York law. Appellants' request that the Court jettison that venerable rule and create a double-standard where the out-of-state marriage involved is between lesbian or gay spouses contravenes not only governing common law but also New York's Sexual Orientation Non-Discrimination Act ("SONDA"), Executive Law Section 296(1)(a), and the State Constitution's guarantee of equal protection, N.Y. Const. art. I, Section 11.

Any different interpretation of the statutory and common law would give rise to an impermissible result, since there is not even a legitimate and rational reason for Westchester County's government to discriminate between same-sex and different-sex couples who may not marry in New York but have been validly married elsewhere. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632-35 (1996) (desire to impose legal disadvantage on gay and lesbian people is not even legitimate or

rational basis for lawmaking); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 549-51 (1985) (town lacked legitimate and rational basis to discriminate on basis of family configuration); *People v. Onofre*, 51 N.Y.2d 476, 490-92 (1980) (moral disapproval is illegitimate basis for government intrusion in areas of important personal decision).

Under the marriage recognition rule, the County would be 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 within New York (and, in the case of uncle/niece marriages, felonies, *see* Penal Law § 255.25). To single out for unfavorable treatment the out-of-state marriages of lesbian and gay Westchester County residents like Defendants-Intervenors, while simultaneously respecting other out-of-state marriages that likewise could not be obtained in New York, would violate SONDA and the guarantee of equal protection. The County Executive properly avoided this result.[10]

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[10] Given that a straightforward application of the marriage recognition rule supports the County Executive's determination, the constitutional ramifications need not even be reached. *See People v. Felix*, 58 N.Y.2d 156, 161 (1983) ("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."). Should they be taken into account, however, there should be no confusion with the distinct issue addressed in *Hernandez* — whether the State Constitution is violated by prohibiting same-sex couples from marrying *within* New York. *See* 7 N.Y.3d at 358. *Hernandez* did not at all consider the different constitutional issue here — whether the guarantee of equal protection would be violated by uneven application of the marriage recognition rule to different categories of out-of-state marriages that are prohibited from taking place within New York.

In sum, the County Executive followed governing New York law mandating that the County respect out-of-state marriages of same-sex couples. The Supreme Court correctly ruled that the County Executive has acted lawfully and that Appellants accordingly failed to state a cause of action under Section 51.

### B. Appellants Cannot Demonstrate That The County Executive Engaged In Fraud Or Other Malfeasance As Required To State A Cause Of Action Under Section 51

Even if it somehow could be found that the County Executive acted "illegally" in following the marriage recognition rule — an entirely untenable conclusion in light of the settled law summarized above — Appellants' first cause of action was still correctly dismissed. Section 51 of the Municipal Law creates standing for a taxpayer to challenge an "illegal official act" and "waste and injury" to public property and funds. *See* Section 51. As the Court of Appeals has held, however, a taxpayer may sue a public officer under Section 51 only in very limited circumstances, not present here: when the official conduct complained of is illegal *and* involves *fraud, collusion, or personal gain. See, e.g., Mesivta of Forest Hills Inst., Inc. v. City of New York*, 58 N.Y.2d 1014, 1016 (1983); *see also Bernstein v. Feiner*, 13 A.D.3d 519, 521 (2d Dep't 2004). "The decisions under Section 51 make it entirely clear that redress may be had only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes." *Kaskel v. Impellitteri*, 306

N.Y. 73, 79 (1953). There is no such allegation in the Amended Complaint, nor would such an allegation be sustainable.[11]

Section 51 does not give taxpayers — or the courts — *carte blanche* to scrutinize the legality of official actions taken by government officers. Instead, it provides a limited remedy for taxpayers to challenge acts by government officials only in egregious situations. Section 51 "must be read narrowly to avoid inappropriate intervention by the judiciary in public policy issues which must be decided, in the last instance, by duly elected representatives." *Montecalvo v. City of Utica*, 170 Misc. 2d 107, 113 (Sup. Ct. Oneida Cty.) (citing *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 133 (1965)), *aff'd on opinion below*, 233 A.D.2d 960 (4th Dep't 1996). In the absence of illegality, fraud, collusion, corruption, or bad faith, the court "has no power or authority . . . to regulate or superintend the official acts of one holding a civil appointment or to make itself the arbiter of a dispute between some dissatisfied taxpayer and the municipal authorities." *City of Utica*, 170 Misc. 2d at 114 (quotations omitted). *See also Hanrahan v. Corrou*, 170 Misc. 922, 925 (Sup. Ct. Oneida Cty. 1938) ("The terms 'waste' and 'injury,' as used in the statute . . . are not intended to subject the action of any

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[11] The Supreme Court addressed standing arguments cursorily before addressing — and dismissing — the claims in the Amended Complaint on their merits. *See* R.27-28. Defendants-Intervenors demonstrate here and in Point II that Appellants lack standing to bring their claims, which is yet another ground for affirmance of the decision below. *See Massena v Niagara Mohawk Power Corp.*, 45 N.Y.2d 482, 488 (1978) (appellate court may affirm on any ground offered below).

administrative official, acting within the limits of his authority and jurisdiction, to the scrutiny and control of a judicial tribunal.").

Accordingly, the failure to allege such malfeasance by a public official requires dismissal of a Section 51 claim. *See In re Sanitation Garage, Brooklyn Dists. 3 and 3A*, 32 A.D.3d 1031, 1036 (2d Dep't 2006) (Section 51 claim properly dismissed for failure to allege that government officials "acted corruptly or fraudulently, or engaged in illegal activities") (citations omitted); *Bernstein*, 13 A.D.3d at 521 (same); *Hill v. Giuliani*, 249 A.D.2d 28, 28 (1st Dep't 1998) (same).

Moreover, the allegations of malfeasance must be detailed and specific, not merely general averments designed to withstand dismissal. *Montecalvo v. Herbowy*, 171 Misc. 921, 926 (Sup. Ct. Oneida Cty. 1997) ("A cause of action for official corruption [under Section 51] must contain special, detailed factual allegations of waste tied to corruption."). *See also* CPLR 3016(b) ("Where a cause of action or defense is based on misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.").

There is no allegation — and certainly no evidence — that the County Executive's actions were fraudulent, corrupt, taken in bad faith, or constituted collusion, as required to be actionable under Section 51. The Amended Complaint

alleges only that the County Executive acted beyond his "authority" and "illegally" when issuing the Executive Order (R.36; R.40), but these allegations alone are insufficient to maintain an action under Section 51. *See, e.g., Bernstein*, 13 A.D.3d at 521; *City of Utica*, 170 Misc. 2d at 114. In essence, the ADF alleges only a disagreement with a legal determination the County Executive made while performing his duties and does not even suggest, much less allege, that he has committed any type of fraud on the public or other culpable conduct of the type comprehended by Section 51. In fact, the County Executive followed the opinion of the State's Attorney General and Comptroller in issuing his Executive Order, a far cry from committing the kind of corrupt act Section 51 addresses.

Indeed, Appellants conceded below that they did not and could not allege that the County Executive engaged in fraud or corruption by issuing the Executive Order. Relying — mistakenly — on *Duffy v. Longo*, 207 A.D.2d 860 (2d Dep't 1994), they argued instead that such allegations of malfeasance are required only if a taxpayer seeks to hold a public official financially liable for restitution, which is not sought here (nor could it be, given that the Executive Order has had no fiscal impact on taxpayers). But *Duffy* held no such thing. To the contrary, the Court broadly observed in *Duffy* that Section 51 "as written, is aimed at officials whose illegal acts entail collusion, fraud, or personal gain," adding: "For more than 120 years, throughout its entire history and incarnations,

the statute has never been . . . applied in any instance in which the critical element of collusion, fraud, or personal gain was lacking." *Id.*[12]

Appellants similarly claimed below that they need make only general allegations of "waste" and "public mischief" to plead a valid Section 51 claim. This too is wrong. A cause of action for official corruption must "contain special, detailed factual allegations of waste tied to corruption," which Appellants simply failed to make. *See Herbowy*, 171 Misc. 2d at 926 (citations omitted); *City of Utica*, 170 Misc. 2d at 111 (citing additional cases). The very Court of Appeals cases Appellants relied on below for their erroneous proposition, *Korn v. Gulotta*, 72 N.Y.2d 363 (1988), and *Stahl Soap Corp. v. City of New York*, 5 N.Y.2d 200 (1959), make clear that illegality alone is insufficient for a Section 51 claim. The complaint must also allege that the official acts will cause "public injury," *Korn*, 72 N.Y.2d at 372, a "waste of public property in the sense that they represent the use of such property for entirely illegal purposes, or where there is a total lack of

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[12] *Duffy* rejected a claim under Section 51 to recover payments made by the City of Yonkers in contempt fines levied by a federal court for failure to comply with a federal anti-discrimination decree. The issue before the Court was whether the appellant town council member, who had openly defied the federal decree, was liable under Section 51 to make restitution for the fines. 207 A.D.2d at 864. The Court held that, although the appellant's actions were clearly illegal, because they did not "entail collusion, fraud, or personal gain," the appellant could not be held liable under Section 51 to make restitution. *Id.* at 865. The Court certainly did not hold that such allegations of malfeasance are required *only* when restitution from a public official, as opposed to some other remedy, like declaratory or injunctive relief, is sought under Section 51.

power in defendants, under the law, to do the acts complained of." *Stahl*, 5 N.Y.2d at 204 (quotations omitted).

The County already recognizes and provides benefits to same-sex couples as domestic partners. R.339-41. The County's policy to accord the same benefits already available to couples whether they are domestic partners or spouses causes no "waste" or "public injury" of any sort, and certainly none actionable under Section 51. It is apparent that this case has nothing to do with concerns on the part of Appellants that taxpayer funds are being wasted on a corrupt or fraudulent purpose and everything to do with their mission to prevent lesbian and gay New Yorkers from receiving legal respect for their valid out-of-state marriages. A Section 51 action against a public official is not a permissible vehicle for pursuing this ideological agenda.

## II.

## THE SUPREME COURT CORRECTLY HELD THAT THE COUNTY EXECUTIVE DID NOT VIOLATE HOME RULE OR OTHERWISE EXCEED HIS AUTHORITY BY ISSUING THE EXECUTIVE ORDER

The Supreme Court correctly dismissed Appellants' second cause of action, brought under the home rule provisions, alleging that the County Executive exceeded his authority as a local official by issuing the Executive Order. Since the County Executive did not act unlawfully but simply followed controlling State law requiring recognition of valid out-of-state marriages of same-sex couples, it

follows that he did not overstep his official role — whether the question is framed as a "home rule" issue or, as Appellants also now suggest, a "separation of powers" violation. But the Court need not even address these issues because Appellants lack standing to assert these claims against the County Executive in the first instance.

### A. Appellants Lack Standing To Bring Claims Under The Home Rule Provisions

Appellants failed even to argue below that they meet general standing principles, which require a plaintiff to demonstrate that he or she suffers an injury-in-fact (1) *distinct* from the general public and (2) that falls within the zone of interests or concerns sought to be protected by the statutory provisions under which the government agency has acted. *See Transactive Corp. v. N.Y. State Dep't of Soc. Servs.*, 92 N.Y.2d 579, 587 (1998); *Soc'y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772-73 (1991). The plaintiff has the burden of establishing standing, which Appellants failed to do. *See id.* at 769. They allege neither a personal injury-in-fact nor any "zone of interest" distinct from the general public. They simply allege that they pay taxes and that the County Executive has spent or will spend County funds pursuant to the Executive Order. R.55-56. Such allegations, even if accepted as true, do not establish general standing to sue. *See, e.g., Colella v. Bd. of Assessors of County of Nassau*, 95 N.Y.2d 401, 407-08

(2000); *Kadish v. Roosevelt Raceway Assocs.*, 183 A.D.2d 874, 874-75 (2d Dep't 1992).

Appellants also do not qualify for common law taxpayer standing, which is available only in limited circumstances to challenge *legislative* action when failing to accord standing would erect an impenetrable barrier to judicial scrutiny of the legislation at issue. *See Colella*, 95 N.Y.2d at 407-08; *Transactive*, 92 N.Y.2d at 589. Where, as here, Appellants challenge executive, rather than legislative, action, common law taxpayer standing does not lie. *See Clark v. Town Bd. of Clarkstown*, 28 A.D.3d 553, 554 (2d Dep't 2006) (no common law taxpayer standing to challenge local government appointment that did not involve "any state or local legislative action"); *Madison Square Garden, L.P. v. N.Y. Metro Transp. Auth.*, 19 A.D.3d 284, 286 (1st Dep't 2005) ("Petitioners lack common-law taxpayer standing because they 'do not seek review of any legislative action'" in challenging action of Metropolitan Transportation Authority).[13]

Since Appellants do not challenge legislative action, it follows that there is no "impenetrable barrier" to scrutiny of legislation, the second requirement

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[13] The only cases Appellants cited below for the contrary proposition are inapposite. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), upheld standing under a specific *statutory* standing provision, State Finance Law Section 123-b, which permits certain taxpayer challenges to actions of State officials. *See Id.* at 814. That case did *not* approve *common law* taxpayer standing to challenge non-legislative action. Moreover, *Boryszewski v. Brydges*, 37 N.Y.2d 361 (1975), also relied on below by Appellants, confirmed that "a taxpayer has standing to challenge *enactments of our State Legislature* as contrary to the mandates of our State Constitution." *Id.* at 362 (emphasis added).

for common law taxpayer standing. Limiting this prong to *legislative* challenges is appropriate because judicial review may be the *only* recourse to challenge legislation, while a party dissatisfied with executive action may seek relief in the Legislature. Nor does Appellants' failure to state a claim under Section 51 of the Municipal Law automatically mean that the "impenetrable barrier" standard is satisfied. If that were true, the legislative standards and requirements for a Section 51 claim would be a nullity. *See Colella*, 95 N.Y.2d at 410-11.

### B. The Executive Order Does Not Violate Legislative Prerogatives And Is Not Preempted By State Law Because The Legislature Has Left The Question Of Marriage Recognition To The Common Law

The home rule provisions grant local governments broad authority to enact local legislation that is not inconsistent with State law or otherwise preempted by a comprehensive and conflicting State legislative scheme. *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 84 (2d Dep't 2007). The Executive Order is neither a local law nor inconsistent with State law. It simply confirms that the County is following governing New York law commanding respect for valid out-of-state marriages of same-sex couples.

If anything, a County legislative enactment providing the *opposite* of the Executive Order — that a local government will *not* respect valid out-of-state marriages of same-sex couples — would run afoul of the home rule restrictions. Such an enactment would be inconsistent with the State marriage recognition rule

and would purport to limit the rights of couples with valid out-of-state marriages in ways not allowed in the statutory or common law. *See Lansdown Entm't Corp. v. N.Y. City Dep't of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989) (local law prohibiting what is allowed by State law violates restrictions on home rule). The question of who is validly married under New York law is determined by application of a clear common law rule repeatedly reaffirmed by the Court of Appeals — a rule that the Legislature has chosen not to alter.

### 1. The Executive Order Is Not A Law Or A Legislative Action

Because the Executive Order is not a "local law," home rule restrictions do not apply. A "local law" must be "(a) adopted . . . by the legislative body of a local government, or (b) proposed by a charter commission or by petition, and ratified by popular vote." N.Y. Mun. Home Rule Law § 2(9). The Executive Order was enacted neither by the Westchester Legislature nor by charter commission or petition. Hence it is not a "local law" to which the home rule provisions apply. *See, e.g., Clark v. Cuomo*, 66 N.Y.2d 185, 191 (1985) ("Executive Order . . . is not a law"). The Executive Order merely states the law and applies it to Westchester County.[14]

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[14] Appellants' argument that there is no "New York law supporting" the requirement of an actual legislative enactment (*see* App. Br. at 24) is plainly wrong. However, the Court need not consider whether a local government could by Executive Order enact substantive measures having the *effect* of legislation, because no such order is involved in this case.

### 2. The Executive Order Is Not Inconsistent With State Law

The Executive Order does not conflict with any "general law" of New York. A "general law" is "[a] state statute which in terms and in effect applies alike to all counties." *Gizzo v. Town of Mamaroneck*, 36 A.D.3d 162, 165 (2d Dep't 2006). While the DRL qualifies as a "general law," the Executive Order is not inconsistent with it. The Executive Order does not allow same-sex couples to marry in Westchester County, does not purport to alter the DRL or any other State or local law, and is expressly limited in its effect "to the maximum extent permitted by law." R.67. The Executive Order thus does not "mandate[] conduct that is expressly prohibited by state statutory law" (App. Br. at 19) because, quite simply, no State statute addresses the question of marriage recognition. Since the Executive Order does no more than announce that the County will follow the long-settled common law marriage recognition rule, it is, by definition, not "inconsistent with state law" any more than it is "illegal" under Section 51.

Citing no authority, Appellants say that the governing common law is "irrelevant" for purposes of home rule analysis (App. Br. at 19 n.6). In fact, the Court of Appeals has held just the opposite — a local law that *conflicts* with the common law is unenforceable as beyond the power of the locality. *See People v. Speakerkits, Inc.*, 83 N.Y.2d 814, 817 (1994) (local law in conflict with common law as well as statutory law struck down as *ultra vires*). Nor is the County

Executive "not empowered to interpret the law" or barred from "interpreting the judicially created common law of New York." App. Br. at 13-14. To the contrary, courts have recognized that local governments can and do interpret and rely upon the law as expressed by the courts. *See, e.g., Police Ass'n of the City of Mount Vernon v. New York State Public Employment Rel. Bd.*, 126 A.D.2d 824, 825-26 (3d Dep't 1987) (upholding city's reliance on definition of "marital status" evolving from case law); *Slattery v. City of New York*, 179 Misc. 2d 740, 744 (Sup. Ct. N.Y. Cty.) (since New York City's domestic partnership law "simply reiterates state law as expressed in *Braschi v. Stahl Assoc. Co.* and state regulations," it does not violate home rule), *aff'd,* 266 A.D.2d 24 (1st Dep't 1999). Appellants' contention that only statutory law constitutes the "law" of New York is incorrect.

### 3. Preemption Does Not Apply To The Executive Order

Appellants' contention that the Executive Order is preempted by State law is similarly without merit because preemption occurs only when "the Legislature has evidenced a desire that its regulations should pre-empt the possibility of varying local regulations . . . or when the State specifically permits the conduct prohibited at the local level." *Jancyn Mfg. Corp. v. Suffolk County*, 71 N.Y.2d 91, 96-97 (1987). The DRL regulates the types of marriages permitted to be entered into within New York, but the State Legislature has not chosen to

prohibit the *recognition* of valid marriages of same-sex couples entered into outside the State. The Executive Order honors this distinction.

Courts determining whether the State has preempted a particular area of law must consider "the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area." *Albany Area Builders Ass'n. v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989); *Ames v. Smoot*, 98 A.D.2d 216, 220 (2d Dep't 1983). The marriage recognition rule dictates a uniform approach, applied statewide, for determining whether an out-of-state marriage is subject to respect here. The County Executive followed this standard rule. Moreover, as noted above, many locales and private actors in New York also have affirmed that the longstanding marriage recognition rule governs and have applied it uniformly to respect the marriages of same-sex couples. The Attorney General, State Comptroller, and DCS have also acknowledged that New York law mandates recognition of such marriages. Therefore, the Executive Order promotes rather than disrupts statewide uniformity in this arena.

Moreover, the County Executive acted well within the realm of authority given to local governments to oversee local affairs. The Appellants do not allege that the County lacks authority, for example, to set compensation and provide health benefits to its employees or to enter into agreements with employee

organizations regarding the terms of employment. *See, e.g.,* County Law § 205; Civ. Serv. Law § 204. Moreover, well prior to the Executive Order, the County covered the domestic partners of its employees under the County health benefit plan and enacted a Domestic Partner Registry Law conferring certain other benefits on County residents in domestic partnerships. *See, e.g.,* Laws of Westchester County ch. 550, § 550.01 *et seq.* As held in *Slattery v. City of New York*, 266 A.D.2d 24 (1st Dep't 1999), a local government does not violate the home rule provisions by extending benefits to domestic partners of its employees and residents. *Id.* at 25 ("in the absence of any clear conflict between pertinent State legislation and the [local law], the City did not exceed its authority by extending . . . benefits to domestic partners.").[15]

The County Executive is also authorized under County law "[t]o see that the laws of the state, pertaining to the affairs and government of the County, the acts and resolutions of the County Board and duly enacted local laws are executed and enforced within the County." Laws of Westchester County ch. 110 § 110.11(6). This may be done using an Executive Order, which can "implement[]

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[15] *Slattery* also noted that "the City has not, by extending benefits to domestic partners, transformed the domestic partnership into a form of common law marriage . . . impinging upon the State's exclusive right to regulate the institution of marriage." *Slattery*, 266 A.D.2d at 25. The Executive Order likewise does not purport to create a "form of common law marriage" or impinge upon the State's regulation of marriage. The Executive Order does no more than confirm that the County will do what State law (i.e., the marriage recognition rule) already compels.

the enforcement of . . . standards" already established under law. *Clark*, 66 N.Y.2d at 191.

Consistent with these powers and responsibilities, the Executive Order confirms that in administering duly enacted County programs, the County will treat married same-sex couples who have legally wed out of State as married. The Executive Order thus is not "legislation" creating new legal standards, rights, or prohibitions, but merely confirmation that the County will follow *existing controlling State law* in administering County employee benefits and other County programs. The Supreme Court thus properly dismissed Appellants' home rule claim.

### C. The Executive Order Does Not Violate Separation Of Powers Principles

Appellants argue, for the first time on appeal, that the Executive Order violates separation of powers principles. Although it was not briefed before the Supreme Court, and therefore should not be considered now, this new argument is equally without merit. As a preliminary matter, Appellants are not arguing that the County Executive usurped the role of his own co-equal branch of government (i.e., the Westchester Legislature), as in every separation of powers case cited by Appellants. *See, e.g.*, *Fullilove v. Beame*, 48 N.Y.2d 376 (1979); *Clark v. Cuomo*, 66 N.Y.2d 185 (1985); *Subcontractors Trade Ass'n v. Koch*, 62 N.Y.2d 422 (1984). Instead, Appellants ask for a novel and unprecedented application of the

separation of powers doctrine, arguing that the *County* Executive usurped the role of the *State* Legislature. This does not make out a claim for breach of the separation of powers. *See Saratoga County Chamber of Commerce Inc. v. Pataki*, 293 A.D.2d 20, 25 (3d Dep't 2002) ("First and most obvious is the fact that the Governor and Congress are not coordinate branches of government, thereby rendering defendant's separation of powers analysis inapt."), *aff'd*, 100 N.Y.2d 801 (2003).

Even if it were properly framed, the separation of powers claim still fails. The executive branch must implement and enforce the law, which is exactly what the County Executive did in declaring that he would honor the marriage recognition rule. *See New York State Inspection, Sec. and Law Enforcement Employees, Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233, 239 (1984) ("The lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review.").

Moreover, executive actions have been struck down for usurpation only when an executive has taken steps toward implementation of a comprehensive plan or regulatory system. *See Prospect v. Cohalan*, 65 N.Y.2d 867 (1985) (executive order dealing with disaster preparedness programs represented first step toward implementation of plan and thus was clear usurpation of legislative

function); *Subcontractors Trade Ass'n*, 62 N.Y.2d at 428-29 (mayor's executive order "goes well beyond his executive powers and actually creates . . . a program at odds with existing legislative policy. . . . Where as here, the executive adopts a plan . . . he has gone beyond his function of implementing general Charter-conferred powers").

In *Clark v. Cuomo*, by contrast, the Court upheld an executive order establishing a program of voter registration by making registration forms and assistance available at State agencies. The Court held that the executive was not "usurping a policy function of the Legislature" but was "merely implementing its policy in a manner which in no way treads on its prerogatives." *Clark*, 66 N.Y.2d at 190.

The Executive Order is neither a plan nor a step toward a plan. It is, as the Supreme Court correctly held, "a policy implementation device in accordance with the current and evolving state of law on recognition of same-sex marriages out-of-state." R.18. It merely instructs County officials to follow existing New York common law on the recognition of lawful marriages entered into outside of New York. *Rent Stabilization Ass'n. of New York Inc., v. Higgins*, 164 A.D.2d 283, 295 (1st Dep't 1990) (agency regulations were not legislative policy-making where agency was simply codifying prior Court of Appeals

precedent that had not been revoked by Legislative enactment), *aff'd*, 83 N.Y.2d 156 (1993).[16]

The County Executive cannot be faulted for discharging his duty to enforce the law.

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[16] None of the other cases cited by Appellants are to the contrary. *See, e.g., Broidrick v. Lindsay*, 39 N.Y.2d 641 (1976) (regulations requiring affirmative action in form of minority employment percentages exceeded executive authority under State and local statute); *Fullilove v. Beame*, 48 N.Y.2d 376 (1979) (same); *Rapp v. Carey*, 44 N.Y.2d 157 (1978) (Governor could not mandate State employees to file financial disclosure statements). In each of those cases, the executive went beyond his duties to follow State law and instead affirmatively promulgated regulations or a regulatory-type system.

## CONCLUSION

For the foregoing reasons, Defendants-Intervenors respectfully request that the decision of the Supreme Court be affirmed.

Dated: New York, New York
December 24, 2007

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**APPELLATE DIVISION – SECOND DEPARTMENT**
**CERTIFICATE OF COMPLIANCE**

Pursuant to 22 NYCRR § 670.10.3(f), the undersigned counsel certifies that the foregoing brief was prepared on a computer using Microsoft Word.

*Type.* A proportionally spaced typeface was used, as follows:

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# ADDENDUM

*Margaret Godfrey, et al. v. Alan G. Hevesi, et al.*
*Index No.: 5896-06; RJI No.: 01-06-086862*

McNamara, J.

In September 2004, an employee of the State of New York and a member of Retirement System wrote to the Comptroller to inquire whether his contemplated marriage in Canada to his same-sex partner would be legally recognized by the Retirement System and how his retirement benefits would be impacted as a result of the marriage. A response was provided on behalf of the Comptroller in October 2004. The employee/member was advised that given that the employee/member and his same-sex partner could legally marry in certain provinces of Canada, the Retirement System would, based on the principal of comity, recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage.[1]

In August 2006, the Alliance Defense Fund, an organization located in Scottsdale, Arizona, sent a letter to the Retirement System inquiring as to whether the Comptroller intended to continue the policy regarding the recognition of same-sex Canadian marriage in the light of the Court of Appeals decision in Hernandez v Robles, 7 NY3d 338 [2006] and the Appellate Division, Second Department ruling in Lanagan v St. Vincent's Hospital, 25 AD3d 90 [2005]. The Retirement System indicated in its response that absent further Legislative action or controlling judicial opinion to the contrary, the Comptroller intended to continue to recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage.

Plaintiffs, citizen-taxpayers of New York State, then instituted this proceeding pursuant to

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[1]Most retirement benefits are not affected by the marital status of the Retirement System member. However, some retirement benefits are payable to a "surviving spouse" or to a "widow/widower". Those benefits include a cost of living adjustment payable to a surviving spouse after the death of the member where the selected retirement option provides that benefits be continued for the life fo the surviving spouse (Retirement and Social Security Law §§78-a [ERS members] and 378-a [PFRS mrembers]). The other benefit is an accidental death benefit which is payable in certain circumstances to certain survivors including the member's widow or widower (Retirement and Social Services Law §§61 [Tier I and II], 509 [Tier III] and 607 [Tier IV]).

State Finance Law §123-b challenging the determination on the basis that implementation of the policy would result in the illegal expenditure of State funds. After plaintiffs brought on an application to preliminarily enjoin the Comptroller from recognizing foreign same-sex marriages, respondent moved to dismiss the action on the ground that plaintiffs lack standing to raise the issue. Peri Rainbow and Tamela Sloan then moved for leave to intervene.

The applications for a preliminary injunction and to dismiss were denied and Rainbow and Sloan were granted leave to intervene (*Godfrey v Hevesi*, Supreme Court, Albany County, Index No. 5896-06, March , 2007, McNamara, J.)

Plaintiffs contend that the decision of the Comptroller to recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage is without legal authority and therefore, is illegal, *ultra vires*, against public policy and otherwise contrary to law. According to plaintiffs, the principal of comity, relied on by the Comptroller in making his determination, does not provide authority for the recognition of same-sex foreign marriages.

Under Retirement and Social Services Law §§74(b) and 374(b), the New York State Comptroller is vested with the "exclusive authority to determine" the proper award of benefits and beneficiaries.

Marriage, so far as its validity in law is concerned, is a civil contract (Domestic Relations Law §10). New York has long chosen, as a matter of comity, to recognize, with two exceptions, a marriage considered valid in the place where it was celebrated, even if it could not have been lawfully entered in this State (*In re May's Estate*, 305 NY 486, 490-491 [1953]). The exceptions apply in those instances where the Legislature has enacted a positive prohibition against the

particular kind of marriage, even when entered into outside New York, and marriages involving polygamy or incest (id. at 491).

The comptroller's decision to recognize same-sex Canadian marriages is based on the determination that such marriages are legal in that jurisdiction and would not otherwise be inconsistent with New York law. New York, unlike the majority of States, has not enacted a "defense-of-marriage" act so as to expressly prohibit recognition of same-sex marriages. Moreover, the question posed to the Comptroller, and the policy determination that resulted, do not concern marriages involving polygamy or incest. Consequently, the determination by the Comptroller to recognize same-sex marriages performed in Canada, in accordance with the laws of that jurisdiction, is consistent with New York law regarding the recognition of marriages performed elsewhere.

Neither the decision of the Court of Appeals decision in Hernandez nor the decision of the Appellate Division in Langan compel a different result here. In Hernandez, the Court found that New York's statutory law limits marriage to opposite-sex couples and that the limitation is consistent with the New York Constitution. As such, the determination in Hernandez did not answer the question raised here. Rather, the question of whether same-sex marriages valid in the jurisdiction where performed should be recognized in New York is an outgrowth of the determination that the law in New York does not compel the State to sanction same-sex marriage.

In Langan, the Appellate Division confronted the question of whether an individual had standing to recover damages for the wrongful death of his same-sex partner. The couple had entered into a civil union in Vermont. The Court found that the relationship did not confer the status of a "surviving spouse" so as to give rise to rights under the wrongful death statute (EPTL §5-4.1). Again,

the issue of recognition of a foreign same-sex marriage was not raised or addressed.

Accordingly, defendants are granted judgment declaring that the policy of the Comptroller to recognize a same-sex Canadian marriages in the same manner as an opposite-sex New York marriages, as set forth in the letters dated October 8, 2004 and August 8, 2006, is legal and not contrary to law.

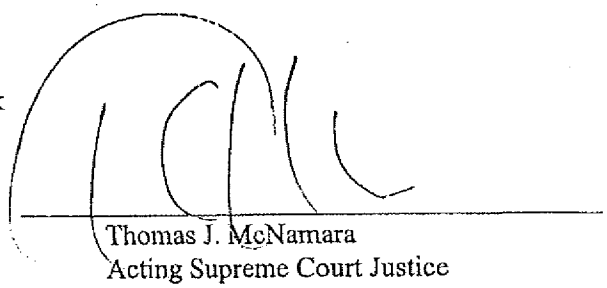
All papers including this Decision and Order are returned to defendant's attorneys. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

This memorandum shall constitute both the Decision and Order of this Court.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York
September 5, 2007



Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

1) Summons dated August 13, 2006;
2) Complaint verified by Margaret Godfrey on August 23, 2006; verified by George Imburgia on August 23, 2006 and verifed by Joseph Rossini on August 30, 2006;
3) Order to Show Cause dated September 7, 2006;
4) Affirmation of Brian W. Raum, Esq., dated August 23, 2006 with exhibits annexed;
5) Notice of Motion by Defendants-Intervenors to Dismiss dated November 10, 2006;
6) Affirmation of Susan L. Sommer, Esq., dated November 9, 2006 with exhibits annexed;
7) Affidavit of Peri Rainbow sworn to October 26, 2006 with exhibit annexed;

8) Affidavit of Tamela Sloan sworn to October 26, 2006;
9) Affirmation of Alphonso B. David, Esq., dated October 27, 2006;
10) Defendants-Intervenors' Memorandum of Law dated November 10, 2006;
11) Defendant's Memorandum of Law dated November 10, 2006;
12) Plaintiff's Memorandum of Law dated December 15, 2007;
13) Defendants-Intervenors' Memorandum of Law dated January 18, 2007;
14) Defendant's Memorandum of Law dated January 18, 2007;
15) Answer of Defendant-Intervenors verified by Peri Rainbow on May 18, 2007 and verified by Tamela Sloan on May 18, 2007;
16) Answer of Defendant verified by Richard Lombardo, Esq., on May 31, 2007.