Albany County Clerk's Index No. 4078/07
Westchester Index No. 16894/2006

Court of Appeals

STATE OF NEW YORK

Albany County Index No. 4078/07

KENNETH J. LEWIS, DENISE A. LEWIS,
ROBERT C. HOUCK, JR., and ELAINE A. HOUCK,

Plaintiffs-Appellants,

—against—

THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
and NANCY G. GORENWEGEN,

Defendants-Respondents,

—and—

PERI RAINBOW and TAMELA SLOAN,

Defendants-Intervenors-Respondents.

(*caption continued on inside front cover*)

BRIEF OF *AMICUS CURIAE*
THE NEW YORK CITY BAR ASSOCIATION
IN SUPPORT OF DEFENDANTS-INTERVENORS-RESPONDENTS

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September 4, 2009

Westchester Index No. 16894/2006

MARGARET GODFREY, ROSEMARIE JAROSZ,
and JOSEPH ROSSINI,

Plaintiffs-Appellants,

—against—

ANDREW J. SPANO,

Defendants-Respondents,

—and—

NEW YORK STATE COMPTROLLER,

Defendant-Intervenor-Respondent,

—and—

MICHAEL SABATINO and ROBERT VOORHEIS,

Defendants-Intervenors-Respondents.

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STATEMENT OF INTEREST

The New York City Bar Association ("NYCBA") is one of the oldest and largest professional associations in the United States. Founded in 1870 to improve the administration of justice, promote the rule of law, and elevate the legal profession's standards of integrity, honor, and courtesy, the NYCBA was among the first bar associations to have a committee addressing lesbian and gay issues.

NYCBA has over 23,000 members and has long taken an active interest in protecting the legal rights of the diverse types of families that compose modern American society. Many of NYCBA's members practice in the area of family law; these attorneys and other NYCBA members represent clients whose very access to the courts may be affected by the resolution of this case. With respect to the particular questions raised here, NYCBA, through its long-standing involvement in these issues and on behalf of the public its members represent, has a vital interest in ensuring that New York recognizes valid out-of-state marriages between same-sex couples in accordance with well-established principles of New York common law. NYCBA submits this brief to emphasize that the recognition of out-of-state marriages between same-sex couples is supported by well-established common law in the state of New York, and likewise, the public policy of New York supports recognition of these marriages. NYCBA strongly urges the Court to uphold the decisions of the lower courts dismissing Appellants' claims.

PRELIMINARY STATEMENT

At issue here is whether marriages between same-sex couples validly executed in other jurisdictions are entitled to legal respect under New York's well established common law, where such marriages are neither expressly prohibited by New York law nor abhorrent to New York's public policy. The common law and the case law interpreting it clearly support such legal recognition, and Appellants are unable to demonstrate otherwise. A judicial decision failing to recognize these validly executed marriages would conflict with the legal doctrine lawyers and judges have relied on for decades in litigating and adjudicating claims of families in a variety of contexts ranging from custody to inheritance. Further, the denial of legal recognition of these marriages would inevitably result in very real life consequences to the lives of married same-sex couples and their families living throughout this State: from Albany to Buffalo; from New York City to Rochester and beyond.

Appellants posit a series of baseless arguments to invalidate these marriages, but the law simply does not support those conclusions. Simply put, the law supports legal recognition of validly executed marriages, such as these at issue here, unless there is positive law prohibiting such recognition or the recognition of the marriages would be "abhorrent" to New York public policy. Neither exception is applicable here. Accordingly, these validly executed marriages should continue to

receive the legal respect they are entitled to pursuant to our State's long-standing doctrine of comity.

ARGUMENT

I. New York Common Law Requires that a Validly Performed Out-of-State Marriage Must Be Recognized as Valid in New York

The marriage recognition rule is a well-settled doctrine of New York common law under which numerous courts have recognized the validity of marriages between same-sex couples solemnized outside the state of New York. *See Martinez v. County of Monroe*, No. 1562 CA 06-02591, 2008 NY Slip Op 909, at *2 (4th Dep't Feb. 1, 2008) ("'[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' to prohibit recognition of a marriage that would have been invalid if solemnized in New York."); *Beth R. v. Donna M.*, 19 Misc. 3d 724, 728 (Sup. Ct. N.Y. County 2008) ("Absent overriding legislation, recognition of *out-of-state* marriages is governed by common law doctrines and comity. New York courts have long held that out-of-state marriages, if valid where entered will be respected in New York even if under New York law the marriage would be void.") (emphasis in original)).

For over a century, New York courts have judged the validity of out-of-state marriages according to the *lex loci celebrationis*, or the law of the place where the marriage was celebrated. *Van Voorhis v. Brintnall*, 86 N.Y. 18, 25 (1881) ("in

questions of marriage contract, the *lex loci contractus* is that which is to determine the status of the parties"). As best explained by this Court in *In re May's Estate*, 305 N.Y. 486, 490 (1953), "subject to two considerations presently to be considered, in the absence of a statute expressly regulating within the domiciliary state marriages solemnized abroad, the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated." This principle is so settled that New York courts have recognized as valid out-of-state marriages that would be criminal if they had been performed in New York. *In re Estate of May*, 305 N.Y. 486, 490 (1953) (court recognizes marriage despite prohibition by New York law, including criminal sanctions); N.Y. Dom. Rel. § 5 (2009) ("If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months.")

In *Van Voorhis v. Brintnall*, the Court of Appeals recognized an out-of-state marriage of a divorcee who, under New York statute and court order, had been barred from remarriage during the life of his former spouse. 86 N.Y. 18, 38 (1881). The Court recognized that the couple married out of state to avoid the Court order but found that this did not make the marriage invalid in the state of New York. *Id.* at 32. Similarly, in *Matt v. Duncan Petroleum Transp.*, 51 N.Y.2d 289 (1980), the

Court of Appeals recognized a common law marriage from Georgia even though such marriages were not recognized under New York law. *See also In re Estate of Watts*, 31 N.Y.2d 491 (1973) (Court only looks to Florida law to decide if common law marriage is valid.); *Shea v. Shea*, 294 N.Y. 909 (1945) (Court recognizes out-of-state common law marriage even though such marriages were not recognized by New York statute.). In *In re Will of Valente*, 18 Misc. 2d 701 (1959), the court recognized a marriage by proxy performed in Italy despite the fact that such marriages were not valid under New York law. In evaluating the validity of the marriage, the court only looked to the requirements of Italian law. In *Hilliard v. Hilliard*, 24 Misc. 2d 861 (Sup. Ct. Greene County 1960), the court denied an application for annulment of a marriage by a 15-year-old performed in Georgia even though the legal age of consent in New York was 18. The court found there was no positive law in New York barring the recognition of underage marriages performed in other states, and thus the general rule of marriage recognition would apply. *Id.*

A. There Is No Positive Law in New York Barring the Recognition of Valid Out-of-State Marriages Between Same-Sex Couples

There are only two narrow exceptions under New York's common law that would bar the recognition of out-of-state marriages, neither of which apply here. The first is the "positive law" exception, which applies where a statute explicitly declares that a given class of marriages, when performed in another jurisdiction,

will be considered void in New York. No such statute exists in New York. In fact, in each of the past three legislative sessions, bills have been introduced in the New York legislature to declare that marriages of same-sex couples are invalid in New York. All of these bills were rejected in committee. *See* 1997 Assembly Bill 158; 1997 Assembly Bill 1649; 2001 Assembly Bill 892; 2001 Senate Bill 2195.

As further explained by *In re Estate of May*, "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." *Id.* at 492. Although marriages of same-sex couples cannot presently be performed in the State of New York, the recognition of such marriages legally performed in other jurisdictions has not been barred. Indeed, New York decisional law makes it clear that there is no positive law exception to the common law for out-of-state marriages of same-sex couples. The Appellate Division in *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dep't 2008), stated: "Absent 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 to prohibit recognition of a marriage that would have been invalid if solemnized in New York." *Id.* at 192 (citing *In re Estate of May,* 305 N.Y. at 493) (internal quotations omitted). Accordingly, the court held that the Legislature had "not enacted legislation to prohibit the recognition of same-sex

marriages validly entered into outside of New York," and concluded "that the positive law exception to the general rule of foreign marriage recognition is not applicable in this case." *Id.*

B. The Recognition of Valid Out-of-State Marriages Between Same-Sex Couples Is Not Abhorrent to New York's Public Policy

The second exception to the marriage recognition rule is if an out-of-state marriage is "offensive to the public sense of morality to a degree regarded generally with abhorrence." *In re Estate of May*, 305 N.Y. at 493. The burden of proving the public policy exception to the common law recognition of valid out-of-state marriages is a heavy burden, and also does not apply to the cases and issues pending before this Court.

1. Appellants Fail To Meet the Heavy Burden for the Narrow Public Policy Exception to the Marriage Recognition Rule

According to New York case law, a litigant who attempts to invoke the public policy exception must show, as a threshold matter, that the foreign law is "offensive to the public sense of morality to a degree regarded generally with abhorrence." *Id.* Although the Appellants try to discount this stringent standard, New York courts have clearly and repeatedly stated that the public policy exception applies only to actions that are "abhorrent," or "repugnant" to New York's public policy. *See Sung Hwan Co., Ltd. v. Rite Aid Corp.*, 7 N.Y.3d 78 (2006); *Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 278 (1981). This

"standard is high, and infrequently met." *Blacklink Transp. Consultants PTY Ltd. v. Von Summer*, No. 105638/07, 2008 NY Slip Op 50017U, at *5 (Sup. Ct. N.Y. County Jan. 9, 2008).

The common law public policy exception to the marriage recognition rule allows the courts to balance the need for general, settled rules, such as the place of celebration rule, while maintaining flexibility to address the situations that arose where applying the rule would not be appropriate. *See generally Cooney v. Osgood Mach, Inc.*, 81 N.Y.2d 66 (1993). For purposes of the marriage recognition rule, the public policy exception to comity is only applied in the rare situation that a particular type of marriage has not already been addressed by the legislature and recognition of the marriage would otherwise clearly be "abhorrent" and "repugnant" to New York's own policies. The "abhorrent" and "repugnant" standard reflects the heavy burden imposed on the narrow public policy exception to comity and is not equivalent to being "merely inconsistent" as Appellants contend. *See Sung Hwan Co., Ltd.*, 7 N.Y.3d 78; *Hammelburger*, 54 N.Y.2d 278.

In *C.M. v. C.C.*, 21 Misc. 3d 926, 927-28 (Sup. Ct. N.Y. County 2008), the Supreme Court upheld jurisdiction over the divorce of a same-sex couple who had been married in Massachusetts. Acknowledging the "very narrow" public policy exception, the Supreme Court stated that the exception, "'has generally been limited to marriages involving polygamy or incest or marriages offensive to the

public sense of morality to a degree regarded generally with abhorrence.'" (quoting *Martinez*, 50 A.D.3d at 192). A similar standard for the public policy exception is used in divorce recognition cases. In *Gotlib v. Ratsusky*, 83 N.Y.2d 696, 701 (1994), the Court of Appeals recognized a divorce granted in the Ukraine. The Court held that failing to recognize the divorce "would seriously undermine the 'rare' public policy exception to the appropriate application of the doctrine of comity (*Greschler v. Greschler*, 51 N.Y.2d 368, 377 (1980); *see also Feinberg v. Feinberg*, 40 N.Y.2d 124 (1976)). Indeed, it would substitute an amorphous and inadvisably open-ended escape valve."

In *Greshler*, the Court of Appeals held that recognizing a divorce decree from the Dominican Republic would not violate New York's public policy. The Court explained,

> the public policy exception to the doctrine of comity is usually invoked only in the rare instance "where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." Thus, for this court to refuse full recognition to a lawful foreign judgment, it must be demonstrated that the decree violates "some fundamental principle of justice, some prevalent conception of good morals, some deeprooted tradition of the common weal."....It follows that foreign judgments generally should be upheld unless enforcement would result in the recognition of a "transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."

51 N.Y.2d at 377 (citations omitted).

New York courts have always placed a heavy burden on the proponent of the exception to prove the existence of the public policy and to demonstrate why that policy could not be upheld if comity were granted. As one court stated, "[t]he public policy inquiry rarely results in refusal to enforce a judgment unless it is 'inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.'" *Blacklink*, 2008 NY Slip Op 50017U, at *5 (quoting *Sung Hwan Co.*, 7 N.Y.3d at 82).

2. Recognition of Marriages Between Same-Sex Couples Is Consistent with New York's Public Policy

Appellants cannot meet the high burden required for the public policy exception to the marriage recognition rule because marriages between same-sex couples are not abhorrent to New York's public policy. As evidenced by its laws and judicial decisions, New York State increasingly regards same-sex partnerships with respect and acceptance, which inherently negates any consensus of "abhorrence" required to invoke this narrow exception to the common law.

In fact, New York courts have, on several occasions, taken a more expansive view of the definition of "family" and have included same-sex relationships in that definition, specifically finding that same-sex partnerships do not to violate New York's public policy. For example, in *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201 (1989), this court extended a New York housing protection statute to protect the individuals in a same-sex relationship. The court explained:

> In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.

Id. at 211. The *Braschi* court adopted the view that "family" is a group of people united by certain affiliations or living together. *Id.* Similarly, the Appellate Division has taken an expansive view of family to afford health benefits to domestic partners. *Slattery v. City of New York*, 266 A.D.2d 24, 25 (1st Dep't 1999) ("we perceive no reason to adopt a more limited definition of "family" in the present context and thus to preclude the City from extending health and other benefits to domestic partners").

Additionally, in the area of adoption, this Court has explicitly disclaimed the existence of any public policy disfavoring adoption by same-sex parents. The Court of Appeals has stated when analyzing the Domestic Relations Law: "In fact, the most recent legislative document relating to the subject urges courts to construe section 117 in precisely the manner we have as it cautions against discrimination against 'nonmarital children' and 'unwed parents.'" *In re Jacob*, 86 N.Y.2d 651, 668 (1995). In that case, this Court expressed a concern for the legal status of children whose adoptions by second parents had already taken place.

Refusal to recognize out-of-state marriages of same-sex parents would have a similar effect on the children, and the legal status of these children would be

unclear. There is simply no reason to call into question the familial and legal status of the children of these marriages by their same-sex parents when such marriages have already been sanctioned under the laws of other jurisdictions and New York lacks any public policy against the recognition of such marriages.

The state interest in keeping marriages together is not because of an esoteric view of family that must be maintained simply for the sake of tradition or because "that's how it's always been." Rather, the state has an interest in *every* marriage, regardless of the sexual orientation of the people involved, because marriage provides the foundation for stability, and emotional and financial support, and is the vehicle for creation of family as that term has been defined by this state. To do as Appellants request, and deny couples who have lawfully married in other jurisdictions the same fundamental right to be recognized as married and all of the rights and responsibilities that such a legal relationship entails, is abhorrent to the public policy of this State.

A well-settled presumption of marriage avoids a time-consuming and intrusive case-by-case analysis of each couple's marital status. Further, the presumption of validity for legal out-of-state marriages under New York's common law and the principles of comity are necessary in today's highly mobile society. As spouses move from place to place for employment and other reasons, so should they be secure in knowing that their marriages and families will be

recognized. *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 72 (1965). The presumption of marriage recognition fosters stability in family relationships, both emotionally and financially. It promotes certainty with regard to individual relationships, as well as the law generally, in areas such as estate and health care planning, and the parentage of children.

In short, the law, regulations and policies of this State clearly show that same-sex relationships are not abhorrent to New York public policy, but rather the contrary. Appellants' attempt to construct an argument suggesting otherwise ignores the reality in this State.

II. Recognition of Out-of-State Marriages of Same-Sex Couples Does Not Violate the Doctrine of Separation of Powers

Having failed to meet their burden of showing that the recognition of validly executed marriages between same-sex couples is abhorrent to New York public policy, Appellants set forth a contorted, disjointed legal argument that the recognition of valid out-of-state marriages of same-sex couples somehow amounts to a violation of the separation of powers doctrine. However, neither the DCS Policy nor the Westchester County Executive Order is inconsistent with their enabling statutes, nor do they infringe upon the Legislature's power to regulate marriage in New York. As explained above, the Legislature has the authority to prohibit recognition of out-of-state marriages of same-sex couples but has repeatedly failed to do so. There is also nothing in the DCS Policy or the

Westchester County Executive Order that prevents the Legislature from enacting legislation to this effect.

The New York Constitution, like the United States Constitution, distributes governmental power into the separate executive, judicial and legislative branches "to prevent too strong a concentration [of power] in one body." *Golden v. Paterson*, 23 Misc. 3d 641, 647 (Sup. Ct. Bronx County 2008). *See also Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985); NY CONST. ART. III, § 1; ART. IV, § 1; ART. VI, § 1. The separation of powers doctrine reinforces this fundamental principle by providing that "no one branch arrogate[s] to itself the powers conferred exclusively on another branch." *Id.*

As applied to the functions of the executive and legislative branches, "the separation of powers requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 821-822 (2003); *Golden*, 23 Misc. 3d at 647. However, "common sense and the necessities of government do not require or permit a captious, doctrinaire and inelastic classification of governmental functions." *Clark*, 66 N.Y.2d at 189 (citation omitted). Thus, "[i]t is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated." *Golden*, 23 Misc. 3d at 648.

Neither the DCS Policy nor the Westchester Executive Order is inconsistent with any New York legislation. On the contrary, both the DCS Policy and the Westchester Executive Order are in keeping with New York statutory and common law. Furthermore, there is nothing in either the DCS Policy or the Westchester Executive Order that usurps or in any way abrogates the powers of the Legislature to regulate, recognize or deny recognition to valid out of state marriages by same-sex couples. Appellants' arguments that either of these actions are in violation of the separation of powers, as explained below, simply ring hollow.

A. The DCS Policy and Westchester Executive Order Are Consistent with the Acts of the New York Legislature

The DCS Policy and Westchester Executive Order provide for recognition of the out-of-state marriages of same-sex couples for purposes of benefits administered by these respective agencies. These executive acts were authorized by New York law and within the latitude afforded to administrative agencies in enacting the statutes passed by the Legislature.

In keeping with the separation of powers doctrine, the Legislature "may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." *General Elec. Capital Corp. v. New York State Div. of Tax Appeals Trib.,* 2 N.Y.3d 249, 254 (2004); *Golden v. Paterson*, 23 Misc. 3d 641, 648 (Sup. Ct. Bronx County 2008).

To this end, statutes such as the New York Civil Service Law may "delegate broad authority to an agency to implement regulations prescribing the details and fulfilling the goals of the policy embodied in the statute, and vest the agency with reasonably wide discretion to make decisions consistent with those prescriptions." *Id. See also Raffellini v. State Farm Mut. Auto. Ins. Co.*, 9 N.Y.3d 196, 201 (2007); *General Elec. Capital. Corp.*, 2 N.Y. 3d at 258.

Section 164 of the Civil Service Law requires DCS to provide health care coverage to each employee's "spouse and dependent children, as defined by the regulations of the president [of the Department of Civil Service]." N.Y. CIV. SERV. LAW § 164. Consistent with the Legislature's mandate, the President of the New York State DCS authorized a policy to recognize as spouses the parties to any marriage of a same-sex couple "performed in jurisdictions where that marriage is legal." DCS Policy Memorandum (May 1, 2007). The DCS Policy implements the mandate of a legislative act, under the validly delegated authority conferred on the President of the DCS by the New York Civil Service Law, and does not violate the separation of powers doctrine.

Similarly, the Westchester Executive Order directs county agencies to recognize marriages of same-sex couples "lawfully entered into outside the State of New York…to the maximum extent allowed by law." This order is within the authority of the County Executive to implement policies within his jurisdiction and

"in accordance with the current and evolving state of law on recognition of same-sex marriages out of state." *Godfrey v. Spano*, 15 Misc. 3d 809, 817-818 (Sup. Ct. Westchester County 2007).

Neither the DCS Policy nor the Westchester Executive order "go beyond stated legislative policy and prescribe a remedial device not embraced by the policy." *Matter of Citizens For An Orderly Energy Policy v Cuomo*, 78 N.Y.2d 398, 410, 582 (1991); *Lewis v. New York State Dept. of Civ. Serv.*, 60 A.D.3d 216, 223-224 (3d Dep't 2009). Appellants do not point to any legislative enactment or statute which purports to define the term "spouse" for purposes of the Civil Service Law, nor is there any act by the New York Legislature which precludes recognition of same-sex married couples whose marriages were solemnized out-of-state.

B. The DCS Policy and Westchester County Executive Order Are Consistent with Established and Binding New York Precedent

Because Appellants cannot cite any Legislative enactment, Appellants instead cite inapposite case law to support their assertion that "[e]very court to interpret [the] term, as used in various New York statutes, has defined a 'spouse' as person legally married to a person of the opposite sex." App. Br. at 60. This assertion is false, and the cases Appellants cite are easily distinguished. Relevant case law shows that DCS Policy is consistent with New York courts' interpretation of the term "spouse" and its application to legally married same-sex couples.

Appellants cite *Cooper, Valentine, Raum* and *Langan* to support the assertion that "[e]very court to interpret [the] term, as used in various New York statutes, has defined a 'spouse' as person legally married to a person of the opposite sex." App. Br. at 60. None of these cases cited by Appellants involve a marriage of a same-sex couple, nor do any of these cases involve recognition of out-of-state marriages. Instead, Appellants gloss over the important detail that in each of these cases, a New York court declined to recognize as a spouse a party to a domestic partnership, civil union or other unmarried couple.

Appellants falsely state that, "The well-settled definition of 'spouse' includes only a husband or a wife in a marriage between a man and a woman." App. Br. at 60. Appellants cite *In re Cooper*, 187 A.D.2d 128, 131-32 (2d 1993) in an attempt to legitimize this glaring misstatement of the law. *Cooper* did not establish a "well-settled definition" of the term "spouse" for any New York law. Rather, the court in *Cooper* simply held that "the term 'surviving spouse', as used in EPTL 5-1.1, cannot be interpreted to include homosexual life partners." *In re Cooper*, 187 A.D.2d 128, 133 (N.Y. App. Div. 2d Dep't 1993). The same-sex couple in *Cooper* was not married in any jurisdiction, and the court did not consider the recognition or any other implications of a validly entered out-of-state marriage of a same-sex couple.

Appellants attempt to construe the holdings in *Valentine, Raum* and *Langan* as defining "spouse" only as "a person legally married to a person of the opposite sex." App. Br. at 60. However, none of these cases involved marriages. First, Appellants cite *Matter of Valentine v. American Airlines*, 17 A.D.3d 38, 40 (2005) for the holding that the term "spouse" as used in the workers' compensation statute excludes same-sex partners. App. Br. at 60. Importantly, this case involved a same-sex couple who were not legally married in any jurisdiction. As such, *Valentine* determined only that a registered domestic partner is not a "legal spouse" for purposes of the Workers' Compensation Law. 17 A.D. 3d at 40. The court in *Valentine* did not consider whether a party to a legally valid marriage entered into in another jurisdiction by a same-sex couple would be recognized as a "legal spouse" under New York law.

Appellants next cite *Raum v. Rest. Assocs., Inc.,* 252 A.D. 2d 369, 375 (1st Dept. 1998) as similarly "finding no merit to plaintiff's argument that the word 'spouse' in the wrongful death statute should be read to include same-sex partners." App. Br. at 60. As with the other cases cited by Appellants, this case is also inapposite because it also contemplates only unmarried same-sex couples. Appellants also cite *Langan v St. Vincent's Hosp. of N.Y.,* 25 A.D.3d 90 (2005) for its interpretation of the term "spouse" in the wrongful death statute. App. Br. at 61. This case involves a same-sex couple who entered a civil union in the state of

Vermont. The court in *Langan* noted that a civil union is not a marriage. As in *Raum*, the court declined to apply the term spouse to an unmarried couple for purposes of New York's wrongful death statute. As with *Cooper*, *Valentine* and *Raum*, the holding in *Langan* cannot be credibly stretched to prevent recognizing as spouses the parties to a valid marriage.

That New York courts have recognized that a distinction between domestic partnerships, civil unions, and marriage is not at issue in this case. Furthermore, exclusion of non-married persons, whether same-sex or otherwise, from the definition of a "spouse" under New York law does not bear on the definition of a "spouse" for valid legally married persons. Thus, Appellants' citations to cases where there was no marriage have no bearing on the issue of whether validly entered marriages of same-sex couples are to be recognized under New York law.

In *Golden*, the court upheld Governor Paterson's May 14, 2008 directive explicitly requiring state agencies to interpret the terms "spouse," "husband" and "wife" to include marriages validly entered into by same-sex couples in foreign jurisdictions. *Golden*, 23 Misc. 3d at 648 ("Governor's Directive"). By its terms, the Governor's Directive instructs all state agencies to adopt precisely the same policy that was implemented by the DCS Policy one year earlier. Dismissing each of plaintiffs' claims against the Governor's Directive as without merit, the court in

Golden specifically addressed the very same separation of powers argument which Appellants have raised against the DCS Policy, and found it entirely unavailing:

> "The Governor's Directive is entirely consistent with this doctrine's principles. In fact, it recognizes that the policy decisions have been made, implements them, and refrains from anything but filling in the interstices in agency regulations and other policy statements to make them consistent with those decisions. Pursuant to the Directive, where any state statute or controlling court decision construing a state statute already defines terms such as 'spouse,' 'husband,' and 'wife,' a state agency may not interpret the statute, promulgate or interpret a regulation, or enforce a policy that defines such terms inconsistently with that binding definition." *Golden*, 23 Misc. 3d at 648 (citations omitted).

The holding in *Golden*, unlike those of the cases cited by Appellants, is directly on point. *Golden* involves recognition by state agencies of the parties to valid out-of-state marriages entered into by same-sex couples as spouses for purposes of agency regulations and policies. Precisely the same issue is before the Court here. The Governor's Directive, like the DCS Policy and Westchester Executive Order, is a valid exercise of executive authority, consistent with the will of the Legislature and the separation of powers doctrine.

CONCLUSION

New York has a long standing tradition of recognizing marriages performed in other states where recognition is not expressly prohibited by New York law and not abhorrent to New York's public policy, as long as they are valid under the laws of the state where the marriage was celebrated. The recognition of out-of-state

marriages between same-sex couples is no exception. Judges and lawyers have relied on this doctrine for decades. Failure to recognize those marriages would only disrupt an otherwise settled law of great importance in domestic relations, healthcare, estates, and many other areas of legal practice. The appellants have submitted only baseless arguments that do not comport with established law. The Court should uphold the common law and continue to recognize marriages between same-sex couples that were validly performed in other jurisdictions.

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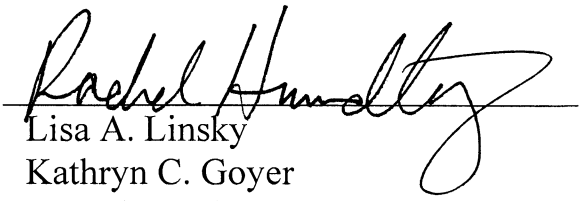
By: 

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