SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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

Petitioners,

- against -

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

Respondent,

– and –

PERI RAINBOW and TAMELA SLOAN,

[Proposed] Respondent-Intervenors.

Index No. 260148/08

Justice Lucy Billings

RESPONDENT-INTERVENORS' MEMORANDUM OF LAW
<u>IN SUPPORT OF THEIR CROSS-MOTION TO DISMISS</u>

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Respondent-Intervenors Peri Rainbow and Tamela Sloan ("Respondent-Intervenors") submit this Memorandum of Law in support of their cross-motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR Rule 7804(f).[1] Respondent-Intervenors, a same-sex couple married in Canada in 2005, are New York State public employees whose interests in the myriad rights, benefits, and responsibilities afforded to other couples who entered marriages outside of New York are threatened by this meritless lawsuit.

INTRODUCTION

This action is an unwarranted attack on the rights of lesbian and gay New York State residents to receive significant protections afforded to other couples who entered valid, legal marriages outside of New York. On June 3, 2008, the Alliance Defense Fund ("ADF"), an Arizona-based advocacy organization, filed a Verified Article 78 Petition on behalf of sixteen purported New York taxpayer petitioners. The ADF subsequently filed an Amended Verified Article 78 Petition dated June 20, 2008, adding two more purported New York taxpayers as petitioners. In its Amended Petition ("Pet."), the ADF seeks to enjoin Governor David Paterson ("Respondent") from properly applying settled case law that requires state agencies to accord legal respect to valid out-of-state marriages of same-sex couples.

On May 14, 2008, Respondent, through his counsel, issued a directive (the "Directive") instructing counsel for all state agencies to review their agencies' policy statements and regulations in order to ensure that same-sex couples legally married in other jurisdictions receive the same treatment under New York law as other legally married couples. The

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[1] Respondent-Intervenors filed an unopposed motion to intervene on July 8, 2008. They file this cross-motion to dismiss prior to the Court's ruling on intervention so as not to cause delay in the proceeding or prejudice to their ability to be heard. In the event the motion to intervene is denied, Respondent-Intervenors respectfully request that they be permitted to file this Memorandum of Law and accompanying affidavits, affirmation, and exhibits, along with their papers in support of intervention, as submissions of *amici curiae*.

Directive's stated goal is "to ensure that terms such as 'spouse,' 'husband' and 'wife,'" as those terms appear in policy statements, regulations, and statutes whose constructions are vested in state agencies, are construed to encompass legal marriages of same-sex couples.

In issuing the Directive, Respondent expressly relied upon the Appellate Division, Fourth Department's unanimous decision in *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008), *lv. dismissed*, 10 N.Y.3d 856 (May 6, 2008). *See* Directive attached as Exhibit A to accompanying Affirmation of Susan L. Sommer in Support of Respondent-Intervenors' Cross-Motion to Dismiss ("Sommer Aff."), dated July 8, 2008. In *Martinez*, the Fourth Department held that marriages of same-sex couples legally entered into in other jurisdictions are "entitled to recognition in New York in the absence of express legislation to the contrary." 850 N.Y.S.2d at 743. The Fourth Department held that the defendant county government in that case was required to extend spousal health coverage to the married same-sex spouse of a public employee and that the plaintiff employee was entitled to pursue money damages from defendant as compensation for the county's past refusal to provide the coverage. *Id.* at 743-44. The court reached its conclusion by employing New York's longstanding marriage recognition rule, which provides that a marriage valid in the place where entered is to be recognized as such in the courts of this State unless contrary to the express prohibitions of a statute or abhorrent to public policy. *See id.* at 742. The court further held that the county's refusal to recognize plaintiff's marriage also violated Executive Law § 296(1)(a), which forbids an employer from discriminating on the basis of an employee's sexual orientation. *Martinez*, 850 N.Y.S.2d at 743.

This is not the first attempt by the ADF to block New York government officials from following settled New York law calling for respect for valid out-of-state marriages. The

ADF brought very similar challenges against the New York State Department of Civil Service ("DCS"), the New York State Comptroller, and the Westchester County Executive because they too complied with the longstanding marriage recognition rule and acted to respect valid out-of-state marriages. Ms. Rainbow and Ms. Sloan intervened as defendants in the actions against DCS and the State Comptroller for the same reasons they intervene in this action — to defend important protections for their family to which they are entitled as a lawfully married couple. All three of these cases were dismissed for failure to state a claim, with judgment entered in favor of the government defendants and defendant-intervenor married same-sex couples. *See Lewis v. NYS Department of Civil Service*, Index No. 4078-07 (Sup. Ct. Albany County Mar. 3, 2008), *appeal docketed*, No. 504900 (3d Dep't Apr. 15, 2008) (Sommer Aff., Exh. B); *Godfrey v. DiNapoli*, Index No. 5896-06 (Sup. Ct. Albany County Sept. 5, 2007); *notice of appeal filed*, County Index No. 5896-06 (3d Dep't Oct. 17, 2007) (Sommer Aff., Exh. C); *Godfrey v. Spano*, 15 Misc. 3d 809 (Sup. Ct. Westchester County 2007), *appeal docketed*, No. 2007-4303 (2d Dep't argued June 23, 2008).

Trial courts in Westchester and Albany Counties thus have all concluded that recognition of the marriages of same-sex couples is consistent with New York law and that the government defendants correctly followed that law in extending respect to such marriages. *See Lewis*, Index No. 4078-07, slip op. at 5-6 ("The policy memorandum issued by the New York State Department of Civil Service Employee Benefits Division in which it recognized, as spouses, the parties to any same sex marriage, performed in jurisdictions where such marriage is legal, is both lawful and within its authority."); *DiNapoli*, Index No. 5896-06, slip op. at 4 ("[T]he determination by the Comptroller to recognize same-sex marriages performed in Canada, in accordance with the laws of this jurisdiction, is consistent with New York law regarding the

recognition of marriages performed elsewhere."); *Spano*, 15 Misc. 3d at 818 (the "Executive Order . . . is a valid exercise of the County Executive's power, not an illegal act . . ."). For the same reasons cited in the controlling *Martinez* case — as well as in the *Lewis, DiNapoli*, and *Spano* cases — the ADF's petition should be dismissed and judgment entered for Respondent.

This action should be recognized for what it is — a maneuver by those who cannot countenance that New York's Governor seeks to apply New York laws evenhandedly to lesbian and gay New York couples. Having already burdened the courts with three failed attempts to challenge legitimate acts of government officials following well-established law, the ADF once again seeks to rehash its untenable arguments. Its latest effort should likewise be rejected.

BACKGROUND

A. The Respondent-Intervenors

Respondent-Intervenors[2] have been in a committed relationship since 2001. Rainbow Aff. ¶ 3. Peri Rainbow is a part-time professor of women's studies, psychology, and education studies at the State University of New York at New Paltz. Rainbow Aff. ¶ 2. Ms. Sloan is the Dean of Students at West Park Union Free School, a public high school that provides education and counseling to students placed through the Department of Social Services or Certified State Education. Sloan Aff. ¶ 1.

The couple lives in a home they own together in Stone Ridge, New York, with their 13-year-old daughter, Cecilia, whom they adopted out of the New York State foster care system in 2003. Rainbow Aff. ¶¶ 1, 6-7. Cecilia suffered severe abuse and neglect during the

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[2] More detailed information about Respondent-Intervenors appears in their affidavits filed with the accompanying motion to dismiss. *See* Affidavit of Peri Rainbow ("Rainbow Aff.") and Affidavit of Tamela Sloan ("Sloan Aff.").

first years of her life, followed by almost three years in foster care, leaving her with a number of special needs. *Id.* at ¶¶ 6, 8. Ms. Rainbow and Ms. Sloan have organized their family and work lives around giving Cecilia the attention and support she needs to thrive. *Id.* at ¶ 9. Ms. Rainbow has arranged her teaching schedule to permit her to be home when Cecilia gets off the school bus, so that she can take Cecilia to therapy sessions, help with homework, and provide her with extra support and security. *Id.*

Respondent-Intervenors share everything in their lives and have taken whatever steps they can to affirm their commitment to one another and to protect one another and Cecilia. *Id.* at ¶¶ 5, 7, 9-10. On August 22, 2005, in a ceremony attended by Cecilia, they were validly married in Ontario, Canada, where same-sex couples may enter into civil marriage. Rainbow Aff. ¶ 10. This action threatens significant employee benefits, including basic family health insurance, that Respondent-Intervenors have earned over years of public service as well as other government protections accorded to married couples. *See Id.* ¶¶ 12-17. It is an attempt by the ADF to re-litigate its failed challenges to State public employee benefits that Respondent-Intervenors already have had to defend in the *Lewis* and *DiNapoli* cases. *See id.* at ¶¶ 15-17.

B. The Directive Is Consistent With The Widespread Respect Accorded In New York To Out-Of-State Marriages Of Same-Sex Couples

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 nationwide law extending marriage rights to same-sex couples. *See* Sommer Aff. ¶¶ 15-16. The requirements and process to enter into civil marriage in Canada are indistinguishable for same-sex and different-sex couples. *Id.* at ¶ 17. Furthermore, Canada has no residency or citizenship requirements to marry there. *Id.* at ¶ 18. Thus U.S. citizens like Ms. Rainbow and Ms. Sloan may legally marry their same-sex (or different-sex) partners in Canada, and many have. *Id.* at ¶

19. Same-sex couples may also enter into civil marriage in Massachusetts,[3] California,[4] Spain, Belgium, the Netherlands, and South Africa.[5] *Id.* at ¶¶ 20-22.

The Directive is consistent with the determinations by many other New York government entities and officials that long-standing common law principles (discussed in Point I below) require New York to respect marriages validly entered into in other jurisdictions even if those marriages would not be valid if entered into here. *See* Sommer Aff. ¶¶ 21-31.

For example, in March 2004, then New York State Attorney General Eliot Spitzer issued an advisory opinion confirming that "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." *See* Sommer Aff. ¶ 25, Exh. D. The New York State Comptroller confirmed this as well in October 2004 and advised that same-sex partners to a valid extra-territorial marriage are entitled to spousal benefits available to government employees under the State Retirement System. *Id.* at ¶ 26, Exh. E. Current Attorney General Cuomo likewise has confirmed that New York law calls for recognition of the out-of-state marriages of same-sex couples. *Id.* at ¶ 25; Exh. X. The New York State Department of Civil Service affords validly married same-sex couples spousal coverage under the New York State Health Insurance Program. *Id.* at ¶ 27, Exh. F. New York

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[3] Unlike Canada, Massachusetts does place statutory limitations on marriages there by out-of-state residents, so New York same-sex couples have not been free to marry in Massachusetts. *See Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006). However, if a validly married Massachusetts same-sex couple moves or travels to New York, as explained in Point I below, their marriage also would be entitled to respect in this State under the marriage recognition rule.

[4] The Supreme Court of California recently held that same-sex couples must be afforded the right to marry under the California Constitution. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Same-sex couples began marrying there on June 17, 2008. *See Information and Documents Regarding California Marriage Licenses*, May 28, 2008 *available at* http://ww2.cdph.ca.gov/HealthInfo/news/Pages/Update05-08.aspx (last visited July 8, 2008). California, like Canada, has no residency requirement to marry there.

[5] Effective, January 1, 2009, same-sex couples will be able to enter into civil marriage in Norway. *See* Sommer Aff. ¶ 22.

City, Albany, Binghamton, Brighton, Buffalo, Ithaca, Nyack, Rochester, and Westchester County have similarly publicly confirmed that, consistent with the marriage recognition rule, they will respect for governmental purposes marriages of same-sex couples validly performed outside the State. *Id.* at ¶¶ 28-29; Exhs. G-Q. Public and private employers across the State likewise are respecting extra-territorial marriages of same-sex couples in New York, as are numerous corporations that conduct business in the State. *Id.* at ¶ 31; Exhs. S-W.

ARGUMENT

The ADF claims in this lawsuit — just as it unsuccessfully argued in *Lewis*, *DiNapoli*, and *Spano* — that state executives lack authority to recognize as spouses married New York State residents like Respondent-Intervenors. The ADF specifically alleges that the Directive violates the separation of powers doctrine (*see* Pet. ¶¶ 34-45) and New York State Finance Law § 123-b (*see* Pet. ¶¶ 46-68).

The standards for granting a motion to dismiss an Article 78 petition pursuant to CPLR § 7804(f) are identical to the standards for granting a motion to dismiss pursuant to CPLR § 3211. *See Donofrio v. City of Rochester*, 144 A.D.2d 1027 (4th Dep't 1988). The ADF's claims on their face fail to state a cause of action as a matter of law, justifying dismissal. *See, e.g., Rosner v. Paley*, 65 N.Y.2d 736, 738 (1985) (motion to dismiss for failure to state cause of action properly granted where complaint fails to state claim as matter of law).

Respondent Governor accordingly cross-moves to dismiss the petition. Respondent-Intervenors join in seeking dismissal and focus here on the proper application of the marriage recognition rule in this case.

I.

THE ADF FAILS TO STATE A CAUSE OF ACTION AGAINST RESPONDENT AS A MATTER OF LAW

Settled New York common law requires that the valid out-of-state marriages of couples like Respondent-Intervenors be accorded legal respect by all agencies in the State. In confirming that the executive branch will respect such marriages, Respondent Governor Paterson has done no more than acknowledge what New York law demands and what Respondent-Intervenors and other married lesbian and gay New York residents are entitled to as of right. The ADF's claim that the longstanding marriage recognition rule does not apply when the rights of these families are at stake contravenes settled New York principles of common law, as well as statutory and constitutional guarantees against discrimination.

The marriage recognition rule itself, not the alternate theories cobbled together by the ADF, supplies the analysis the courts must follow — as a consistent string of New York courts already have done — to determine whether an out-of-state marriage unavailable here to same-sex spouses must still be respected in New York. The rule specifies how to analyze whether a particular type of marriage cannot be given the presumption of respect afforded to a valid out-of-state marriage: by determining (1) whether the Legislature has expressly prohibited recognition of the marriage within the State, and (2) whether it would be so abhorrent to New York public policy to give recognition to the union that legal respect must be denied. Multiple New York courts have rejected the arguments raised by the ADF that out-of-state marriages of same-sex couples are not entitled to be respected under these established criteria.

A. **The Directive Follows Controlling Appellate Law, Which Is Consistent With Uniform Lower Court Rulings And Requires Recognition Of The Out-Of-State Marriages Of Same-Sex Couples**

In issuing his Directive Respondent Governor simply followed a string of uniform decisions, including controlling appellate precedent, all holding that the marriage recognition rule calls for governmental recognition of out-of-state marriages of same-sex couples. Already four tribunals in New York have held that government executives have the authority to accord the same benefits to same-sex couples who marry out-of-state as are accorded different-sex couples who marry out-of-state, and a fifth — the Second Department — has vacated a contrary trial court ruling. Already, in three of those cases, the ADF has challenged the authority of executives in New York to adhere to the marriage recognition rule and accord legally required benefits to same-sex couples, and three times the ADF has been rebuffed. *See Lewis*, Index No. 4078-07, slip op. at 4-5 (dismissing ADF's complaint to enjoin DCS from adhering to marriage recognition rule by providing health insurance benefits to married same-sex spouses of public employees); *DiNapoli*, Index No. 5896-06, slip op. at 4 (dismissing ADF's complaint to enjoin Comptroller from adhering to marriage recognition rule by providing retirement and accidental death benefits to married same-sex spouses of public employees); *Spano*, 15 Misc. 3d at 814-17 (dismissing ADF's complaint to enjoin County Executive from requiring that County agencies adhere to marriage recognition rule).

Indeed, the Fourth Department recently confirmed that the marriage recognition rule remains good law and not only *permits but requires* government recognition of the valid out-of-state marriages of same-sex couples. *See Martinez*, 850 N.Y.S.2d at 742. As the only appellate decision squarely addressing this issue, *Martinez* is controlling on all trial courts in New York State faced with the question of whether to recognize same-sex couples' out-of-state marriages. *See People v. Shakur*, 215 A.D.2d 184, 185 (1st Dep't 1995) ("Trial courts within

this department must follow the determination of the Appellate Division in another department until such time as this Court or the Court of Appeals passes on the question."); *Ayers v. O'Brien*, 19 Misc. 3d 449, 454 (Sup. Ct. N.Y. County 2008).

Moreover, the Second Department has acknowledged *Martinez* as the current authoritative statement of the law. In *Funderburke v. N.Y. State Dep't of Civil Service*, 49 A.D.3d 809, 854 N.Y.S.2d 466 (2d Dep't 2008), the Second Department dismissed as moot an appeal from a Supreme Court order upholding DCS's one-time denial of spousal health coverage to married same-sex spouses of public employees following DCS's change in policy to adhere to the marriage recognition rule. In addition to holding the appeal moot, the Second Department also took the unusual step of *vacating* the Supreme Court order in light of *Martinez,* because otherwise the lower court decision "could spawn adverse legal consequences for the [couple] or be used as precedent in future cases, causing confusion on the legal issues in this area of the law." *Id.* at 470.

Just several months ago, in a different context, a Supreme Court in this Department also reached the conclusion that out-of-state marriages of same-sex couples must be given legal respect in New York, thereby adhering to the Fourth Department's controlling decision in *Martinez*. In *Beth R. v. Donna M.*, 19 Misc. 3d 724, 853 N.Y.S.2d 501 (Sup. Ct. NY County 2008), *notice of appeal filed,* County Index No. 350284/07 (1st Dep't Mar. 18, 2008), the court held that the marriage in Canada of a same-sex couple is entitled to recognition in New York for purposes of proceeding with a divorce action and access to the family protections that come through a divorce determination. Citing *Martinez*, the court held that "recognition of [a] marriage [between a same-sex couple] is not against the public policy of New York." *Id.* at 506.

Far from giving rise to a claim under State Finance Law § 123-b, which allows taxpayers to challenge "illegal" government expenditures, the Governor's Directive and its proposed measures are compelled by controlling State law.

B. The Marriage Recognition Rule Requires That Valid Out-Of-State Marriages Of Same-Sex Couples Be Accorded Legal Respect

These recent precedents simply follow the well-established common law marriage recognition rule, which for well over a century has required that validly performed out-of-state marriages be recognized as valid in New York. *See, e.g., Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 293 (1980); *In re Estate of May*, 305 N.Y. 486, 490 (1953) ("[I]n 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."); *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"); *Martinez*, 850 N.Y.S.2d at 742.

Under the marriage recognition rule, *even where the marriage is expressly prohibited or invalid under New York statute*, it nonetheless is entitled to legal respect within New York if valid in the jurisdiction in which it was entered. Thus, for example, common law marriages, although prohibited by the Legislature since 1933, are respected from other jurisdictions. *See Mott,* 51 N.Y.2d at 292 ("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); *see also, e.g., Black v. Moody*, 276 A.D.2d 303, 304 (1st Dep't 2000); *In re Estate of Yao You-Xin*, 246 A.D.2d 721, 721 (3d Dep't 1998); *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 v. R.S.R. Corp., 167 A.D.2d 582, 583 (3d Dep't 1990); *Dozack v. Dozack*, 137 A.D.2d 317, 318 (3d Dep't 1988).

New York likewise respects a valid out-of-state marriage between an uncle and a niece, though such a marriage would be invalid, void, and subject to criminal penalty under Domestic Relations Law ("DRL") § 5(3) and the predecessor to Penal Law § 255.25 if celebrated here. *May*, 305 N.Y. at 492-93. Similarly, although a proxy marriage — one concluded at a ceremony attended by only one of the parties — cannot be contracted in New York pursuant to DRL § 12, such a marriage will be deemed valid in New York 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 County 1959). And New York will respect an out-of-state marriage of parties too young under DRL § 7(1) to marry here. *See Hilliard v. Hilliard*, 24 Misc. 2d 861, 863 (Sup. Ct. Greene County 1960).

With marriage comes emotional and financial stability for spouses and any children, which supports a strong presumption of the validity of a marriage — whether entered within or without New York — to protect these family ties. *See, e.g.*, *Amsellem v. Amsellem*, 189 Misc. 2d 27, 29 (Sup. Ct. Nassau County 2001) ("[T]he presumption of marriage . . . is one of the strongest presumptions known to the law.") (citing *In re Estate of Lowney*, 152 A.D.2d 574, 576 (2d Dep't 1989)) (internal citation omitted). Where, as here, the "party actually challenging the validity of the marriage is a total stranger to the marital relation, the presumption becomes even stronger." *Seidel v. Crown Indus.*, 132 A.D.2d 729, 730 (3d Dep't 1987). "[A] stranger to the marital relationship has a heavy burden to establish its invalidity." *Meltzer v. McAnns Bar & Grill*, 85 A.D.2d 826, 826 (3d Dep't 1981). The ADF taxpayer petitioners,

complete strangers to the couples whose marriages they gratuitously attack, cannot meet this heavy burden.

C. Neither Exception To The Marriage Recognition Rule Applies Here

Only two narrow exceptions have been held to limit the marriage recognition rule. As the Fourth Department decided in *Martinez* and as four lower New York courts likewise have ruled, neither of those two exceptions applies here. *See Martinez*, 850 N.Y.S.2d at 742-43; *Lewis*, Index No. 4078-07, slip op. at 4-5; *DiNapoli*, Index No. 5896-06, slip op. at 4; *Spano*, 15 Misc. 3d at 816-17; *Beth R.*, 853 N.Y.S.2d at 504-06.

The first exception is where a statute explicitly declares that a given class of marriages, when celebrated in another jurisdiction, will be considered void in New York. *See May*, 305 N.Y. at 492-93; *Van Voorhis v. Brintnall*, 86 N.Y. 18, 26 (1881) ("prohibition by positive law" constitutes exception to marriage recognition rule). While a number of other states have enacted positive laws prohibiting recognition of out-of-state marriages between same-sex couples, New York, notably, has not. As observed by *Martinez*, "New York has not chosen . . . to enact legislation denying full faith and credit to same-sex marriages validly solemnized in another state." 850 N.Y.S.2d at 743.

Although the Court of Appeals held in *Hernandez v. Robles* that under the DRL marriages between same-sex couples currently cannot be performed in New York, 7 N.Y.3d 338, 357 (2006), that has no bearing on whether such marriages, if validly performed elsewhere, should be recognized here. Indeed, *Martinez* expressly rejected the ADF's contention that *Hernandez* militated against recognizing marriages of same-sex couples celebrated elsewhere. 850 N.Y.S.2d at 743 ("The Legislature has not enacted legislation to prohibit the recognition of same-sex marriages validly entered into outside of New York, and we thus conclude that the positive law exception to the general rule of foreign marriage recognition is not applicable in this

case."). *See also DiNapoli*, Index No. 5896-06, slip op. at 4 ("[T]he determination in *Hernandez* did not answer the question raised here."); *Beth R.*, 853 N.Y.S.2d at 506.

The very purpose of the marriage recognition rule is to address situations, such as this one, where a union validly solemnized elsewhere does not fall within the DRL's definitions of marriages permitted to be entered into here. Under the rule, because the Legislature has not expressly prohibited out-of-state marriages of same-sex couples from being recognized in New York, the marriages must be treated as valid and subject to all the same legal rights and protections accorded to other marriages validly entered into within or without the State.

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 — 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 such a marriage would be expressly prohibited, deemed void, and subject to criminal penalty if entered in New York. Despite these 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.

As *Martinez* confirmed, this longstanding rule applies to same-sex couples. 850 N.Y.S.2d at 742. The New York Legislature has not elected to "interdict" out-of-state marriages between same-sex couples, and so Respondent is not empowered to refuse to treat them as valid here. *May*, 305 N.Y. at 493. *See also Moore v. Hegeman*, 92 N.Y. 521, 524-25 (1883) ("The statute . . . prohibiting the marriage . . . can have no effect beyond the territorial limits of this State. Where the laws of another State do not prohibit such marriage . . . its validity cannot be questioned in this State."); *Van Voorhis*, 86 N.Y. at 33 (marriage of divorcee who traveled to Connecticut to avoid 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 the courts to forbid its recognition here); *Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44, 48-49 (1970) (Florida common law marriage was subject to recognition by Workmen's Compensation Board).

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." *May,* 305 N.Y. at 493. This abhorrence exception requires an overwhelming social consensus that a marriage is patently repugnant to the morality of the community. *Id.* The exception is so narrow that, throughout the lengthy history of the marriage recognition rule, only polygamous and closely incestuous marriages have been held to meet its stringent criterion. *Van Voorhis*, 86 N.Y. at 26 (exception applies in cases "of incest or polygamy coming within the prohibitions of natural law"); *Earle v. Earle*, 141 A.D. 611, 613 (1st Dep't 1910) ("the *lex loci contractus* governs as to the validity of the marriage, unless the marriage be odious by common consent of nations, as where it is polygamous or incestuous by the laws of nature");

People v. Ezeonu, 155 Misc. 2d 344, 346 (Sup. Ct. Bronx County 1992) (polygamous marriage not accorded respect).

This exception does not remotely govern here, and, as *Martinez* noted, the Court of Appeals confirmed this in the *Hernandez* case: "The Court of Appeals noted [in *Hernandez*] that the Legislature *may* enact legislation recognizing same-sex marriages . . . and, in our view, the Court of Appeals thereby indicated that the recognition of plaintiff's marriage [to her same-sex spouse] is not against the public policy of New York." *Martinez*, 850 N.Y.S.2d at 743 (emphasis in original; citation to *Hernandez* omitted).

Moreover, 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 that the ADF would have to demonstrate to invoke this narrow exception to the marriage recognition rule. *See* Sommer Aff. ¶¶ 23-30. This includes, for example, recognition of out-of-state marriages not only by the Governor, but also by the courts; the State's Comptroller; the State's Attorney General; and other public officials, municipal and county governments, unions, and private entities around the State. Sommer Aff. ¶¶ 23-31. Indeed, far from being *abhorrent* to New York public policy, recognition of out-of-state marriages of same-sex couples now clearly *is* the public policy of New York. And in a clear statement that marriages between same-sex couples certainly are not "abhorrent" here, on June 19, 2007 the New York State Assembly voted 85 to 61 to pass legislation, initiated by then-Governor Eliot Spitzer, granting same-sex couples the right to marry here in New York. Sommer Aff. ¶ 33. Thus, granting respect not only to out-of-state marriages but to marriages *within* New York for same-sex couples already has the support of a strong majority of the public's elected Assembly representatives. *Martinez* has flatly rejected the ADF's now-boilerplate contention that

recognizing out-of-state marriages of same-sex couples would violate State public policy. 850 N.Y.S.2d at 743.

D. <u>The ADF Cannot Evade The Governing Marriage Recognition Rule</u>

Confronted with the inevitable conclusion that the marriage recognition rule compels legal respect for out-of-state marriages of same-sex couples, the ADF attempts to persuade the Court simply to abandon the rule altogether when it comes to considering marriages between lesbian and gay spouses. But none of the ADF's contentions displace the marriage recognition rule as the governing legal standard for analyzing how this category of marriage must be treated under New York law.

First, in the face of *Martinez* and other cases squarely applying the marriage recognition rule to legal out-of-state marriages by same-sex couples, the ADF tries to create an "appellate department split" where none actually exists. Pet. ¶¶ 52-55. It relies on a line of cases plainly inapplicable because they involved same-sex couples who were never married in *any* jurisdiction. *See Langan v. St. Vincent's Hospital of N.Y.*, 25 A.D.3d 90 (2d Dep't 2005) (surviving party of 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) ("*Langan I*"); *Langan v. State Farm Fire & Casualty*, 48 A.D.3d 76 (3d Dep't 2007) ("*Langan II*") (surviving party of Vermont civil union could not bring action for workers' compensation death benefits because not considered married under Vermont law); *In re Estate of Cooper*, 187 A.D.2d 128 (2d Dep't 1993) (unmarried domestic partner could not bring wrongful death action as "spouse"). The Second Department specifically noted in *Langan I* that "the Vermont Legislature went to great pains to expressly decline to place civil unions and marriages on an identical basis," an action "[t]he import of [which was] of no small moment" in the court's decision. *Langan*, 25 A.D.3d at 94-95. *See also DiNapoli*, Index No. 5896-06, slip op. at 5 ("the

issue of recognition of a foreign same-sex marriage was not raised or addressed" in *Langan*). The results in cases like *Langan I*, *Langan II*, and *Cooper* 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 Estate of 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).

Second, the ADF's lengthy discussion of the purportedly universal and fundamental "definition" of marriage as limited to different-sex couples (Pet. ¶¶ 58-63) ignores the undeniable reality that same-sex couples can and do legally marry in numerous jurisdictions, including Canada, Massachusetts, California, the Netherlands, Belgium, Spain, South Africa, and soon, Norway (*see* Sommer Aff. ¶¶ 15-22), as well as the widespread consensus within New York among public and private actors to respect the valid out-of-state marriages of same-sex couples (*see id.* ¶¶ 23-31). Thus the marriage recognition question cannot be answered by consulting outdated dictionaries, published in an age when same-sex couples could not marry, that describe marriage as involving a "husband and wife." Pet. ¶¶ 58, 63.[6] According to the legal definition that prevails in many respected sister jurisdictions, the term "marriage" self-evidently now does encompass marriages between same-sex partners.

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[6] Although legal standards and precedent, not dictionary definitions, govern this case, the one contemporary dictionary the ADF itself cites as an authority on the definition of "marriage" actually *supports* application of the marriage recognition rule in this context. *See* Pet. ¶ 58. The ADF misleadingly quotes 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 July 8, 2008).

The marriage recognition rule has long been premised on the unique personal nature of the marital contract and the concommitant importance of promoting certainty and stability for the parties who choose to marry and avoiding the necessity for intrusive, case-by-case evaluations of the validity of marriages across state or national lines. *See, e.g., 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; *Persad v. Balram*, 187 Misc. 2d 711, 715 (Sup. Ct. Queens County 2001). The personal attachments and commitment underlying marriage and need for family stability and certainty are no less weighty for same-sex married couples like Respondent-Intervenors 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.

The ADF's claim that the marriage recognition rule was never intended "as a conduit for far-reaching social change" (Pet. ¶ 65) is yet another red herring. 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* pp. 13-15, above. Second, even in the absence of such 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* pp. 15-17, above.

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In fact, the rule contemplates that whole categories of out-of-state marriages must be honored even if entered into in other jurisdictions by New Yorkers intentionally bypassing a prohibition on a specific type of marriage within this State. While other jurisdictions had liberalized their divorce laws, New York until the 1966 amendment of DRL § 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). Large numbers of New Yorkers barred under this provision from remarrying in New York traveled to other jurisdictions to evade the restriction and enter into new marriages. A long string of cases nonetheless upheld these extra-territorial marriages as valid in New York. Thus a spouse barred by DRL § 8 from remarrying in New York "with impunity could go to a foreign jurisdiction — as countless have in the past — and there remarry . . . . [I]f the remarriage would be valid there, it would be valid here." *Almodovar v. Almodovar,* 55 Misc. 2d 300, 301 (Sup. Ct. Bronx County 1967).[7]

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[7] *See also Farber,* 26 N.Y.2d at 55; *Moore,* 92 N.Y. at 524-25 ("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; *Van Voorhis,* 86 N.Y. at 32-33; *In re Estate of Peart,* 277 A.D. 61, 69 (1st Dep't 1950) (noting line of cases recognizing validity of second marriages obtained out-of-state to evade New York prohibition on remarriages).

E. Failure By Respondent To Extend Spousal Benefits To Validly Married Lesbian And Gay New York Residents Would Be Unlawful Not Only Under The Marriage Recognition Rule But Also Under State Anti-Discrimination Law And The Guarantee Of Equal Protection

Far from acting illegally and *ultra vires*, as the ADF claims, Respondent merely confirmed that the State's agencies would abide by what New York law affirmatively requires — that the marriages of couples like Respondent-Intervenors be respected. Respondent issued the Directive to ensure that the *executive* branch properly and uniformly *executes* the law, a task that Respondent — as is denoted by the very name of the branch he heads — is required to do. The question of who is validly married under New York law is not determined *ad hoc* at the discretion of each executive agency, but by execution of a clear common law rule repeatedly reaffirmed by the New York Court of Appeals and held to apply in this precise context by the Appellate Division — a rule that the Legislature has not chosen to alter.

Under the marriage recognition rule, all state agencies are required to respect an out-of-state common law, uncle/niece, proxy, or underage marriage, even though those marriages are prohibited within New York. As the *Martinez* court held, to deny benefits to married lesbian and gay individuals like Respondent-Intervenors while simultaneously conferring such benefits on those with other out-of-state marriages that likewise could not be obtained in New York would violate the prohibition against sexual orientation discrimination codifed in Executive Law § 296, as well as that law's prohibition against sex discrimination. Section 296 of the Executive Law bars discrimination on the basis of sexual orientation and sex in employment, public accommodations, educational institutions, and publicly assisted housing, as well as in private housing accommodations and commercial space. The *Martinez* court held that denying recognition of the marital status of a validly married same-sex couple not only violated the marriage recognition rule but also § 296's prohibition against sexual orientation discrimination.

See Martinez, 850 N.Y.S.2d at 743 ("The sole reason for defendants' rejection of the marital status of plaintiff is her sexual orientation, and defendants thus violated Executive Law § 296(1)(a)."). Regulatory agencies providing married spouses with any of the services protected in the Executive Law already are not permitted to limit the provision of those services to different-sex couples who married in other jurisdictions; Governor Paterson's Directive quite simply effectuates the anti-discrimination law's requirements.[8]

Disrespecting the valid out-of-state marriages only of same-sex couples while recognizing those of other couples who could not marry within New York also would violate the constitutional guarantee of equal protection. N.Y. Const. Art. I, § 11. That guarantee "imposes a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment." *Brown v. State*, 89 N.Y.2d 172, 190 (1996). Same-sex and different-sex couples in marriages not available in New York but validly entered into elsewhere stand in precisely the same position with respect to their crucial interest in obtaining spousal benefits. Excluding only same-sex couples with valid out-of-state marriages from receiving such benefits lacks even a legitimate or rational justification. *See, e.g., Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (striking down on rational basis grounds statute treating legitimate and illegitimate children differently for purposes of right to maintain action for wrongful death of parent). To

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[8] *See, e.g.*, 9 N.Y. Comp. Codes R. & Regs. § 2104.6 ("A landlord may evict a tenant at the termination of the lease term where the tenant no longer occupies the premises except that a family member, including a *husband*, *wife*, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law of the tenant shall not be evicted." (emphasis added)); 12 N.Y. Comp. Codes R. & Regs. § 391.1 ("Actuarial guidelines for computing Workers' Compensation benefits to a surviving spouse and children presume that one-third of the total benefit will be paid to a surviving wife or dependent husband and two-thirds to the children. If there is no surviving spouse, the benefit is to be shared by the children."); 9 N.Y. Comp. Codes R. & Regs. § 1627-3.1 ("Family factors, *e.g.*, the lack of adequate housing causing families to be separated, or satisfaction of family composition requirements . . . must be satisfied in order for a tenant to be eligible for low-rent housing. For these purposes, 'family relationships' are deemed established *by marriage* or a birth certificate." (emphasis added)).

single out same-sex couples and refuse recognition only to *their* marriages thus would violate the guarantee of equal protection.[9]

Put bluntly, were the executive branch to refuse recognition to valid out-of-state marriages of same-sex couples, it would be acting illegally and would expose the State to liability for violating the rights of married same-sex New Yorkers. The relief Petitioners seek would force Governor Paterson and the State's executive agencies into the posture of violating the marriage recognition rule, the Executive Law, and the State Constitution, and should be denied.

II.

THE RESPONDENT HAS NOT "LEGISLATED" IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE

For the same reasons the ADF's first line of argument fails to state a claim, so too does the ADF's claim that Respondent violated the separation of powers doctrine by issuing the Directive. In determining to follow State law by interpreting "spouse" to include those in a valid out-of-state marriage with a spouse of the same sex, the Respondent has not usurped the Legislative function. All that the Respondent has done is to direct state agencies to interpret the term "spouse" for purposes of administering various rights, benefits, and responsibilities consistent with the common law marriage recognition rule and the controlling *Martinez* decision. In the absence of an explicit Legislative prohibition against respecting out-of-state marriages of

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[9] Given that a straightforward application of the marriage recognition rule requires affirming Governor Paterson's determination, these constitutional ramifications need not even be reached. *See People v. Felix*, 58 N.Y.2d 156, 161 (1983).

same-sex couples, the marriage recognition rule prevails. Indeed, any other interpretation of "spouse" by the Respondent would be contrary to constitutional, statutory, and common law.[10]

[10] The ADF asks for a preliminary injunction but cannot establish entitlement to that interim remedy. A petitioner has the "burden in seeking a preliminary injunction to show a likelihood of success on the merits, a danger of irreparable injury if provisional relief is withheld and a balance of equities in their favor." *Schulz v. New York*, 217 A.D.2d 393, 396 (3d Dep't 1995) (denying preliminary injunction motion to movant asserting taxpayer claim under Finance Law § 123-b) (citing *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1998)). For the foregoing reasons, the ADF cannot show a likelihood of success on the merits. Nor can it demonstrate the required irreparable harm or "detriment[] to the public interest," State Finance Law § 123-e(2), if a preliminary injunction does not issue. To be entitled to a preliminary injunction the ADF must "establish that a real threat of irreparable injury exists by factual demonstration. Mere apprehension or conjectural injury, or injury of an inconsequential nature will not qualify as irreparable injury." *Bisca v. Bisca*, 108 Misc. 2d 227, 231 (Sup Ct. Spec. Term Nassau County 1981). The ADF erroneously contends that it need not demonstrate irreparable harm because the cause of action created under § 123 furthers the "public interest." Pet. n.1. However, the only case cited for this proposition, *State of New York v Terry Buick, Inc.*, 137 Misc. 2d 290 (Sup Ct. Dutchess County 1987), held only that the *Attorney General* need not demonstrate irreparable harm when seeking injunctive relief on behalf of the public to enjoin fraudulent or illegal acts. *Id.* at 294. In contrast, private parties seeking injunctive relief pursuant to § 123 must satisfy the traditional requirements for obtaining a preliminary injunction, including irreparable harm. *See e.g., Community Serv. Soc'y v. Cuomo,* 167 A.D.2d 168, 172 (1st Dep't 1990) (in action against governor brought by taxpayer plaintiffs pursuant to State Finance Law § 123-b, motion court "carefully considered the likelihood of success on the merits, the showing of irreparable harm, and the importance of maintaining the status quo" before issuing injunction). The ADF also cannot show that a balancing of the equities tips in its favor rather than in favor of the New York State couples whose rights it seeks to impair.

CONCLUSION

For the foregoing reasons, Respondent-Intervenors respectfully request that their cross-motion to dismiss the Amended Verified Article 78 Petition be granted and that a declaration be entered into favor of all Respondents.

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New York, New York

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