

SUPREME COURT, STATE OF NEW YORK
BRONX COUNTY

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In the Matter of

MARTIN J. GOLDEN, et al.,

Index No. 260148/08

Petitioners,

-against-

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

Respondent.

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**MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENT'S CROSS-MOTION
TO DISMISS THE AMENDED PETITION**

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Preliminary Statement

Petitioners bring this special proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") and State Finance Law § 123-b against the Honorable David A. Paterson, Governor of the State of New York. Petitioners assert a "citizen taxpayer" challenge to a memorandum by Governor's counsel. This memorandum, addressed to the attention of executive agency counsel, directs a review of agency practices to ensure compliance with a recent decision by New York Supreme Court, Appellate Division, which held that New York law requires recognition of same-sex marriages entered into in other jurisdictions where such marriages are legal. Petitioners assert that the issuance of this memorandum was

unlawful and ask this Court for a declaration that the State is barred from recognizing same-sex marriages, notwithstanding that (1) previous citizen taxpayer actions challenging the State's recognition of such marriages have failed; (2) the only Appellate Division decision on point holds that State law recognizes such marriages; and (3) the Legislature has declined to prohibit recognition of such marriages.

This memorandum of law is submitted in support of Governor Paterson's cross-motion to dismiss the petition pursuant to CPLR § 7804(f) on the grounds that Petitioners are barred from relitigating issues already decided in previous taxpayer actions; Petitioners lack standing to assert their claims; Petitioners' claims are not ripe for review; the challenged memorandum was not illegal; and, in any event, New York law provides for the recognition of same-sex marriages validly entered into in other jurisdictions.

Brief Statement of the Case

In this special proceeding, Petitioners seek a declaration that a May 14, 2008 memorandum from Governor's counsel to agency counsel, which noted recent court decisions holding that New York law requires recognition of same-sex marriages legally performed in other jurisdictions and requested a review of agency rules and procedures applicable to recognition of such marriages, was unlawfully issued and should be rescinded. See Amended Petition,

dated June 20, 2008, ("A. Pet.") Exhibit A to the accompanying Affirmation of Monica A. Connell ("Connell Aff."). However, they fail to set forth the events that led the issuance of this memorandum.

A. The New York Legislature Declines to Prohibit Recognition of Same Sex Marriages from Other Jurisdictions.

Unlike the majority of other states, New York has declined to enact a law to prohibit the recognition of same-sex marriages legally performed in other jurisdictions.¹ While such bills have

¹The majority of states have enacted so-called "defense of marriage acts" which expressly prohibit the recognition of same-sex marriages. See Alabama Const. Amend., Acts 2005, No. 05-35 and Code § 30-1-19; Alaska Const. Art. I, § 5 and Stat. § 25.05.013; Arkansas Const. Amend. 83, § 1 and Code §§ 9-11-107 and 9-11-109; Arizona Rev. Stat. §§ 25-101 and 25-112; California Family Code § 308.5; Colorado Rev. Stat. § 14-2-104; 13 Delaware Code § 101; Florida Stat. § 741.212; Georgia Const. Art. I, § IV ¶ 1 and Official Code § 19-3-3.1; Hawaii Const. Art. I, § 23 and Rev. Stat. § 572-1; Idaho Code § 32-209; 750 Illinois Comp. Stat. §§ 212 and 216; Indiana Code § 31-11-1-1; Iowa Code § 595.2; Kansas Const. Art. 15, § 16 and Stat. § 23-101; Kentucky Const. § 233a and Rev. Stat. § 402.020; Louisiana Const. Art. XII, § 15 and Civil Code Art. 3520; 19-A Maine Rev. Stat. § 701; Michigan Const. Art. I, § 25 and Comp. Laws § 551.271; Minnesota Stat. § 517.03; Mississippi Const. Art. 14, § 263A and Code § 93-1-1; Missouri Const. Art. 1, § 33 and Stat. § 451.022; Montana Const. Art. XIII, § 7 and Code § 40-1-401; Nebraska Const. Art. I, § 29; Nevada Const. Art. I, § 21; New Hampshire Rev. Stat. § 457:3; North Carolina Stat. § 51-1.2; North Dakota Const. Art. XI, § 28; Ohio Const. Art. XV, § 11 and Rev. Code § 3101.01; Oklahoma Const. Art. II, § 35 and 43 Oklahoma Stat. § 3.1; Oregon Const. Art. XV, § 5a; 23 Pennsylvania Con. Stat § 1704; South Carolina Code § 20-1-15; South Dakota Stat. § 25-1-38; Tennessee Code § 36-3-113; Texas Const. Art. I, § 32 and Family Code § 6.204; Utah Const. Art. I, § 29 and Code § 30-1-4.1; Virginia Code § 20-45.2; Washington Rev. Code § 26.04.020; West Virginia Code § 48-2-603. Congress has also enacted legislation providing that "[n]o State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding, of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession or tribe..." 28 U.S.C. §

been introduced in every New York legislative session since 1998, not one has even been reported out by a committee. See, e.g., S. 2800/A. 4978, 230th Sess., Reg. Sess. (introduced February 12, 2007).

B. In 2004, an Informal Attorney General Opinion States That New York Law Requires the Recognition of Same-Sex Marriages Performed in Other Jurisdictions.

In 2004, the Attorney General, in response to queries from multiple municipal officials, issued an informal opinion that addressed a number of questions regarding marriage between persons of the same sex, concluding that: (1) the Domestic Relations Law does not authorize the performance of same-sex marriages in New York; and (2) New York law requires the recognition of same-sex marriages performed in jurisdictions that do authorize them. See Connell Aff., Exhibit B.

C. State Agencies and Municipalities Recognize Out of State Same-Sex Marriages; Courts in Albany and Westchester Counties Reject "Citizen Taxpayer" Actions Challenging Such Recognition.

In September 2004, a member of the New York State and Local Retirement System asked the Office of the New York State Comptroller whether the Retirement System would recognize a marriage between persons of the same sex performed in Canada, where same-sex couples may legally marry. In response, the Comptroller's Office issued an opinion stating that it would

1738C. By its terms, this federal legislation does not prohibit states from recognizing same-sex marriages.

recognize such a marriage "based on the principle of comity".

The Comptroller's determination was challenged by taxpayers represented by the Alliance Defense Fund ("ADF"), an Arizona-based organization that also represents petitioners here. The Supreme Court, Albany County, rejected the taxpayer challenge. It held that the Comptroller's decision was within his authority and consistent with New York law. See Godfrey v. Hevesi, 2007 N.Y. Misc. LEXIS 6589 (Sup. Ct. Albany Co. September 5, 2007). Plaintiff taxpayers filed an appeal of that determination but have not perfected their appeal.²

In 2006, Westchester County Executive Andrew J. Spano issued an executive order directing all employees under his jurisdiction "to recognize same sex marriages lawfully entered into outside

² In October, 2004, a retired school teacher who had legally married his same-sex partner in Canada sued, inter alia, the New York State Department of Civil Service after his request for health and dental insurance coverage for his spouse was rejected. The Supreme Court, Nassau County granted summary judgment in favor of the Department of Civil Service. See Funderburke v. NYS Dep't of Civil Service, 15 Misc.3d 284 (Sup. Ct. Nassau Co. July 11, 2006). Plaintiff appealed. During the pendency of the appeal, the Department of Civil Service changed its policy to require recognition of, and extension of relevant spousal benefits to, same-sex couples validly married in another jurisdiction. See Funderburke v. NYS Dep't of Civil Service, 49 A.D.3d 809 (2d Dep't 2008). The Appellate Division, Second Department, while dismissing the appeal as moot, also vacated relevant portions of the Supreme Court's orders, "in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent." Funderburke v. New York State Dept. of Civ. Serv., 2008 NY Slip Op 2789, 3 (N.Y. App. Div. 2d Dep't 2008) (citations and internal quotations omitted).

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 these couples, to the maximum extent allowed by law". This executive order was challenged by the same taxpayers, also represented by ADF. By decision dated March 12, 2007, the Supreme Court, Westchester County held that recognition of such out of state marriages is required under New York law, that the terms of the executive order were not inconsistent with the State Constitution or any law and that the order was a valid exercise of the County Executive's power. See Godfrey v. Spano, 15 Misc. 3d 809, 812-13, 817 (Sup. Ct. Westchester Co. March 12, 2007). An appeal of this decision was argued to the Second Department on June 23, 2008.

In May 2007, the New York State Department of Civil Service issued a revised policy memorandum announcing that it would recognize same sex marriages performed in jurisdictions where such marriages are legal. This policy memorandum was challenged by different taxpayers, once again represented by ADF, who asserted that the memorandum was illegal, unconstitutional, ultra vires, void and constituted an illegal expenditure of State funds. See Lewis v. N.Y.S. Dep't of Civil Service, 2008 N.Y. Misc. LEXIS 1623 (Sup. Ct. Albany Co. March 3, 2008). Cross-motions to dismiss and for summary judgment were pending when the Fourth Department decided the case Martinez v. County of Monroe,

50 A.D.3d 189 (4th Dep't 2008) which addressed the recognition of same-sex marriages by New York State. Relying on Martinez, the court in Lewis held that the Department's policy memorandum was lawful and within its authority. See Lewis v. N.Y.S. Dep't of Civil Service, 2008 N.Y. Misc. LEXIS 1623. Plaintiffs have perfected their appeal in Lewis to the Third Department.

D. In 2008, the Appellate Division, Fourth Department Declares That New York Law Requires Recognition of Same-Sex Marriages Performed in Jurisdictions Where Such Marriages Are Legal.

On February 1, 2008, the Fourth Department held that New York's "marriage-recognition rule" provides that same-sex marriages legally performed in other jurisdictions are "entitled to recognition in New York State in the absence of express legislation to the contrary." See Martinez v. County of Monroe, 50 A.D.3d 189 (4th Dep't 2008). It ruled that plaintiff's employer, a community college, improperly denied her request for spousal health care benefits based on a lawful Canadian same-sex marriage.

Martinez first described New York's marriage-recognition rule, pursuant to which marriages that are validly performed in other jurisdictions are presumptively recognized here, even if such marriages could not have been performed here:

For well over a century, New York has recognized marriages solemnized outside of New York unless they fall into two categories of exception: (1) marriage, the recognition of which is prohibited by the "positive law" of New York and (2) marriages involving incest or polygamy, both of

which fall within the prohibitions of "natural law" ... Thus, if a marriage is valid in the place where it was entered, "it is to be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law or the express prohibitions of a statute". ... "[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.

Id. at 191-92 (citations omitted).

Applying that rule to the facts of this case, Martinez found that plaintiff's marriage must be recognized in New York:

[U]nlike the overwhelming majority of states, New York has not chosen, pursuant to the federal Defense of Marriage Act (28 USC § 1738C), to enact legislation denying full faith and credit to same-sex marriages validly solemnized in another state... The Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York.

Id. 192-93. The Court found that by refusing to recognize plaintiff's valid same-sex marriage, plaintiff's employer had violated State Human Rights Law, entitling plaintiff to monetary damages. Id. at 193.

On May 8, 2008, the Court of Appeals denied leave to appeal for lack of finality. Martinez v. County of Monroe, 2008 N.Y. LEXIS at 1450 (2008).

E. Noting Court Decisions Holding That New York Law Requires Recognition of Legal Same-Sex Marriages From Other Jurisdictions, Governor's Counsel Issues a Memorandum to Agency Counsel.

On or about May 14, 2008, shortly after the Court of Appeals dismissed the appeal in Martinez, Governor Paterson's counsel, David Nocenti, issued an unpublished internal memorandum to New York State agency counsel captioned "Martinez decision on same-sex marriages" ("Nocenti Memo"). See Connell Aff., Exhibit C. The Nocenti Memo informed the agency counsel of the Martinez decision and recent decisions by the Supreme Court, Albany and Westchester Counties. It stated that the failure to recognize same-sex marriages may violate state law and that "agencies that do not afford full faith and credit to same-sex marriages that are legally performed in other jurisdictions could be subject to liability." Accordingly, the Nocenti Memo asked that agency counsel "timely conduct a review" of each agency's policy statements and regulations, as well as the statutes whose construction is vested in the agency, to ensure compliance with these court decisions and to identify instances where some other provision of law would limit the agency's ability to recognize legal same-sex marriages. It asked that agency counsel notify Nocenti in writing by June 30, 2008 of the actions each agency has taken "in response to this memo" and "any potential legal problems" that have come to agency counsel's attention. See Connell Aff., Exhibit C.

F. The Present Proceeding.

On or about June 3, 2008, Petitioners commenced this Article 78 proceeding by order to show cause. On or about June 20, 2008, they served an Amended Petition, foregoing the order to show cause and proceeding by Notice. Petitioners challenge the Nocenti Memo under section 123-b of the State Finance Law, governing taxpayer actions.³ See A. Pet, ¶ 25. They claim that, through the issuance of the Nocenti Memo, Governor Paterson has exceeded his authority in a manner which is illegal and which will cause a wrongful expenditure of state funds. See A. Pet, ¶¶ 1-2, 27-30.

Petitioners, some of whom are State legislators, are New York residents and taxpayers. See A. Pet, ¶¶ 1-16. They are represented by ADF, an organization that has represented plaintiffs in the other taxpayer actions, mentioned above, which unsuccessfully challenged State recognition of same-sex marriages.

Petitioners characterize the Nocenti Memo as an "Executive Directive," issued at the direction of Governor David Paterson, which "will require action by, or otherwise impact, most state agencies." See A. Pet, ¶¶ 23-30. They claim that implementation

³ In addition to the substantive deficiencies set forth below, Petitioners' taxpayer claim is procedurally defective because claims under the State Finance Law must be brought through the commencement of an action and not a special proceeding. See, e.g., CPLR § 7804(a) and State Finance Law § 123-b; Cavares, Inc. v. Ketter, 56 A.D.2d 730, 731 (4th Dep't 1977). Such claims are not properly part of an Article 78 proceeding and are subject to dismissal. See CPLR § 7803.

of the Nocenti Memo "will cause the expenditure of funds throughout the entire state, in every county and municipality." See A. Pet, ¶ 29, 46-48, and that such expenditures may include "government funds for insurance benefits, financial assistance to needy families, home energy assistance, and payment calculations for state income taxes." See A. Pet, ¶ 24. They seek injunctive and declaratory relief against "enforcement" of the Nocenti Memo. See A. Pet, ¶ 3.

In sum, Petitioners ask the Court to take the remarkable step of "enjoining" a memorandum by Governor's counsel calling to the attention of State agencies numerous court decisions on the recognition of out-of-state same-sex marriage, including the binding decision of the only Appellate Division case on the issue. Petitioners effectively ask the Court to disregard this case law and the Legislature's refusal to effect a State a policy rejecting such marriages. Petitioners fall short of make any showing that the challenged memorandum is contrary to the law of New York, and the Court should reject their extraordinary claims.

ARGUMENT

POINT I

**PETITIONERS ARE BARRED FROM RELITIGATING
ISSUES PREVIOUSLY DECIDED IN OTHER CITIZEN
TAXPAYER ACTIONS.**

Collateral estoppel precludes a party, or those in privity with a party, from relitigating in a subsequent proceeding an issue raised in a prior action or proceeding and decided against that party when there was a full and fair opportunity to contest the earlier decision. Buechel v. Bain, 97 N.Y.2d 295, 303-4 (2001); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984).

A judgment in a citizen taxpayer action bars re-litigation of issues which were raised or could have been raised therein and applies to subsequent suits by different taxpayers. See Murphy v. Erie County, 60 Misc.2d 954, 962-63 (Sup. Ct. Erie Co. 1969), aff'd, 310 N.Y.S.2d 959 (4th Dep't 1970), aff'd, 28 N.Y.2d 80, 86 (1970); Campbell v. Nassau County, 192 Misc. 821, 825 (Sup. Ct. Nassau Co. 1948), aff'd, 274 A.D. 929 (2d Dep't 1948); Halleran v. City of New York, 132 Misc. 73, 81 (Sup. Ct. N.Y. Co. 1928), aff'd, 226 A.D. 785 (1st Dep't 1929); People's Gas & Electric Co. v. Oswego, 207 A.D. 134, 140-41 (4th Dep't 1923), aff'd, 238 N.Y. 606 (1924). Hence, if taxpayers bring suit and a judgment is rendered against them, a different group of taxpayers cannot bring a subsequent suit in an attempt to relitigate the same

issues.⁴ Murphy, 60 Misc.2d at 962-63.

Petitioners here are bound by the determinations in prior citizen taxpayer actions holding that New York's marriage recognition rule applies to same-sex marriages entered into in jurisdictions where such marriages are legal.⁵ They may not relitigate the express findings that the recognition of such marriages is not barred by New York law and that it is not a violation of the doctrine of separation of powers for state agencies to recognize such same-sex marriages. See Lewis v. N.Y.S. Dep't of Civil Service, 2008 N.Y. Misc. LEXIS 1623 (Sup. Ct. Albany Co. March 3, 2008); Godfrey v. Hevesi, 2007 N.Y. Misc. LEXIS 6589 (Sup. Ct. Albany Co. September 5, 2007); Godfrey v. Spano, 15 Misc.3d 809, 810 (Sup. Ct. Westchester Co. March 12, 2007). Petitioners here ask this Court to adjudicate the identical issues previously decided against plaintiffs in other taxpayer actions: that New York's marriage recognition rule does not mandate the recognition of same-sex marriages (see A. Pet., ¶¶ 57-63), recognition of same-sex marriages is barred by the law and policy of New York (see A. Pet., ¶¶36-45,64-68), the

⁴See also Taylor v. Sturgell, 2008 U.S.LEXIS 4885, *28 (2008) in which the Supreme Court noted, in dicta, that states are free to foreclose successive litigation by nonlitigants under certain statutory schemes or in cases brought only on behalf of the public at large. Id. at *28.

⁵The fact that plaintiffs in those cases have taken appeals is of no significance. See, e.g., Matter of Amica Mutual Ins. Co. v. Jones, 85 A.D.2d 727, 728 (2d Dep't 1981).

recognition of same-sex marriages by State agencies is illegal (see A. Pet., ¶¶ 46-56), and the issuance of an executive order to state agencies directing that they recognize same-sex marriages is a violation of the doctrine of separation of powers (see A. Pet., ¶¶ 30-35). They are precluded from doing so.

POINT II

THE PETITION SHOULD BE DISMISSED BECAUSE PETITIONERS LACK STANDING TO PURSUE THEIR CLAIMS.

Standing is a threshold issue that should ordinarily be resolved before deciding the merits of an underlying claim. Soc'y of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 769 (1991). The burden of establishing standing is on Petitioners. Id. "[I]njury in fact' has become the touchstone" for standing because "the existence of an injury in fact - an actual legal stake in the matter being adjudicated - ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'" Id. (internal citation omitted). See also Matter of Transactive Corp. v. New York State Dept. of Social Servs., 92 N.Y. 2d 579, 587 (1998).

In this case, Petitioners challenge the Nocenti Memo pursuant to State Finance Law § 123-b, which authorizes any "citizen taxpayer" to maintain an action against a state officer to challenge the "wrongful expenditure, misappropriation,

misapplication, or any other illegal or unconstitutional disbursement" of state funds or property, whether or not such person has been "specially aggrieved" by the challenged conduct. See State Finance Law § 123-b(1). However, courts do not allow the "convenient statutory hook" of § 123-b to apply "essentially to challenge nonfiscal activities" of the state. Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 813 (2003). Standing under section 123-b is narrowly construed and the Court of Appeals has emphasized that section 123-b standing requires that plaintiffs demonstrate "a sufficient nexus" between the challenged action and "fiscal activities of the State" because "most [state] activities can be viewed as having some relationship to expenditures ... [and] too broad a reading of section 123-b would create standing for any citizen who had the desire to challenge nearly all governmental acts." See Rudder v. Pataki, 93 N.Y.2d 273, 281 (1999). See also Transactive Corp. v. New York State Dep't of Soc. Servs., 92 N.Y.2d 579, 589 (1998); Urban League of Rochester, Inc. v. County of Monroe, 49 N.Y.2d 551, 556 (1980).

Here, plaintiffs challenge only the issuance of an internal memorandum, which itself does not direct any expenditures, let alone any improper ones. This memorandum lacks the requisite nexus to the State's fiscal activities to confer taxpayer standing. As the Court of Appeals already has made clear,

taxpayer standing does not extend so far as to permit judicial review of the manner in which the Governor manages executive agencies. See Rudder, 93 N.Y.2d at 280-81.

In Rudder, plaintiffs alleged that the Governor lacked authority to create the Governor's Office of Regulatory Reform ("GORR") and provide it with rulemaking responsibilities. The Court held that plaintiffs lacked standing pursuant to section 123-b to challenge the nonfiscal activity at issue in establishing GORR. The fact that GORR received State monies to support its regulatory responsibilities was insufficient to confer taxpayer standing. See Rudder, 93 N.Y.2d at 280-81; see also Colella v. Board of Assessors of the County of Nassau, 95 N.Y.2d 401, 410 (2000) (no taxpayer standing for claim that assessor erred in granting a third-party a religious exemption); Kennedy v. Novello, 299 A.D.2d 605, 607 (3d Dept. 2002) (no taxpayer standing where the challenged action "was the State's nonfiscal determination that the procedures in question fell within the practice of optometry"); Matter of Gerdts v. State, 210 A.D.2d 645, 648 (3d Dept. 1994) (no standing under section 123-b where the claim was "not directed at the illegal expenditure of funds"), appeal dismissed, 85 N.Y.2d 856, lv. denied, 85 N.Y.2d 810 (1995).

This petition presents an even more attenuated nexus between the challenged action and any expenditure of state funds. That

at some time in the future a State agency may recognize a same-sex marriage in some manner- unspecified by Petitioners- that may require the expenditure of State funds does not supply the necessary connection to a present fiscal activity of the State. These allegations are insufficient to confer standing under section 123-b, which requires "a specific challenge to the expenditures of identifiable State funds." Public Util. Law Project of N.Y. Inc. v. New York State PSC, 263 A.D.2d 879, 881 (3d Dep't. 1999). Taxpayer standing is available to challenge actual agency actions that cause actual unlawful expenditures, not abstract declarations. See Kennedy v. Novello, 299 A.D.2d 605, 607 (3d Dep't 2002) (no taxpayer standing to challenge determination that certain procedures fell within definition of optometry, in the absence of allegation that Medicaid funds were unlawfully allocated as a result), app. denied, 99 N.Y.2d 507 (2003). Petitioners' inability to identify an illegal expenditure of identifiable state funds caused by the Nocenti Memo therefor must result in the dismissal of their claims.

POINT III

THE PETITION MUST BE DISMISSED BECAUSE PETITIONERS' CLAIMS ARE NOT RIPE FOR REVIEW.

For similar reasons, this petition does not present a claim that is ripe for judicial review. New York courts lack subject matter jurisdiction over controversies, including Article 78

proceedings and taxpayer actions, that are not ripe for judicial review. Matter of New York State Inspection, Security and Law Enforcement Employees v. Cuomo, 64 N.Y.2d 233, 240 (1984); see also Cuomo v. Long Is. Light. Co., 71 N.Y.2d 349, 354 (1988); New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 541 (1977). This ripeness requirement is founded on the long standing principle that "the 'function of the courts is to determine controversies between litigants.... They do not give advisory opinions.'" New York Public Interest Research Group, Inc., 42 N.Y.2d at 529 (quoting Matter of State Ind. Comm., 224 N.Y. 13, 16).

To establish ripeness under the State Finance Law, a plaintiff must demonstrate that the defendant "has caused, is causing, or is about to cause" an illegal or unconstitutional disbursement of identifiable State funds. See State Finance Law § 123-b; Public Util. Law Project of N.Y. Inc. v. New York State PSC, 263 A.D.2d 879, 881 (3d Dep't. 1999). Inherent in the "is about to cause" language is a requirement that the challenged disbursement of funds be imminent. "Where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract." N.Y. State Inspection, Sec. & Law Enforcement Emples., Dist. Council 82 v. Cuomo, 64 N.Y.2d at 240.

Petitioners fail to identify any expenditures of identifiable state funds which have occurred or are imminent. While the Nocenti Memo informed State agencies of recent decisions regarding the recognition of out of state same-sex marriages and directed that they review their governing statutes, regulations and policies to ensure compliance with the law, it did not itself effect the recognition of same-sex marriages (Martinez and other court decisions did), nor did it cause the expenditure of identifiable state funds. Because the Memo does not cause any "injury" to Petitioners and the "harm" Petitioners seek to enjoin is remote and hypothetical, this proceeding must be dismissed as unripe. See New York Public Interest Research Group, 42 N.Y.2d at 535; see also Church of St. Paul, 67 N.Y.2d 510, 520 (1986); Matter of Queensview Housing Enterprise Inc., v. Grayson, 179 A.D.2d 434 (1st Dept. 1992).

POINT IV

PETITIONERS' TAXPAYER AND ARTICLE 78 CLAIMS FAIL ON THE MERITS BECAUSE THE ISSUANCE OF THE NOCENTI MEMO WAS NOT ILLEGAL.

In order to state a claim under the State Finance Law, Petitioners must set forth allegations which would, if true, establish that the challenged conduct is unlawful, not merely a poor exercise of discretion. See State Finance Law § 123-b; Saratoga County Chamber of Commerce, 100 N.Y.2d at 813-14; see also Abrams v. N.Y. City Transit Auth., 39 N.Y.2d 990, 993 (1976);

Transactive Corp., 92 N.Y.2d at 589 (taxpayer claim must allege "clear illegality"). Furthermore, in order to state a basis for relief under Article 78, Petitioners must establish a clear legal right to the relief that they seek. See Brusco v. Braun, 84 N.Y.2d 674, 679 (1994); Morgenthau v. Erlbaum, 59 N.Y.2d 143, 147 (1983), cert. denied, 464 U.S. 993 (1983); Matter of Pirro v. Angiolillo, 89 N.Y.2d 351, 355-56 (1996); Matter of Holtzman v. Goldman, 71 N.Y.2d 564, 569 (1988). To the extent that they seek a declaration that the issuance of the Nocenti Memo was unlawful, they must clearly establish its illegality.⁶

The instant petition must be dismissed because Petitioners cannot establish that the Nocenti Memo was unlawful. The Nocenti Memo accurately states the law as established by the Appellate Division. The Appellate Division is a single state-wide court divided into judicial departments for administrative purposes. See Mountain View Coach Lines v Storms, 102 A.D.2d 663, 664-665 (2d Dept 1984). Pursuant to the doctrine of stare decisis, decisions of the Appellate Division of any judicial department are binding on

⁶ Petitioners have not set forth the specific type of relief that they seek under Article 78. Because they seem to assert that the Governor was without the authority to direct the issuance of the Nocenti Memo, it would appear that they seek a writ of prohibition. However, a writ of prohibition may not issue against executive action. See Morgenthau v. Erlbaum, 59 N.Y.2d at 147; see also Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 815 (2003); Dondi v. Jones, 40 N.Y.2d 8, 13 (N.Y. 1976). As a result, even were they able to assert that the issuance of a memorandum from counsel to state agencies was somehow outside the Governor's authority, they would not be entitled to a writ of prohibition.

trial courts across the state in the absence of a contrary ruling by the Court of Appeals or the Appellate Division for the judicial department in which the trial court is located. See People v. Turner, 5 N.Y.2d 476, 482 (2005); Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473, 476 (1985); Mountain View Coach Lines v Storms, 102 A.D.2d at 664-665.

Petitioners do not dispute that in Martinez, the Appellate Division, Fourth Department declared that under New York's well-settled marriage recognition rule, same-sex marriages legally entered into in other jurisdictions are entitled to recognition in New York State. Martinez, 50 A.D.3d at 191-92. There is no other Appellate Division decision on this issue. Thus, Martinez constitutes the controlling law in New York State. See, e.g., Lewis v. N.Y.S. Dep't of Civil Service, 2008 N.Y. Misc. LEXIS 1623 (holding that Martinez is controlling). Furthermore, in Martinez, the court found that the State's failure to recognize such marriages is unlawful and may subject the State to money damages in a claim under State Human Rights law. Thus, the Nocenti Memo, which accurately informs agency counsel about the law of New York State, is clearly not illegal or unconstitutional.

In challenging the Nocenti Memo, Petitioners argue that Martinez has not settled the issue of the recognition of same-sex marriages because there are "inconsistencies" among the Appellate Divisions. Petitioners invite this Court to reject the Martinez

decision. See A. Pet, ¶ 56. However, the cases relied upon by Petitioners do not demonstrate conflicts among the judicial departments of the Appellate Division because those cases do not address the recognition of same-sex marriages legally entered into in other jurisdictions. Accordingly, they are plainly insufficient to show that the Nocenti Memo was illegally issued.

For example, Petitioners rely upon In re Cooper, 187 A.D.2d 128, 130 (N.Y. App. Div. 2d Dep't 1993). See A. Pet, ¶ 53. But Cooper did not consider whether same-sex marriages validly performed in other jurisdictions should be recognized. Rather, it ruled on whether a member of a same-sex couple, who were never married but had lived together, could enforce "spousal rights" under the Estates, Powers and Trusts Law. Cooper is thus inapposite.

Petitioners also cite to the Langan decisions, but those cases are similarly inapposite. See A. Pet, ¶¶ 49-50. In Langan v. St. Vincent's Hospital of New York, 25 A.D.3d 90 (2nd Dept. 2005) (Langan I), the Appellate Division, Second Department held that the plaintiff lacked standing to bring a wrongful death action since the plaintiff, the decedent's same-sex partner with whom the decedent had entered into a civil union in the State of Vermont, was not the decedent's surviving spouse. In doing so, the court drew a distinction between a marriage and a civil union and explicitly held that this distinction made it unnecessary for the

court to consider the marriage-recognition rule:

Although the dissenters equate civil union relationships with traditional heterosexual marriage, we note that neither the State of Vermont nor the parties to the subject relationship have made that jump in logic.... The Vermont Legislature went to great pains to expressly decline to place civil unions and marriage on an identical basis. While affording same-sex couples the same rights as those afforded married couples, the Vermont Legislature refused to alter traditional concepts of marriage (i.e., limiting the ability to marry couples of two distinct sexes).... The import of that action is of no small moment. The decedent herein, upon entering the defendant hospital, failed to indicate that he was married. Moreover, in filing the various probate papers in this action, the plaintiff likewise declined to state that he was married. In essence, this court is being asked to create a relationship never intended by the State of Vermont in creating civil unions or by the decedent or the plaintiff in entering into their civil union. For the same reason, the theories of Full Faith and Credit and comity have no application to the present fact pattern.

25 A.D.3d at 94-95.

Similarly, in Langan II, the court considered only whether a Vermont civil union permitted the surviving partner to be recognized as a "spouse" under the Workers Compensation law. Langan v. State Farm Fire & Casualty, 48 A.D.3d 76 (3rd Dept. 2007). The same-sex couple in Langan I and Langan II had never been, and did not purport to be, married and thus the recognition of an out of state marriage was not at issue.⁷

⁷ Petitioners ask this Court to find that the recognition of out of state same-sex marriages violates the Court of Appeals decision in Hernandez v. Robles, 7 N.Y.3d 338 (2006). See A. Pet, ¶¶ 36, 43-44.

Petitioners attack the logic of the distinction the Langan cases and Cooper drew between marriages and other legal relationships, such as civil unions, see A. Pet, ¶ 55. However, in doing so, Petitioners reject the very logic of the cases upon which they purport to rely. They do not explain how Governor Paterson can be thought to have violated the law by simply following the dictates of Martinez – as well as those of the Langan cases and Cooper – instead of reformulating the holdings of these cases to suit Petitioners' preferences.

The Martinez decision, the only Appellate Division case to address recognition of same-sex marriages, is not in conflict with any other Appellate Division decision and is controlling law. The issuance of the Nocenti Memo calling attention to Martinez and other related court decisions was therefore not illegal.

This argument has already been rejected in previous taxpayer actions. See, e.g., Godfrey v. Spano, 15 Misc.3d at 817 (holding that Hernandez "dealt with the intrastate licensing of same-sex marriage; not with interstate or foreign recognition of such marriages"). In Hernandez, the Court of Appeals was asked to consider whether the New York State Constitution mandates that New York permit same-sex marriages. The Court held that the Domestic Relations law limits marriage in New York State to opposite-sex couples and the Constitution does not compel extension of the right to marry to same-sex couples. Although New York does not currently authorize the performance of same-sex marriages, see Hernandez, 7 N.Y.3d at 356-57, that fact says nothing about whether New York recognizes such marriages if validly performed elsewhere. Indeed, under the marriage recognition rule, New York recognizes a marriage that was valid where performed even if it would have been invalid if performed in New York. See Point V, infra. Hernandez, then, has nothing to do with New York's marriage recognition rule. Nor is there any conflict between Hernandez's holding that same-sex marriages may not be performed in New York and the recognition of a same-sex marriage validly performed elsewhere.

POINT V

**NEW YORK LAW RECOGNIZES SAME-SEX MARRIAGES
VALIDLY ENTERED INTO IN OTHER JURISDICTIONS.**

For all of the reasons stated above, Petitioners' attempt to collaterally attack Martinez by challenging an accurate statement of its holding should be rejected. In essence, Petitioners ask this Court to sit as an appellate tribunal for Martinez and "overrule" its determination that New York's marriage recognition rule requires recognition of same-sex marriages validly entered into in other jurisdictions. See A. Pet, ¶ 51 ("This Court need not follow the Fourth Department's ill reasoned decision"). It is respectfully submitted that this is contrary to well established law.

However, even were the Court somehow to reach the merits, it should conclude that Martinez properly applied New York's marriage recognition rule and should rule accordingly.

A. It Is Well-Established In New York That A Marriage Considered Valid In The Jurisdiction Where Entered Into Should Be Treated As Valid Under New York Law.

For well over a century, a marriage considered valid in the jurisdiction where entered into has been treated as valid under New York law. See 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."); Van Voorhis v. Brintnall, 86 N.Y. 18, 25 (1881); Decouche v. Savetier, 3 Johns. Ch. 190, 211 (N.Y. Ch. 1817).

Under this rule, a marriage is recognized in New York if valid where entered into, even if it would have been invalid if performed in New York. For example, although New York does not permit a marriage in this State between an uncle and his niece, [see Domestic Relations Law §5(3)], New York has recognized such a marriage when entered into in a jurisdiction that did authorize it. See In Re Estate of May, 305 N.Y. at 492 (observing that the Legislature had not taken the additional step of expressly voiding such a marriage that was "solemnized in a foreign State where such marriage is valid" and concluding that the Domestic Relations Law's prohibition on such marriages entered into in New York "should not be extended by judicial construction"). Likewise, New York courts have recognized a foreign marriage by proxy, even though such a marriage would be invalid if performed in this State. See Fernandes v. Fernandes, 275 A.D. 777 (2d Dept. 1949); In Re Probate of the Will of Valente, 18 Misc.2d 701, 704-05 (Sur. Ct. Kings Co. 1959). Further, common-law marriages from other States also are recognized, despite the fact that they are not permitted under New York law.⁸ See Mott v.

⁸ The Legislature abolished common-law marriages in 1933. L. 1933, Ch. 606.

Duncan Petroleum Trans., 51 N.Y.2d 289, 292 (1980); Shea v. Shea, 294 N.Y. 909 (1945); Katebi v. Hooshiari, 288 A.D.2d 188 (2d Dept. 2001); Black v. Moody, 276 A.D.2d 303 (1st Dept. 2000); Lancaster v. 46 NYL Partners, 228 A.D.2d 133, 142 (1st Dept. 1996); Carpenter v. Carpenter, 208 A.D.2d 882, 883 (2d Dept. 1994); Hulis v. M. Foschi & Sons, 124 A.D.2d 643, 644 (2d Dept. 1986).

The marriage recognition rule is a specific application of the general principle of comity that New York courts "apply the laws of other States where the application of those laws does not conflict with New York's public policy." Crair v. Brookdale Hospital Medical Center, 94 N.Y.2d 524, 528-29 (2000). The very existence of the rule makes it clear that recognizing a marriage solemnized in another jurisdiction does not violate or conflict with the public policy of New York merely because the Domestic Relations Law does not authorize the performance of the marriage in question. See Mott v. Duncan Petroleum Trans., 51 N.Y.2d 289, 292-93 (1980) (recognizing Georgia common-law marriage despite statutory prohibition on common-law marriage, citing Domestic Relations Law § 11); In Re Estate of May, 305 N.Y. 486, 491-93 (1953); Shea v. Shea, 294 N.Y. 909, 911 (1945).

B. The Limited Exceptions To The Marriage Recognition Rule Do Not Apply to Same-Sex Marriages.

The only exceptions to the marriage recognition rule occur where: (i) the Legislature has expressly prohibited by statute the recognition of a particular kind of out-of-state marriage; or (ii) where the out-of-state union would be abhorrent to New York's public policy, i.e., where the 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 490-93; In Re Probate of the Will of Valente, 18 Misc.2d at 704; Van Voorhis v. Brintnall, 86 N.Y. at 26-27; Moore v. Hegeman, 92 N.Y. 521, 524 (1883). Neither exception applies to New York's recognition of valid foreign same-sex marriages.

(i) Legislative Action

The New York State Legislature has not prohibited by statute the recognition of foreign same-sex marriages. A same-sex marriage is not included among the types of marriages found by the Legislature to be void or voidable. See Domestic Relations Law §§ 5-7. Moreover, while the Penal Law prohibits polygamous and incestuous marriages (Penal Law §§ 255.20, 255.25), nothing in the Penal Law (nor, that matter, in any other statute) prohibits same-sex marriages.

Thus, the basic premise of this petition – that the Legislature has made a "policy decision to limit the institution

of marriage, and all the benefits thereof, to unions between one man and one woman," see A. Pet, ¶ 44 – is simply mistaken. Quite to the contrary, as Martinez accurately stated, New York has declined to enact legislation denying full faith and credit to same-sex marriages validly solemnized in another state, though it would be permitted to do so under the federal Defense of Marriage Act (28 USC § 1738C). See Martinez, 50 A.D.3d at 192-93. Petitioners ask this Court to rule as though the Legislature had enacted a bill that it has repeatedly declined to enact.

Since the Legislature has not expressly prohibited by statute the recognition of foreign same-sex marriages, the first exception to the marriage recognition rule is inapplicable.

(ii) Public Policy

The public policy exception has been construed narrowly, and only marriages involving polygamy or "incest in a degree regarded generally as within the prohibition of natural law..." have been deemed abhorrent by the courts of this State. In Re Estate of May, 305 N.Y. at 491; see also Bell v. Little, 204 A.D. 235, 237 (4th Dept. 1922), aff'd, 237 N.Y. 519 (1923); Earle v. Earle, 141 A.D. 611, 613-14 (1st Dept. 1910); People v. Ezeonu, 155 Misc.2d 344, 345-46 (Sup. Ct. Bronx Co. 1992). The holding in Martinez shows that the recognition of legally performed same-sex marriages is not contrary to public or legislative policy. 50 A.D.3d at 192-93; See also, Lewis, 2008 N.Y. Misc. LEXIS 1623 at

*4; Godfrey v. Spano, 15 Misc.3d at 817 (an executive order directing that county recognize valid out of state same-sex marriages was a valid exercise of executive authority and not inconsistent with the State Constitution or any law).

Petitioner's contention that same-sex marriages fall within the narrow exception for marriages "abhorrent" to New York policy (see A. Pet, at ¶¶ 40-45, 64-68) is without basis. As noted above, the New York legislature has declined the opportunity to prohibit the recognition of such marriages. Further, the notion that such marriages are viewed under New York public policy as akin to incest is at odds with the panoply of protections offered by New York law to same-sex couples.

For example, New York's adoption statutes provide that the unmarried same-sex partner of a child's biological parent, who is raising the child together with the biological parent, may become the child's second parent by means of adoption. See In re Jacob, 86 N.Y.2d 651 (1995). See also 18 NYCRR §421.16(h)(2) (providing that qualified adoption agencies shall not reject applicants "solely on the basis of homosexuality"). New York case law has also recognized the legitimacy of committed same-sex relationships by protecting unmarried same-sex partners from eviction. See Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 211-214 (1989) (long-term interdependent relationship between same-sex partners rendered plaintiff a "family member" of tenant for

purposes of 9 NYCRR §2204.6(d), which prohibits eviction of "any member of the tenant's family" under specified circumstances). Moreover, Public Health Law § 4201 provides same-sex domestic partners with the ability to make decisions about the disposition of their partner's bodily remains upon death. In addition, former Governor Pataki signed into law a number of September 11th-related bills recognizing the rights of domestic partners, including same-sex domestic partners. See L. 2002 ch. 73, ch. 467 and ch. 468.

New York statutes also expressly prohibit discrimination on the basis of sexual orientation, both in general [see Civil Rights Law § 40-c(2) (no person shall, because of sexual orientation, be subjected to discrimination in his or her civil rights or to any harassment)] and specifically with respect to employment, education, housing, the use of places of public accommodation, and the extension of credit [see Executive Law §§ 296(1), (2), (2-a)]. See also Education Law § 313(1)(a) (ensuring equality of opportunity to access educational institutions); Insurance Law § 2701(a) (defining "Holocaust victim" for purposes of Holocaust Victims Insurance Act to include "any person... who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons based on... sexual orientation... between [1929] and [1945] in areas under Nazi

influence"). Moreover, the New York Penal Law specifically criminalizes offenses involving animus on the basis of sexual orientation [see Penal Law § 240.30(3) (aggravated harassment in the second degree); id. § 240.31 (aggravated harassment in the first degree)] and provides for additional punishment where such animus exists [see id. § 485.05(1) (hate crimes)].

In light of these significant rights and protections accorded unmarried same-sex couples, and the lack of any statutory prohibition against the recognition of same-sex marriages, it cannot seriously be argued that it is abhorrent to New York's public and legislative policy to treat same-sex couples who marry in another jurisdiction in the same manner as opposite-sex couples who do the same.

C. If the Court Reaches the Merits of Petitioners' Claims, Governor Paterson Is Entitled to Declaratory Relief.

In the event that the Court considers the substance of Petitioners' claims, because Petitioners seek a declaration that the issuance of the Nocenti Memo was unlawful, the court should not only deny the petition, but should also declare that the issuance of the Nocenti Memo was lawful. See City of New York v. State, 94 N.Y.2d 577, 588 n. 3 (2000) ("It was error, however, to dismiss the complaint in this action for a declaratory judgment merely because plaintiffs were not entitled to the declaration they sought.") (citation omitted); Maresca v. Cuomo, 64 N.Y.2d 242, 249 (1984), appeal dismissed, 474 U.S. 802 (1985); Fisher v.

Becker, 32 A.D.2d 786, 787 (2d Dept. 1969) ("Upon the determination of a declaratory judgment action on the merits against the plaintiff, the court must declare the parties' rights and not dismiss the complaint.") (citations omitted), aff'd, 26 N.Y.2d 938 (1970); Vinnie Montes Waste System, Inc. v. Town of Oyster Bay, 150 Misc.2d 109, 114 (Sup. Ct. Nassau Co. 1991), aff'd, 199 A.D.2d 493 (2d Dept. 1993).

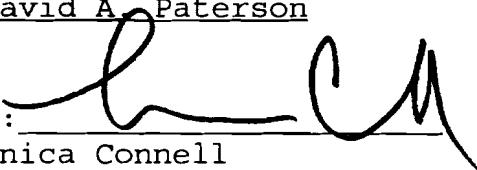
CONCLUSION

FOR THE FOREGOING REASONS, THE AMENDED PETITION SHOULD BE DISMISSED IN ITS ENTIRETY AND THIS COURT SHOULD DECLARE THAT MARTINEZ IS GOVERNING LAW IN THE STATE AND THE NOCENTI MEMO WAS THUS PROPERLY ISSUED.

Dated: New York, New York
July 9, 2008

Respectfully submitted

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