

Court of Appeals
State of New York

KENNETH J. LEWIS, *et al.*, Plaintiffs-Appellants,

v.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, *et al.*,

Defendants-Respondents.

**BRIEF OF THE NEW YORK STATE CATHOLIC CONFERENCE
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Richard E. Barnes
Counsel of Record
New York State Catholic Conference
465 State Street
Albany, New York 12203
(518) 434-6195

Paul Benjamin Linton
Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, Illinois 60062-3614
(847) 291-3848

Thomas Brejcha
President & Chief Counsel
Thomas More Society
29 S. La Sallet Street
Suite 440
Chicago, Illinois 60603
(312) 782-1680

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Interest of the *Amicus*

The New York State Catholic Conference (the Conference) has been organized by the Roman Catholic Bishops of New York as the institution by which the Bishops speak cooperatively and collegially in the field of public affairs. The Conference promotes the social teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigration, civil rights, criminal justice and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and to the people of the State of New York.

Whether the Court should recognize same-sex marriages lawfully contracted in other jurisdictions presents an issue of vital importance to the Catholic Church and the people of this State. Consistent with our Judeo-Christian moral heritage and the longstanding tradition of Western law, the Conference affirms the understanding that marriage, as a natural and social institution, is reserved for opposite-sex couples so that they may procreate and raise children. Recognition of same-sex marriages would undermine that understanding and would violate the public policy of the State as set forth in the Domestic Relations Law. Nothing in this Court's jurisprudence requires recognition of such marriages. Accordingly, the judgment of the Appellate Division, Third Department, should be reversed.

SUMMARY OF ARGUMENT

In *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), this Court held that the public policy of the State of New York, as set forth in the Domestic Relations Law, prohibits marriages between members of the same-sex. 7 N.Y.3d at 357. In this case, the Court is called upon to decide whether, despite that public policy, New York must recognize same-sex marriages that are lawfully contracted in the few American and foreign jurisdictions that allow them. The Third Department, relying principally upon this Court's decisions in *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881), *Thorp v. Thorp*, 90 N.Y. 602 (1882), *Moore v. Hegeman*, 92 N.Y. 521(1883), and *Matter of May*, 305 N.Y. 486 (1953), held that such marriages must be recognized in New York because they do not violate the natural law nor is their recognition prohibited by any positive law of the State. Slip op. at 3-6. The Conference respectfully, but forcefully, disagrees with the Third Department's holding.

First, this Court *has* refused to recognize a valid out-of-State marriage between New York residents on grounds other than those cited by the Third Department. *See Cunningham v. Cunningham*, 206 N.Y. 341 (1912) (authorizing action to annul an out-of-State marriage between New York minors). Second, the exceptions to the marriage recognition rule the Third Department identified—

marriages that violate natural law and those that are prohibited by positive law—fail to account adequately for the State’s refusal to recognize foreign polygamous marriages. Third, careful examination of the principal source upon which the “positive law” exception is based, Story’s COMMENTARIES ON THE LAW OF CONFLICT OF LAWS, reveals that the exception is *not* limited to a statute that expressly denies recognition to an out-of-State marriage.

The unstated principle that emerges from a review of the applicable cases is that state courts will recognize, for all purposes, a valid out-of-State marriage between two persons who *could* have married each other in New York, but will not give *prospective* recognition to a marriage between two persons who could *not* have married each other here. In certain circumstances, however, the courts may give *retrospective* recognition to such marriages, but only to the extent necessary to enable the parties to divorce (or separate pending divorce) and to resolve issues relating to inheritance, survivor’s benefits and the like. In none of these circumstances is the court required to recognize the continuing (present and future) validity of a marriage that could not have taken place in New York. This Court should make explicit what is implicit in the decided cases and reformulate the marriage recognition rule to strike the appropriate balance between recognizing out-of-State marriages and protecting the public policy of the State of New York.

ARGUMENT

NOTHING IN THIS COURT’S JURISPRUDENCE REQUIRES THE STATE OF NEW YORK OR ANY OF ITS AGENCIES OR POLITICAL SUBDIVISIONS TO RECOGNIZE THE VALIDITY OF A LAWFUL OUT-OF-STATE MARRIAGE BETWEEN TWO PERSONS WHO COULD NOT HAVE MARRIED EACH OTHER IN NEW YORK.

In *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), this Court held that the public policy of the State of New York, as set forth in the Domestic Relations Law, prohibits marriages between members of the same-sex. *Id.* at 357 (“New York’s statutory law clearly limits marriage to opposite-sex couples”). The issue in this case is whether, contrary to that policy, New York must recognize same-sex marriages lawfully contracted in other jurisdictions. The Third Department held that, under this Court’s marriage recognition rule, such recognition must be accorded to same-sex marriages. For the reasons set forth in this Argument, the Conference respectfully disagrees with that holding. The Conference submits that the marriage recognition rule should be reformulated to reflect more accurately the decided precedents and to strike the appropriate balance between recognizing out-of-State marriages between two persons who could have married each other in New York and not recognizing out-of-State marriages between two persons who could not have married each other under the public policy of the State, as set forth in the Domestic Relations Law.

The Marriage Recognition Rule

In a series of cases going back to 1881, this Court has held that the validity of a marriage contract is to be determined by the law of the jurisdiction where it was entered into; if valid there, it is to be recognized as such by the courts of this State unless the marriage violates the natural law (generally understood to include polygamous or incestuous marriages) or is prohibited by positive law.¹ The latter exception, the Court has explained, does not apply “in the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad.” *Matter of May*, 305 N.Y. at 490 (citing *Van Voorhis*, *Thorp* and *Moore*).

Plaintiffs and certain *amici* argue that a same-sex marriage lawfully contracted in another State should not be recognized in New York under the principles set forth by this Court in *Matter of May*, either because the very concept of a same-sex marriage is repugnant to the understanding of marriage as a union of a man and a woman and, therefore, is contrary to natural law,² or, alternatively,

¹ See *Van Voorhis v. Brintnall*, 86 N.Y. 18, 24-26 (1881); *Thorp v. Thorp*, 90 N.Y. 602, 605-06 (1882); *Moore v. Hegeman*, 92 N.Y. 521, 524 (1883); *Matter of May*, 305 N.Y. 486, 490-91 (1953). Prior to the enactment of any “statute regulating marriage, or prescribing [its] solemnities . . . , or defining the forbidden degrees,” Chancellor Kent expressed the opinion that, “independent of any church canon, or of any statut[ory] prohibition,” marriages in the “direct lineal line of consanguinity,” as well as marriages between brothers and sisters, are unlawful and void “by the law of nature.” *Wightman v. Wightman*, 4 Johns. Ch. 343, 347-49 (1820) (dictum in opinion holding that the marriage of a “lunatic” violates the natural law and declaring such marriage “null and void”).

² In *Funderburke v. New York State Dep’t of Civil Service*, 13 Misc.3d 284 (Sup. Ct. Nassau County 2006), *vacated as moot*, 49 A.D.3d 809 (2nd Dep’t 2008), the court refused to

because same-sex marriages are prohibited by the public policy of the State. *See Hernandez*, 7 N.Y.3d at 357 (“New York’s statutory law clearly limits marriage to opposite-sex couples”). Although the Conference does not take issue with either argument, it believes that this case presents an appropriate opportunity for the Court to reexamine the relevant precedents, review the facts of those cases and reformulate the rule for recognition of out-of-State marriages.

Analysis of the Marriage Recognition Rule

The marriage recognition rule reiterated in *Matter of May* appears to admit of no exceptions other than those identified therein, to wit, marriages that violate natural law or those that are denied recognition by an express statute. But, for the reasons that follow, that appearance is misleading.

apply the “marriage recognition rule” to a lawful Canadian same-sex marriage because same-sex union is not a “marriage” as defined by this Court in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006). In *Hernandez*, this Court observed that, at the time articles 2 and 3 of the Domestic Relations Law were adopted in 1909, it was the “universal understanding” that “only people of different sexes may marry each other.” 7 N.Y.3d at 357. *See also Storrs v. Holcomb*, 168 Misc.2d 898, 900 (Sup. Ct. Tompkins County 1996) (referring to “[t]he long tradition of marriage, understood as the union of male and female”). In *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dep’t 2008), however, the Fourth Department reasoned that recognition of a valid Canadian same-sex marriage is not against the public policy of New York because “the Legislature *may* enact legislation recognizing same-sex marriages.” 50 A.D.3d at 192 (emphasis in original). But the mere possibility that, *at some time in the future*, the Legislature may enact legislation allowing same-sex marriages to be performed in New York has no logical bearing on whether recognition of such marriages, lawfully contracted elsewhere, violates the *present* public policy of the State. Presumably, the Legislature also has the authority to allow polygamous or incestuous marriages to be contracted in the State, but unless and until it exercises that authority such marriages obviously violate the public policy of the State, *see* N.Y. DOM. REL. LAW §§ 5, 6 (McKinney 1999), and will not be recognized even if lawfully contracted elsewhere.

As an initial matter, the Conference points out that this Court *has* refused to recognize a valid out-of-State marriage that did not fall into either of the exceptions that have been recognized to date. In *Cunningham v. Cunningham*, 206 N.Y. 341 (1912), the Court held that a minor female who had married an adult male in New Jersey, both being residents of New York, was entitled to proceed with an action to annul her marriage, even on the assumption that the marriage in New Jersey was valid. Writing for the majority, Judge Haight stated

[T]he marriage of the plaintiff to the defendant in the state of New Jersey, while she was under the age of legal consent, without the knowledge or consent of her parents, *was repugnant to our public policy and legislation*, and in view of the fact that the parties were, and ever since have been, residents of this state, our courts have the power to relieve the plaintiff by annulling the marriage.

Cunningham, 206 N.Y. at 349 (emphasis added). The majority held that the annulment action could proceed even though, as the dissenting judge noted, the out-of-State marriage was neither “contrary to the prohibition of the natural law, [n]or the express prohibitions of a statute.” *Id.* at 352 (Werner, J., dissenting) (citing *Van Voorhis, Thorp and Moore*).³ In *Holland v. Holland*, 212 N.Y.S.2d 805 (Sup. Ct. Kings County 1961), the trial court, relying upon *Cunningham*,

³ See also *Reid v. Reid*, 72 Misc. 214, 217 (Sup. Ct. Queens Trial Term 1911) (valid marriage of minors in the District of Columbia could not be said to be “contrary to the prohibitions of natural law”) (citation and internal quotation marks omitted), *aff’d*, 146 A.D. 916 (2nd Dep’t 1911).

granted an annulment under similar circumstances. The court distinguished the general rule enunciated by this Court in *Van Voorhis, Thorp and Moore*, stating that “exceptions have grown from the trunk of this general rule *where the countervailing public policy of the domicile of the contracting parties [is] affected . . .*” 212 N.Y.S.2d at 806 (emphasis added).⁴ If, in the words of *Cunningham*, the out-of-State marriage of underage minors, who *could* have married each other in New York with their parents’ consent, was “repugnant to our public policy and legislation,” it would be difficult to conclude that an out-of-State marriage between two members of the same sex, who could *not* have married each other in New York, is not also “repugnant to our public policy and legislation.”

This Court’s opinion in *Cunningham*, which has not been overruled, establishes that there are exceptions to the marriage recognition rule other than those based upon natural law or the express provisions of a statute. Moreover, it is not at all apparent that either of those exceptions adequately explains why a polygamous marriage, lawfully entered into in another jurisdiction (*e.g.*, Saudi

⁴ See also *Mitchell v. Mitchell*, 63 Misc. 580 (Sup. Ct. Erie Sp. Term 1909) (granting annulment to minor residents of New York who were lawfully married in Canada), *but see* *Donohue v. Donohue*, 63 Misc. 111 (Sup. Ct. Erie Trial Term 1909) (denying annulment on similar facts). On the basis of the particular facts before them, three other trial courts denied annulments to minor residents of New York who were lawfully married in another jurisdiction. See *Hilliard v. Hilliard*, 24 Misc. 2d 861 (Sup. Ct. Greene County 1960); *Marone v. Marone*, 105 Misc. 371 (Sup. Ct. N.Y. Sp. Term 1918); and *Reid v. Reid*, 72 Misc. 214 (Sup. Ct. Queens Trial Term 1911).

Arabia), would not be recognized in New York. There is no statute expressly denying recognition to a valid out-of-State polygamous marriage (or, for that matter, any other valid out-of-State marriage). Accordingly, that exception, under the applicable case law, would not apply. And, although the practice of polygamy has been abhorred and condemned in Western law for centuries, it would be difficult to call polygamy a violation of natural law, *i.e.*, law that is binding everywhere and at all times,⁵ given its acceptance among the ancient Hebrews, from whom we derive many of our basic legal and moral principles, as well as among Muslims throughout their fourteen-hundred year history.⁶ Yet, there is surely no question (or at least there should be none) that New York is not required to recognize polygamous marriages, wherever contracted.⁷ And if,

⁵ See *Wightman v. Wightman*, 4 Johns. Ch. at 350 (“[p]rohibitions of the natural law are of absolute, uniform, and universal obligation”) (Chancellor Kent).

⁶ In its discussion of natural law, the online version of the Catholic Encyclopedia notes that “[p]olygamy . . . is not under all circumstances incompatible with the essential principles of a rationally ordered life, since the chief ends prescribed by nature for the marital union—the propagation of the race and the due care and education of offspring—may, in certain states of society, be attained in a polygamous union.” CATHOLIC ENCYCLOPEDIA, Natural Law, Part III, The Qualities of the Natural Law (<http://www.catholic.org/encyclopedia>).

⁷ This Court has displayed a marked reluctance to rely on natural law principles in its jurisprudence. See, e.g., *People v. Onofre*, 51 N.Y.2d 476, 488 n. 3 (1980) (“it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values) (striking down state sodomy statute); *Byrn v. New York City Hospitals Corp.*, 31 N.Y.2d 194, 201 (1972) (recognizing that, on philosophical or religious grounds, “a conceived child may be regarded as a person, albeit at a fetal stage,” but denying that “the legal order necessarily corresponds to the natural order”) (rejecting challenge to pre-*Roe* statute allowing abortion on demand through the twenty-fourth week of pregnancy), *appeal dismissed for want of a substantial federal question*,

notwithstanding its historical antecedents in Judaism and its contemporary manifestations in Islamic and other cultures,⁸ polygamy is still regarded, at least in Western civilization, as a violation of natural law, then same-sex marriage, which until very recently has never been allowed in any society at any time,⁹ should also be regarded as a violation of natural law.

Finally, there is reason to suggest that this Court has given an overly restrictive definition to the second exception to the marriage recognition rule, that based on positive law. The Court has repeatedly cited Joseph Story's famous

410 U.S. 949 (1973). *See also Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 96 (1976) (Breitel, C.J., dissenting) ("putting aside controversial concepts of 'natural law' and, in the Anglo-American jurisprudence, the unique tradition of the common law, there [are] only three rules of law, Constitutions, statutes, and local law or regulations authorized by statute or Constitution"). Given that reluctance, it is at least questionable whether the "natural law" exception to the marriage recognition rule has any independent vitality. That, in turn, suggests that the statutory prohibition—express or implied—of bigamous, polygamous, incestuous and same-sex marriages provides the necessary and sufficient basis for refusing to recognize such marriages lawfully contracted outside the State.

⁸ Polygamy is lawful not only in the many countries whose law is based, wholly or in part, on the Koran (*e.g.*, Algeria, Bangladesh, Egypt, Indonesia, Iraq, Jordan, Libya, Morocco, Pakistan, Syria, Yemen), but also in countries with significant Muslim minorities (India, the Philippines, Singapore and Sri Lanka), where it is allowed for followers of Islam, and several countries in Africa that recognize African customary law (*e.g.*, Burkina Faso, Cameroon, Eritrea, Gabon, Guinea, Kenya, Namibia, Nigeria, South Africa, Uganda, Zambia and Zimbabwe), as well as in the small Asian kingdom of Bhutan, which is Buddhist. *See* Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis*, Final Report for Status of Women Canada 22-25, 27-28 (May 31, 2005) (surveying national policies on polygamy) (<http://ssrn.com/abstract=1360230>).

⁹ The leading academic effort to establish an historical pedigree for the acceptance and toleration of same-sex marriage, *see* William Eskridge, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996), has been subjected to a detailed and devastating critique by two scholars. *See* Peter Lubin and Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271 (Summer 1998).

nineteenth-century COMMENTARIES ON THE LAW OF THE CONFLICT OF LAWS in support of its marriage recognition decisions. See *Matter of May*, 305 N.Y. at 490; *Van Voorhis*, 86 N.Y. at 24-26. A careful examination of Story’s COMMENTARIES indicates that the positive law exception is *not* limited to those laws that expressly prohibit recognition of certain marriages performed in other jurisdictions.

Story enunciates the “general principle” that, “between persons, *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there[,] it is valid everywhere. . . . If invalid there[,] it is equally invalid everywhere.” Joseph Story, COMMENTARIES ON THE LAW OF CONFLICT OF LAWS § 113, at 146 (7th ed. 1872).¹⁰ The rule, however, is subject to exceptions. “The most prominent, if not the only known exceptions to the rule,” Story notes, “are those marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects, entitling themselves, under special circumstances, to the benefit of the laws of their own country.” *Id.* § 113a, at 146-47.¹¹ In reference to the second exception, “those positively prohibited by the public law of a country

¹⁰ This is the same edition of Story’s COMMENTARIES cited by this Court in *May* and, apparently (no edition is specified), the same one cited in *Van Voorhis*.

¹¹ The last exception deals with the unusual circumstances in which a marriage will be recognized even though it was not valid under the laws of the jurisdiction in which it was performed.

from motives of policy,” Story emphasizes that such prohibitions “can apply strictly only to the subjects of that country.” *Id.* § 117, at 160. He then cites the example of an English law “respecting the royal family, by which they are prohibited from contracting marriage unless under special circumstances pointed out in the act.” *Id.* at 161. Although the law on its face (12 Geo. 3, ch. 11) did not *expressly* prohibit foreign marriages by members of the royal family, Story notes that “the provisions of that act have been actually applied to the case of a foreign marriage contracted by one of the royal princes.” *Id.* The law in question, of course, had very limited application (certain members of the royal family). It is cited here solely for the purpose of demonstrating that the exception to the marriage recognition rule for “positive prohibitions,” as understood by Story, is not restricted to prohibitions that expressly reference out-of-State (or out-of-country) marriages.¹²

Reformulation of the Marriage Recognition Rule

In light of the foregoing considerations, the Conference submits that this

¹² “If a citizen of a foreign State, in which State polygamy is legal, would bring his half dozen or so legal wives to our country, the marriage of the six spouses to the one spouse would not be considered legal or valid by us. The reason for that is that *there is a positive law against polygamy.*” *Matter of Incuria*, 155 Misc. 755, 759 (Fam. Ct. Manhattan 1935) (dictum in case refusing to recognize marriage contracted Italy between an aunt and her nephew) (emphasis supplied). This is so, even though the “positive law against polygamy,” to which the court referred in *Incuria*, see N.Y. DOM. REL. LAW § 6, does not, by its own terms, expressly address the validity of a polygamous marriage lawfully contracted in another jurisdiction.

Court should reformulate the marriage recognition rule to give effect to the underlying policy reasons for and against recognizing marriages contracted in other jurisdictions and to harmonize the existing precedents. Under that rule, the courts of this State would recognize, for all purposes, a valid out-of-State marriage between two persons who could have married each other in New York. State courts would not give prospective recognition to any valid out-of-State marriage between two persons who, under New York law, could not have married each other.¹³ In appropriate circumstances, however, typically involving matters relating to probate administration and rights of inheritance, determining survivor's benefits, or adjudicating issues relating to divorce (or separation pending divorce), state courts could give retrospective "recognition" to such marriages. Such limited recognition would not entail acknowledgment of the continuing validity of a marriage that is contrary to the public policy of New York.¹⁴ When an out-of-State marriage between two persons who could not have married each other in

¹³ See *Bell v. Little*, 204 A.D. 235, 237 (4th Dep't 1922) ("[t]he State should not apply the *lex loci contractus* to one of its own citizens when by doing so a situation is created which is not in conformity with its own recognized policy"), *aff'd*, 237 N.Y. 519 (1923).

¹⁴ In *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Ct. App. 1948), the California Court of Appeal held that the State's public policy against polygamous marriage did not prohibit two wives from inheriting equal shares of their husband's estate. *Id.* at 502. The court explained that "if decedent had attempted to cohabit with his two wives in California," that would have violated the State's public policy against polygamy, but "[w]here only the question of descent of property is involved, 'public policy' is not affected." *Id.*

New York ends in the death of one of the spouses or their divorce (or separation pending divorce), permitting state courts to resolve matters attendant thereto does not jeopardize the State's public policy against such marriages. The marriage, after all, is over. This rule, the Conference submits, strikes the appropriate balance between upholding the general principle that a marriage valid where contracted will be recognized everywhere and vindicating the State's public policy forbidding bigamous, polygamous, incestuous and same-sex marriages.

Application of the Reformulated Rule

The reformulated marriage recognition rule the Conference proposes, if adopted by this Court, would provide a more predictable methodology for determining whether, and under what circumstances, New York courts will recognize marriages lawfully contracted in other jurisdictions. Moreover, the reformulated rule is consistent with the results (if not the reasoning) of every reviewing court decision of this State regarding marriage recognition (other than those presently under review by this Court),¹⁵ and all but one of the state trial court decisions to date (excepting those recent trial court decisions dealing with the

¹⁵ In the course of its research, the Conference has not found a single decision of this Court or of the Appellate Division of the Supreme Court that has recognized the *continuing* (present and future) validity of a marriage lawfully contracted in another State between two persons who could not have married each other in New York (for the reasons set forth in this section of the brief, the former "remarriage-after-divorce" cases are not an exception to this statement). This may explain why the New York Legislature has never felt the need to enact a special statute dealing with the non-recognition of foreign (*i.e.*, out-of-State) marriages.

recognition of same-sex marriages).¹⁶

First, “although New York does not itself recognize common-law marriages,” which have been prohibited by statute for more than seventy-five years,¹⁷ “a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted.” *Matter of Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980).¹⁸ Second, “though proxy marriages,” in which one party to the marriage is not physically present but is represented by a third party, “have never been authorized by statute in this State,[¹⁹] they have never been considered repugnant to its public policy and do not contravene the

¹⁶ See *Campione v. Campione*, 107 N.Y.S.2d 170 (Sup. Ct. Queens County 1951) (refusing to annul marriage between an uncle and his niece lawfully contracted in Italy, even though they could not have married each other in New York). *But see Bucca v. State*, 128 A.2d 506, 510 (N.J. Super Ct. Ch. Div. 1957) (rejecting reasoning of *Campione* in case involving similar facts); *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961) (uncle-niece marriage lawfully contracted in Italy would not be recognized in Connecticut, the domiciliary State of the husband). A marriage between an uncle and a niece is not only prohibited (and declared void) by the Domestic Relations Law, see N.Y. DOM. REL. LAW, § 5, subd. 3 (McKinney 1999), but also is classified as a Class E felony (“Incest in the third degree”) under the Penal Code. See N.Y. PENAL CODE § 255.25 (McKinney 2008).

¹⁷ 1933 N.Y. Laws, ch. 606, *codified at* N.Y. DOM. REL. LAW § 11 (first sentence) (McKinney 1999).

¹⁸ See also *Matter of Steiner*, 12 A.D.3d 682 (2nd Dep’t 2004) (following *Mott*); *Matter of Yao You-Xin*, 246 A.D.3d 721 (3rd Dep’t 1998) (same); *Matter of Coney v. R.S.R. Corp.*, 167 A.D.2d 582 (3rd Dep’t 1990) (same); *Matter of Catapone*, 17 A.D.3d 672 (2nd Dep’t 2005) (same).

¹⁹ See N.Y. DOM. REL. LAW § 12 (McKinney 1999) (requiring parties to a marriage to “solemnly declare,” in the presence of the authorized celebrant and attending witness or witnesses, “that they take each other as husband and wife”).

natural law.” *Matter of Valente*, 18 Misc. 2d 701, 704 (Surr. Ct. Kings County 1959). Accordingly, New York will recognize proxy marriages lawfully contracted in jurisdictions that permit such marriages. *Valente* (upholding valid Italian proxy marriage); *Ferraro v. Ferraro*, 192 Misc. 484, 487-88 (Fam. Ct. Kings County 1948) (recognizing valid ceremonial proxy marriage that took place in the District of Columbia), *aff’d sub nom. Fernandes v. Fernandes*, 275 A.D. 777 (2nd Dep’t 1949). Third, although New York law requires the parties to a marriage to be at least eighteen years of age,²⁰ a marriage lawfully contracted between minors in another jurisdiction *may* be recognized in the Empire State.²¹ What must be noted about all three types of marriages—common law, proxy and minors—is that the parties *could* have married each other in New York in a ceremonial marriage in

²⁰ N.Y. DOM. REL. LAW, § 7 (McKinney 1999).

²¹ *See Hilliard v. Hilliard*, 24 Misc. 2d 861 (Sup. Ct. Greene County 1960) (dismissing complaint seeking to annul lawful marriage in Georgia between a fifteen-year-old female resident of New York and a twenty-year-old male resident of Virginia); *Marone v. Marone*, 105 Misc. 371 (Sup. Ct. N.Y. Sp. Term 1918) (dismissing complaint seeking to annul marriage in New Jersey between two residents of New York, one of whom was under the age of eighteen at the time of the marriage); *Reid v. Reid*, 72 Misc. 214 (Sup. Ct. Queens Trial Term 1911) (denying annulment of the lawful marriage in the District of Columbia between a female resident of New York, who was under the age of eighteen at the time of the marriage, and a twenty-one year old male resident of Maryland); *Donohue v. Donohue*, 63 Misc. 111 (Sup. Ct. Erie Trial Term 1909) (dismissing complaint seeking to annul lawful marriage in Canada between two residents of New York, both of whom were under the age of eighteen at the time of the marriage). As previously noted, depending upon the circumstances (the age of the minors, whether they have cohabitated, whether they have had any children), New York courts may grant annulments to out-of-State marriages between underage New York residents. *See Cunningham v. Cunningham*, 206 N.Y. 341 (1912); *Mitchell v. Mitchell*, 63 Misc. 580 (Sup. Ct. Erie Sp. Term 1909); *Holland v. Holland*, 212 N.Y.S.2d 805 (Sup. Ct. Kings County 1961).

which they were both physically present and, in the case of minors, with the consent of their parents and, if necessary, the court.²²

On the other hand, New York does not recognize incestuous or bigamous marriages, even if such marriages were lawfully contracted in another jurisdiction. Thus, “a marriage performed in a foreign jurisdiction between persons of whom one was then bound by an existing marriage is void in this State, even though the same is valid in the jurisdiction where it was contracted.” *People v. Kay*, 141 Misc. 574, 578 (Magis. Ct. 1931), citing *Earle v. Earle*, 141 A.D. 611, 613-15 (1st Dep’t 1910) (same). *See also Benjamin v. Walch*, 160 Misc. 34, 39 (Surr. Ct. N.Y. County 1936) (citing *Earle*); *People v. Ezeonu*, 155 Misc. 2d 344 (Sup. Ct. Bronx County 1992) (defendant in rape prosecution could not raise defense that he was legally married to the victim, who was his “second” or “junior” wife under the laws and customs of Nigeria); *Rubman v. Rubman*, 140 Misc. 671, 672 (Sup. Ct. N.Y. County 1931) (“no matter with what freedom of action and desire two parties, one of whom was an American citizen, entered into a polygamous marriage in a country sanctioning the same as valid, it would here be held void”). And New York will not recognize an incestuous marriage, regardless of the validity of the marriage under the laws of the jurisdiction where it was contracted.

²² N.Y. DOM. REL. LAW, § 15, subd. 2, subd. 3 (McKinney 1999).

Matter of Incuria, 155 Misc. 755 (Fam. Ct. Manhattan 1935) (refusing to recognize marriage between an aunt and her nephew, without regard to whether the marriage was lawful in Italy).

This Court’s decision in *Matter of May*, 305 N.Y. 486 (1953), is not an exception to the reformulated marriage recognition rule the Conference proposes. In *May*, the Court recognized, for purposes of determining who was entitled to letters of administration of an estate, the validity of an out-of-State marriage between an uncle and his niece. The case did *not* concern the *present* recognition of an *existing* marriage that violated the public policy set forth in the Domestic Relations Law’s prohibition of certain consanguineous marriages. *See* N.Y. DOM. REL. LAW § 5, subd. 3 (McKinney 1999) (declaring “incestuous and void” a marriage between “[a]n uncle and niece or an aunt and nephew”).²³ In *May*, the wife (the niece) had died several years earlier and the issue before the Court was whether the surviving husband (her uncle) or their children had the right to administer her estate. It should also be noted that the predicate for the holding in *May*—that the marriage was lawful in the State in which it had been contracted

²³ *Cf. United States ex rel. Devine v. Rodgers*, 109 F. 886, 888 (E.D. Pa. 1901) (refusing to recognize validity of Jewish marriage, lawfully contracted in Russia, between an uncle and his niece, where such marriage could not have been entered into in Pennsylvania and “continuance of the relation here [in Pennsylvania] would at once expose the parties to indictment in the criminal courts [for incest], and to punishment and imprisonment in the penitentiary”).

(Rhode Island)—was based upon an unconstitutional statute.²⁴ Once the invalidity of that statute is recognized, the underlying basis for the *May* opinion collapses.

Prior to 1966, New York law prohibited the remarriage of a party against whom a divorce had been granted on the grounds of adultery. Initially, the prohibition of the guilty spouse’s right to remarry extended throughout the lifetime of the innocent spouse.²⁵ An amendment to the statute, however, allowed a court, upon a showing of good conduct, to grant the guilty spouse permission to remarry. At first, such permission could not be sought or granted until five years after the divorce,²⁶ but this period was later reduced to three years.²⁷ The statutory

²⁴ Rhode Island, like New York, prohibits marriages between uncles and nieces, and aunts and nephews. See R.I. GEN. STAT. §§ 15-1-1, 15-1-2 (2003). Such marriages are “null and void.” *Id.* § 15-1-3. Rhode Island, however, specifically exempts from the strictures of §§ 15-1-1 through 15-1-3 “any marriage which shall be solemnized among the Jewish people, within the degrees of affinity or consanguinity allowed by their religion.” *Id.* § 15-1-4. The exemption for members of only the Jewish religion was (and is) unconstitutional under the Supreme Court’s decision in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), in which the Court struck down the creation of a public school district that excluded all but Satmar Hasidim. In *Kiryas Joel*, the Court held that, while the Constitution “allows the State to accommodate religious needs by alleviating special burdens,” the Establishment Clause forbids the State from “singl[ing] out a particular religious sect for special treatment, . . .” *Id.* at 705, 706. “[W]hatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored.” *Id.* at 706-07 (citations omitted). In creating an exception to the prohibition of marriages between uncles and nieces only for members of the Jewish faith, § 15-1-4 violates the Establishment Clause. See *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another”).

²⁵ See N.Y. REV. STAT. Pt. II, ch. 8, § 49 (1829).

²⁶ 1897 N.Y. Laws, ch. 452, *codified at* N.Y. DOM. REL. LAW § 8 (1909).

²⁷ 1919 N.Y. Laws, ch. 265, *codified at* N.Y. DOM. REL. LAW § 8 (Cahill 1923).

prohibition of remarriage after divorce was repealed in 1966.²⁸

In a series of cases, this Court held that the statutory prohibition against remarriage of the guilty spouse was penal in nature (because adultery was then a criminal offense punishable as a misdemeanor, if not a felony) and that, in the absence of any language in the statute purporting to have extraterritorial effect, the prohibition could not be applied to invalidate otherwise valid marriages contracted outside the State of New York, even by residents of the State who were seeking to evade the strictures of the statute. *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881); *Thorp v. Thorp*, 90 N.Y. 602 (1882); *Moore v. Hegeman*, 92 N.Y. 521 (1883). See also *Fisher v. Fisher*, 250 N.Y. 313, 319 (1929) (citing *Moore*). Accordingly, when the guilty party to a divorce remarried in another State at time when he (or she) could not have remarried in New York, the courts of this State would recognize the validity of the marriage. *Van Voorhis, Thorp, Moore, Fisher*.

The “remarriage-after-divorce” cases are readily distinguishable from the reformulated marriage recognition rule the Conference proposes. First, they were based on the theory that the statutory prohibition on remarriage (of the spouse divorced on the grounds of adultery) was penal in nature (because adultery was a crime) and, as such, could have no extraterritorial effect in the absence of special

²⁸ 1966 N.Y. Laws, ch. 254, § 1, *codified at* N.Y. DOM. REL. LAW § 8 (McKinney 1977).

legislation. *See Matter of Peart*, 277 A.D. 61, 70 (1st Dep’t 1960) (“[t]he view in New York has long been that prohibitions against remarriage are, wherever possible, to be treated as in the nature of penalties or restrictions and not to incapacitate the parties from contracting a valid marriage elsewhere”). The prohibition of same-sex marriage, however, is not penal in nature because the underlying sexual conduct attendant to a same-sex marriage is not (and cannot constitutionally be treated as) criminal. *See People v. Onofre*, 51 N.Y.2d 476 (1980) (declaring New York sodomy statute unconstitutional on federal constitutional grounds); *Lawrence v. Texas*, 539 U.S. 558 (2003) (same with respect to Texas sodomy statute). The understandable reluctance of this Court to extend the scope of a criminal statute (adultery) and its related civil consequences (disqualification to remarry) to conduct engaged in outside the State, absent clear legislative warrant, is of little help in determining whether same-sex marriages, lawfully contracted in another State, should be recognized in New York.

Second, in *Van Voorhis*, this Court emphasized that the statutory prohibition on remarriage of the spouse divorced on the grounds of adultery was a “personal disqualification” that did not “arise from any law of nature or of nations, but simply from positive law.” 86 N.Y. at 36. The prohibition of same-sex marriage, however, is not a “personal disqualification” based upon individual conduct.

Rather, it applies to anyone who would want to enter into a same-sex marriage. And, given the near universal prohibition of same-sex marriage,²⁹ a policy not to recognize such marriages may be said to embody the “law of nations.”³⁰

Third, the former prohibition of remarriage after divorce was of doubtful constitutionality. A statute forbidding a party found guilty of adultery in a divorce proceeding from remarrying—either during the lifetime of the innocent spouse or for a period of years and then only after approval of a court—obviously interferes with the fundamental constitutional right to marry recognized in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Such interference cannot be justified by an interest in “punishing” the spouse guilty of adultery. *See generally Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down statute providing that any resident of the State having minor children not in his custody whom he is under a court order

²⁹ Of the 192 Member States in the United Nations, only six—Belgium, Canada, the Netherlands, Norway, Spain and Sweden—or seven, if South Africa is included, allow same-sex marriage. The details may be reviewed at the website of the Marriage Law Foundation. *See* <http://www.marriagelawfoundation.org/publications/International.pdf>.

³⁰ More than one hundred forty years ago, the Supreme Court of Indiana asked, “What . . . then constitutes the thing called a marriage? what is it in the eye of the *jus gentium* [law of nations]? It is the union of one man and one woman, ‘so long as they both shall live,’ to the exclusion of all others, by an obligation which, during that time, the parties can not, of their own volition and act, dissolve, but which can be dissolved only by authority of the State. Nothing short of this is a marriage. And nothing short of this is meant, when it is said, that marriages, valid where made, will be upheld in other States.” *Roche v. Washington*, 19 Ind. 53, 57 (1862). *See also Matter of Shields*, 783 N.Y.S.2d 270, 274 (Sup. Ct. Rockland County 2004) (referring to the “agelong and virtually universal understanding of the term ‘marriage’ [as] the state of union between persons of the opposite sex”) (citation and internal quotation marks omitted), *aff’d*, 32 A.D.3d 1036 (2nd Dep’t 2006).

or judgment to support may not marry without court approval).

Finally, it must be noted that a review of the “remarriage-after-divorce” decisions citing *Van Voorhis*, *Thorp*, *Moore* and *Fisher* fails to disclose any case in which a state court recognized the continuing validity of a marriage (contracted in another State) of a New York domiciliary who was divorced on grounds of adultery in New York and who was therefore barred by state law from remarrying. In each case, one of the spouses had died and there was an issue regarding who was entitled to letters of administration,³¹ an inheritance or survivor’s benefits,³² or there was an action for divorce (or separation pending divorce).³³

With respect to same-sex marriages lawfully contracted in another jurisdiction, the reformulated rule the Conference proposes would allow the courts of New York State to adjudicate divorces (or separation pending divorce) of same-sex couples and issues relating thereto (*e.g.*, child custody),³⁴ and to determine matters relating to probate administration and inheritance arising out of a same-sex

³¹ *Matter of Peart*, 277 A.D. 61 (1st Dep’t 1950).

³² *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881) (construction of a will); *Moore v. Hegeman*, 92 N.Y. 521 (1883) (determining lawful issue of a decedent); *Olmsted v. Olmsted*, 118 A.D. 69 (1st Dep’t 1907) (heirship); *Matter of Nichols v. Buffalo Weaving & Belting Co.*, 276 A.D. 228 (3rd Dep’t 1949) (right to receive accidental death benefits as surviving spouse).

³³ *Thorp v. Thorp*, 90 N.Y. 602 (1882) (divorce); *Fisher v. Fisher*, 250 N.Y. 313 (1929) (separation).

³⁴ *See, e.g., C.M. v. C.C.*, 21 Misc.3d 926 (Sup. Ct. N.Y. County 2008) (divorce); *Beth R. v. Donna M.*, 19 Misc.3d 724 (Sup. Ct. N.Y. County 2008) (same).

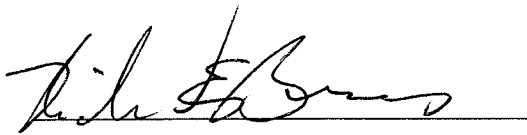
marriage. The rule, however, would bar the continuing recognition of such marriages,³⁵ thus requiring reversal of the judgment of the Appellate Department in this case.

³⁵ See, e.g., *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dep't 2008) (holding that plaintiff's same-sex Canadian marriage was entitled to recognition in New York State for purposes of her application for spousal health care benefits); *Godfrey v. DiNapoli*, 22 Misc.3d 249 (Sup. Ct. Albany County 2008) (same with respect to an award of retirement benefits).

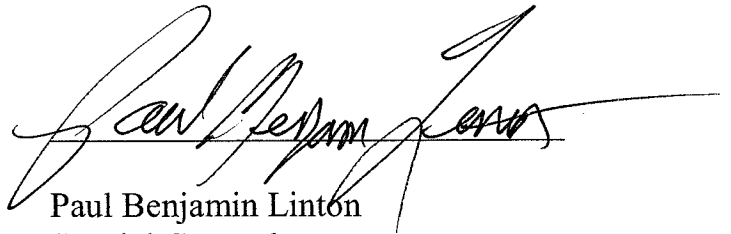
CONCLUSION

For the foregoing reasons, *amicus curiae*, the New York State Catholic Conference, respectfully requests that this Honorable Court reverse the judgment of the Supreme Court, Appellate Division, Third Department.

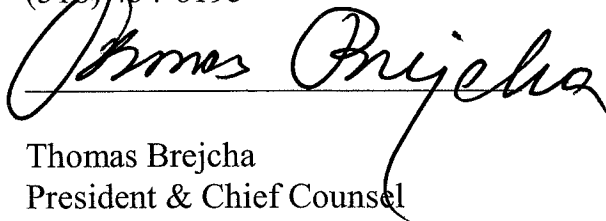
Respectfully submitted,



Richard E. Barnes
Counsel of Record
New York State Catholic Conference
465 State Street
Albany, New York 12203
(518) 434-6195



Paul Benjamin Linton
Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, Illinois 60062-3614
(847) 291-3848



Thomas Brejcha
President & Chief Counsel
Thomas More Society
29 S. La Salle Street
Suite 440
Chicago, Illinois 60603
(312) 782-1680

Affidavit of Service

I, Paul Benjamin Linton, an attorney, affirm under penalties of perjury that on July 17, 2009, I served four copies of the attached *Brief of the New York State Catholic Conference as Amicus Curiae in Support of Plaintiffs-Appellants* to the following counsel of record by depositing the same in the United States Post Office, Northbrook, Illinois, first class postage prepaid:

James P. Trainor
Cutler, Trainor & Cutler, LLP
2 Hemphill Place, Suite 153
Malta, New York 12020

Susan L. Sommer
Lambda Legal Defense &
Education Fund
120 Wall Street, Suite 1500
New York, New York 10005-3904

Benjamin W. Bull
Brian W. Raum
James A. Campbell
Alliance Defense Fund
15100 North 90th Street
Scottsdale, Arizona 85260

Jeffrey S. Tractman
Norman C. Simon
Kramer, Levin, Naftalis &
Frankel, LLP
1177 Avenue of the Americas
New York, New York 10036-2714

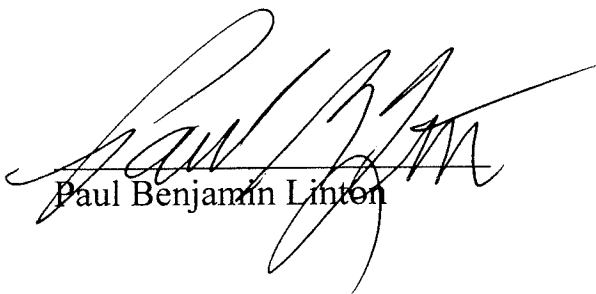
Attorneys for Plaintiffs-Appellants

Attorneys for Defendants-
Intervenors-Respondents

Sasha Samberg-Champion
State of New York
Office of the Attorney General
120 Broadway, 25th Floor
New York, New York 10271


Attorney for Defendants-Respondents

Dated: July 17, 2009



Paul Benjamin Linton

Signed before me
this 17th day of July, 2009,
in Glenview, Illinois



Notary

