

STATE OF NEW YORK  
COURT OF APPEALS

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KENNETH J. LEWIS, et al.,  
*Plaintiffs-Appellants,*  
-against-  
NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, et al.  
*Defendants-Respondents,*  
-and-  
PERI RAINBOW and TAMELA SLOAN,  
*Defendants-Intervenors-Respondents.*

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MARAGARET GODFREY, et al.,  
*Plaintiffs-Appellants,*  
-against-  
ANDREW J. SPANO, in his official capacity as the Westchester County Executive,  
*Defendant-Respondent,*  
-and-  
NEW YORK STATE COMPTROLLER  
*Defendant-Intervenor-Respondent*  
-and-  
MICHAEL SABATINO and ROBERT VOORHEIS,  
*Defendants-Intervenors-Respondents.*

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BRIEF OF THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION, THE EMPIRE STATE PRIDE AGENDA, MARRIAGE EQUALITY NEW YORK, THE LESBIAN, GAY, BISEXUAL & TRANSGENDER COMMUNITY CENTER, AND THE LOFT IN SUPPORT OF DEFENDANTS-RESPONDENTS

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## DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), *amici* hereby disclose that they do not have any corporate parents, subsidiaries or affiliates. *Amicus* the New York Civil Liberties Union (NYCLU) hereby discloses that it is the New York State affiliate of *amicus* the American Civil Liberties Union (ACLU), and *amicus* ACLU hereby discloses that it has affiliate organizations throughout the United States, including NYCLU.

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## PRELIMINARY STATEMENT

Going all the way back well into the nineteenth century, the black letter principle that New York “recognizes as valid a marriage considered valid in the place where celebrated” has been “so well settled . . . as to become a maxim in the law.” *See Van Voorhis v. Brintnall*, 86 N.Y. 18, 25, 26 (1881). This “marriage recognition rule,” as it came to be known, was developed under the common law to address precisely the type of issue present here. It provides that a marriage validly entered into outside of New York will be recognized in this State, unless it is subject to one of two rarely applied exceptions. These two exceptions are either that: (1) recognition of the out-of-state marriage is expressly prohibited by a New York statute; or (2) the marriage is otherwise “offensive,” “abhorrent,” or “obnoxious” to New York public policy. *In re May*, 305 N.Y. 486, 492 (1953); *see also Welsback Elec. Corp. v. MasTec North Am., Inc.*, 7 N.Y.3d 624, 628-29 (2006).

For well over a century, this common law marriage recognition rule has been routinely, consistently and indiscriminately applied to every single out-of-state marriage that has been considered either by this Court or by the lower courts of this State. Moreover, *amici curiae* have found only two instances—in the case of polygamy or incest—where a New York court, in considering the validity of an out-of-state marriage under the marriage recognition rule, held that one of the two

established exceptions applied and refused to recognize the legitimacy of the out-of-state marriage. *See, e.g., People v. Ezeonu*, 155 Misc.2d 344, 346 588 N.Y.S.2d 116, 117 (Sup. Ct. Bronx Cty. 1992) (refusing to recognize polygamous marriage); *Incuria v. Incuria*, 155 Misc. 755, 759, 280 N.Y.S. 716, 721-22 (N.Y. Dom. Rel. Ct. 1935) (refusing to recognize incestuous marriage between aunt and nephew). Surely, the out-of-state marriages at issue on this appeal could hardly be more distinguishable on the facts or on policy grounds than the polygamous and incestuous marriages at issue in those cases.

It is therefore not surprising that appellants do not really contest that if applied here as it has always been applied by the courts, New York's marriage recognition rule and bedrock principles of comity compel the recognition of otherwise valid marriages of same-sex couples in this State. Appellants instead ask this Court to disregard that centuries-old common law principle and take the extraordinary step of holding either that the marriage recognition rule simply does not apply or that there is yet a third, previously unknown exception to the marriage recognition rule for the marriages of same-sex couples. Neither this Court's jurisprudence, nor New York's statutory and constitutional principles, however, would permit such an obviously unequal application of the law. The fact that the married couples at issue on this appeal are of the same sex cannot and should not

deter this Court from applying long-standing and well-settled principles of the common law.

Indeed, appellants do not cite a single case to support the proposition that the marriage recognition rule does not apply or that there is some third exception for valid civil marriages of same-sex couples. Rather, they advance a theory, cut from whole cloth, that because marriages of same-sex couples are, in their view, “structurally different” from marriages of heterosexual couples, the marriage recognition rule simply does not apply. But the notion that an out-of-state marriage of a same-sex couple that was authorized and valid under the law of a neighboring state such as Massachusetts or Connecticut is not really a marriage for purposes of New York’s marriage recognition rule is dramatically out-of-step with the statutes, policies and judicial decisions of this State, runs counter to the current widely held understanding that the marriages of same-sex couples are, indeed, marriages, and reflects the illegitimate view that same-sex couples should be treated differently under the law than heterosexual couples should. *See, e.g., 303 West 42nd Street Corp. v. Klein*, 46 N.Y.2d 686, 692 (1979) (equal protection forbids government from applying law “with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances”) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

Applying the marriage recognition rule—as the law requires—there can be little doubt that the marriages at issue here do not fall under either of the two recognized exceptions to the rule: clearly, there is no statute prohibiting the recognition in New York of marriages of same-sex couples and such marriages are certainly not “offensive” or “abhorrent” to New York’s public policy. For this reason, when considering this precise issue in 2004, the New York Attorney General opined that “New York law presumptively requires that parties (to marriages between same-sex couples from other jurisdictions) must be treated as spouses for purposes of New York law.” Attorney General Elliot Spitzer’s Legal Memo, (Mar. 3, 2004), *available at* [http://www.prideagenda.org/Portals/0/pdfs/spitzer\\_marriage\\_letter.pdf](http://www.prideagenda.org/Portals/0/pdfs/spitzer_marriage_letter.pdf). And since 2004, nearly every New York court to consider the validity of an out-of-state marriage of a same-sex couple under common law principles has recognized such marriages as valid in this State. *See, e.g., Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep’t 2008); *Lewis v. N.Y.S. Dep’t of Civil Serv.*, 60 A.D.3d 216, 872 N.Y.S.2d 578 (3d Dep’t 2009); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (N.Y. Sur. Ct. 2009).<sup>1</sup>

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<sup>1</sup> *Amici curiae* are aware of only one reported lower court decision, which did not apply the common law principles to determine the validity of an out-of-state marriage of a same-sex couple, and that decision was subsequently vacated as moot by the Appellate Division, Second Department. *Funderburke v. Dep’t of Civil Service*, 13 Misc.3d 284, 822 N.Y.S.2d 393 (N.Y. Sup. Ct. Nassau County 2006) (declining to recognize Canadian marriage of same-sex couple for benefit purposes), *vacated as moot*, 49 A.D.3d 809, 854 N.Y.S.2d 466 (2d Dep’t 2008).

Indeed, efforts in the Legislature to withhold recognition of out-of-state marriages of same-sex couples have been consistently and overwhelmingly rejected. And, of course, only months ago, the New York State Assembly passed a bill (for the second time) that would actually extend the right to marry *in* New York to same-sex couples. Given these and other legislative, executive and judicial pronouncements, there can be little question that, while New York does not *yet* authorize same-sex couples to enter into a civil marriage in this State, honoring marriages validly performed in another jurisdiction is not only not “offensive” or “abhorrent,” but instead is perfectly consistent with the public interest and public policy.

This appeal thus presents the application of the well-settled marriage recognition rule, *Van Voorhis*, 86 N.Y. at 25, to same-sex couples’ out-of-state marriages. The Third Department below, in *Lewis v. N.Y.S. Dep’t of Civil Serv.*, 60 A.D.3d 216, 872 N.Y.S.2d 578 (3d Dep’t 2009), following a prior decision of the Fourth Department, *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep’t 2008), not only applied the well-settled marriage recognition rule to marriages of same-sex couples, but in so doing, decided that such marriages are entitled to recognition in New York. The Second Department, in *Godfrey v. Spano*, 57 A.D.3d 941, 871 N.Y.S.2d 296 (2d Dep’t 2008), likewise held that a County executive order requiring recognition of same-sex couples’

valid out-of-state marriages is lawful and consistent with the County Executive's authority. This Court should affirm.

**INTEREST OF AMICI CURIAE**

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States, and has more than 500,000 members. The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the ACLU and is a nonprofit, nonpartisan organization with approximately 50,000 members. Both organizations have a long history of legal advocacy to protect the rights of all people, regardless of sexual orientation and gender identity and expression, to equal treatment under the law. Because the recognition of valid out-of-state marriages of same-sex couples in this state, at issue in this appeal, implicates the fair and equal application of the law to all individuals, the ACLU and NYCLU hereby file as *amici curiae* to highlight to this Court the importance of affirming the decisions below.

Founded in 1990, the Empire State Pride Agenda (The Pride Agenda) is New York's statewide civil rights and advocacy organization committed to winning equality and justice for LGBT New Yorkers and their families. The Pride Agenda has offices in New York City and Albany and is one of the largest statewide LGBT organizations in the country. The Pride Agenda is dedicated to

ensuring that all New Yorkers are protected from discrimination and that all New York families are supported by their government. The organization is a leader in working to achieve equal protection of LGBT families by state government, and as such has continuously tracked the legal protections afforded to New York's same-sex couples and their families by all three branches of New York State government.

Founded in 1998, Marriage Equality New York (MENY) is a grassroots, all-volunteer organization with over 3,000 members and supporters, and the oldest organization in the state of New York to advocate full and equal marriage for all families. MENY and its dedicated volunteers are devoted to ending discrimination in civil marriage through education, awareness and media campaigns, political actions, and coalition building. While same-sex couples currently cannot marry in this State, MENY supports this State's recognition of same-sex couples' out-of-state marriages and has joined this brief in support of affirming the decisions below.

The Lesbian, Gay, Bisexual & Transgender Community Center (LGBT Community Center) provides a home for the birth, nurture and celebration of organizations, institutions and culture devoted to LGBT issues; cares for individuals and groups in need; educates the public and community concerning LGBT issues; and empowers individuals and groups to achieve their fullest

potential. Established in 1983, the LGBT Community Center has grown to become the largest LGBT multi-service organization on the East Coast and second largest LGBT community center in the world. The LGBT Community Center runs many programs, including Center Families, a model for LGBT family organizing that promotes the legitimacy and visibility of LGBT families. More than 2,500 families in the tristate area partake in the Center Families program. The LGBT Center joins in this brief due to its strong belief in equal rights for same-sex couples and their families.

Located in White Plains (Westchester County), New York, The LOFT is a not-for-profit, community-based organization serving the lesbian, gay, bisexual, and transgender (LGBT) community of the lower Hudson Valley. Founded in October 1983 as a meeting place for gay and lesbian groups and organizations, The LOFT has continued to grow and serve the LGBT community through outreach, support, programming, and services and has furthered the cause for inclusion, diversity and pride through education, advocacy and celebration. Numerous LGBT families in Westchester County benefit from having their State and County government recognize their out-of-state marriage. Accordingly, The LOFT joins this brief in support of affirming the decisions below, which will serve to provide peace of mind to many Westchester families and other families throughout the State.

## **STATEMENT OF FACTS**

In the interest of brevity and efficiency, *amici curiae* adopt and incorporate by reference the statements of facts in defendants-respondents' and defendants-intervenors-respondents' memoranda of law.

## **ARGUMENT**

This Court should affirm the Second and Third Department decisions below on the grounds that this State's long-standing marriage recognition rule compels recognition in New York of valid marriages of same-sex couples.

### **I.**

#### **The Marriage Recognition Rule Applies to All Marriages, Including Marriages of Same-Sex Couples**

The core of appellants' argument is that the common law marriage recognition rule—which has routinely and consistently been applied in New York for over a century—simply does not apply to marriages of people of the same sex. (Lewis Br. at 14; Godfrey Br. at 12.) This argument is not only inconsistent with this Court's jurisprudence, but finds no support in law or reason. Not only has the marriage recognition rule, by definition and in practice, always been applied to *all* marriages valid where solemnized, but to exclude marriages of same-sex couples from the equal application of this rule would be inconsistent with the fundamental principles of law and equity. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[I]mposing a broad and undifferentiated disability on a single named group” is “exceptional” and “invalid.”).

### A. The Marriage Recognition Rule Constitutes Well-Settled Law

For over one hundred and twenty years, this Court has consistently applied the marriage recognition rule to determine whether New York will recognize a marriage solemnized in another jurisdiction, regardless of whether the marriage would have been valid if performed in New York. *See 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); *Matter of May*, 305 N.Y. 486 (1953); *Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44 (1970); *Matter of Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289 (1980). From its first application in this State, the rule was recognized as “well established” in the common law, *Van Voorhis*, 86 N.Y. at 24-25, and it was reaffirmed as “settled law” over fifty years ago, *May*, 305 N.Y. at 490.

Never has this or any New York court excluded any class or group of people or type of marriage from the application of the rule. To the contrary, this Court has applied the rule to a broad range of marriages that could not have been entered into in this State, including those involving divorced adulterers and new spouses, *Van Voorhis*, 86 N.Y. 18; *Thorp*, 90 N.Y. 602; *Moore*, 92 N.Y. 521, incestuous relationships, *May*, 305 N.Y. 486, and common-law marriages, *Farber*, 26 N.Y.2d 44; *Mott*, 51 N.Y.2d 289. Lower courts in New York have even applied the rule to “proxy marriages,” where one of the spouses to a marriage was not

present at the marriage ceremony, *Fernandes v. Fernandes*, 275 A.D. 777, 87 N.Y.S.2d 707 (2d Dep't 1949); *Matter of Valente's Will*, 18 Misc.2d 701, 188 N.Y.S.2d 732 (Surr. Ct. Kings County 1959), and marriages where the wife was as young as fifteen, *Hilliard v. Hilliard*, 24 Misc.2d 861, 209 N.Y.S.2d 132 (Sup. Ct. Greene County 1960); *Donahue v. Donahue*, 63 Misc. 111, 116 N.Y.S. 241 (Sup. Ct. Erie County 1909).

Time and again, even when judges have disagreed on whether a particular marriage will ultimately be recognized under the rule, they apply the rule uniformly and indiscriminately. *Compare May*, 305 N.Y. at 490 (applying the rule to recognize an incestuous marriage whose formation would be criminally punishable in this State) *with id.* at 494 (Desmond, J., dissenting) (applying the rule even though incestuous relationships “have been condemned by public opinion for centuries”). As stated by this Court, this unfailing application of the marriage recognition rule serves the dual purpose of promoting stability in marital relationships, *Van Voorhis*, 86 N.Y. at 26, and safeguarding the authority of the Legislature to determine if out-of-state marriages should be denied recognition, *May*, 305 N.Y. at 492 (the judiciary should not find that out-of-state marriages are prohibited without explicit legislative action).

## B. Marriages of Same-Sex Couples Are Marriages

Notwithstanding this long, uninterrupted history, appellants argue that the common law marriage recognition rule should not be applied to out-of-state marriages of people of the same sex. As support for this extraordinary position, appellants contend that marriages of same-sex couples are somehow “structurally” different from the marriages of heterosexual couples, (Lewis Br. at 14; Godfrey Br. at 12), and that, because of this purported “structural difference,” the marriage recognition rule should not be applied. In other words, appellants argue that the tens of thousands of marriages of same-sex couples taking place over the past several years, *see* Ben Furmas and Josh Rosenthal, *Benefits Denied* at 2, Center for American Progress, Mar. 2009, *available at* [http://www.americanprogress.org/issues/2009/03/benefits\\_denied.html](http://www.americanprogress.org/issues/2009/03/benefits_denied.html), are not really marriages at all.

Appellants’ argument misses the undeniable fact that marriages of people of the same sex are treated and accepted as marriages with the same kinds of rights, responsibilities and relationships that have always attended to civil marriage and not some “altogether different” type of union, (Lewis Br. at 22; Godfrey Br. at 35). *See Hernandez v. Robles*, 7 N.Y.3d 338, 358-59 (2006) (the Legislature may “extend marriage or some or all of its benefits to same-sex couples”); *see also* A.7732, 232d Sess., Reg. Sess. (2009) (bill extending marriage rights to same-sex couples). Indeed, same-sex couples have been marrying in

other states and countries—such as Massachusetts, Connecticut and Canada—for years and there has been no “structural” change to the institution of civil marriage in any of those jurisdictions. To be sure, New York has already been recognizing marriages of same-sex couples for the past five years, again, not only without any change to the institution of civil marriage, but with growing acceptance and support for the passage of a bill permitting the marriages of same-sex couples in this State. (*See infra* at 14.)

First and fundamentally, the actions of the New York Legislature clearly demonstrate that same-sex couples’ marriages are, indeed, marriages. As an initial matter, the Legislature repeatedly has dismissed efforts by a small minority to prohibit the recognition in New York of out-of-state marriages of same-sex couples. Although a statutory prohibition on the recognition of marriages of same-sex couples has been introduced in the Legislature every year since 1996, none of these bills has ever been reported out of committee. *See, e.g.*, A.4978/S.2800, 230th Sess., Reg. Sess. (introduced Feb. 12, 2007). In fact, in the last four legislative sessions support for a so-called “Defense of Marriage Act” in New York has dwindled to practically nothing.<sup>2</sup> The fact that valid out-of-state

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<sup>2</sup> In the 2003–2004 session, the bill had thirty-eight total sponsors (including main sponsors, co-sponsors and multi-sponsors from both the Assembly and the Senate); thirty in the 2005–2006 session, and a mere fifteen in the 2007–2008 session. *See* A.2998/S.2220, 226th Sess., Reg. Sess. (introduced Feb. 3 & 21, 2003); A.4097/S.2056, 228th Sess., Reg. Sess. (introduced Feb. 8, 2005); A.4978/S.2800, 230th Sess., Reg. Sess. (introduced Feb. 12,

marriages of same-sex couples are marriages for purposes of the marriage recognition rule (and any other purpose) is demonstrated by these failed attempts to prohibit recognition of such marriages in New York State. As a matter of logic and common sense, the State would not have to legislate *against* the recognition of out-of-state marriages of same-sex couples, if, as appellants' contend, same-sex couples could not get "married" in other states, regardless of the law.

Not only has the Legislature overwhelmingly refused to withhold recognition for out-of-state marriages of same-sex couples, but it is actually on the verge of passing a law permitting same-sex couples to marry within this State. The New York State Assembly has twice passed a bill, by a considerable margin, that would allow same-sex couples to marry in New York, and support for such a bill continues to grow. A.7732, 232d Sess., Reg. Sess. (2009) (56 sponsors for the bill and an Assembly vote of 89-52 in favor of the bill); A.8590, 230th Sess., Reg. Sess. (2007) (Assembly vote of 85-61 in favor of the bill).<sup>3</sup> And indeed, the Governor has expressed his unequivocal intention to sign into law a bill permitting

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2007). This year the bill was introduced in only the Assembly with only one sponsor and no cosponsors. See A.3000, 232d Sess., Reg. Sess. (introduced Jan. 22, 2009).

<sup>3</sup> As for the Senate, although recent polling of New York Senators suggests that such a vote would be very close in the Senate, Josh Robin, *Lawmakers Maintain Divide Over Gay Marriage Bill*, June 4, 2009, available at [http://www.nyl.com/content/top\\_stories/100201/lawmakers-maintain-divide-over-gay-marriage-bill/Default.aspx](http://www.nyl.com/content/top_stories/100201/lawmakers-maintain-divide-over-gay-marriage-bill/Default.aspx), if and when the Senate will consider this or any legislation is presently unknown in light of the recent turmoil in the New York Senate. See Danny Hakim, *With Senate Astir, Governor Will Delay Same-Sex Marriage Bill*, N.Y. TIMES at A13, July 11, 2009; Danny Hakim, *In the New York Senate, Order Is Restored, but Decorum Isn't*, N.Y. Times at A14, July 18, 2009.

same-sex couples to marry in New York. *See, e.g.,* Jeremy W. Peters, *Paterson Introduces a Same-Sex Marriage Bill*, N.Y. Times at A1, Apr. 17, 2009.

The Executive branch, in turn, as well as numerous local governments, have announced policies that explicitly recognize that valid out-of-state marriages of same-sex couples should be accorded the same treatment as marriages of heterosexual couples. In 2004, the Attorney General issued an opinion in which his office concluded that although the Legislature did not intend to authorize marriages of same-sex couples under the Domestic Relations Law, “New York law presumptively requires that parties (to same-sex marriages from other jurisdictions) must be treated as spouses for purposes of New York law.” Attorney General Elliot Spitzer’s Legal Memo, (Mar. 3, 2004), *available at* [http://www.prideagenda.org/Portals/0/pdfs/spitzer\\_marriage\\_letter.pdf](http://www.prideagenda.org/Portals/0/pdfs/spitzer_marriage_letter.pdf). In 2007, in a brief filed with the Fourth Department, the current Attorney General Andrew Cuomo confirmed that same-sex spouses should be treated as married under New York law, arguing:

[F]ar from being abhorrent to public policy, recognizing same-sex marriages validly performed elsewhere *is* the declared policy of the state, as reflected in the pronouncements of the Department of Civil Service, the Office of the Comptroller, and the Office of the Attorney General. That should be the end of the analysis.

*See Martinez v. County of Monroe* (4th Dep’t 2008), Brief of the Attorney General of the State of New York as *Amicus Curiae* in Support of Plaintiff-Appellant,

Docket No. 06-2591, (dated Aug. 16, 2007) at 1-2, *available at* [http://www.nyclu.org/files/martinez\\_v\\_monroe\\_ag\\_amicus\\_081607.pdf](http://www.nyclu.org/files/martinez_v_monroe_ag_amicus_081607.pdf) (emphasis in original). Of course, Attorney General Cuomo's view on the public policy of the State is reaffirmed by his role in the appeals at issue here.

The New York State Comptroller similarly issued an opinion in 2004 enabling the same-sex spouses of state employees to receive certain benefits through the New York State Retirement System. Op. of N.Y. State Comptroller Alan G. Hevisi (Oct. 8, 2004), and the current Comptroller renewed that commitment in 2007. In addition, the New York State Department of Civil Service ("DCS") announced its policy, at issue in *Lewis*, to recognize as valid out-of-state marriages of same-sex couples for the purpose of providing spousal benefits under the New York State Health Insurance Program and other Department-administered benefit programs. NYS DCS, Employee Benefits Division Policy Memorandum, revised May 1, 2007. New York City reached the same conclusion with respect to certain benefits under its pension system. Letter of Corporation Counsel Michael A. Cardozo to Hon. Michael R. Bloomberg, dated Nov. 17, 2004. And last year, Governor Paterson clarified that there is a statewide policy of recognizing out-of-state marriages of same-sex couples at all state agencies. Memorandum from David Nocenti to Agency Counsel (May 14, 2008), *available at* [http://www.nyclu.org/files/Nocenti\\_Order\\_05.14.08.pdf](http://www.nyclu.org/files/Nocenti_Order_05.14.08.pdf). Both the policies of

Governor Paterson and the Comptroller and have been upheld by lower courts. *See Golden v. Paterson*, 23 Misc.3d 641, 877 N.Y.S.2d 822 (N.Y. Sup. Ct. Bronx County 2008) (upholding Governor's guidance to state agencies to recognize out-of-state marriages of same-sex couples); *Godfrey v. DiNapoli*, 22 Misc.3d 249, 866 N.Y.S.2d 844 (N.Y. Sup. Ct. Albany County 2008) (upholding state comptroller's recognition of Canadian marriage of same-sex couple).

At the local level, at least ten municipalities across the State now explicitly recognize the out-of-state marriages of same-sex couples, including Albany, Binghamton, Buffalo, Brighton, Ithaca, New York City, Nyack and Rochester.<sup>4</sup> Moreover, at least ten municipalities and counties have created domestic partnership registries that are available to same-sex couples,<sup>5</sup> and more have extended health benefits to the partners of public sector employees.<sup>6</sup>

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<sup>4</sup> *See* Statement of Gerald D. Jennings, Mayor of Albany (Oct. 1, 2005); City of Binghamton, N.Y. Executive Order No. 2007-01 (June 1, 2007); Statement of Anthony M. Masiello, Mayor of Buffalo (Mar. 5, 2004); Statement of Sandra Frankel, Town Supervisor of Brighton (Mar. 5, 2004); Statement of Carolyn K. Peterson, Mayor of Ithaca (Mar. 2, 2004); Letter from Anthony W. Crowell, Special Counsel to Mayor of New York City, to Alan Van Capelle (Apr. 6, 2005); Comments of John Shields, Mayor of Nyack (Feb. 27, 2004); Letter from William A. Johnson, Jr., Mayor of Rochester, to Chuck Bowen (Apr. 28, 2004). These letters are provided on the Empire State Pride Agenda website, Legislation and Other Government Action, *available at* <http://www.prideagenda.org/tabid/71/Default.aspx>. *See also* Opinion of Caitlin Halligan, New York Solicitor General, to Darrin B. Derosia, Counsel for City of Cohoes, and Peter Case Graham, Attorney for Town of Olive (Mar. 3, 2004) (“New York law presumptively requires that parties to [same-sex marriages from other jurisdictions] must be treated as spouses for purposes of New York law.”)

<sup>5</sup> These municipalities include Albany, East Hampton, Huntington, Ithaca, New York City, Southampton, Southold, Suffolk County, Rochester and Westchester County. *See* Empire State Pride Agenda, “Issues Explained: Domestic Partnerships, Registries, and Benefits,”

And this Court, while deciding that there was no state constitutional right for same-sex couples to marry in New York, certainly never adopted appellants' position that marriage of a same-sex couple is somehow "structurally different" from marriage. *Hernandez*, 7 N.Y.3d at 358-59. To the contrary, this Court endorsed the view that because there was no right for same-sex couples to marry under the state constitution, the decision as to whether New York should permit same-sex couples to marry in this State should be left to the Legislature. *See id.* ("of course the Legislature may . . . extend marriage or some or all of its benefits to same-sex couples").

In addition to formal legal and political recognition, marriages of same-sex couples performed in other jurisdictions are now commonly recognized and accepted as marriages culturally in this State as well.<sup>7</sup> For example, a

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available at <http://www.prideagenda.org/IssuesExplained/MarriageandFamilyProtection/QuickFacts/DomesticPartnershipsRegistriesandBenefits/tabid/199/Default.aspx>.

<sup>6</sup> These municipalities include Albany, Greenburgh, Ithaca, Nassau County, New York City, Port Jefferson, Rochester, Rockland County, Suffolk County, Ulster County and Westchester County. *Id.*

<sup>7</sup> Indeed, five states in the United States already permit same-sex couples to marry within their borders, or will do so in 2010. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (striking down marriage ban); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008) (striking down same-sex marriage ban); S. 115, An Act to Protect Religious Freedom & Recognize Equality in Civil Marriage, 2009 Vt. Act & Resolves no. 3 (recognizing marriage effective Sept. 1, 2009); H.B. 436, An Act Relative to Civil Marriage & Civil Unions, 2009 N.H. Law. ch. 59; (recognizing marriage effective Jan. 1, 2010). *See also In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (striking down marriage ban), *recognized as superseded by, Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (upholding Proposition 8 prohibiting marriages by same-sex

multitude of religious organizations, including most recently the Lutherans, not only bless marriages for same-sex couples, but allow lesbians or gay men in committed relationships to be ordained as clergy, *see* Brief of Amici Curiae Religious Organizations, New York Congregations and Clergy, And Other New York Faith-Based Communities in Support of Plaintiffs-Appellants at 15-20, *Hernandez*, 7 N.Y.3d 338 (filed Apr. 12, 2006); Michael Luo and Christina Capechi, *Lutheran Group Eases Limits on Gay Clergy*, N.Y. Times at A9, Aug. 22, 2009. Hundreds of newspapers, including the New York Times and the Albany Times Union, routinely print wedding announcements for same-sex couples. *See, e.g.*, Devan Sipher, *Vows: Kate Adamick and Kay Diaz*, N.Y. Times at Style 11, May 24, 2009 (announcing marriage of same-sex couple); *Wedding*

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couples, but holding prior marriages remain valid). And, such marriages have been or will soon be permitted in many foreign countries, including Canada, the Netherlands, Belgium, Spain and South Africa. *See* [Belgium] C.C. art. 143 (book I, tit. V, ch. I) (recognizing “two persons of different sexes or of the same sex may contract marriage”); [Canada] S.C. 2005, ch. 33, §§ 2, 4 (extending marriage to same-sex couples); [the Netherlands] Art 1:30 BW (2001) (recognizing “a marriage can be contracted by two people of different or the same sex”); [Spain] C.C. art. 44 (2005) (recognizing “matrimony shall have the same requisites and effects regardless of whether the persons involved are of the same or different sex”); [South Africa] *Minister of Home Affairs and Another v. Fourie and Another* 2006 (1) SA 524 (S. Afr.) (recognizing marriages); [Norway] Norwegian Ministry of Foreign Affairs, *Norway Introduces New Marriage Act*, Jun. 24, 2008, available at <http://www.norway.org/policy/gender/ekteskapslov.htm> (recognizing that “two persons of the opposite sex or the same sex may enter into marriage”); Christine Demstader, *Sweden Says “I do” to Same-Sex Marriage*, Swedish Institute, May 1, 2009, available at <http://www.sweden.se/eng/Home/Lifestyle/Reading/Sweden-says-I-do-to-same-sex-marriage/> (describing new laws recognizing marriages). Israel also recognizes foreign marriages of same-sex couples, even though same-sex couples are not permitted to marry domestically. Yuval Yoaz, *In precedent-setting ruling court says state must recognize gay marriage*, Haaretz, Nov. 21, 2006, available at <http://www.haaretz.com/hasen/spages/790724.html>.

*Announcement: Ralph Penney & Michael Weisberg*, Albany Times Union, Feb. 24, 2007, available at <http://www.legacy.com/TimesUnion-Albany/Celebrations.asp?Page=Announcement&PersonId=86579080> (announcing marriage of same-sex couple); see also *Inclusive Newspaper List 2008*, GLAAD, available at <http://www.glaad.org/Document.Doc?id=33>.

Given the above, it is absurd for appellants to argue as they do that marriages of same-sex couples are somehow so radically different from marriages of straight couples that the marriage recognition rule does not apply. (Lewis Br. at 14; Godfrey Br. at 12.) Indeed, appellants' own argument does not support their position in any event. By analogizing the marriages of same-sex couples with polygamous marriages and arguing that each is "structurally different," appellants fail to recognize that the marriage recognition rule *does* apply to the question of whether New York State will recognize an out-of-state polygamous marriage. *Van Voorhis*, 86 N.Y. at 26 (holding that polygamy falls under one of the two exceptions to the marriage recognition rule). In other words, the reason why polygamous marriages are not recognized is because they have been found to be "offensive" to New York policy, not because the marriage recognition rule does not apply to them. See, e.g., *Ezeonu*, 155 Misc.2d at 346, 588 N.Y.S.2d at 117-18. (refusing to recognize polygamous marriage as offensive to public policy).

**C. The Courts Have Consistently Applied the Marriage Recognition Rule to Marriages Of Same-Sex Couples**

In light of the long-standing common law rule and the widespread recognition that a marriage of a same-sex couple is of course a marriage, it is hardly surprising that nearly every New York court to consider the issue since out-of-state marriages became a viable option for same-sex couples several years ago has already rejected the arguments made by appellants here. *Martinez*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (recognizing out-of-state marriages of same-sex couples for purposes of benefits); *Godfrey*, 57 A.D.3d 941, 871 N.Y.S.2d 296 (upholding a county executive order requiring departments and agencies to recognize out-of-state marriages of same-sex couples for purposes of benefits); *Lewis*, 60 A.D.3d 216, 872 N.Y.S.2d 578 (upholding Department of Civil Service's recognition of out-of-state marriages of same-sex couples); *In re Donna S.*, 23 Misc.3d 338, 871 N.Y.S.2d 883 (N.Y. Fam. Ct. Monroe County 2009) (noting New York's recognition of out-of-state marriages of same-sex couples in the context of an adoption proceeding); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (noting New York's recognition of same-sex couple's marriage in the Netherlands); *Beth R. v. Donna M.*, 19 Misc.3d 724, 853 N.Y.S.2d 501 (N.Y. Sup. Ct. N.Y. County 2008) (recognizing a Canadian marriage of two women for the purpose of granting divorce); *C.M. v. C.C.*, 21 Misc.3d 926, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. N.Y. County 2008) (same); *Golden v. Paterson*, 23 Misc.3d 641, 877 N.Y.S.2d 822

(N.Y. Sup. Ct. Bronx County 2008) (upholding Governor’s directive to recognize out-of-state marriages of same-sex couples); *Godfrey v. DiNapoli*, 22 Misc.3d 249, 866 N.Y.S.2d 844 (N.Y. Sup. Ct. Albany County 2008) (upholding state comptroller’s recognition of Canadian marriage of same-sex couple).<sup>8</sup> Each has held that the marriage recognition rule applies to out-of-state marriages of same-sex couples. *Id.*

Indeed, to hold to the contrary—that the marriage recognition rule does not apply simply because of the sexual orientation of the people getting married—would not only result in a rather stunning exercise of unequal application of the law, *see Klein*, 416 N.Y.2d at 223, *Romer*, 517 U.S. at 632, but would betray this Court’s settled jurisprudence on the common law rule, not to mention the widespread legal, political, and cultural consensus in this State to treat otherwise valid marriages of same-sex couples as marriages, as discussed above.

## II. New York Common Law Compels Recognition of a Same-Sex Couple’s Valid Out-of-State Marriage

As outlined above, a court may reject a valid out-of-state marriage under the marriage recognition rule only if: (1) there is a statute prohibiting its

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<sup>8</sup> Although there is one reported lower court decision finding against recognition of an out-of-state same-sex marriage, that decision was subsequently vacated as moot by the Governor’s Policy Memorandum on this issue. *Funderburke*, 13 Misc.3d 284, 822 N.Y.S.2d 393 (not recognizing same-sex Canadian marriage for benefit purposes), *vacated as moot*, 49 A.D.3d 809, 854 N.Y.S.2d 466 (2d Dep’t 2008).

recognition, or (2) recognition of the marriage is “abhorrent” to New York public policy. It is simply beyond question that neither one of these exceptions is even remotely satisfied here.

**A. The Legislature Has Not Prohibited Recognition of Same-Sex Couples’ Valid Out-of-State Marriages**

The obvious inapplicability of the first exception to the marriage recognition rule can be addressed in relatively short order.

Under the first exception, an out-of-state marriage is recognized in New York unless the Legislature has affirmatively prohibited its recognition. *See May*, 305 N.Y. at 490-91. Contrary to appellants’ arguments (Lewis Br. at 52-53), in deciding whether this exception applies, the courts look to whether recognition of the type of out-of-state marriage at issue has been expressly forbidden by the Legislature, not whether the Legislature has authorized such a marriage to be licensed in New York. *Id.* at 493 (recognizing an otherwise prohibited out-of-state marriage “absent any New York statute expressing clearly the Legislature’s intent to regulate within this State marriages of its domiciliaries solemnized abroad”).

As discussed above, it is undisputed that New York’s Legislature has never enacted a prohibition against the recognition of out-of-state marriages of same-sex couples. Indeed, in stark contrast to other states which have enacted their

own so-called “Defense of Marriage Acts” or state constitutional amendments,<sup>9</sup> New York has consistently declined to pass legislation prohibiting recognition of out-of-state marriages of same-sex couples. In fact, the Legislature has seen dwindling support for prohibiting, and growing support for permitting, marriages of same-sex couples in New York. *See supra* 14. Accordingly, the first exception to the marriage recognition rule plainly does not apply here.

**B. Recognition of Same-Sex Couples’ Marriages  
Is Not Abhorrent to New York Public Policy**

Because there is no statute that prohibits the recognition of out-of-state marriages of same-sex couples, recognition of these valid out-of-state marriages should be withheld under the second common law exception to the

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<sup>9</sup> Ala. Code § 30-1-19; Ala. Const. art. I, § 36.03; Alaska Const. art. I § 25; Ariz. Rev. Stat. Ann. §§ 25-101, 25-112; Ark. Code Ann. § 9-11-208; Cal. Const. art. I, § 7.5; Colo. Rev. Stat. § 14-2-104; Colo. Const. art. II, § 31; Del. Code Ann. tit. 13, § 101; Fla. Stat. Ann. §§ 741.04; Ga. Code Ann. § 19-3-3.1; Ga. Const. art. I, § IV; Haw. Rev. Stat. §§ 572-1; Haw. Const. art. I, § 23; Idaho Code Ann. § 32-209; Idaho Const. art. III, § 28; 750 Ill. Comp. Stat. 5/212; Ind. Code § 31-11-1-1; Kan. Stat. Ann. §§ 23-101(a), 23-115; Kan. Const. art. 15, § 16; Ky. Rev. Stat. Ann. § 402.045; Ky. Const. § 233A; La. Civ. Code Ann. Art. 89; La. Const. art 12, § 15; Md. Code Ann., Fam. Law § 2-201; Mich. Comp. Laws §§ 551.1; Minn. Stat. §§ 517.03(4); Miss. Code Ann. §§ 93-1-1(2), 93-1-3; Miss. Const. art. 14, § 263A; Mo. Rev. Stat. § 451.022; Mo. Const. art. I, § 33; Mont. Code Ann. §40-1-401(d); Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.C. Gen. Stat. § 51-1.2; N.D. Cent. Code §§ 14-03-01, 14-03-08; Ohio Rev. Code Ann. § 3101.01; Okla. Stat. tit. 43, § 3.1; Okla. Const. art. II, § 35; Or. Const. art. XV, § 23; Pa. Cons. Stat. § 1704; S.C. Code Ann. § 20-1-15; S.C. Const. art. XVII, § 15; S.D. Codified Laws § 25-1-38; S.D. Const. art. XXI, § 9; Tenn. Code Ann. § 36-3-113; Tenn. Const. art. XI, § 18; Tex. Fam. Code Ann. § 6.204; Tex. Const. art. I, § 32; Utah Code Ann. § 30-1-4.1; Utah Const. art. I, § 29; Va. Code Ann. § 20-45.2; Va. Const. art. I, § 15-A; Wash. Rev. Code § 26.04.020; W. Va. Code § 48-2-603; Wis. Const. art. XIII, § 13; Wyo. State. Ann. § 20-1-101. *See generally Andersen v. King County*, 138 P.3d 963, 969-70 (Wash. 2006) (describing the passage of federal and state Defense of Marriage Acts after marriage litigation began in earnest in the 1990s).

marriage recognition rule only if, as in the case of polygamy or certain types of incest between close family members, *Van Voorhis*, 86 N.Y. at 27, the marriages are “offensive to the public sense of morality to a degree regarded generally with abhorrence.” *May*, 305 N.Y. at 493 (emphasis added); *see also Martinez*, 50 A.D.3d at 192, 850 N.Y.S.2d at 743 (same). The strong adjectives (*e.g.*, “offensive,” “abhorrent,” and “obnoxious”) that the courts use to formulate this exception is surely no accident—New York “reserve[s] the public policy exception ‘for those foreign laws that are truly obnoxious.’” *See Welsback Elec. Corp. v. MasTec North Am., Inc.*, 7 N.Y.3d 624, 628-29 (2006) (citing *Cooney v. Osgood Machinery, Inc.*, 81 N.Y.2d 66, 79 (1993)); *see also May*, 305 N.Y. at 493 (rejecting New York criminal law against incestuous marriage as public policy strong enough to bar recognition of a valid out-of-state incestuous marriage). Given this formulation, once again, otherwise valid out-of-state marriages of same-sex couples do not come close to meeting these criteria.

Appellants’ purported support for their argument that out-of-state marriages of same-sex couples fall within this second exception is limited to the facts that New York itself does not authorize the performance of marriages of same-sex couples and that, in *Hernandez*, this Court upheld New York’s marriage statute. (*See, e.g.*, Lewis Br. ¶¶ 17, 22-23, 28, 36-37, 42-43.) However, applying appellants’ logic, this limited exception would swallow the entire rule: every out-

of-state marriage analyzed under the marriage recognition rule necessarily is not permitted under New York law. That, after all, is why the marriage recognition rule is being applied in the first place. (*See supra* 10-11.)

As demonstrated by the recent actions of the New York Legislature and the Executive branch, as well as by this Court's and the lower courts' jurisprudence, recognition of out-of-state marriages of same-sex couples comports entirely with New York's public policy. Similarly, far from the degree of disapproval that would amount to "abhorrence" of such marriages, a recent poll found that fifty-one percent of New York voters support a law allowing same-sex couples to marry in New York. "New York State Voters Support Same-Sex Marriage Quinnipiac University Poll Finds," Quinnipiac University Polling Institute, June 23, 2009 *available at* <http://www.quinnipiac.edu/x1318.xml?ReleaseID=1340>. Indeed, as noted above, every single New York court to consider this question—including the Third Department below—has held as such. *See, e.g., Lewis*, 60 A.D.3d at 222, 872 N.Y.S.2d at 584 ("New York's public policy [] cannot be said to abhor the recognition of out-of-state same-sex marriages."); *Martinez*, 50 A.D.3d at 192, 850 N.Y.S.2d at 743 ("[*Hernandez*] noted that the Legislature *may* enact legislation recognizing same-sex marriages [] and, in our view, the Court of Appeals thereby indicated that the recognition of plaintiff's marriage is not against the public policy of New York.").

**1. The Legislature Has Not Taken Any Actions That Demonstrate That Marriages of Same-Sex Couples Are Abhorrent to Public Policy**

The Legislature has not taken any action that demonstrates that marriages of same-sex couples are abhorrent to public policy. To the contrary, as noted above, the New York Assembly has twice passed a statute authorizing marriage for same-sex couples. *See* A.7732, 232d Sess., Reg. Sess. (2009) (voting in favor of a bill granting same-sex couples the same marriage rights as opposite-sex couples). *See also* A.3000, 232d Sess., Reg. Sess. (introduced Jan. 22, 2009) (declining to pass legislation denying recognition of marriages of same-sex couples solemnized in another jurisdiction).

The Legislature also has demonstrated a growing acceptance and recognition of same-sex couples and their families by extending a variety of “spousal benefits” available to married heterosexual couples to same-sex domestic partners, including granting benefits to surviving partners of September 11 victims and partners of active-duty military personnel,<sup>10</sup> and by granting same-sex

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<sup>10</sup> *See, e.g.*, N.Y. Comp. Codes R. & Regs. § 5.113.30 (McKinney 2009) (benefits from the Crime Victims Board if 50% of financial support was provided by victim); N.Y. Est. Powers & Trusts Law § 11-4.7 (McKinney 2009) (September 11 Memorial Fund Awards); N.Y. Workers’ Comp. Law § 4 (McKinney 2009) (workers compensation spousal death benefits); N.Y. Educ. Law § 608 (McKinney 2009) (participation in World Trade Center Memorial Scholarship Program for domestic partners and their children); N.Y. Educ. Law § 272(1)(1) (McKinney 2009) (library internet access for military partners); N.Y. Exec. Law § 354-b(2)(b)(i) (McKinney 2009) (burial insurance for military partners); N.Y. Mil. Law § 254(2) (McKinney 2009) (videoconferencing for military partners); N.Y. Pub. Serv. Law § 92(3-a) (McKinney 2009) (discounted telephone rates for military partners); N.Y. Real Prop. Tax Law § 925-d (McKinney 2009) (property tax relief for military partners).

domestic partners credit union access, hospital visitation, and the right of control to a deceased spouse's bodily remains on the same terms as an opposite-sex spouse.<sup>11</sup> The Legislature also has enacted an antidiscrimination law, *Martinez*, 50 A.D.3d at 193, 850 N.Y.S.2d at 743 (citing N.Y. Exec. Law § 296(1)(a)), which prohibits employers from treating an employee's out-of-state marriage to a same-sex spouse differently than an employee's out-of-state marriage to an opposite-sex spouse, *see id.* (holding that, "by refusing to recognize plaintiff's valid Canadian marriage, defendants violated Executive Law § 296(1)(a)"),<sup>12</sup> and has enacted numerous other laws to protect individuals from discrimination and animus based on sexual orientation, evincing public policy in favor of equal treatment regardless of sexual orientation.<sup>13</sup>

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<sup>11</sup> *See* N.Y. Banking Law § 451(2)(d)(1) (McKinney 2009); N.Y. Pub. Health Law § 2805-q (McKinney 2009); N.Y. Pub. Health Law § 4201 (McKinney 2009).

<sup>12</sup> Provisions of the Executive Law known as the Human Rights Law state, "It shall be an unlawful discriminatory practice . . . [f]or an employer . . . because of the sexual orientation . . . of any individual, to . . . discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.Y. Exec. Law § 296(1)(a) (McKinney 2009). Thus, under the Human Rights Law, where an employer's "sole reason" for denying full spousal benefits is the fact that the employee's spouse, under a recognized marriage, is of the same sex as the employee, the employer has violated Section 296(a)(1). *Martinez*, 50 A.D.3d at 193, 850 N.Y.S.2d at 743.

<sup>13</sup> *See, e.g.*, N.Y. Civil Rights Law § 40-c(2) (McKinney 2009) (protecting the general right against discrimination on the basis of sexual orientation); N.Y. Educ. Law § 313(1)(a) (McKinney 2009) (ensuring equality of opportunity to access educational institutions without regard to sexual orientation); N.Y. Exec. Law §§ 296 to 296-a (McKinney 2009) (prohibiting discrimination in employment, housing, credit, places of public accommodations, volunteer firefighting, and educational institutions on the basis of sexual orientation); N.Y. Penal Law §§ 240.30(3), 240.31 (McKinney 2009) (criminalizing offenses involving animus on the basis of sexual orientation); N.Y. Penal Law § 485.05(1) (McKinney 2009) (defining a hate

In the face of these Legislative pronouncements, New York’s public policy cannot reasonably be said to “abhor,” or to find as “obnoxious” or “offensive,” the recognition of out-of-state marriages of same-sex couples.

**2. The Executive Branch Has Similarly Demonstrated That Recognizing Out-of-State Marriages of Same-Sex Couples Is Not Abhorrent to Public Policy**

Likewise, as discussed above, recent action by the Governor evidences not only that recognizing out-of-state marriages of same-sex couples is consistent with New York public policy, but also an unambiguous commitment to permitting such marriages in New York.

**3. Courts Agree That Recognizing Out-of-State Marriages of Same-Sex Couples Is Not Abhorrent to Public Policy**

Appellants cite to this Court’s decision in *Hernandez* a number of times as purported justification for their position that recognizing out-of-state marriages of same-sex couples is abhorrent to public policy. However, nothing in that decision even relates to—let alone suggests an “abhorrence” of—New York’s public policy. To the contrary, the *Hernandez* plurality noted explicitly that “it is not for us to say whether same-sex marriage is right or wrong,” and, indeed,

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crime as a crime motivated by the victim’s perceived sexual orientation); 18 N.Y. Comp. Codes R. & Regs. § 421.16(h)(2) (McKinney 2009) (prohibiting adoption agencies from rejecting applicants “solely on the basis of homosexuality”); Pub. Hous. Law § 14.4(c) (McKinney 2009) (allowing a broad definition of family members, which can include same-sex spouses).

expressly recognized that the Legislature could, and might, allow marriages of same-sex couples to be performed in New York. 7 N.Y.3d at 366.

And, of course, this Court has accorded significance to same-sex relationships in many ways. For example, this Court has held that same-sex partners are “family members,” protected from eviction, *see Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211-14 (1989); *see also Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 494-95 (2001) (same-sex couples may challenge exclusion from housing set aside for married couples), and that a person may adopt the child of his or her same-sex partner, *see In re Jacob*, 86 N.Y.2d 651, 660 (1995); *see also e.g., In re Donna S.*, 23 Misc.3d 338, 871 N.Y.S.2d 883 (noting New York’s recognition of out-of-state marriages of same-sex couples in the context of an adoption proceeding); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (same).<sup>14</sup> These decisions harmonize with New York’s public policy that recognizes and respects the relationships of same-sex couples.

Last but surely not least, nearly every New York court to have considered the issues presented here has upheld the law or ordinance extending benefits to same-sex spouses in valid out-of-state marriages. *See Martinez*, 50 A.D.3d 189, 850 N.Y.S.2d 740; *Godfrey*, 57 A.D.3d 941, 871 N.Y.S.2d 296;

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<sup>14</sup> *See also In re Daniels*, 2 Misc.3d 413, 417, 773 N.Y.S.2d 220, 223 (N.Y. City Civ. Ct. 2003) (holding that same-sex partners may change surnames).

*Lewis*, 60 A.D.3d 216, 872 N.Y.S.2d 578; *In re Donna S.*, 23 Misc.3d 338, 871 N.Y.S.2d 883; *In re Adoption of Sebastian*, 879 N.Y.S.2d 677; *Beth R. v. Donna M.*, 19 Misc.3d 724, 853 N.Y.S.2d 501; *C.M. v. C.C.*, 21 Misc.3d 926, 867 N.Y.S.2d 884; *Golden*, 23 Misc.3d 641, 877 N.Y.S.2d 822; *Godfrey*, 22 Misc.3d 249, 866 N.Y.S.2d 844. These decisions are consistent with the views of New York bar associations. *See, e.g.*, The New York State Bar Association, News Release, *State Bar Co-Sponsored Resolution Wins Approval of the American Bar Association*, (Aug. 11, 2009) (“In June, the State Bar’s House of Delegates adopted a resolution [] to amend the state’s Domestic Relations Law to give same-sex couples the right to marry and to recognize civil marriages that have been contracted elsewhere.”); The Association of the Bar of the City of New York Committee on Lesbian and Gay Rights, Committee on Sex and Law, & Committee on Civil Rights, *Report On Marriage Rights For Same-Sex Couples In New York*, 13 Colum. J. Gender & L. 70, 92 (2004) (“Traditional principles of full faith and credit, comity, and choice-of-law support New York’s recognition of same-sex marriages and civil unions performed in foreign states.”). *See also* Melissa A. Kucinski, *New York’s Recognition Of Same-Sex Marriages*, 39 Fam. L.Q. 841, 858 (2005) (arguing that New York must recognize same-sex marriages if they were “valid where . . . contracted.”); Jay Weiser, *Foreword: The Next Normal—Developments Since Marriage Rights For Same-Sex Couples In New York*, 13

Colum. J. Gender & L. 48 (2004) (arguing that New York's comity laws will result in the recognition of out-of-state same-sex marriages).

Thus, Appellants' claim that the recognition of out-of-state marriages of same sex couples violates a strong public policy cannot be plausibly advanced. *Amici curiae*, therefore, respectfully submit that New York law recognizes as valid in New York valid marriages of same-sex couples performed elsewhere.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court affirm the decisions of the Second and Third Department below.

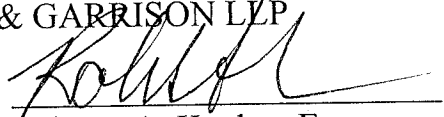
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