No Oral Argument Requested

SUP. CT. ALBANY COUNTY
INDEX NO. 4078/07

SUP. CT. WESTCHESTER COUNTY
INDEX NO. 16894/2006

Court of Appeals

STATE OF NEW YORK

KENNETH J. LEWIS, DENISE A. LEWIS, ROBERT C. HOUCK, JR., and ELAIN A. HOUCK,
Plaintiffs-Appellants,

-against-

THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE and NANCY G. GORENWEGEN, in her official capacity as President of the New York State Department of Civil Service,
Defendants-Respondents,

-and-

PERI RAINBOX and TAMELA SLOAN,
Defendants-Intervenors-Respondents

MARGARET GODFRELY, ROSEMARIE JAROSZ, and JOSEPH ROSSINI,
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-Respondent

BRIEF FOR *AMICI CURIAE* CONFLICTS OF LAWS SCHOLARS IN SUPPORT OF DEFENDANTS-INTERVENORS-RESPONDENTS

TOBIAS BARRINGTON WOLFF
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia PA 19104
Telephone: (215) 898-7471
Facsimile: (215) 573-2025

Attorney for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI*

Amici are scholars in the field of Conflict of Laws who teach and write on choice of law. They include authors of leading casebooks on the Conflict of Laws, current and former chairs of the AALS Section on the Conflict of Laws, and authors of numerous scholarly articles on the operation of civil marriage and other family law doctrines in multistate disputes. *Amici* are deeply concerned with the proper administration of choice-of-law doctrines in our federalist system, having dedicated much of their professional lives and published work to that topic. They submit this brief in the hope of assisting the Court in reaching an appropriate resolution to this dispute.

Lea Brilmayer is the Howard M. Holtzman Professor of International Law at Yale Law School. Herma Hill Kay is the Barbara Nachtrieb Armstrong Professor of Law at Berkeley Law, University of California. Andrew Koppelman is the John Paul Stevens Professor of Law at Northwestern University Law School. Erin O'Hara is Professor of Law, Director of the Law and Human Behavior Program, and Associate Dean for Academic Affairs at Vanderbilt University Law School. Kermit Roosevelt III is Professor of Law at the University of Pennsylvania Law School. Joseph William Singer is the Bussey Professor of Law at Harvard Law School. Tobias Barrington Wolff is Professor of Law at the University of

Pennsylvania Law School and the Jesse Climeko Visiting Professor of Law at Harvard Law School.[1]

SUMMARY OF ARGUMENT

The State of New York has adhered to a place-of-celebration rule in multistate marriage disputes for well over a century. This case presents no reason to depart from that rule. To the contrary, the circumstances surrounding this dispute make it ill-suited for a reexamination of New York's long-standing precedents, for the balance of policy considerations that underlie the place-of-celebration rule tip even more strongly in favor of retaining that rule in the case of same-sex couples.

Unlike many previous multistate marriage disputes considered by this Court and others, the couples in this case have a clearly recognized constitutional right to form an intimate relationship and share a household. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *People v. Onofre*, 51 N.Y.2d 476 (1980). In past marriage recognition disputes, courts have had to weigh, as a factor of primary importance, the state's interest in preventing disfavored couples from sharing a household and an intimate relationship within the state, along with the manner in which that interest was implicated by the dispute before it. Even when courts have adhered to the place-of-celebration rule in cases involving criminally proscribed relationships,

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[1] All titles and institutional affiliations are provided for informational purposes only.

the state's interest in barring the couples from the prohibited form of intimacy has weighed in the balance. In this case, the state can have no such interest, for it is clearly established that same-sex couples may not be prohibited from sharing intimacy, forming a household, and knitting their lives together. As a consequence, one of the principal factors that might weigh against recognition is eliminated, making adherence to New York's established rule even more appropriate.

In addition, the legislative and executive policies of New York already favor equal treatment of same-sex couples. New York State has enacted laws that prohibit antigay discrimination and has passed legislation recognizing the out-of-state marriages and domestic partnerships of same-sex couples in discrete circumstances, and its subdivisions have extended benefits to same-sex couples through domestic partnership and other mechanisms. Although the state legislature has not yet enacted legislation to equalize the ability of same-sex couples to marry under local law, the Governor, Attorney General, State Comptroller, and other executive officials have invoked the fullest extent of their authority to confirm the place-of-celebration rule for same-sex couples when they marry out of state. *Amici* are unaware of any other interstate marriage decision in which the disputed category of relationship has enjoyed such extensive and explicit support from the political branches of government. To depart from New York's established rule in

such a case would require this Court to resolve important questions about the extent and nature of executive authority in the administration of multistate disputes, questions as to which there is little or no precedent. This Court should be loath to provoke such an inquiry when adherence to a long established rule will avoid the issue.

Choice-of-law rules involve trade-offs between competing interests. In addressing the competing interests presented by this dispute, New York does not write on a blank slate. The place-of-celebration rule that this Court has embraced and repeatedly reaffirmed strikes a reasonable and stable balance between competing interests. That balance tips even further toward recognition in cases involving same-sex couples, making this dispute an inappropriate vehicle for reconsidering New York's long-standing rule. The best course in this case is to reject Appellants' invitation to overrule settled precedent through the use of the novel exceptions and other devices that they advocate, retain New York's well-established rule, and affirm the decisions below.

ARGUMENT

I.

THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RECONSIDERING NEW YORK'S LONG EMBRACE OF THE PLACE-OF-CELEBRATION RULE

This Court embraced the place-of-celebration rule for multistate marriage disputes in the nineteenth century, offering one of the strongest articulations of that rule in the American common-law tradition. It has consistently adhered to that rule, even in cases that might have been thought to test it stringently. Thus, this Court has given effect to out-of-state marriages in cases where a couple has traveled for a brief time with the express purpose of evading local restrictions, *see, e.g., Van Voorhis v. Brintnall*, 86 N.Y. 18, 23 (1881) (recognizing marriage of divorced adulterer in probate of estate where parties "went to New Haven for the purpose of evading the New York law" that prohibited their marriage); in cases where the marriage involved a couple that were expressly forbidden from sharing sexual intimacy under the criminal laws of New York, *see, e.g., In re May's Estate*, 305 N.Y. 486, 491 (1953) (recognizing evasive marriage of uncle and niece in probate of estate despite New York laws making such marriages criminal when performed locally and outlawing the couple's sexual intimacy); and in cases involving the ongoing administration of benefits under New York's Worker's Compensation Law, *see, e.g., Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289,

291–94 (1980) (recognizing Georgia common-law marriage based upon brief sojourn by New York couple and the possibility of awarding benefits to widow if such common-law marriage existed); *Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44, 51–56 (1970) (same in case involving Florida common-law marriage based upon brief sojourn by New York couple).

Like all choice-of-law rules, the place-of-celebration rule involves a balance between competing considerations. By selecting a rule that gives maximum effect to the marriages of other states, New York emphasizes several key interests. First, it protects couples from having their reliance upon their marriage frustrated. Most people do not have the sophistication to make nuanced legal judgments about when they can expect a marriage to be recognized. Rather, they assume that "married" means "married" and they plan their lives accordingly. The place-of-celebration rule emphasizes the protection of those reliance interests, rather than seeking to identify scenarios in which reliance might be deemed unreasonable and then expecting average couples to shape their behavior around those judgments. Second, the place-of-celebration rule dissuades married couples from disavowing their own obligations to each other and to third parties. When couples knit their lives together through marriage, they make promises of support and care toward one another. By giving maximum effect to marriages that are valid where celebrated, New York prevents couples from repudiating those obligations.

Finally, by giving generous effect to marriages celebrated in other states, the place-of-celebration rule invites reciprocal treatment for New York marriages. *See* Joseph W. Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. Civ. Rts. & Civ. Liberties 1, 4–6 (2005) (summarizing these interests and urging the desirability of the place-of-celebration rule).

The balance struck by the place-of-celebration rule also deemphasizes certain interests. When a state gives effect to an out-of-state marriage that is deliberately evasive, it risks rewarding or encouraging couples in the circumvention of local law. In embracing the place-of-celebration rule, this Court has ruled that, if the legislature wants to avoid such risks, it must be explicit in specifying when it wishes to deny recognition to out-of-state marriages. *See Van Voorhis*, 86 N.Y. at 31–35 (holding that express legislative direction is necessary to deny recognition to an evasive marriage that is valid where celebrated because it is for the legislature to defend New York's statutory prerogatives). In addition, if a state prohibits certain forms of sexual intimacy altogether, a rule that recognizes out-of-state marriages might risk admitting that prohibited intimacy into the jurisdiction. As *Amici* discuss below, this factor has weighed heavily in the common-law treatment of marriage disputes. Once again, by embracing the place-of-celebration rule, this Court has deemphasized any such interest in the aggressive regulation of sexual intimacy.

In determining whether this Court should consider departing from its long-established rule in the case at bar, the primary question should be whether there is any reason to believe that the balance of competing considerations somehow weighs against the place-of-celebration rule more strongly here than it has in this Court's earlier precedents. If the answer is no, then there would appear to be no reason to depart from those precedents.

Not only is there no reason to depart from the place-of-celebration rule in this case, but in fact the balance of competing considerations weighs more strongly in favor of retaining the rule here. The strongest state interest that might weigh in favor of denying recognition to an out-of-state marriage — the desire to prohibit disfavored forms of sexual intimacy or relationships — is constitutionally unavailable to New York in cases involving same-sex couples. Unlike in some of this Court's precedents, that interest is absent from this case. Furthermore, the political branches of New York government have expressed a strong policy in favor of equal treatment for gay, lesbian and bisexual New Yorkers and their relationships, including executive support for recognition of out-of-state marriages of same-sex couples, a circumstance that was absent from the many cases in which this Court has embraced and adhered to the place-of-celebration rule in the past. As a consequence, this dispute presents a particularly strong case for adhering to New York's existing precedents.

A. The Most Important Interest upon which States have Relied in Denying Recognition to Out-of-State Marriages at Common Law — the Regulation of Intimate Sexual Conduct — is Absent in Cases Involving Married Same-Sex Couples.

At common law, the most important governmental interest that state courts have discussed in their analysis of multistate marriage disputes has been the regulation of intimate sexual conduct. In most jurisdictions, marriage has been the exclusive avenue for noncriminal sexual activity for much of the state's history. In that broad sense, marriage laws have historically operated in tandem with prohibitions on fornication or adultery to give an exclusive legitimacy to marital sex. More narrowly, when states have used their criminal laws to prohibit particular types of couples from engaging in any form of sexual intimacy within the jurisdiction, courts have frequently concluded that they must interpret their laws on the recognition of out-of-state marriages in harmony with that express public policy. Both in disputes where the court has granted some form of recognition to an out-of-state marriage and in disputes where the court has refused to give such a marriage any effect, the manner in which the request for recognition would implicate the regulation of sexual conduct within the jurisdiction has been the primary concern. Where giving effect to a nonconforming marriage would undermine a state's restrictions on sexual conduct, courts have usually concluded that they must deny such requests. Where giving effect to a marriage would not

derogate from any conduct restriction, courts have often found that the state has no strong interest in denying recognition.[2]

This link between out-of-state marriages and regulation of sexual conduct has been given voice most directly in criminal prosecutions. When a couple marries in one jurisdiction, moves or returns to another jurisdiction where an intimate relationship between the two is forbidden, and then seeks to offer the marriage as a defense to a subsequent criminal prosecution, the clash between the asserted marital rights and the state's conduct restrictions is starkly presented. In most such cases, states have refused to recognize the marriage as an affirmative defense to the prosecution because doing so would directly undermine the prohibition on intimate conduct.

The decision of the Supreme Court of Tennessee in *State v. Bell*, 66 Tenn. 9 (1872), is a frequently cited example. *Bell* involved the criminal prosecution of the husband in an interracial marriage for violation of the Tennessee fornication law. The husband and his wife had been married in Mississippi, which had no antimiscegenation statute at the time, and had then come to Tennessee, where interracial relationships were categorically prohibited. The husband sought to interpose the Mississippi marriage as a defense to the prosecution, invoking the

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[2] Portions of the arguments in this section are developed at greater length in Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. Penn. L. Rev. 2215 (2005).

general rule that the law of the place-of-celebration should govern the effect given to a marriage. *See id.* at 9–10. The court refused, warning that accepting that view in all cases would permit hordes of "unnatural" couplings to invade the state:

> Extending [sic] the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed the relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.

Id. at 11. As the Tennessee court explained some years later in expanding upon its holding in *Bell*, the refusal to recognize an interracial marriage as a defense to a criminal prosecution was necessary to give effect to "the very pronounced convictions of the people of this State [in the criminal code] as to the demoralization and debauchery involved in such alliances." *Pennegar v. State*, 10 S.W. 305, 307 (1889) (exploring distinctions between *State v. Bell* and a prosecution involving a remarriage following adultery). Courts have routinely offered such explanations in refusing to recognize a marriage as a defense to a criminal prosecution, both in miscegenation cases — *see, e.g., State v. Tutty*, 41 F. 753, 761-62 (S.D. Ga. 1890) (denying effect to a D.C. interracial marriage offered as a defense to criminal prosecution for interracial fornication in Georgia); *Kinney v. Commonwealth*, 71 Va. 858, 866 (1878) (refusing to recognize an out-of-state marriage as a defense in an antimiscegenation prosecution, because doing so would

undermine laws of the jurisdiction that "prohibit[ed] and punish[ed] such unnatural alliances with severe penalties") — and in prosecutions involving bigamous or consanguineous marriages — *see, e.g., United States ex rel. Devine v. Rodgers*, 109 F. 886, 888 (E.D. Pa. 1901) (refusing to recognize a marriage between an uncle and his niece as a defense against deportation because "a continuance of the relation . . . would at once expose the parties to indictment in the criminal courts, and to punishment by fine and imprisonment in the penitentiary"); *State v. Brown*, 23 N.E. 747, 750 (Ohio 1890) (refusing to read an exception for validly married couples into a statute criminalizing sex between an uncle and his niece because the state is "not bound, upon principles of comity, to permit persons to violate our criminal laws . . . because they have assumed, in another state or country where it was lawful, the relation which led to the acts prohibited by our laws"); *Pennegar*, 10 S.W. at 308 (denying effect to a second marriage by a couple who married following the wife's divorce for adultery in a previous marriage because "their return to this State, and cohabiting as man and wife" violated Tennessee's "lewdness" statute and threatened "public morals, peace, and [the] good order of society"); *State v. Ezeonu*, 588 N.Y.S.2d 116, 118 (Sup. Ct. Bronx County 1992) (denying effect to a husband's purported second marriage in Nigeria as a defense to a statutory rape charge involving a thirteen-year-old girl in New York). Many anti-miscegenation states also required proof of actual cohabitation before a

mixed-race couple could be convicted, similarly revealing the concern with regulation of intimate conduct that lay at the core of these restrictive rules. *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2151 & n.36 (2005) (collecting cases illustrating this phenomenon).

There are some exceptions to this rule in the common law — cases in which courts have allowed criminal defendants to shield themselves from prosecution through the invocation of a nonconforming marriage. *See, e.g., State v. Ross*, 76 N.C. 242, 246–47 (1877) (recognizing an out-of-state interracial marriage as a defense in a criminal prosecution for fornication and adultery, despite the invalidity of the marriage in the local jurisdiction); *State v. Graves*, 307 S.W.2d 545, 550 (Ark. 1957) (permitting the husband and parents of an underage bride to invoke marriage as a defense to criminal prosecution for delinquency of a minor, despite deliberate evasion of Arkansas marriage laws); *but see State v. Kennedy*, 76 N.C. 251, 253 (1877) (refusing, in a companion case to *Ross*, to recognize an out-of-state interracial marriage where the North Carolina couple clearly and deliberately evaded local marriage restrictions). But the paucity of such exceptions in the criminal context proves the rule, and, even in such cases, the state's interest in reinforcing its local restrictions on intimate conduct has loomed large in the conflicts analysis. *See Ross*, 76 N.C. at 247 ("The only evil which could be

avoided by [denying effect to the marriage] is that the people of this State might be spared the bad example of an unnatural and immoral but lawful cohabitation."); *see also Graves*, 307 S.W.2d at 554 (Smith, J., concurring) ("It was at first my inclination to . . . [say] that although the validity of this marriage would be recognized in this state our policy against underage marriages should prevent the couple from living together until attaining the age at which they might have been married in Arkansas . . . .").

Outside the context of criminal prosecution, in contrast, courts have frequently given effect to marriages that would violate local restrictions on intimate conduct, provided that the purpose for which the marriage is offered did not involve the introduction of prohibited conduct into the state. The issue arises most frequently in disputes over inheritance and probate, where one party makes claims upon an estate that depend upon the validity of the decedent's out-of-state marriage. Obviously enough, the court can give effect to a marriage in administering an estate without licensing any prospective violations of the jurisdiction's criminal code. Many courts have explained that the state has no weighty interest in denying effect to an out-of-state marriage in such a case, precisely because the invocation of the marriage in probate does not interfere with local conduct restrictions. In the absence of any argument about the regulation of intimate conduct within the jurisdiction, these courts have concluded, the state has

no good reason to frustrate the private reliance interests of the parties, aid the spouses in recanting obligations, or depart from the general rule of comity that calls for the recognition of marriages that were valid where performed.

The point is made succinctly in the California Court of Appeals' decision in *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Dist. Ct. App. 3d Dist. 1948). *Dalip Singh Bir* involved the probate of the California holdings of a native of India who died intestate in California, leaving two wives in India who both made claims upon the estate as widows. Both women had lawfully married the decedent in India and had lived with him in the Punjab Province, but the trial court in California refused to recognize the validity of the more recently celebrated marriage in the probate proceeding, concluding that local law only permitted the court to give effect to one of the marriages. *See id.* at 499–500. The appeals court reversed, concluding that there was no good reason to deny effect to the marriage when doing so would not interfere with any restrictions on the regulation of intimate conduct within California.

> The decision of the trial court was influenced by the rule of "public policy" [against polygamous marriages]; but that rule, it would seem, would apply only if decedent had attempted to cohabit with his two wives in California. Where only the question of descent of property is involved, "public policy" is not affected.

Id. at 502. Other courts have relied upon similar reasoning. In Mississippi, for example, the supreme court held in 1948 that interracial marriages should be given

effect in probate proceedings, despite that state's antimiscegenation laws, because the "manifest and recognized purposes of" those laws "was to prevent persons of Negro and white blood from living together in this state" and, where there is no request for in-state cohabitation, "to permit one of the parties to such a marriage to inherit property . . . does no violence" to the policy. *Miller v. Lucks*, 36 So.2d 140, 142 (Miss. 1948).

As with the criminal prosecutions, there are some exceptional probate cases that come out the other way. But even most of the outlier cases maintain a consistent focus on the centrality of conduct regulation in describing the state interests that drive the decision. For example, in some instances where courts have refused to give any effect to an out-of-state marriage in probate, even where doing so would not interfere directly with local conduct restrictions, the court has identified the criminal prohibition on intimate conduct as the source of the weighty policy statement that has required that result. *See, e.g., Rhodes v. McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (refusing to give effect to the "incestuous" marriage of a stepfather and his stepdaughter in an action for dower, because "where the same facts which statutorily prohibit the marriage are also made a penal violation, such is indicative of the pronounced conviction of the people of this State regarding such marriages"); *Catalano v. Catalano*, 170 A.2d 726, 728 (Conn. 1961) (refusing to give effect to a marriage between an uncle and his niece in a

probate action because such incest carries a penalty of up to ten years imprisonment and "[t]his relatively high penalty clearly reflects the strong public policy of this state").

In contrast, where states have chosen not to criminalize the intimate conduct of particular types of couples at all, even though forbidding the couple from marrying within the jurisdiction, some courts have taken the absence of a conduct regulation to indicate that the state has little or no interest in denying effect to a valid marriage from another state. The Supreme Court of Kansas issued a holding to that effect in 1981, for example, in a probate case involving a marriage between first cousins. "Although our statutes prohibit first cousin marriages and impose criminal penalties where such marriages are contracted in Kansas," the court explained:

> [W]e cannot find that a first cousin marriage validly contracted elsewhere is odious to the public policy of this state. The reason for the inclusion of first cousins in [the Kansas marriage prohibition] has become less compelling in recent years as evidenced by the legislature's omission of sexual intercourse between first cousins in the definition of incest.

In re Estate of Loughmiller, 629 P.2d 156, 161 (Kan. 1981). The Supreme Court of Ohio is the only court of which *Amici* are aware that has expressly come to a different conclusion, and it did so by rejecting one of its own precedents that had previously embraced the argument. *See In re Estate of Stiles*, 391 N.E.2d 1026, 1027 (Ohio 1979) (refusing to give effect to an out-of-state marriage between an

uncle and a niece, despite the repeal of the criminal prohibition on sexual intercourse for such couples), *declining to follow Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958) (recognizing marriage between first cousins, explaining: "It will thus be seen that first-cousin marriages in this state are not made void by explicit provision to that effect. Moreover . . . , sexual relations between cousins are not incestuous.").

In short, throughout these varied forms and configurations of multistate marriage disputes, the reinforcement of a jurisdiction's criminal laws prohibiting disfavored intimate conduct has been the dominant interest that courts have identified in applying restrictive laws to out-of-state marriages that were valid where performed. The desire to prohibit disfavored sexual conduct and to exclude disfavored relationships from the jurisdiction has been the primary concern around which state marriage-recognition doctrines have taken shape. Thus, in a modern dispute concerning the out-of-state marriage of a same-sex couple, one of the first questions that this Court should ask is how a request for recognition implicates New York's policies and interests concerning the regulation of sexual intimacy and cohabitation by such couples.

The range of legitimate answers to that question has changed dramatically in the wake of *People v. Onofre*, 51 N.Y.2d 476 (1980), and *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Onofre*, this Court held that the Federal Constitution prohibits

states from criminalizing private, adult, non-commercial sexual intimacy, applying that holding to a man who was prosecuted for having sex with another man. *Onofre*, 51 N.Y.2d at 483–85. Nearly a quarter-century later, the United States Supreme Court followed suit, interpreting the substantive right to "liberty" in the Due Process Clause to extend its protection to intimate sexual conduct between two partners of the same sex and declaring unconstitutional those laws that had prohibited private sexual intimacy between consenting same-sex adults in a noncommercial setting. *See Lawrence*, 539 U.S. at 578–79. Moreover, the *Lawrence* Court situated its holding within a larger discussion of the relationships of same-sex couples, confirming the equal dignity of those relationships under the Constitution and explaining that the protection of sexual intimacy for gay, lesbian and bisexual people must be accompanied by protection of their prerogative to enter into and maintain lasting intimate relationships:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id. at 567. Although the *Lawrence* case itself did not deal with an attempt by the state to prevent a gay couple from cohabiting, the liberty interest that the opinion extends to gay couples clearly includes the right to maintain a family home — a

right that has been established for non-gay couples for some time. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 505-06 (1977) (recognizing constitutional right of a family to maintain a home together and extending that right beyond the nuclear family to include a grandmother and her grandsons). Following *Lawrence* and *Onofre*, same-sex couples in New York have a right to enjoy private intimacy and to share a household in which they can hold themselves out to their community as participants in a committed relationship.

These precedents have a direct impact upon the range of interests that the State of New York may legitimately assert when presented with a request to give effect to the valid marriage of a same-sex couple performed in another jurisdiction. Heretofore, the doctrines surrounding the recognition of out-of-state marriages have taken shape around a policy of excluding disfavored conduct from the borders of the forum state. The primary interest that states have asserted in such disputes, consistent with their laws prohibiting sex and cohabitation, has been an interest in maintaining a community in which certain forms of sexual and intimate relationships are not present. Following *Lawrence* and *Onofre*, New York can claim no legitimate interest in excluding the relationships of same-sex couples from its borders. As a consequence, the case for retaining the place-of-celebration rule is even stronger in disputes involving same-sex couples than it has been in this Court's earlier precedents.

Indeed, the implications of this shift in constitutional doctrine are particularly consequential in New York. By embracing the place-of-celebration rule and adhering to that rule even in cases involving criminally prohibited relationships, this Court had already deemphasized the state's interest in aggressive regulation of sexual intimacy. With the decisions in *Onofre* and *Lawrence*, any interest that New York might claim in denying recognition to the marriage of a same-sex couple becomes that much weaker.

In re May's Estate provides an important point of comparison in this respect. In that case, this Court gave effect to an evasive marriage between an uncle and a niece, a type of sexual coupling that was criminally prohibited under New York law and remains so to this day. *See* N.Y. Penal Law § 255.25 (McKinney 2009). The dispute before the Court arose out of the probate of an estate and hence did not involve a validation of the ongoing presence of the relationship within the jurisdiction. But this Court declined to rest its holding on any such distinction, instead using broad language to define the operation of the place-of-celebration rule, even in a case involving a relationship that New York law defined as criminally incestuous:

> We regard the law as settled that, subject to two exceptions presently to be considered [*i.e.*, a positive law prohibition or a narrowly defined public policy exception defined by a standard of "abhorrence"], and in the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad, the legality of a marriage between

persons *sui juris* is to be determined by the law of the place where it is celebrated.

In re May's Estate, 305 N.Y. at 490 (citations omitted). Following *Lawrence*, lower federal courts have held that states still retain the power to prohibit incestuous sexual conduct. *See Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005) (rejecting *Lawrence* challenge and upholding criminal prosecution for incest in case of brother and sister who engaged in sexual congress and had children). Thus, *In re May's Estate* continues to stand for the proposition that New York will recognize an out-of-state marriage that is valid where performed, even where it has exercised the prerogative to prohibit sexual intimacy between the couple altogether. The case for departing from that rule is dramatically weaker in a dispute, like this one, that involves a relationship in which the sexual intimacy and cohabitation of the couple are not the subject of any criminal prohibition within the State, and in fact are clearly protected under the U.S. Constitution.

B. The Strong Support From the Political Branches of Government for the Relationships Involved in this Case Counsels Against any Departure from the Place-of-Celebration Rule.

The level of support that statewide executive officials have offered for the committed relationships of gay, lesbian and bisexual New Yorkers is unprecedented among the multistate marriage disputes that this Court has considered. As Defendant-Intervenors explain in detail in their principal brief, the

Governor, the current and former Attorneys General, and the current and former State Comptrollers have all embraced the position that the place-of-celebration rule applies to the out-of-state marriages of same-sex couples and should be respected in New York, whether secured through evasion or otherwise, with the Governor issuing a statewide directive to that effect to all agency counsel. *See* Brief of Defendants-Intervenors-Respondents at 8–12, *Lewis v. New York State Dep't of Civil Serv.*, No. 4078/07 (N.Y. filed July 16, 2009). That executive support is coupled with numerous laws at the state and local level prohibiting discrimination against gay, lesbian and bisexual New Yorkers, including discrimination against same-sex couples, and even a legislative recognition of their out-of-state marriages and domestic partnerships in the case of hospital visitation and emergency health-care decisions. *See* N.Y. Public Health Law §§ 2805-q(2)(a), 4201 (McKinney 2009); Brief of Defendant-Intervenors-Respondents at 35–36 & n.37 (cataloging other New York statutes and decisions that prohibit antigay discrimination and guarantee equal treatment for same-sex couples). This situation stands in sharp contrast to the typical marriage recognition case, where a private litigant makes a claim under an open-ended statute or common-law doctrine and enjoys neither executive validation nor the benefit of a supportive statutory backdrop. Indeed, *Amici* are aware of no other reported decision in a multistate marriage case in

which the disputed relationship category has enjoyed the benefit of such extensive and explicit legislative and executive support in the recognizing jurisdiction.

These circumstances counsel against any departure from the place-of-celebration rule in this case for several reasons. First, the political support described above should put to rest any doubts about whether a public policy exception might somehow be appropriate in cases involving same-sex couples. In light of this Court's restrictive approach to the interpretation of the public policy exception — limiting it to cases of relationships "regarded generally with abhorrence," *In re May's Estate*, 305 N.Y. at 493; declining to apply the exception even in some cases where the relationships were subject to criminal prohibition in New York, *id.*; and appearing to limit the exception to categories of marriage that no American state permits (polygamous marriages and closely consanguineous unions like those between siblings), *see Van Voorhis*, 86 N.Y. at 26 — it would be perverse for this Court to find the exception to apply to a category of relationships that enjoys such explicit support from the political branches.

In this connection, *Amici* note the attempt by Appellants to argue that New York's law prohibiting same-sex couples from marrying within the State should be viewed as a "structural" prohibition that is different in kind from what Appellants call the "regulatory" restrictions of this Court's past precedents. *See* Reply Brief of Plaintiff-Appellants at 5–9, *Lewis v. New York State Dep't of Civil Serv.*,

No. 4078/07 (N.Y. filed Aug. 3, 2009). This is a distinction made from whole cloth, and this Court should give it no credence. Rather, appellants appear to be taking a familiar but inapt distinction and attempting to retool it in the hope of adding weight to their public policy argument.

At common law, courts have frequently distinguished between regulatory restrictions on the formalities associated with celebrating a marriage (whether a license is required, who performs the ceremony, what representations the spouses have made to each other, and the like), and laws that prohibit certain couples from marrying altogether (interracial couples, an uncle and a niece, same-sex couples). The significance of the distinction comes primarily in distinguishing between marriages that may be "voidable" — able to be annulled because of a regulatory infraction, but with that voidability subject to waiver, estoppel and other equitable defenses — and marriages that are "void *ab initio*" or "absolutely void" and impermissible under local law from their inception. *See, e.g., Nakoneczna v. I & L Eisenberg*, 60 A.D.2d 403, 406–07 (3d Dep't 1977) (distinguishing between marriages that are "voidable" by reason of a spouse's impotence and those that are "void *ab initio*," and explaining the different implications of the two classes of infirmity where a widow who receives worker's compensation remarries but later annuls the second marriage); *Brown v. Brown*, 51 Misc. 2d 839, 842 (N.Y. Fam. Ct. 1966) (explaining the common law distinction between a marriage that is

"voidable" because one spouse was underage at the time she married and lied about her age, and a marriage that is "void *ab initio*" because one spouse was already married at the time that the second marriage was performed).

This Court's embrace of the place-of-celebration rule is firmly grounded in cases where the disputed marriage was "void *ab initio*" or "absolutely void" under local law. *See, e.g., In re May's Estate*, 305 N.Y. at 491 (identifying a marriage between an uncle and a niece as "void" when performed locally, but nonetheless recognizing valid Rhode Island marriage); *Van Voorhis*, 86 N.Y. at 28 (recognizing the Connecticut marriage by a divorced adulterer during the lifetime of the former spouse, which under New York law would be "absolutely void" if performed locally). This is the only form of "structural" infirmity that this Court (or any other) has recognized at common law, and this Court's place-of-celebration rule clearly applies to such cases. In light of the support that same-sex couples enjoy from the political branches of government, it would be inappropriate for this Court to apply the public policy exception to the relationships of those couples.

The strong position of the executive in this case also counsels this Court to adhere to its place-of-celebration precedents in order to avoid the necessity of making new law on a novel and untested question. Choice-of-law disputes necessarily involve judgments and trade-offs on matters of policy, requiring a state to decide which interests it wishes to insist upon and which it will deemphasize

when its laws come into conflict with the laws of a sister state. Legislatures sometimes provide express direction on these questions of policy, but in the typical case, common-law courts must make these determinations without such assistance. In this case, however, the Governor has embraced the place-of-celebration rule as a correct statement of the law and has employed the maximum extent of his authority to implement that rule in all statewide agencies. The Attorney General has likewise embraced that policy position as a party to these proceedings representing the interests of the State. *Amici* are unaware of another multistate marriage ruling in which the choice-of-law question has come to the court in such a posture, with the state's executive officials having weighed in so strongly on the proper balance of policy considerations.

In order to consider departing from its established choice-of-law precedents and rejecting the actions of the Governor, this Court would also have to issue a ruling on the extent of the Governor's power to bind the State of New York to a resolution of competing policy interests in a choice-of-law dispute through the use of his administrative powers where, as here, there is neither a legislative mandate nor a legislative restriction on the question. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–639 (1952) (Jackson, J., concurring) (setting forth an approach for measuring federal executive authority in the absence of clear legislative direction). In other words, the Court would have to speak to the

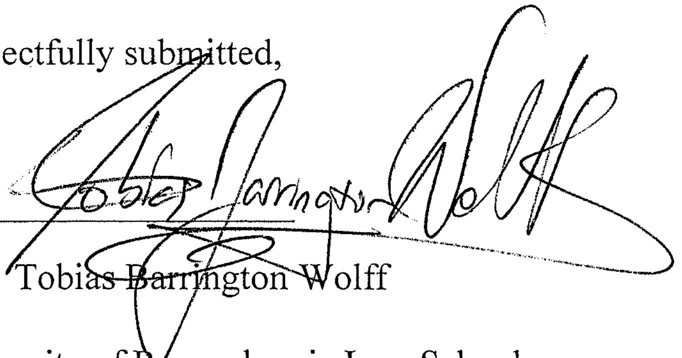
independent role of the executive as a source of policy authority in choice-of-law disputes under the common law. Such a ruling would break new ground, and it is unnecessary for the Court to do so when adherence to its consistent line of precedents in this area would avoid the question altogether.

Conclusion

For all these reasons, *Amici* Conflict of Laws Scholars respectfully submit that this case presents an inapt vehicle for any reconsideration of this Court's long adherence to the place-of-celebration rule. The best course is for this Court to affirm the decisions below.

Dated: New York, New York
September 3, 2009

Respectfully submitted,



By : ______________________
Tobias Barrington Wolff

University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia PA 19104
Telephone no. (215) 898-7471

Attorney for Amici Curiae