
Court of Appeals
State of New York

Kenneth J. Lewis, et al.,

Plaintiff-Appellants,

-against-

New York State Department of Civil Service, et al.,

Defendants-Respondents.

Albany County
Index No. 4078/07

Margaret Godfrey, et al.,

Plaintiff-Appellants,

-against-

Andrew J. Spano, et al.,

Defendants- Respondents.

Westchester County
Index No. 16894/06

***AMICUS CURIAE* BRIEF ON BEHALF OF
NEW YORK STATE UNITED TEACHERS
IN SUPPORT OF DEFENDANTS- RESPONDENTS**

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STATEMENT OF INTEREST

The issues presented by these cases are of great importance to the more than 600,000 public and private sector members of New York State United Teachers, which includes teachers and other school-related employees employed in New York. (See Aff. Richard C. Iannuzzi, ¶ 2). NYSUT has a significant and substantial interest in assuring that its members, a number of whom have entered into validly performed same-sex marriages, receive equal treatment under the law and that its public sector members receive health insurance benefits equivalent to

those in the private sector. As the determination of these appeals could affect benefits such as health care, these issues are pertinent to the employees whom NYSUT represents. (See Aff. Richard C. Iannuzzi, ¶¶ 5, 6).

NYSUT has a direct interest in protecting its estimated 132,000 in-service and retired members who serve or previously served in school districts and universities that participate in the New York State Health Insurance Plan (“NYSHIP”), all of whom deserve equal benefits. NYSUT’s interests include ensuring that its members who choose to enter into valid same-sex marriages outside of New York are provided the same benefits as those provided to members registered as domestic partners. NYSUT also has an interest in ensuring that all of its members participating in NYSHIP with their spouses, whether opposite-sex or same-sex, are guaranteed equal benefits. Further, as health care is mandatory subject of bargaining between a union and employer, NYSUT has an interest in ensuring that the terms and conditions of the collective bargaining agreements between the local unions it represents and the school districts are secure. (See Aff. Richard C. Iannuzzi, ¶ 9).

Likewise, it is in NYSUT’s interest to protect its Westchester County members who entered into same-sex marriages and to ensure that they receive benefits equal to those in opposite-sex marriages. Denying same-sex spouses

coverage because of their marital status, as opposed to their domestic partnership status, only serves to interfere with the marital relationship. (See Aff. Richard C. Iannuzzi, ¶ 7).

As discussed below, under New York's well-established marriage recognition rule, same-sex marriages validly performed outside of New York must be afforded recognition. Further, said marriages do not fall within either of the limited exceptions to this long-standing precedent.

Additionally, the New York State Department of Civil Service ("DCS") was fully authorized to provide benefits under NYSHIP to spouses of employees who have entered into valid same-sex marriages. DCS acted within its proper authority and reasonably interpreted the term "spouse" to include spouses of same-sex couples. Accordingly, the New York Supreme Court, Appellate Division, Third Department decision in *Lewis, et al. v. DCS, et al.* should be upheld.

Lastly, Westchester County Executive Order No. 3 of 2006 is entirely lawful. The Westchester County Executive acted properly within his power and authority by directing county departments to recognize valid same-sex marriages performed outside of the state. In addition, the Plaintiffs-Appellants have failed to establish that the Executive Order resulted in any unlawful expenditure of public funds. Accordingly, the New York Supreme Court, Appellate Division, Second

Department decision in *Godfrey, et al. v. Spano, et al.*, should be upheld.

ARGUMENT

POINT I

NEW YORK STATE LAW REQUIRES RECOGNITION OF SAME-SEX MARRIAGES VALIDLY PERFORMED IN OTHER JURISDICTIONS.

The longstanding marriage recognition rule in New York State requires that a marriage validly performed in another jurisdiction be recognized in New York even if that marriage could not have been solemnized in New York. The only exceptions to this rule are where recognition of the marriage is specifically barred by statute or where recognition of such marriage would be abhorrent to New York public policy. As discussed below, same-sex marriages validly performed in other jurisdictions do not fall within either of the two limited exceptions to the marriage recognition rule. Accordingly, both DCS and Westchester County properly recognized these marriages.

It is well-settled that a marriage that is valid in the jurisdiction where it was performed will be recognized as valid in New York. *See In re Estate of May*, 305 N.Y. 486, 490 (1953) ("[I]n the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad, the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated."); *Van Voorhis v. Brintnall*, 86 N.Y. 18, 25 (1881) ("[T]he rule

recognizes as valid a marriage considered valid in the place where celebrated."); *Decouche v. Savetier*, 3 Johns. Ch. 190, 211 (1817) ("There ... [is] no doubt of the general principle, that the rights dependent upon nuptial contracts are to be determined by the *lex loci*."). This time-honored principle derives from English common law. *See, e.g., Scrimshire v. Scrimshire*, 161 Eng. Rep. 782, 790 (Consistory Ct. 1752).

Consistent with this long-standing proposition, New York recognizes marriages validly performed in other jurisdictions even if the marriage would have been invalid if performed in New York. *See Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980) (finding that Workers' Compensation Board must first determine whether a valid common-law marriage from a sister state exists and is therefore recognized in New York, before denying a claim upon the ground that the decedent and claimant are not married); *In re Estate of May*, 305 N.Y. at 491-93 (recognizing a marriage between an uncle and niece entered into outside of New York); *Shea v. Shea*, 294 N.Y. 909, 909 (1945) (finding that if a common-law marriage came into existence in Georgia and was supported by evidence, the marriage could be recognized in New York State); *Carpenter v. Carpenter*, 208 A.D.2d 882, 883 (2d Dep't 1994) (holding a couple's common-law marriage valid based on overwhelming evidence that they entered into a common-law marriage

pursuant to the laws of the State of Pennsylvania, during a brief visit to that state); *Fernandes v. Fernandes*, 275 A.D. 777 (2d Dep't 1949) (affirming an order directing husband to pay support for his wife because their marriage in the District of Columbia was valid as both a common-law marriage and a marriage by proxy); *In re Will of Valente*, 18 Misc.2d 701, 704-05 (Sur. Ct. Kings County 1959) (holding a proxy marriage performed in conformity with the laws of Italy is recognized under the law of the State of New York). The limited exceptions to this rule are: (1) if the Legislature has expressly prohibited recognition of a particular type of out-of-state marriage or, (2) where recognition of the marriage would be abhorrent to New York public policy. See *In re Estate of May*, 305 N.Y. at 491, 493.

To satisfy the first exception, the Legislature must *explicitly prohibit* the recognition of the marriage even if the marriage was validly performed in another jurisdiction. This exception, however, requires that the Legislature do more than simply prohibit the performance of the marriage in New York. For example, this Court recognized a validly performed Rhode Island marriage between an uncle and his niece, even though *New York Domestic Relations Law* § 5(3) expressly voids such a marriage if performed in New York. See *In re Estate of May*, 305 N.Y. at 491-93. The Court explained that the Legislature had failed to void such marriages

which were "solemnized in a foreign State where such marriage is valid . . . ," although "examples of such legislation are not wanting . . ." *Id.* at 492. The Court concluded that the *Domestic Relations Law's* prohibition on performing such marriages in New York "should not be extended by judicial construction" to a prohibition on recognizing such marriages in New York. *Id.*

Likewise, although New York statute expressly prohibits common law marriages, *see Domestic Relations Law* § 11 (stating that "[n]o marriage shall be valid unless solemnized"), this Court has consistently recognized such marriages where they met the requirements of other States' laws pertaining to common law marriage. *See Shea v. Shea*, 294 N.Y. 909, 911 (1945) *adopting* the dissenting opinion in the lower court, 268 A.D. at 687 (Johnston, J., dissenting) (noting that common law marriages from other States are entitled to recognition); *see also Ziegler v. P. Cassidy's Sons*, 220 N.Y. 98, 110 (1917) (unless the Legislature has deemed it "wise and best to affix the stamp of illegality . . ." upon a marriage, "[t]he courts ought not to be asked to pronounce marriages invalid").

As for the second exception, this Court has stated that the exception is limited to cases of polygamy or incest, both of which are also strongly condemned by statute, *see In re Estate of May*, 305 N.Y. at 491; *Van Voorhis*, 86 N.Y. at 26. The Legislature has indicated that polygamous marriages are repugnant to public

policy by declaring such marriages "absolutely void" as well as criminal. *Domestic Relations Law* § 6; *Penal Law* § 255.15; see also *People v. Ezeonu*, 155 Misc.2d 344, 346 (Sup. Ct. Bronx County 1992) (it is "significant" that polygamous marriages are both expressly made void and criminalized by statute). Likewise, incestuous marriages are both void and criminal. *Domestic Relations Law* § 5; *Penal Law* § 255.25.

The marriage recognition rule has become enshrined in New York jurisprudence in large part because it promotes certainty by avoiding the "infinite mischief and confusion" that would otherwise arise "with respect to legitimacy, successions, and other rights" and responsibilities of parties to marriages performed outside the jurisdiction, as well as with respect to the rights of their children. *Scrimshire*, 161 Eng. Rep. at 790; see also *Van Voorhis*, 86 N.Y. at 26; *Haviland v. Halstead*, 34 N.Y. 643, 647 (1866); Joseph Story, *Commentaries on the Conflict of Laws*, §121 (Isaac F. Redfield Ed., 6th ed. 1865). The rule is an outgrowth of the general principle of comity, which dictates that New York courts "apply the laws of other States where the application of those laws does not conflict with New York's public policy." *Crair v. Brookdale Hosp. Med. Ctr.*, 94 N.Y.2d 524, 528-29 (2000); see also *Gotlib v. Ratsutsky*, 83 N.Y.2d 696, 700 (1994)("[I]n a world of different people, Nations and diverse views and policies,"

foreign pronouncements regarding marital status are honored in New York unless they are fully "repugnant" to New York policy).

A. Neither of the Exceptions to the Marriage-Recognition Rule Apply to Validly Performed Out of State Same-Sex Marriages.

Because recognition of same-sex marriages validly performed in another jurisdiction is not barred by statute, nor is recognition of these marriages contrary to New York public policy, such marriages must be recognized in New York.

First, there has been no express prohibition of recognition of same-sex marriages by the New York State Legislature.

The Legislature has unequivocally declined to state that recognition of same-sex marriages validly performed in other jurisdictions is against New York public policy. On the contrary, the New York State Assembly has passed a bill authorizing the performance of same-sex marriages in New York on two separate occasions. *See* A. 7732, 231st Sess., Reg. Sess. (delivered to Senate May 12, 2009); A. 8590, 230th Sess., Reg. Sess. (delivered to Senate June 19, 2007).

Because the New York State Legislature has not expressly prohibited recognition of same-sex marriages entered into in other jurisdictions, Plaintiffs-Appellants' citations to cases from jurisdictions that have policies barring recognition of such marriages are entirely irrelevant. For example, *In re Kandu*,

31.5 B.R. 123, 133-34 (Bankr. W.D. Wash. 2004), held that a Canadian same-sex marriage was not entitled to recognition under federal law (Lewis Br. at 28-29); *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166, 183 (2005), relied upon legislation providing that "same-sex marriage is not recognized by New Jersey law" (Lewis Br. at 34)¹; *Rosengarten v. Downes*, 71 Conn. App. 372, 395 (2002), holding that Connecticut courts lacked jurisdiction to dissolve a Vermont civil union (Lewis Br. at 34).

The Legislature has not expressly prohibited recognition of validly performed same-sex marriages. Therefore, this exception to the marriage recognition rule is inapplicable to the instant cases.

Second, recognition of same-sex marriages validly performed in other jurisdictions is not abhorrent to New York public policy.

Recognition of same-sex marriages validly performed in other jurisdictions is consistent with a growing number of New York policies that affirmatively protect same-sex relationships. It is State policy not to condone any form of discrimination on the basis of sexual orientation. *See Executive Law* § 296 et. al. This landmark law is a clear and unequivocal statement of New York public

¹ References to the Appellants' Briefs will be cited as ("Lewis. Br. at ___") and ("Godfrey Br. at ___"). References to the Lewis Appendix will be cited as ("L.A. ___"), to the Lewis Record as ("L.R. ___"), to the Godfrey Record as ("G.R. ___") and to the Godfrey Appendix as ("G.A. ___").

policy. According to the Sponsors' Memo, this law represents a policy of "vigorous pursuit for equal treatment of all New Yorkers." See Sponsor's Mem. in Support, reprinted in Bill Jacket for Ch. 2 (2002), at 4.

Additionally, there are numerous policies in New York that recognize the "relationship status" of same-sex partners. For instance, New York recognizes some same-sex partners as "family members" protected from eviction. *See Braschi v. Stahl Assoc. Co.*, 74 N.Y.2d 201, 211-14 (1989). In *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 494-95 (2001), this Court held that same sex couples may challenge exclusion from housing set aside for married couples. Likewise, *In re Matter of Jacob*, 86 N.Y.2d 651, 668-69 (1995), held that through adoption, the unmarried same-sex partner of a child's biological parent can become the child's second parent.

Similarly, it has been the policy of the State to recognize same-sex domestic partnerships for a variety of purposes. For example, domestic partners were permitted to make claims against the September 11th Victim Compensation Fund, *Cruz v. McAneney*, 31 A.D.3d 54, 58 (2d Dep't 2006); same-sex domestic partners are eligible for a supplemental burial allowance for partners killed in military combat, *see Executive Law* § 354-b; same-sex domestic partners may visit their partners in hospitals just as spouses may, *see Public Health Law* § 2805-q; same-sex domestic partners may dispose of their partners' remains, *see Id.* § 4201(1)(c);

and same-sex domestic partners are eligible for sick leave from their jobs in the judiciary to care for their partners, *see* 22 N.Y.C.R.R. § 24.4(a)(2). As will be discussed further below, DCS permits same-sex domestic partners of State employees to enroll in NYSHIP, and has done so for a number of years. Additionally, since 1994, the New York State Insurance Department has permitted private employers to offer domestic-partner health coverage. *See, e.g.*, N.Y. Dep't of Ins., Op. No. 07-11-10 (2007).

Further evincing New York public policy, three statewide elected officials have determined that New York law or policy is compatible with the recognition of same-sex marriages validly performed in other jurisdictions: the Attorney General (L.R. 163-168), the Comptroller (L.R. 170-175), and the Governor, *see Golden v. Paterson*, 23 Misc.3d 641, 649 (Sup. Ct. Bronx County 2008). Similar determinations have been made by many municipalities, including Albany (L.R.197), Buffalo (L.R. 204), New York City (L.R. 195), Rochester (L.R. 212), and Westchester County (L.R. 199).

As this Court has looked in the past to the statements and actions of statewide elected officials to determine State policy, it should do so here as well. *See, e.g., Crane Neck Ass'n, Inc. v. N.Y. City/Long Island County Servs. Group*, 61 N.Y.2d 154, 163 (1984) (looking to, *inter alia*, gubernatorial statements in

ascertaining state policy to "deinstitutionalize mentally and developmentally retarded individuals"). The actions of elected officials, as this Court has recognized, are responsive to "the prevailing attitudes of the community" and inform New York public policy. *Ehrlich-Bober & Co., Inc. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980); *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 14 (1964). Accordingly, since statewide officials have consistently found that recognition of these marriages is consistent with New York public policy, so should this Court.

Plaintiffs-Appellants erroneously argue that recognition of same-sex marriages validly performed in other jurisdictions is abhorrent to State policy by likening them to marriages entered into under duress or those between adults and young children. *See* Lewis Br. at 24. This argument fails precisely because of the many policies discussed above which protect same-sex couples and relationships. Unlike the litany of policies in place to protect same-sex couples, there are absolutely no New York laws or policies protecting the rights of an adult spouse of a young child or a spouse of a marriage entered into under duress. In fact, the Legislature has explicitly stated that "the consent of parties capable in law of making a contract is essential" to the "validity in law" of a marriage. *Domestic Relations Law* §10; *see also Cunningham v. Cunningham*, 206 N.Y. 341, 349

(1912) (the court would not recognize out-of-state marriage where "the consent was procured through force, duress or fraud, etc.").

Appellants also erroneously argue that the holding in *Hernandez v. Robles*, 7 N.Y.3d 338, 356 (2006), suggests that there is a policy in New York which provides the basis for barring the recognition of same-sex marriages validly performed in other jurisdictions. *See* Lewis Br. at 28. This argument is without merit. The issue in *Hernandez* was whether the *Domestic Relations Law* authorized same-sex marriage in New York. *Id.* at 357. Although *Hernandez* held that the *Domestic Relations Law* did not provide for marriage licenses to be issued to same-sex couples, it did not address the question of recognition of same-sex marriages validly performed in other jurisdictions. The *Hernandez* ruling is entirely consistent with the precepts of the marriage-recognition rule, which leaves to the Legislature the decision whether to bar recognition of validly performed same-sex marriages from other jurisdictions.

Thus, neither of the exceptions to the marriage-recognition rule apply to validly performed out of state same-sex marriages.

POINT II

DCS PROPERLY RECOGNIZED VALIDLY PERFORMED OUT OF STATE SAME-SEX MARRIAGES FOR NYSHIP ENROLLMENT.

As discussed below, DCS acted entirely within its authority by including in NYSHIP spouses of same-sex marriages validly entered into in other jurisdictions.

A. DCS Lawfully Exercised Its Authority to Include Employees' Dependents in NYSHIP.

It falls squarely within DCS's authority to offer NYSHIP benefits to committed same-sex partners of its employees. According to *Civil Service Law* §161(1), DCS has authority "to establish a health insurance plan for state officers and employees and their dependents." Importantly, NYSHIP was created in response to the rise in private employer-sponsored medical coverage to provide State employees with "similar opportunities." See Governor's Message to ch. 461, *reprinted in* 1956 N.Y. State Legis. Annual 418, at 419. Its authorizing legislation deliberately left practical details of administering this plan to DCS, with the expectation of extensive employee input. *Id.* The Legislature's only requirement for coverage was that DCS provide coverage for each employee's "spouse and dependent children, as defined by the regulations of the president" of DCS. *Civil Service Law* § 164(1). DCS is therefore only required to provide coverage for dependents who are spouses or children, and is authorized to cover any dependents

of State employees, with the term "dependent" left to DCS's interpretation. *Id.* §161(1).

As the agency authorized to administer the plan, DCS should be afforded deference in construing the term "dependent." DCS has exercised its authority to provide coverage for domestic partners of State employees. Such domestic partner benefits were secured through collective bargaining. In 2000, the New York State Insurance Department stated that the term "dependent" does not "limit coverage to a traditional family unit." N.Y. Dep't of Ins. Op. No. 00-09-12 (2000).

Under well-settled law with respect to statutory interpretation, DCS's interpretation of the definition of the term "dependent" must be upheld as long as it is reasonable. *See, e.g., Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v. Dep't of Env'tl. Prot.*, 11 N.Y.3d 327, 334 (2008), (holding, "[as] a general rule, the construction given statutes . . . by the agency responsible for their administration, if not irrational or unreasonable, should be upheld.") (internal quotation and citation omitted); *Samiento v. World Yacht, Inc.*, 10 N.Y.3d 70, 79 (2008); *see also Syracuse Urban Renewal Agency v. State*, 106 A.D.2d 23, 26 (3d Dep't 1985) (deferring to DCS's interpretation in administration of NYSHIP).

Further, DCS has no obligation to "rigidly restrict" the class of people covered by the broad term "dependent," but rather is free to interpret it in a manner that reflects "the reality of family life" today. *See Braschi*, 74 N.Y.2d at 211. In

making these determinations, DCS must also be guided by its directive to provide health insurance coverage commensurate with comparable private employers. It is precisely by offering domestic partner benefits through NYSHIP that DCS is able to carry out its directive to offer coverage which is comparable to that provided by private employers.

Because DCS was within its power to provide NYSHIP benefits to same-sex partners of its participating employees, including those same-sex spouses of such employees, the New York Supreme Court, Appellate Division, Third Department decision must be upheld.

B. DCS's Interpretation of the Term "Spouse" to Include Same-Sex Spouses is Reasonable and in Accordance with the *Civil Service Law*'s Mandate to Broadly Provide Coverage to Active Members Throughout the State.

DCS's interpretation of the statutory term "spouse" to include all those in validly performed marriages recognized by New York law is eminently reasonable. Assuming *arguendo* that this case presents a question of statutory interpretation, *see* Lewis Br. at 62, DCS is entitled to deference in its "specific application of a broad statutory term." *Matter of O'Brien v. Spitzer*, 7 N.Y.3d 239, 242 (2006) (internal quotation omitted). In addition, here the Legislature has explicitly delegated the authority to DCS to define the terms "spouse and dependent children," *see Civil Service Law* §164(1), which also militates in favor of showing

deference to DCS. Where as here, the definition of the term "spouse" is reasonable, it should be upheld.

Further, there is nothing in the legislative history or the *Civil Service Law* indicating that the Legislature intended to exclude any lawfully married NYSHIP beneficiaries from coverage. As stated in *Civil Service Law* §161(3), NYSHIP is meant to have a wide reach and "provide benefits on a non-discriminatory basis to the extent possible, to active members throughout the State, wherever located."

Appellants' reliance on cases holding that same-sex couples who are not married are not "spouses" as that term is used in various statutes is entirely misplaced. *See* Lewis Br. at 53-54, 60-61. These cases simply do not address the issue of whether the same-sex partners to a valid *marriage* are "spouses." The cases cited by appellants concern the question of whether civil unions, domestic partnerships, and other non-marital relationships make the parties thereto a "spouse." As none of these cases address the question raised by appellants, whether a party to a validly performed marriage is a "spouse," they are irrelevant.

As DCS properly interpreted "spouse" to encompass spouses of same-sex marriages validly performed in other jurisdictions for purposes of enrollment in NYSHIP, the New York Supreme Court, Appellate Division, Third Department decision should be upheld.

POINT III

WESTCHESTER COUNTY EXECUTIVE ANDREW J. SPANO PROPERLY EXERCISED HIS AUTHORITY WHEN HE ISSUED EXECUTIVE ORDER NO. 3 OF 2006.

As the Chief Executive of Westchester County, Andrew J. Spano had administrative authority to issue Executive Order No. 3 of 2006 so as to ensure that validly married same-sex couples are afforded the same treatment by County entities as opposite-sex married couples. There should be absolutely no distinction between married couples and couples defining themselves as domestic partners for the purposes of benefits.

- A. The County Executive Is Empowered to Provide the Same Benefits as Those Afforded to Domestic Partners to Couples in Valid Same Sex Marriages.

The Westchester County Executive's Order is a valid exercise of power and conforms with the County's intent to comply with the law. As Chief Executive Officer of the County, the County Executive is legally obligated "[t]o see that the laws of the state pertaining to the affairs and government of the county, the acts and resolutions of the County Board and duly enacted local laws are executed and enforced within the county." *See Laws of Westchester County* § 110.11. Thus, the County Executive has broad administrative authority to promulgate Executive Orders in furtherance of this obligation.

Executive Order No. 3 is completely within the Chief Executive's lawful domain. It does not grant new benefits, create new rights, enable same-sex couples to marry, seek to alter or interpret the *Domestic Relations Law*, or contradict existing statutory or common law. Rather, Executive Order No. 3 requires the recognition of existing rights which are already granted to all marriages performed outside the State, including between same-sex marriages, to the maximum extent permitted by existing State statutory and common law.

Further, it is clearly within the County's legal authority to set compensation, provide health benefits to its employees, and enter into agreements with employee organizations which establish the terms and conditions of employment. *See, e.g., New York State County Law* § 205; *New York State Civil Service Law* §§ 204, 204-a; *see also Slattery v. City of New York*, 179 Misc.2d 740, 754 (Sup. Ct. N.Y. County 1999) (local governments have broad authority to determine the benefits accorded employees and "absent absolute conflict with statutory or constitutional authority, the courts should not intervene where the salary and benefits accorded to municipal employees are at issue"), *aff'd*, 266 A.D.2d 24 (1st Dep't 1999), *appeal dismissed*, 94 N.Y.2d 897 (2000).

In that regard, Westchester County has covered the domestic partners of all of its employees under the health benefit plan for many years. (G.R. 213-214). The Executive Order itself reiterates that Westchester County enacted its Domestic

Partnership Registry Law in September 2002, in “seeking to support all caring, committed and responsible family units.” (G.A. 71)

Further, it is established that health benefits are a form of compensation and a term of employment. *See Incorporated Village of Mineola v. Int’l Bhd. of Teamsters*, 11 Misc.3d 844, 847(Sup Ct. Nassau County 2005). As such, the provision of health insurance for public employees, such as County employees, is a mandatory subject of collective bargaining. *See Aeneas McDonald Police Benevolent Ass’n v. City of Geneva*, 92 N.Y. 2d 326, 331-332 (1998) (health benefits for current employees is a mandatory subject of collective bargaining, and practices relating to health insurance cannot be unilaterally modified by the public employer without negotiation).

For instance, the terms and conditions of employment set forth in the contract provisions of the collective bargaining agreement between the County as employer and the Civil Service Employees Association (“CSEA”) adopt the language of NYSHIP eligibility and use the term “spouse” interchangeably with the term “domestic partner.”

Specifically, the contract provision concerning health insurance and other leave states that “[t]he current POMCO Health Care Plan will be amended to provide “domestic partner” language in accordance with the NYSHIP (Empire) Plan as administered by the State of New York.” (G.A. 109) Likewise, the

provision with respect to bereavement leave states that “[f]or purposes of this clause, domestic partner and spouse shall be interchangeable.” (G. A.106) and the contract provision concerning family sick leave states “[a]ny available accumulated leave balance may be used for illness in the family, including for domestic partners in accordance with NYSHIP (Empire Plan) as administered by the State of New York.” (G.A.106).

In sum, Westchester County already lawfully extends health benefits and certain types of leave to individuals in same-sex committed relationships by virtue of domestic partnership coverage. The County can administer its benefits at its discretion and in accordance with its lawful statutory mandates, and this includes providing health benefits to those couples who have identified their partners as domestic partners as well as same-sex couples who have been lawfully married in other jurisdictions. Therefore, there was nothing improper in the issuance of Executive Order No.3, and the New York State Supreme Court, Appellate Division, Second Department properly opined that it was a valid exercise of the County Executive’s power.

- B. Appellants Have Failed to Establish that Executive Order No. 3 of 2006 Results in any Unlawful Expenditure of Public Funds.

The Plaintiffs-Appellants have failed to identify any illegality or wrongful

expenditure of funds that may be expended for the purpose of providing benefits to partners in same-sex marriages to which they would not otherwise be entitled. The Executive Order confirms that in administering duly enacted County programs, the County will recognize married same-sex couples who have legally wed out of State, only to the extent to which New York State law permits such recognition. Accordingly, absent any illegality, corruption, or waste of taxpayer funds, the County Executive directed that county governmental departments must adhere to existing controlling State law in administering County employee benefits and other County programs. As the Appellate Division noted, the Executive Order requires recognition of same-sex marriages "to the maximum extent allowed by law" and therefore, explicitly directs that any and all governmental action flowing from the Executive Order will necessarily be carried out within legal bounds. (G.A. 5).

In addition, as this Court has stated, in order to sustain a claim of illegality, the County Executive's actions had to "imperil the public interests or [be] calculated to work public injury or produce some public mischief (citation omitted) with regard to the use of public property or funds." *Matter of Korn v. Gulotta*, 72 N.Y.2d 363, 372 (1988). Such an action "requires a showing of clear illegality, a total lack of power to do the acts complained of." *Wein v. City of New York*, 80 Misc.2d 894, 899 (Sup. Ct. N.Y. County 1975), *aff'd*, 47 A.D.2d 367 (1st Dep't

1975). Additionally, the courts have required "special allegations of waste tied to corruption." *Bettors v. Knabel*, 288 A.D.2d 872 (4th Dep't 2001) (citing *Montecalvo v. City of Utica*, 170 Misc.2d 107, 111(Sup. Ct. Oneida County 1996), *aff'd* on opinion below, 233 A.D.2d 960(4th Dep't 1996), *appeal dismissed*, 89 N.Y.2d 938 (1997), *appeal denied*, 98 N.Y.2d 659 (2002)). Here, there has been no such showing. In fact, a Westchester County official confirmed in a sworn affidavit that there "was no instance where the County has expended funds or extended benefits in connection with this Executive Order." (G.R. 339, para. 4).

Moreover, any allegations of malfeasance must be detailed and specific, not merely general averments designed to withstand dismissal. *Montecalvo v. Herbowy*, 171 Misc.2d 921, 926 (Sup. Ct. Oneida County 1997) ("A cause of action for official corruption [under Section 51] must contain special, detailed factual allegations of waste tied to corruption"); *see also CPLR* § 3016(b) ("Where a cause of action or defense is based on misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.") The allegations in the Amended Complaint aver only that the County Executive acted beyond his "authority" and "illegally" when issuing the Executive Order (G.A. 42-47). These allegations, alone, are insufficient to maintain an action under Section 51. *See, eg., Bernstein v. Feiner*, 13 A.D.3d 519, 521 (2d Dep't 2004) (Section 51 claim of petitioner taxpayer who

challenged the imposition of a town tax solely on residents of an unincorporated area to finance the costs of acquiring certain parkland was denied where taxpayer failed to allege the requisite fraud, collusion, or bad faith necessary to maintain a Section 51 cause of action); *Montecalvo*, 170 Misc.2d at 114 (plaintiffs failed to articulate any factual allegations, which, if believed, would have led the court to believe that official misconduct had occurred or would necessarily have led to waste of municipal assets.)

The Plaintiffs-Appellants have also failed to cite any controlling authority that the actions of the County Executive were illegal and *ultra vires* such as to preclude recognition of same-sex marriages in the manner prescribed in Executive Order No. 3 of 2006. In the absence of illegality, fraud, collusion, corruption, or bad faith, courts do not sit in judgment on questions of administrative discretion and do not interfere with the conduct of municipal officials. *See Gaynor v. Rockefeller*, 15 N.Y.2d 120, 134 (1965) ("in a taxpayer's action, [t]he courts do not sit in judgment upon questions of legislative policy or administrative discretion.") (internal quotation and citation omitted); *Mesivta of Forest Hills Inst., Inc. v. City of New York*, 58 N.Y.2d 1014, 1016 (1983) (sitting in judgment without the fraud or illegality necessary to support a taxpayer action pursuant to section 51 "would subject the discretionary action of all local officers and municipal bodies to review by the courts at the suit of the taxpayers, a result which

would burden the courts with litigation, without increasing the efficiency of local administration.")

In sum, Plaintiffs-Appellants have failed to establish that Executive Order No.3, which directs that county departments and boards recognize same sex marriages lawfully entered into outside the State of New York, resulted in any unlawful expenditure of public funds. The County Executive properly issued Executive Order No. 3 which results in allowing same-sex couples lawfully married out of state to enjoy the same benefits as those provided to couples defining themselves as domestic partners.

CONCLUSION

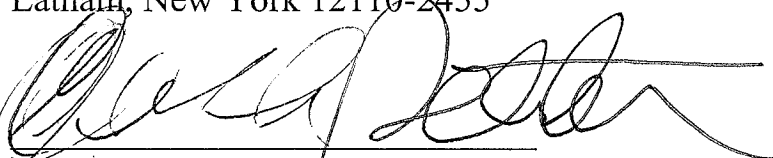
For the reasons set forth in this brief, the August 27, 2009 Affirmation of Elizabeth R. Schuster, and the August 25, 2009 Affidavit of Richard C. Iannuzzi, *Amicus Curiae* NYSUT respectfully requests that the decisions of the Appellate Division, Third Department in *Lewis, et al. v. DCS, et al.* and the Appellate Division, Second Department in *Godfrey, et al. v. Spano, et al.*, be affirmed.

Dated: August 31, 2009

Respectfully submitted,

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