

Court of Appeals

STATE OF NEW YORK



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

against

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

and

PERI RAINBOW and TAMELA SLOAN,
Defendants-Intervenors-Respondents.

**BRIEF OF THE NEW YORK STATE BAR
ASSOCIATION AS AMICUS CURIAE IN SUPPORT
OF DEFENDANTS-RESPONDENTS**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTERESTS OF <i>AMICUS CURIAE</i>	1
PRELIMINARY STATEMENT.....	3
BACKGROUND.....	5
ARGUMENT	6
I. NEW YORK’S COMMON LAW OF COMITY IN THE MARRIAGE CONTEXT IS LONG STANDING AND WELL ESTABLISHED, DICTATES THE RESULT REACHED BY THE LOWER COURTS HERE, AND SHOULD NOT BE ALTERED MERELY TO ACHIEVE A DIFFERENT RESULT	6
A. Under New York’s Well-Developed Marriage-Recognition Jurisprudence, Marriages of Same-Sex Couples Validly Entered in Other Jurisdictions Should Be Recognized in New York	6
B. The New and Novel Analytical Approaches Developed by Plaintiffs-Respondents and Their <i>Amici</i> Are Result-Oriented Constructs that Directly Conflict with this Court’s Long-Standing Marriage-Recognition Jurisprudence	13
II. NEW YORK LAW RECOGNIZES MARRIAGES OF SAME-SEX COUPLES VALIDLY ENTERED IN OTHER JURISDICTIONS, AND THIS COURT’S DECISION IN <i>HERNANDEZ V. ROBLES</i> DOES NOT DICTATE A CONTRARY RESULT	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

Braschi v. Stahl Assocs. Co.,
74 N.Y.2d 201 (1989) 10

Carpenter v. Carpenter,
208 A.D.2d 882 (2d Dep’t 1994)..... 7

Cruz v. McAneney,
31 A.D.3d 54 (2d Dep’t 2006)..... 10

Decouche v. Savetier,
3 Johns Ch. 190 (1817) 7

Earle v. Earle,
141 A.D. 611 (1st Dep’t 1910) 9

Fernandes v. Fernandes,
275 A.D. 777 (2d Dep’t 1949)..... 7

Glaser v. Glaser,
276 N.Y. 296 (1937) 10

Hernandez v. Robles,
7 N.Y.3d 338 (2006)*Passim*

In re Jacob,
86 N.Y.2d 651 (1995) 10

In re May’s Estate,
305 N.Y. 486 (1953)*Passim*

In re Peart’s Estate,
277 A.D. 61 (1st Dep’t 1950) 8

Incuria v. Incuria,
155 Misc. 755 (Dom. Rel. Ct. N.Y. City 1935)..... 9

Langan v. St. Vincent’s Hospital of N.Y.,
25 A.D.3d 90 (2d Dep’t 2005), *appeal dismissed*, 6 N.Y.3d 890 (2006)..... 15

<i>Langan v. State Farm Fire & Cas.</i> , 48 A.D.3d 76 (3d Dep’t 2007).....	15, 16
<i>Levin v. Yeshiva Univ.</i> , 96 N.Y.2d 484 (2001)	10
<i>Martinez v. County of Monroe</i> , 50 A.D.3d 189, <i>appeal dismissed</i> , 10 N.Y.3d 856 (2008).....	15, 16
<i>Mott v. Duncan Petroleum Transp.</i> , 51 N.Y.2d 289 (1980)	6
<i>People v. Ezeonu</i> , 155 Misc. 2d 344 (Sup. Ct. Bronx Co. 1992)	9
<i>Shea v. Shea</i> , 268 A.D. 677 (2d Dep’t), <i>rev’d on dissenting op.</i> , 294 N.Y. 909 (1945).....	8
<i>Van Voorhis v. Brintnall</i> , 86 N.Y. 18 (1881)	7, 8

STATUTES

DOMESTIC RELATIONS LAW § 5.....	11
EXECUTIVE LAW § 296	10
EXECUTIVE LAW § 354-b.....	10
PENAL LAW § 255.25.....	11
PUBLIC HEALTH LAW § 2805-q	10
PUBLIC HEALTH LAW § 4201(1)(c)	10
N.Y.C.R.R. § 24.4(a)(2).....	10

OTHER AUTHORITIES

Benjamin A. Cardozo, <i>The Nature of the Judicial Process</i> 149 (Yale University Press 1921).....	16
NYSBA Report on Legal Issues Affecting Same-Sex Couples (2005), available at, http://www.nysba.org/AM/Template.cfm?Section=Special_Committee_on_LGBT_People_and_the_Law_Home&template=/CM/ContentDisplay.cfm&ContentID=13520 (2005).....	1
NYSBA Report on Marriage Rights for Same-Sex Couples (2009), available at, http://www.nysba.org/AM/Template.cfm?Section=News_Center&Template=/CM/ContentDisplay.cfm&ContentID=28371	1
NYSBA Resolution on Report on Marriage Rights for Same-Sex Couples (2009), available at, http://www.nysba.org/AM/Template.cfm?Section=News_Center&Template=/CM/ContentDisplay.cfm&ContentID=28361	2

INTERESTS OF *AMICUS CURIAE*

The New York State Bar Association (“NYSBA” or the “Association”) is the largest voluntary state bar association in the United States, with more than 76,000 members. Founded in 1876, NYSBA serves the profession and the public by, among other things, promoting reform in the law and facilitating the administration of justice.

NYSBA has long supported equality for same-sex couples and their relationships. In 2005, NYSBA’s 284-member House of Delegates, representing every Judicial District in New York and each of the Association’s Sections, approved an extensive report concerning the legal issues affecting same-sex couples and passed a resolution that they be afforded equal legal rights.¹ Since then, equal legal rights for same-sex couples has been one of NYSBA’s top legislative priorities. In June 2009, NYSBA’s House of Delegates nearly unanimously approved a supplemental report and passed a further resolution underscoring the Association’s continued support of marriage for same-sex couples.²

¹ http://www.nysba.org/AM/Template.cfm?Section=Special_Committee_on_LGBT_People_and_the_Law_Home&template=/CM/ContentDisplay.cfm&ContentID=13520 (approved report).

² http://www.nysba.org/AM/Template.cfm?Section=News_Center&Template=/CM/ContentDisplay.cfm&ContentID=28371 (approved report);

The Association has a Special Committee on LGBT (lesbian, gay, bisexual and transgender) People and the Law, which it mandated to promote equality in the law for LGBT people, to eliminate discrimination against LGBT attorneys and litigants, to promote equality of opportunity for, and increase the visibility of, and contributions made by LGBT attorneys, and to promote diversity in the bench by inclusion of all minorities, including LGBT people.

Many of NYSBA's members practice in the areas of family law and trusts and estates. They confront first-hand the myriad legal issues facing lesbian or gay clients who live or work in New York when they seek to protect their same-sex partners as well as any children of their relationships. Because most states and the foreign jurisdiction bordering New York allow same-sex couples to marry, the issue of whether New York State recognizes their valid marriages is of paramount importance to these clients and their counsel.

NYSBA strongly urges this Court to affirm the lower court's judgment in *Lewis v. New York State Dep't of Civil Serv.*, Index No. 4078/07 (Albany County),

http://www.nysba.org/AM/Template.cfm?Section=News_Center&Template=/CM/ContentDisplay.cfm&ContentID=28361 (adopted resolution).

that marriages of same-sex couples validly performed in other states or foreign jurisdictions are recognized in New York.³

PRELIMINARY STATEMENT

Under New York's well-settled comity and choice-of-law principles, this State recognizes virtually all marriages validly performed in other jurisdictions, regardless of whether such marriages could be performed in New York. Valid out-of-state marriages are presumptively recognized unless recognition has been expressly prohibited by New York's Legislature or unless recognition would be abhorrent, repugnant or destructive to a strong expressed public policy. Because neither of these exceptions apply, marriages of same-sex couples validly entered in other jurisdictions must be recognized in New York. (*See* Point I(A), below.)

Having failed to meet their burden of showing that one of the two exceptions to the marriage-recognition rule apply, Plaintiffs-Appellants and *Amici* supporting them invite this Court to embrace various new and novel approaches to marriage recognition. However, because these approaches are inconsistent with this Court's established precedent and are engineered solely for the purpose of denying marriages of same-sex couples the recognition to which they are legally entitled, this Court should not fashion a new standard. The appropriate legal analysis is

³ NYSBA also strongly supports affirmance in *Godfrey v. Spano*, Index No. 16894/06 (Westchester County), on appeal to this Court, for the reasons set forth in this brief and in the briefs of the Respondents in that case.

clear, convincing and straightforward: Because neither of the marriage-recognition rule's exceptions applies, New York recognizes valid out-of-state marriages of same-sex couples. (*See* Point I(B), below.)

And, contrary to the various assertions of Plaintiffs-Appellants and their *Amici*, this Court's decision in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), does not dictate a different result. *Hernandez* did not address the recognition of out-of-state marriages, nor did it identify any legislative enactment, intent or public policy expressly *against or prohibiting* marriage of same-sex partners. Instead, the holding in *Hernandez* is limited to the proposition that "the New York Constitution does not *compel* recognition of marriages between members of the same sex." 7 N.Y.3d at 356 (emphasis added). Here, the fact that the New York Constitution does not require the domestic grant of marriage to same-sex couples does not affect whether, under long-standing principles of comity, New York recognizes marriages of same-sex couples validly solemnized elsewhere. (*See* Point II, below.)

The issue before this Court has wide-ranging implications for same-sex couples domiciled in New York State, as well as those in neighboring states or other jurisdictions. Now that Massachusetts, Connecticut, Vermont, Maine, New

Hampshire and Iowa allow same-sex couples to marry,⁴ as do Canada, Spain and other foreign countries, and with the very real prospect that other states and foreign jurisdictions will do so in the future, the lives of countless people living and/or working in New York will be radically affected by this Court's ruling. For example, if New York were to refuse to respect the domestic marriage laws of its neighboring states and Canada, a significant disincentive would arise for same-sex couples married in those jurisdictions to cross the border into New York to live, work, or even vacation, because their fundamental civil legal relationship that is valid where performed would cease to exist.

For all these reasons, and as explained in greater detail below, this Court should affirm the lower court's judgment.

BACKGROUND

To avoid unnecessary duplication, NYSBA respectfully refers the Court, in lieu of a separate factual recital, to the summaries of the facts set forth in the Respondents' briefs, as well as the facts set forth in the decision of the lower court. (A.4-A.13.)

⁴ The Maine and New Hampshire legislatures have enacted marriage rights for same-sex couples that are scheduled to take effect in the coming months.

ARGUMENT

I.

NEW YORK'S COMMON LAW OF COMITY IN THE MARRIAGE CONTEXT IS LONG STANDING AND WELL ESTABLISHED, DICTATES THE RESULT REACHED BY THE LOWER COURTS HERE, AND SHOULD NOT BE ALTERED MERELY TO ACHIEVE A DIFFERENT RESULT

Under well-established comity and choice-of-law principles, because recognizing marriages of same-sex couples is neither expressly barred by statute nor repugnant to any New York public policy, the marriage-recognition rule dictates that New York recognize such marriages validly entered in other jurisdictions, regardless of the fact that, at present, such marriages cannot be validly solemnized in New York. Furthermore, neither the marriage-recognition rule's presumption, nor the recognition accorded marriage of same-sex couples when the rule is properly and faithfully applied, should be upset by the result-oriented modifications and burden-shifting suggested by the Plaintiffs-Appellants and their *Amici*.

A. Under New York's Well-Developed Marriage-Recognition Jurisprudence, Marriages of Same-Sex Couples Validly Entered in Other Jurisdictions Should Be Recognized in New York

For well over a century, New York has applied tried-and-true comity and choice-of-law principles to recognize marriages validly performed in other jurisdictions, even if those marriages would not have been valid if performed in

New York. *See Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980); *In re May's Estate*, 305 N.Y. 486, 490-93 (1953); *Van Voorhis v. Brintnall*, 86 N.Y. 18, 25 (1881); *Decouche v. Savetier*, 3 Johns Ch. 190, 211 (1817); *Carpenter v. Carpenter*, 208 A.D.2d 882, 883 (2d Dep't 1994); *Fernandes v. Fernandes*, 275 A.D. 777, 777 (2d Dep't 1949). Although New York's Domestic Relations Law currently recognizes as valid only those marriages solemnized between individuals of the opposite sex, *see Hernandez*, 7 N.Y.3d at 357, New York's marriage-recognition rule nonetheless presumes that marriages between individuals of the same sex, validly entered in other jurisdictions, will be recognized in New York.

As explained at some length in the Briefs for State Respondents (at 14-34) and Defendants-Intervenors-Respondents (at 24-39) – and as even Plaintiffs-Appellants and their *Amici* essentially concede – the only exceptions to this marriage-recognition presumption arise where: (i) the Legislature has expressly prohibited recognizing a particular kind of out-of-state marriage; or (ii) recognition of a marriage would be repugnant, abhorrent or do violence to some strong New York public policy. *See May's Estate*, 305 N.Y. at 491-93.

First, as the Appellate Division recognized in its decision (A.8), “the rule’s first exception is inapplicable because no New York statute expressly precludes recognition of a same-sex marriage solemnized elsewhere.” *See May's Estate*, 305 N.Y. at 493 (recognizing that, in order for the first exception to bar recognition, the

Legislature must clearly demonstrate an intent, in express terms, to void a marriage legally entered into in another jurisdiction); *Van Voorhis*, 86 N.Y. at 34-35 (same); *In re Peart's Estate*, 277 A.D. 61, 70 (1st Dep't 1950) (same). Although the Legislature may have prohibited (or voided) a certain type of marriage domestically in New York, such an action is not sufficient to trigger the first exception to the marriage-recognition rule. *See id.* Instead, the Legislature must express an intent not to recognize particular out-of-state marriages. *See, e.g., May's Estate*, 305 N.Y. at 491-93 (recognizing the Rhode Island marriage between an uncle and niece, despite New York's statutory voidance of such domestic marriages); *Shea v. Shea*, 268 A.D. 677, 688 (2d Dep't 1945) (Johnston, J., dissenting), *rev'd on dissenting op.*, 294 N.Y. at 911 (recognizing a foreign common-law marriage, despite New York's statutory prohibition of such marriages domestically).

Here, the Legislature has expressed no intent to prohibit the *recognition* of out-of-state marriages between same-sex couples. Indeed, in contrast to those cases recognizing out-of-state marriages that would have been invalid if performed in New York, *see id.*, New York's Legislature has not expressly prohibited the domestic solemnization of marriages between same-sex couples in New York. Instead, at most – and for the time being – it has merely limited New York marriages to couples of different sexes. *See Hernandez*, 7 N.Y.3d at 357. But the

analysis need not proceed that far. Because New York’s Legislature has not expressed an intent to prohibit recognition of out-of-state marriages between same-sex couples, the first exception does not bar recognition.

Second, as the Appellate Division explained (A.6-A.9), in New York, the public-policy exception to the marriage-recognition rule has only been applied to preclude recognition of validly entered out-of-state marriages involving: (i) polygamy, *see Earle v. Earle*, 141 A.D. 611, 611 (1st Dep’t 1910); *People v. Ezeonu*, 155 Misc. 2d 344, 346 (Sup. Ct. Bronx Co. 1992); and (ii) incest, *see Incuria v. Incuria*, 155 Misc. 755, 758-59 (Dom. Rel. Ct. N.Y. City 1935). The fact that New York’s Domestic Relations Law does not explicitly authorize marriage between same-sex partners – but instead, refers only to opposite-sex marriage – does not evince a strong public policy that might regard marriage of same-sex couples as abhorrent, repugnant or in any way destructive. Indeed, although it reflects a policy in favor of opposite-sex marriage, New York Domestic Relations Law does not go so far as to establish any policy – whether *pro* or *con* – regarding marriage for same-sex couples. Legislative silence should not be made to “speak volumes” simply because opponents of marriage rights for same-sex couples somehow find such silence compelling.

In any event, New York’s public policy regarding the legal effect to be given to same-sex relationships is not limited to the Domestic Relations Law. This Court

has recognized that public policy equates with “the law of the State, whether found in the Constitution, the statutes or judicial records.” *Glaser v. Glaser*, 276 N.Y. 296, 302 (1937). It bears noting that, as explained in greater detail in the State Respondents’ Brief (at 27-34), certain statutes and “judicial records” from this Court and the lower courts in New York evince a strong public policy that – far from defining (or branding) marriage of same-sex partners as abhorrent – actually *supports* same-sex relationships. *See, e.g., Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211-14 (1989); *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 494-95 (2001); *In re Jacob*, 86 N.Y.2d 651, 669 (1995); *Cruz v. McAneney*, 31 A.D.3d 54, 58 (2d Dep’t 2006); *see also* Executive Law § 296; *id.* § 354-b; Public Health Law § 2805-q; *id.* § 4201(1)(c); N.Y.C.R.R. § 24.4(a)(2).

Thus, New York has adopted a policy of according legal status to same-sex relationships, while declining to adopt any cognizable public policy expressly against the marriage of same-sex couples. The case for recognizing such marriages is therefore far stronger than in those cases involving marriages that would have been expressly precluded from being solemnized in New York by virtue of Legislative enactment – and those marriages were nonetheless recognized.⁵ *See,*

⁵ In their brief (at 28), Plaintiffs-Appellants assert “a strong public policy for recognizing and granting benefits to relationships between opposite-sex couples” and that such marriage “is a deeply rooted fundamental right under the State Constitution” (citation and emphasis omitted). Plaintiffs-Appellants incorrectly conclude, however, that the necessary corollary is that “it is inappropriate to extend

e.g., *May's Estate*, 305 N.Y. at 493 (Rhode Island marriage otherwise regarded as incestuous in New York was deemed not inconsistent with New York public policy “to a degree regarded generally with abhorrence”). If an out-of-state marriage that would have been regarded as incestuous if solemnized in New York merits recognition under comity and choice-of-law principles, *see id.*, there certainly can be no merit to the argument espoused by Plaintiffs-Appellants that marriage of same-sex partners – which, unlike incestuous marriage, has not been expressly made void and criminal, *see* Domestic Relations Law § 5; Penal Law § 255.25 – somehow violates New York public policy to the requisite degree. The recognition of marriages of same-sex couples validly performed elsewhere falls well within comity’s ambit.

Furthermore, from a practical perspective, recognizing marriages of same-sex couples entered in other jurisdictions makes sense. Aside from the purely legal reasons to affirm the lower court’s judgment, this Court should give due regard to the untold mischief that a reversal undoubtedly would visit upon same-sex couples, living both in New York and in its neighboring jurisdictions – not to mention the likely negative effects that New York’s failure-to-recognize would have upon the

comity to foreign-created same-sex ‘marriages’” (*id.* (citation omitted)). Simply because public policy may favor, and “fundamental rights” may be accorded to, different-sex couples, it does not necessarily follow that public policy disfavors marriages of same-sex couples. Accordingly, Plaintiffs-Appellants’ reasoning must be rejected as *non sequitur*.

larger issue of the State's relations with its neighboring states and other (domestic and foreign) jurisdictions.

After all, if New York law and public policy were interpreted to deny recognition of the marriages of same-sex couples validly entered in other jurisdictions, one of the many negative effects would be to limit considerably the opportunities and incentives for same-sex couples who might otherwise choose to live, work or even travel to New York. For example, if a spouse of a same-sex couple validly married in Massachusetts was accidentally killed in New York, the surviving spouse would lose all rights and privileges he or she otherwise would have to bring a wrongful-death claim in New York. Similarly, if a same-sex couple, validly married in Connecticut but living in New York, decided to divorce, the negative legal and financial implications of New York's failure to recognize their out-of-state marriage likely would be crippling, turning an undoubtedly bad situation even worse. Surely, New York's law and public policy protects same-sex individuals validly married in other jurisdictions against such drastic and devastating practical effects.

B. The New and Novel Analytical Approaches Developed by Plaintiffs-Respondents and Their *Amici* Are Result-Oriented Constructs that Directly Conflict with this Court's Long-Standing Marriage-Recognition Jurisprudence

Although New York's marriage-recognition rule and its analytical approach is well-established and clear, Plaintiffs-Appellants and their *Amici* would have this Court either: (i) shift the general presumption afforded recognition under the rule; or (ii) adopt some new and novel approaches that find no support under existing case law.

First, as explained above, the presumption in favor of marriage recognition remains effective except where: (i) the Legislature has expressly prohibited recognizing a particular kind of out-of-state marriage; or (ii) recognition of a marriage would be repugnant to some New York public policy. *See May's Estate*, 305 N.Y. at 491-93. Accordingly, the burden is upon Plaintiffs-Appellants to show that New York public policy somehow precludes recognition of same-sex couples' marriages. Respectfully, this Court should affirm the lower court's decision for the simple reason that Plaintiffs-Appellants have failed to meet this burden.

In order for this Court to affirm the lower court's decision, it need not be shown that New York public policy affirmatively supports recognition of marriages of same-sex couples validly performed in other jurisdictions. In fact, if that were the case, there would be no need for any comity analysis in the marriage

context at all; instead, recognition would be achieved solely by specific legislative fiat. Undoubtedly, this is not the law in New York.

Second, in an apparent concession that the proper application of New York’s marriage-recognition law to marriages of same-sex couples validly performed in other jurisdictions results in New York’s recognition of such marriages, *Amicus* to Plaintiffs-Appellants, the New York State Catholic Conference (the “Conference”), urges this Court to adopt and apply an entirely new analytical framework and legal standard in marriage-recognition cases. In particular, the Conference asks this Court to “reformulate the marriage recognition rule” by “recogniz[ing], for all purposes, a valid out-of-State marriage between two persons who *could* have married each other in New York,” refusing to “give *prospective recognition* to a marriage between two persons who could *not* have married each other [in New York],” and “[i]n certain circumstances . . . give *retrospective* recognition to such marriages, but only to the extent necessary to enable the parties to divorce (or separate pending divorce) and to resolve issues relating to inheritance, survivor’s benefits and the like.” (Brief of the New York State Catholic Conference as *Amicus Curiae* in Support of Plaintiffs-Appellants at 3 (emphases in original).)

In addition, compelled by a similarly result-oriented approach, Plaintiffs-Appellants separately urge this Court to draw an artificial distinction, unsupported by existing precedent, between what are purportedly mere “regulatory” differences

(where recognition is allowed) and what are held out as “structural” differences (where recognition is not allowed). (Brief of Plaintiffs-Appellants at 14.) Of course, Plaintiffs-Appellants would have this Court conclude that marriages of same-sex couples fall within this latter category.

Cut from whole cloth as a “reformulation” of the analytical approach mandated under existing precedent, and despite the Conference’s and Plaintiffs-Appellants’ strained efforts to reconcile their analytical approaches with the controlling case law, these new and novel theories fly in the face of this Court’s marriage-recognition jurisprudence and the well-established standard to be applied in such cases. In short, these theories find no support in existing precedent.

Although it was not until recently that New York has been confronted with the issue of whether it should recognize marriages of same-sex couples validly solemnized in other jurisdictions, every New York court that has considered this issue has recognized such marriages validly performed in other jurisdictions – *see, e.g., Lewis* (A.4-13; A.14-A.19); *Martinez v. County of Monroe*, 50 A.D.3d 189, 191-94 (4th Dep’t), *appeal dismissed*, 10 N.Y.3d 856 (2008)⁶ – and this Court now

⁶ In their discussions of *Langan v. St. Vincent’s Hospital of N.Y.*, 25 A.D.3d 90 (2d Dep’t 2005), *appeal dismissed*, 6 N.Y.3d 890 (2006), and *Langan v. State Farm Fire & Cas.*, 48 A.D.3d 76 (3d Dep’t 2007), Plaintiffs-Appellants confuse the issue confronting this Court. As explained more fully in the Brief for the State Respondents (at 43), those cases merely hold that civil unions, domestic partnerships, and other non-marital relationships do not make one a “spouse” for

faces the issue for the first time. But this Court should be extremely wary of abandoning clear precedent and fashioning a new standard or adopting an untried rule simply because this Court has not previously confronted recognition of marriages in the context of same-sex couples or, worse still, because application of the decades-old approach would result in recognition. *See generally* Benjamin A. Cardozo, *The Nature of the Judicial Process* 149 (Yale University Press 1921) (“adherence to precedent should be the rule and not the exception”). As shown by the Appellate Division’s well-reasoned decision (A.4-A.13), as well as the Fourth Department’s equally well-reasoned opinion in *Martinez*, 50 A.D.3d at 191-94, there is ample legal precedent upon which the issue now before this Court can (and should) be decided. As a result, there is no compelling reason to adopt the misguided, result-oriented approaches espoused by Plaintiffs-Appellants and their *Amici*. In essence, Plaintiffs-Appellants and their *Amici* would have this Court radically restructure existing precedent to comport with their private beliefs regarding marriage rights for same-sex couples.

purposes of the particular issues involved in those cases. *See id.* Here, by contrast, the issue concerns whether, applying comity and choice-of-law principles, same-sex “spouses” validly married in other jurisdictions will be recognized as such in New York.

II.

NEW YORK LAW RECOGNIZES MARRIAGES OF SAME-SEX COUPLES VALIDLY ENTERED IN OTHER JURISDICTIONS, AND THIS COURT’S DECISION IN *HERNANDEZ v. ROBLES* DOES NOT DICTATE A CONTRARY RESULT

Although Plaintiffs-Appellants and their *Amici* repeatedly cite to this Court’s decision in *Hernandez*, 7 N.Y.3d at 357, for the proposition that “New York’s statutory law clearly limits marriage to opposite-sex couples,” the holding in *Hernandez* does not dictate the result in this case. In fact, respectfully, given the issue at stake here, the *Hernandez* decision is irrelevant – or, at best, only marginally relevant – and, as marshaled and reformulated by Plaintiffs-Appellants and their *Amici*, a red-herring.

In *Hernandez*, this Court observed that “[w]hether marriages [between members of the same sex] should be recognized [domestically in New York] is a question to be addressed by the Legislature” and held that “the New York Constitution does not compel recognition of marriages between members of the same sex.” 7 N.Y.3d at 356; *see also id.* at 379. Notably, this Court did not identify any public policy expressly *against* marriage of same-sex couples. Instead, this Court held that the legislative decision to limit the benefits of marriages performed in New York to opposite-sex couples was rational. *See id.*

Nowhere in its *Hernandez* decision did this Court either address the issue of whether New York should recognize marriages of same-sex partners validly

entered in other jurisdictions or identify any legislative intent explicitly prohibiting any such recognition. As the State Respondents point out, “[t]he question of whether same-sex marriages validly performed in other jurisdictions should be recognized under comity principles was not raised.” (Brief for State Respondents at 6, 21-22.) As a result, although *Hernandez* stands for the proposition that, under the current legislative scheme, New York limits recognition of *domestic* marriages to those between persons of the opposite sex, *Hernandez* does not provide any basis for reversing the decision of the lower court here recognizing marriages of same-sex couples validly performed elsewhere.

Furthermore, affirming the lower court’s decision would not redefine the domestic law of marriage in New York or usurp the Legislative prerogative, as Plaintiffs-Respondents and their *Amici* suggest. New York’s Domestic Relations Law, as presently interpreted by this Court in *Hernandez*, will continue to govern New York’s domestic marriage definition, and, certainly, a faithful application of comity principles will not in any way usurp the Legislature’s role. An affirmance will simply accord recognition to the domestic definitions of marriage adopted by the legislatures of sister jurisdictions. Although perhaps different from New York’s own domestic definition, those definitions are not prohibited from recognition by any New York positive law, nor do they differ so dramatically from

strong New York public policy as to warrant the drastic and unprecedented result now advanced by Plaintiffs-Appellants and their *Amici*.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Appellate Division, Third Department in *Lewis v. New York State Department of Civil Service*, Index No. 4078/07 (Albany County).

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September 4, 2009

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