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**State of New York**  
**Court of Appeals**

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KENNETH J. LEWIS, et al.,

*Plaintiffs-Appellants,*

-against-

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

*Defendants-Respondents*

(Index No. 4078/07 (Albany County))

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MARGARET GODFREY, et al.,

*Plaintiffs-Appellants,*

-against-

ANDREW J. SPANO, &c., et al.,

*Defendants-Respondents,*

and

NEW YORK STATE COMPTROLLER,

*Intervenor-Respondent.*

(Index No. 16894/06 Westchester County)

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**BRIEF FOR STATE RESPONDENTS**  
**IN RESPONSE TO AMICI CURIAE**

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Dated: September 25, 2009

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## PRELIMINARY STATEMENT

The State Respondents submit this brief in response to the three amicus briefs filed in support of plaintiffs — the briefs of the New York State Catholic Conference (the “Conference”), New Yorkers for Constitutional Freedoms (“NYCF”), and Family Watch International (“FWI”).

As the State Respondents have explained in their main brief (at 16-19), this Court’s precedents require recognition of an out-of-state marriage unless such recognition is expressly barred by positive law or otherwise would be abhorrent to public policy. Plaintiffs’ amici ask this Court to overturn decades of settled law, either by grafting onto the venerable marriage-recognition rule new exceptions that would exclude same-sex marriages or by reformulating the rule altogether. But they offer no convincing reason to abandon traditional marriage-recognition principles, either in this case or more broadly.

## ARGUMENT

### UNDER THIS COURT'S SETTLED PRECEDENT, OUT-OF-STATE SAME-SEX MARRIAGES ARE ENTITLED TO RECOGNITION IN NEW YORK

#### A. Recognition of Out-of-State Marriages Is Not Limited to Marriages Between People Who Could Have Married Each Other in New York.

One such reformulation, proposed by the Conference, would provide that the only out-of-state marriages recognized for all purposes are those in which the partners could have married each other in New York. Recognizing that this Court and others routinely recognize marriages in which the parties could not have married each other here, *see, e.g., In re Estate of May*, 305 N.Y. 486 (1953), the Conference asks this Court to announce a new rule whereby such marriages will be recognized only for limited purposes, such as divorces or estate administration. *See Conference Br. at 3.* As the Conference acknowledges, its proposed rule is “unstated” in New York jurisprudence. *Id.* And contrary to the Conference’s contention, its proposed rule is neither “implicit” in this Court’s precedent nor workable in practice. *Id.*

The Conference acknowledges, as it must, that to accommodate its proposed doctrinal change, this Court would have to jettison the actual

rule announced in *Estate of May* and prior cases — that the positive law exception is “limited to those laws that expressly prohibit recognition of certain marriages performed in other jurisdictions.”<sup>1</sup> *Id.* at 11; see *Estate of May*, 305 N.Y. at 490; *Van Voorhis v. Brintnall*, 86 N.Y. 18, 32 (1881). This Court should do so, the Conference argues, because for more than a century it has misread Joseph Story’s treatise on the conflict of laws. Conference Br. at 11-12.

First of all, the “correctness” of the rule announced in *Estate of May* and *Van Voorhis* is irrelevant under this Court’s principles of stare decisis.

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<sup>1</sup> Not to the contrary is *Cunningham v. Cunningham*, 206 N.Y. 341 (1912), in which this Court granted an annulment to an underage girl who had married an adult male in New Jersey. The Conference errs (see Br. at 7) in asserting that this Court refused to recognize the legal existence in New York of the New Jersey marriage. Rather, *Cunningham* necessarily recognized the marriage in order to grant an annulment — an order that, like a divorce, affected the status of the marriage in New Jersey as well as in New York. See 206 N.Y. at 349. Lower courts immediately recognized that *Cunningham* did not cast doubt more broadly on New York’s recognition of out-of-state underage marriages, but instead authorized annulment of such marriages if the usual requirements for annulment were met — including the desire of either party to obtain such an annulment. See, e.g., *Marone v. Marone*, 105 Misc. 371 (Sup. Ct. N.Y. County 1918). Any notion that this Court intended to deviate from its traditional marriage-recognition jurisprudence, and cast doubt more broadly on New York’s recognition of out-of-state underage marriages, did not survive *Estate of May*. See *Hilliard v. Hilliard*, 24 Misc. 2d 861, 863 (Sup. Ct. Greene County 1960) (recognizing underage marriage).

*See, e.g., People v. Taylor*, 9 N.Y.3d 129, 148-49 (2007). Rather, for this Court to reconsider its longstanding doctrine, it must be shown that this doctrine creates “an unworkable rule” or “creates more questions than it resolves.” *Id.* at 149. The Conference makes no such showing here; to the contrary, the marriage-recognition rule has greatly simplified the courts’ task in determining whether marriages are to be recognized, by leaving largely to the Legislature the difficult and politically charged decision not to recognize a marriage validly performed elsewhere. Moreover, because the Legislature can always amend the marriage-recognition rule — either as a whole or as applied to particular types of marriages — it is particularly unwarranted here for this Court to reconsider more than a century of jurisprudence. *Id.*; *see also id.* at 156-57 (Smith, J., concurring).

And in any event, the Conference makes no showing that the traditional marriage-recognition rule is erroneous. Unlike the Conference’s proposed reformulation, the existing rule is consistent with broader principles of comity jurisprudence. *See, e.g., Gotlib v. Ratsutsky*, 83 N.Y.2d 696, 700 (1994) (foreign divorce recognized in New York in the absence of policy “repugnant” to New York’s). Indeed, while it would matter little if New York’s marriage-recognition rule were inconsistent

with the principles expounded by Justice Story in the nineteenth century, in fact this Court's jurisprudence hews far closer to Story's view than does the rule proposed by the Conference. See Conference Br. at 10-12. According to Story, marriages not involving polygamy and incest generally should be recognized unless such recognition is "positively prohibited by the public law of a country from motives of policy." Joseph Story, *Commentaries on the Conflict of Laws* § 113a (Isaac F. Redfield ed., 6th ed. 1865). Thus, he articulated the rule much the same way that this Court did in *Estate of May*.<sup>2</sup>

Nor is there any basis for the Conference's assertion (Br. at 7) that, in the unlikely event another State or western country were to allow polygamous marriages, the marriage-recognition rule would require New York to recognize them. For as long as this Court has articulated the marriage-recognition rule, it has been settled law that recognition of polygamous marriages is repugnant to New York policy. See, e.g., *Van Voorhis*, 86 N.Y. at 26. As pointed out by another of plaintiffs' amici, it is

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<sup>2</sup> That general principle is hardly undermined by the English courts' choice not to recognize the royal family's foreign marriages where such marriages were inconsistent with English law, given the unique and strong interest that country has in its royal family's matrimonial status. See Conference Br. at 12.

for that reason that the Legislature has seen no need to codify this rule explicitly. *See* NYCF Br. at 8-9. And even putting aside *stare decisis*, this Court easily could conclude that recognition of polygamous marriages conflicts with New York law and policy in ways that recognition of same-sex marriages does not. For example, New York law permits a spouse to annul a marriage on the ground that the other spouse is in another marriage. *See* Domestic Relations Law § 140(a). Similarly, it permits a spouse to obtain a separation or divorce on the ground that the other spouse has had sexual intercourse with another person. *Id.* §§ 170(4), 200(4). Thus, it is not simply that a polygamous marriage cannot be performed in New York. The behavior contemplated by such marriages is sufficiently disapproved that it constitutes grounds for dissolving the marriages under New York law.

Not only does the Conference fail to identify a problem that warrants reformulating the traditional rule, it proposes a substitute — a rule wherein a marriage is recognized in New York only if the parties to it could have married in New York — that would introduce substantial uncertainty into what, until now, has been a well-settled and easily applied doctrine. Far from harmonizing this Court's precedents, the

Conference's proposed rule would throw them into doubt, as two of this Court's most important marriage-recognition cases — *Estate of May* and *Van Voorhis* — involved couples who could not have married in New York.

It is true that, on the facts of *Estate of May*, this Court could have issued a narrower ruling that recognized an uncle-niece marriage only for the purposes of estate administration. See Conference Br. at 18. But this Court chose not to rest its holding on any such distinction. Instead, it reiterated a single marriage-recognition rule that applies in all circumstances. And in doing so, it affirmed and continued a line of cases recognizing the continued validity in New York — for all purposes — of uncle-niece marriages that were valid when and where performed. See, e.g., *In re Estate of Simms*, 26 N.Y.2d 163, 167 (1970) (finding valid contract to enter into such marriage, following *Estate of May*); *In re Estate of Saffer*, 39 Misc. 2d 691, 692 (Surr. Ct. Kings County 1963) (same), *aff'd*, 20 A.D.2d 849 (2d Dep't 1964); *Weisberg v. Weisberg*, 112 A.D. 231 (1st Dep't 1906) (recognizing continued validity of such marriage performed before New York enacted ban on them). The Conference's proposed reformulation of *Estate of May* thus would require a rethinking of *Estate of Simms* and other cases as well.

Similarly, the Conference's proposed rule cannot be squared with *Van Voorhis* and other cases recognizing the out-of-state marriages of those who, following a divorce in which they were found at fault, were precluded from remarrying in New York. At the time *Van Voorhis* was decided, this disability lasted until the innocent former spouse's death, and thus could preclude the other spouse from remarrying in New York indefinitely — yet this Court freely recognized out-of-state remarriages. See 86 N.Y. at 28. It is irrelevant that the Legislature later relaxed the remarriage ban to some extent, before ultimately abandoning it altogether.<sup>3</sup>

While the Conference notes (Br. at 23) that this Court's marriage-recognition cases typically arise out of one spouse's death or request for divorce, the reason for this is practical rather than doctrinal. Because the

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<sup>3</sup> The Conference also suggests that the *Van Voorhis* rule applies only where the bar on marriage in New York is a disability imposed for prior criminal conduct, such as the adultery involved in *Van Voorhis*. Accordingly, it argues, the rule does not apply where no criminal conduct is at issue — and same-sex relationships have not been criminalized since 1980. Conference Br. at 20-21. But the Conference has it precisely backwards. As explained more fully in the conflict of laws scholars' brief, out-of-state marriages are *more* readily recognized where the State's criminal law is not implicated. See Br. for Conflicts of Laws Scholars at 19-22. And it cannot be true that New York imposes more restrictive rules on constitutionally protected conduct than on criminal conduct.

parties to a continuing marriage have no interest in raising the question, the validity of a marriage entered into elsewhere is rarely questioned throughout the marriage's lifetime. From a practical standpoint, incentives and opportunities for challenge arise in estate administration — when third parties have an incentive to challenge a marriage's validity — or divorce, when one of the marriage's own parties has a similar incentive.

Moreover, reconstructing the marriage-recognition test around whether a marriage could have been performed validly in New York would require the resolution of difficult questions of New York law that are irrelevant under current doctrine. For example, with respect to underage marriages, a court would have to inquire into whether, under New York law, the couple could have married in New York. In the case of a couple where one person is under sixteen years of age, this requires a finding as to whether a New York court would have granted permission to marry. *See Domestic Relations Law § 15(3)*. It seems incongruous for New York courts to determine whether they would have given permission, where another State already has given such permission.

**B. It Is Irrelevant Whether Recognition of an Out-of-State Marriage Would Have Been Repugnant to New York Policy Many Years Ago.**

NYCF takes a somewhat different approach, asking this Court to hold that what it means to be married in New York has been fixed in time since (at least) the nineteenth century. *See* NYCF Br. at 4-6. Amici implicitly concede that they cannot demonstrate that recognition of same-sex marriage is repugnant to any *contemporary* New York policy. Thus, they and plaintiffs alike resort to arguing that long-ago New York policymakers and judges would have found same-sex marriage repugnant. *See, e.g.*, Lewis Reply Br. at 1 (arguing that same-sex unions “until a few years ago were an unheard of legal construct anywhere in the world”); *id.* at 14 (relying on “the more than two hundred years of unbroken history during which the Legislature has uniformly understood marriage as the union of one man and one woman”).

Whether or not this is so, it is irrelevant, because all that is at issue here is whether same-sex marriage fatally conflicts with New York policy *today*. The rights and responsibilities that constitute a marriage under New York law and in society at large — as well as the rules as to which

people may marry which other people — are *not* static, but have changed and continue to change over time.<sup>4</sup>

NYCF correctly observes that the courts that first formulated the marriage-recognition rule were not confronted with questions regarding the recognition of same-sex marriage, since no other jurisdiction then permitted such marriages. NYCF Br. at 3. But had they been, the marriage-recognition rule would have provided them the framework for analyzing the question. And if the answer would have come out differently in earlier years, that is because New York policy with respect to same-sex relationships — as with respect to many other issues — has changed so dramatically in recent years. *See* State Respondents Br. at 28-31. As with any comity doctrine that assesses the degree to which an out-of-state law or judgment conflicts with New York's own law, proper

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<sup>4</sup> Indeed, they continue to vary across state and national boundaries. And for precisely this reason, contrary to FWI's assumption, it is not unusual — let alone illogical — for New York to have one definition of marriage with respect to those marriages that it permits to be performed here and another definition with respect to those foreign marriages that it will recognize. *See* FWI Br. at 5, 8. Reconciling the various definitions of marriages is precisely the reason for the marriage-recognition rule.

application of the marriage-recognition doctrine can yield different results as New York's own policy changes.

Amici's argument to the contrary was rejected in *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9 (1964). There, this Court upheld enforcement in New York of a gambling debt incurred in Puerto Rico, notwithstanding that New York law banned such gambling, and had done so for many years. In finding that enforcement would not be repugnant to New York's contemporary policy, this Court did not merely look to "the decisions of our courts in the Victorian era," but also took account of "the changing attitudes of the People of the State of New York." *Id.* at 14. In particular, it pointed to (1) the recent "legalization of pari-mutuel betting and the operation of bingo games" and (2) what was then merely a "strong movement for legalized off-track betting." *Id.* at 15. Such a "trend," this Court found, indicated a growing "acceptance of licensed gambling transactions as a morally acceptable activity." *Id.* (emphasis omitted).

*Intercontinental Hotels* makes it clear that, even where New York has not yet legalized certain activity, the intensity of its disapproval can diminish over time, to the point that recognizing such activity when

performed out of state is no longer repugnant to this State's policy. Just as *Intercontinental Hotels* pointed to the legalization of certain specific gambling activities as evidence that other forms of gambling no longer were repugnant to this State's policy, so too the fact that New York now offers legal protections to same-sex relationships for a growing number of purposes is powerful evidence that same-sex marriage is not currently repugnant to New York policy.

And *Intercontinental Hotels*' reliance on the "strong movement" — not yet successful at the time — to legalize further gambling is parallel to the contemporary political debates over legalizing the performance of same-sex marriage in New York. The Court's reliance on this movement was appropriate, since the support of a substantial part of New York's body politic for repealing the ban on an activity makes it unlikely that the activity is not just illegal but is fully repugnant to contemporary New York policy. As articulated more fully in the conflict of laws scholars' brief, it would be unprecedented for marriages that have the degree of political support that same-sex marriages have in New York to be declared repugnant to a jurisdiction's policy. See Br. for Conflicts of Laws Scholars at 22-28.

The proposition that history can overcome current policy finds no support in *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007), in which the Rhode Island Supreme Court held that the State's family courts had no jurisdiction over a divorce claim arising from a same-sex marriage. See FWI Br. at 2-3. *Chambers* held that a statute empowering those courts to hear "all petitions for divorce from the bonds of marriage" did not include same-sex marriages, because the legislators who enacted the statute did not understand the term "marriage" to include them. 935 A.2d at 962. Having so construed the statute, it did not reach the question of whether the marriages in question were entitled to recognition under comity principles. *Id.* at 963 n.14. *Chambers* thus is not a comity case at all.

**C. There Is No Basis for Holding That the Recognition of Same-Sex Marriages Validly Performed Elsewhere Requires Affirmative Legislative Action.**

Finally, NYCF contends (Br. at 11-12) that a same-sex marriage, unlike the many other out-of-state marriages that this Court has recognized, should not be recognized in New York "until the legislature has spoken" by voting on whether to permit the performance of such marriages in New York. This proposed rule effectively amounts to an

abrogation of the marriage-recognition rule itself. Moreover, it ignores the reality that the Legislature already has had considerable time to weigh this issue and has chosen not to intervene.

It may well be the case that, in the highly unlikely event that a sister State or other respected jurisdiction should choose to solemnize marriages unlike any that our Legislature has ever contemplated — such as object or animal marriage, *see* NYCF Br. at 12-14 — the courts could refuse to recognize such marriages under the abhorrence exception, even absent any legislation affirmatively barring such recognition. But this case does not present such facts.

The New York Legislature has had before it repeatedly since 1996 the question of whether same-sex marriages from other jurisdictions should be recognized. In that year, the United States passed legislation making explicit that the States had the authority to bar the recognition of same-sex marriages, should such recognition be contrary to their public policies. The New York Legislature has considered specific bills in multiple sessions that would do just that. And it has not seen fit to act — not because it has not had time, not because this issue has slipped under

the radar screen, but because there has been insufficient support for such a ban.

Accordingly, NYCF's proposal amounts to nothing more than abandoning the traditional presumption that a marriage validly performed elsewhere will be recognized here absent a specific policy to the contrary. And neither plaintiffs nor their amici can offer any reason why this presumption should not be followed, either in general or with respect to same-sex marriages. All of the reasons they offer for not recognizing same-sex marriages are matters of policy that can be, and have been, considered by the Legislature. Whether or not the Legislature could rationally adopt them, *see* FWI Br. at 9-10, the Legislature has declined to do so.

## CONCLUSION

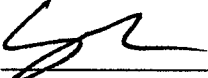
Both Appellate Division judgments should be affirmed.

Dated: New York, New York  
September 25, 2009

Respectfully submitted,

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COMMENTARIES  
ON THE  
CONFLICT OF LAWS,  
FOREIGN AND DOMESTIC,  
IN REGARD TO  
CONTRACTS, RIGHTS, AND REMEDIES,  
AND ESPECIALLY IN REGARD TO  
MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS.

BY  
JOSEPH STORY, LL.D.,  
ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, AND  
VANCE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

*"In regard to the subject of the conflict of laws, positive régime d'elle par-dessus tout, entre nations, dans des cas, de la nature de la nature des règles, et des principes, qui peuvent être appliqués dans la pratique. Les principes de la nature des règles, et des principes, qui peuvent être appliqués dans la pratique. Les principes de la nature des règles, et des principes, qui peuvent être appliqués dans la pratique." —*  
SULLIVAN, *Précis de la Personnalité, 40 pages, 1865.*

SIXTH EDITION, CAREFULLY REVISED AND CONSIDERABLY ENLARGED.

BY  
ISAAC F. REDFIELD, LL.D.

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1865.

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regulated, in many others, at the apparent levity with which the fundamental relation of society is handled; and a most essential principle certainly is, that between persons, according to marriage is to be decided by the law of the place where and obligated.<sup>1</sup> If valid there, it is valid everywhere. It has a ubiquity of obligation. If invalid there, it is equally invalid everywhere.<sup>2</sup> The grounds of this doctrine we shall have occasion presently to consider.<sup>3</sup> It is only necessary here to state that it has received the most deliberate sanction of the English and American courts.<sup>4</sup>

§ 113 a. The most prominent, if not the only known exceptions to the rule, are those marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects, entitling themselves under special circumstances to the benefit of the laws of their own country.<sup>5</sup> Cases, illustrative of each of these exceptions, have been already alluded to.<sup>6</sup>

§ 114. In respect to the first exception, that of marriages, involving polygamy and incest, Christianity is understood to prohibit polygamy and incest; and therefore no Christian country would recognize polygamy, or incestuous marriages.<sup>7</sup> But when

<sup>1</sup> Ante, § 80, 81. See *Kent v. Burgess*, 11 Simons, R. 361; *Patterson v. Gaines*, 6 How. U. S. R. 550.

<sup>2</sup> *Ryan v. Ryan*, 2 Phill. Eccl. R. 382; *Herbert v. Herbert*, 3 Phill. Eccl. R. 58; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. R. 54; *Ruding v. Smith*, 2 Hagg. Consist. R. 390, 391; *Scrimshire v. Scrimshire*, 2 Hagg. Consist. R. 393; *Munro v. Saunders*, 6 Bligh, R. 473, 474; *Ilderton v. Ilderton*, 2 H. Bl. 145; *Middleton v. Jarverin*, 2 Hagg. R. 431; *Lacon v. Higgins*, 3 Starkie, R. 178; 2 Kent, Comm. Lect. 26, p. 91, 92, 93, 3d edit.; *Medway v. Needham*, 16 Mass. R. 157; *Putnam v. Putnam*, 8 Pick. R. 433; *West Cambridge v. Lexington*, 1 Pick. R. 506; 1 Burge, Comm. on Col. and For. Law, ch. 5, § 3, p. 184 to p. 201; 2 Kaine on Eq., B. 3, ch. 8, § 1; *Kent v. Burgess*, 11 Simons, R. 361.

<sup>3</sup> Post, § 121. See also ante, § 80.

<sup>4</sup> See cases cited *supra*, § 113, note 1; *Sutton v. Warren*, 10 Mete. 451; *Phillips v. Gregg*, 10 Watts, 158; *Morgan v. McGhee*, 5 Humphreys, R. 13; *State v. Patterson*, 2 Ired. 346; post, § 122 to § 124.

<sup>5</sup> 1 Burge, Comm. on Col. and For. Law, ch. 5, § 3, p. 188.

Ante, § 89.

<sup>7</sup> Paley on Moral Phil. B. 3, ch. 6; 2 Kent, Comm. Lect. 26, p. 81, 3d edit.; 1 Bl. Comm. 436. See Grotius, B. 2, ch. 5, § 9; *Greenwood v. Curtis*, 6 Mass. R. 378; *Sutton v. Warren*, 10 Mete. 451; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 1