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NEW YORK STATE
COURT OF APPEALS

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

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ARGUMENT

I. COMITY PRINCIPLES PROHIBIT EXECUTIVE OFFICIALS FROM RECOGNIZING SAME-SEX UNIONS CONSIDERED “MARRIAGES” BY FOREIGN JURISDICTIONS.

Respondents incorrectly portray the comity question before this Court as a well-settled issue involving the reflexive application of precedent. *See* Inter. Br. at 25. In doing so, they ignore the novelty of their argument that comity extends to out-of-state same-sex unions that have been deemed “marriages” in other jurisdictions—unions that until a few years ago were an unheard of legal construct anywhere in the world. Neither this Court nor any other state’s highest court has extended comity to foreign-created same-sex unions. But here, Respondents seek an unprecedented ruling, urging the Court to stretch comity in a way that usurps the Legislature’s prerogative to define the fundamental essence of the institution of marriage as it is understood in New York.

The Intervenors-Respondents thus erroneously assert that Taxpayers bear a heightened “burden” to overcome the common law’s preference for recognizing out-of-state marriages. *See* Inter. Br. at 37. To the contrary, it is Respondents who advocate for an unprecedented application of comity, and as a result, they (and not Taxpayers) bear the burden of convincing this Court that it should extend comity in this novel way. “[W]henver a doubt does exist [as to the application of comity], the court . . . will prefer the laws of its own . . . to that of [another].” Joseph Story,

Commentaries on the Conflict of Laws 29, § 28 (Melville M. Bigelow ed., The Lawbook Exchange 2008) (1834). It is Respondents who ask this Court to prefer the laws of another; thus, they have the burden of showing that there is no doubt comity extends to foreign same-sex unions—a high hurdle that they fall far short of clearing.

Simply put, Respondents’ comity arguments are built on a faulty foundation. They incorrectly assume throughout their arguments that a foreign jurisdiction’s use of the term “marriage” automatically requires this Court to apply an exceedingly deferential application of comity. *See* Inter. Br. at 24; State Br. at 15. But their simplistic analysis exalts “form over substance,” a result typically condemned by this Court. *See Fitzpatrick v. Am. Honda Motor Co., Inc.*, 78 N.Y.2d 61, 70 (1991). When deciding whether comity extends to a particular out-of-state union, “there is no magic in a name”; marriage is more than a mere label. *See* Story, Commentaries on the Conflict of Laws at 184 n.(a), § 108. In New York, marriage is a fundamental social institution—individual unions of one man and one woman composing the basic building block of society. *See Fearon v. Treanor*, 272 N.Y. 268, 272 (1936) (stating that marriage “constitutes an institution involving the highest interests of society”). A foreign jurisdiction that redefines the essential structure of that institution creates a fundamentally different institution, and comity principles will not import it into this State. *See* Story,

Commentaries on the Conflict of Laws at 26, § 25 (noting that comity principles do not require a state to “yield up its own fundamental . . . institutions in favor of those of another”).

Throughout their briefing, the State Respondents and the Intervenor-Respondents repeatedly mischaracterize Taxpayers’ comity arguments. They either discuss Taxpayers’ arguments out of context, or they set up “strawmen,” which do not accurately portray Taxpayers’ position. While Taxpayers will specifically highlight some of these mischaracterizations, it is not practical to address them all. But notably, this apparent unwillingness to respond to Taxpayers’ actual arguments suggests an inability to do so persuasively.

A. The Public-Policy Exception Does Not Require Condemnation In New York’s Positive Law.

Respondents assert that the public-policy exception applies only to “marriages that are strongly condemned by positive state law.” State Br. at 18; *see also* Inter. Br. at 53-54; Spano Br. at 29. But positive law condemnation, through criminal prohibitions or otherwise, is not a prerequisite for applying the public-policy exception, and Respondents do not cite any authority for their suggestion that it is. In fact, this Court’s own precedent plainly demonstrates that the public-policy exception does not hinge on the existence of positive law condemning particular legal unions.

In *In re May's Estate*, 305 N.Y. 486, 493 (1953), this Court held that the public-policy exception did not apply even though the challenged incestuous marriage was void and criminal under New York's positive law. *Id.* at 491, 493. Moreover, in *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881), and *Thorp v. Thorp*, 90 N.Y. 602 (1882), this Court did not apply the public-policy exception even though the challenged marriages were prohibited and "absolutely void" under this State's positive law prohibiting remarriage after divorce during the life of the non-adulterous spouse. Those decisions, which are discussed by Respondents, show that the public-policy exception does not depend on whether the relationship is strongly condemned under positive state law. If Respondents were correct in their understanding of the public-policy exception, all those cases would have been decided differently. Thus, Respondents' understanding of the public-policy exception conflicts directly with this Court's precedent and, as a result, should not be adopted by this Court.¹

¹ Additionally, the Intervenors-Respondents, relying on one sentence from the *May's Estate* decision, urge this Court to apply the following standard: application of the public-policy exception depends on whether an out-of-state union is "offensive to the public sense of morality to a degree regarded generally with abhorrence." *See* Inter. Br. at 33 (quoting *May's Estate*, 305 N.Y. at 493). But as Taxpayers explained in their opening brief, this language from *May's Estate* merely expressed the well-established common-law principle that "incestuous" marriages outside the lineal line (parent-child) or the first degree of the collateral line (brother-sister) are not prohibited by natural law. *See* Taxpayers' Br. at 24-25. That narrowly focused statement cannot be extrapolated outside that context to express a general rule for marriage-recognition cases. Respondents, however, have failed to indicate why this lone sentence should form the basis of this Court's analysis of the public-policy exception. Moreover, quantifying and analyzing the "public sense of morality" would take the judiciary far outside its general realm of competence. The Court should thus avoid this unworkable standard.

B. Structurally Different Foreign Unions Substantially Conflict With This State’s Public Policy And Thus Are Not Entitled To Recognition In New York.

This Court has yet to prescribe a precise line for distinguishing between foreign unions falling within the public-policy exception and foreign unions falling outside it. As discussed above, the line suggested by Respondents—that the public-policy exception applies only to those out-of-state unions that are condemned by positive law—is not supported by this Court’s precedent and, thus, cannot adequately explain this Court’s limited jurisprudence on this issue. In contrast, Taxpayers’ approach to this analysis—that the public-policy exception necessarily applies to those out-of-state unions, like polygamous marriages, that deviate from the core, fundamental, and unchanged structure of marriage in New York—is consistent with and supported by this Court’s precedent. But rather than directly addressing Taxpayers’ argument on this point, Respondents have either mischaracterized their position or quickly dismissed it without much consideration. *See* State Br. at 36-38; Inter. Br. 52; Spano Br. at 31.

Respondents begin by inaccurately portraying Taxpayers’ distinction between the structural characteristics of marriage in New York and the regulatory requirements of entering a marriage in this State. *See* State Br. at 36; Inter. Br. 52. The State Respondents, for example, erroneously suggest that this distinction between a structural characteristic and a regulatory requirement depends on the

strength of its supporting policy—a largely subjective indicator. *See* State Br. at 36. While it is true that stronger, more enduring policies generally underlie the structural characteristics of marriage as compared to the regulatory requirements, the distinction between the two is not determined by the strength of the underlying policy, but instead, by concrete, objective considerations.

The “structure” of marriage in New York is defined as its most basic component parts—one man and one woman. *See Anonymous v. Anonymous*, 67 Misc.2d 982, 984 (Sup. Ct. Queens Co. 1971) (acknowledging “the two basic requirements for a marriage contract, i.e., a man and a woman”).² In contrast, the “regulatory” requirements of marriage are “rule[s] or restriction[s]” that “control[]” the entrance to or exit from that union. *See* Black’s Law Dictionary 1311 (8th ed. 2004) (defining “regulation” and “regulatory”). Labeling and separately characterizing the regulatory requirements of marriage is not an arbitrary *ipse dixit* of Taxpayers’ imagination; those regulatory requirements have been recognized as such by the United States Supreme Court for well over one hundred years. *See Meister v. Moore*, 96 U.S. 76, 78-79 (1877) (discussing the existence and interpretation of state statutes that “regulate the mode of entering into [marriage]”

² The plain meaning of the word “structure” supports Taxpayers’ use of that term in connection with marriage. The “structure” of something is defined as “the aggregate of elements of an entity in their relationship to each other.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/structure> (last visited on July 31, 2009). And “elements” are defined as “distinct part[s] of a composite.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/element> (last visited on July 31, 2009). Thus, the structure of something is its most basic component parts as they relate to each other.

and contrasting those statutes from the “common-law right to form the marriage relation” by “agree[ing] presently to take each other for husband and wife”). In short, this distinction is straightforward and clear, with firm grounding in legal precedent.

Separating the structural components of marriage in this State—one man and one woman—from the merely regulatory requirements provides an objective means to distinguish between those foreign unions that necessarily fall within the public-policy exception and those that do not. Some foreign unions are so fundamentally different from marriage as it is understood in New York, that it would substantially conflict with this State’s public policy to recognize those unions as marriages. The foreign unions that necessarily fall within that category are those that do not share the basic, core, enduring structure of marriage in this State—one man and one woman.³ As is demonstrated in Taxpayers’ opening brief, extending comity to the structurally different unions at issue here—those involving same-sex couples—substantially conflicts with many of the strong policies underlying marriage in New York (*e.g.*, marriage’s inextricable connection to procreation; marriage’s ability to create more stability and permanence in the

³ Taxpayers do not suggest that every foreign marriage between a man and a woman will fall outside the public-policy exception and thus be entitled to recognition in New York. Some marriages between one man and one woman will nevertheless significantly conflict with the strong public policy of this State and thus fall within the public-policy exception. The structural-regulatory distinction merely identifies those foreign unions that *necessarily* fall within the public-policy exception; it does not purport to account for all out-of-state marriages falling within that exception.

relationships that cause children to be born; and marriage's goal of encouraging children to grow up with both a mother and a father). *See* Taxpayers' Br. at 42-44.

Notably, this structurally based approach to the public-policy exception, unlike the approach Respondents suggest, is fully consistent with this Court's precedent. Consider, for example, this Court's treatment of polygamous and incestuous marriages under the public-policy exception. Polygamous unions are the only out-of-state marriages that this Court has indicated an unwavering refusal to recognize. *See May's Estate*, 305 N.Y. at 491 (stating that New York will not recognize out-of-state polygamous marriages); *Van Voorhis*, 86 N.Y. at 26 (same). In contrast, while this Court at times has expressed an unwillingness to recognize out-of-state incestuous marriages under the public-policy exception, *see id.*; its precedent plainly shows that some incestuous unions will in fact be recognized here. *See May's Estate*, 305 N.Y. at 493. The most readily apparent, logical distinction between polygamous marriages (which are uniformly denied recognition under the public-policy exception) and incestuous marriages (which sometimes are recognized in New York) is that polygamous unions are an altogether structurally different relation from marriage in this State, whereas, incestuous unions conform to that basic structure. Thus, Taxpayers' argument (unlike Respondents') reconciles this Court's precedent on the public-policy exception.

Taxpayers' discussion of the distinction between structural characteristics and regulatory requirements also exposes a failed attempt by the Intervenor-Respondents to mischaracterize Taxpayers' position. The Intervenor-Respondents erroneously contend that Taxpayers argue "that the recognition question should be controlled by New York's statutory provisions for who may marry here." Inter. Br. at 3. But Taxpayers have made no such argument, and their discussion of the structural-regulatory distinction plainly shows that they have not. As part of that discussion, Taxpayers readily acknowledge that this State often recognizes out-of-state marriages that do not conform to New York's statutory provisions for who may marry here. *See, e.g.*, Taxpayers' Br. at 39-40. So the Intervenor-Respondents lack any basis for this gross mischaracterization of Taxpayers' arguments.⁴

C. New York's Public Policy Is Determined By The Legislature.

Application of the public-policy exception requires this Court to identify and evaluate New York's public policy regarding marriage and other legally

⁴ The State Respondents also attempt to mischaracterize Taxpayers' comity arguments, erroneously alleging that Taxpayers have argued that marriage-recognition principles do not apply to "New York domiciliaries who travel to other jurisdictions." State Br. at 20. But Taxpayers have not made that argument. Instead, Taxpayers have indicated that one of the factors this Court should consider, in determining whether to apply comity in an unprecedented way, is whether the recognition at issue would affect the "status" of its own citizens. *See* Taxpayers' Br. at 51-53; *see also People v. Baker*, 76 N.Y. 78, 86 (1879); Story, Commentaries on the Conflict of Laws at 187, § 112. Here, DCS's policy recognizes as "spouses" the partners to a same-sex union that has been labeled a "marriage" by a foreign jurisdiction. (A. 46.) That policy thus directly relates to the "status" of state domiciliaries, and the Court should consider this fact when determining whether this extension of comity improperly encroaches on the prerogatives of the State Legislature.

recognized relationships. Because it is undeniable that the State Legislature has neither redefined marriage to include same-sex couples nor created a comprehensive scheme for legally recognizing same-sex relationships (such as civil unions or domestic partnerships), Respondents seek to expand the sources of public policy to include everything from executive-branch and municipal memoranda and proclamations to publications in New York newspapers. *See* Inter. Br. at 34; State Br. at 30-32.

But this Court has repeatedly indicated that the “juridical meaning” of “public policy” is narrow; it includes only “the law of the [S]tate” as enacted by the Legislature in statutes or by the people in their Constitution. *Kraut v. Morgan & Bro. Manhattan Storage Co., Inc.*, 38 N.Y.2d 445, 451-52 (1976); *accord Glaser v. Glaser*, 276 N.Y. 296, 301-02 (1937); *F. A. Straus & Co. v. Canadian Pac. R.R. Co.*, 254 N.Y. 407, 413 (1930); *Mertz v. Mertz*, 271 N.Y. 466, 472 (1936). This Court has also cautioned the judiciary against the dangers of gleaned public policy from a broad panoply of whimsical, non-legislative sources: “[W]hen courts attempt to define . . . public policy without a firm foundation in precedent or law, they usurp the legislative function which is, of course, to define the public will.” *Kraut*, 38 N.Y.2d at 452. This Court should thus decline Respondents’ suggestions to look beyond statewide legislatively enacted law as a source of public policy.

Referencing executive-branch proclamations as a source of public policy results in a fatally circular analysis that enables executive-branch officials to justify their own unlawful conduct. The facts of this case illustrate this point. Assuming, as Respondents assert, that the executive branch dictates public policy, this Court would look to executive-branch conduct to determine whether DCS’s new policy (*i.e.*, executive-branch conduct) violates public policy. This circular analysis would permit executive-branch officials—all of whom answer to the same Governor—to act in concert to unilaterally change public policy (and thus the law) without legislative approval.

There is a particular problem with attempting to glean public policy from the three statewide executive-branch officials’ opinions and directives regarding the recognition of same-sex unions considered “marriages” in foreign jurisdictions. *See* Inter. Br. at 35; State Br. at 31. When those officials indicated that same-sex unions considered “marriages” in other jurisdictions should be recognized in New York, they purported to interpret common-law principles of comity. (*See* A. 80-81, 94-95.) Hence, they were not expressing public policy, but an incorrect understanding of comity principles. It would thus be improper to rely on these erroneous legal conclusions as expressions of New York’s public policy.

Respondents also argue that the “controlling public policy” is found in the common-law preference for recognizing out-of-state marriages. *See* State Br. at

17; Inter. Br. at 48. But it is circular to suggest that, in determining whether comity should be withheld under the public-policy exception, the controlling public policy is found in the general common-law rule favoring the recognition of foreign marriages. If the Court were to adopt that analytical approach, the public-policy exception would never apply because the general rule would swallow that exception. This Court should not adopt an analytical approach that would render the public-policy exception meaningless.⁵

D. New York’s Legislatively Created Policy Uniformly Recognizes Marriage As The Union Of One Man And One Woman.

In New York, “[i]n all cases . . . marriage has always been considered as the union of a man and a woman[.]” *B. v. B.*, 78 Misc.2d 112, 117 (Sup. Ct. Kings Co. 1974); *see also Anonymous*, 67 Misc.2d at 984. This Court in *Hernandez* recently affirmed that long-standing structure of marriage in this State. *See Hernandez v.*

⁵ Respondents also urge this Court to look to “the prevailing attitudes of the community” as a source of public policy. State Br. at 32; Inter. Br. at 46. Aside from the unworkable nature of such a vague indicator, and the case law from this Court emphasizing that such hazy standards usurp the Legislature’s “function . . . to define the public will,” *see Kraut*, 38 N.Y.2d at 452; looking to “the prevailing attitudes of the community” as a gauge for public policy does not favor recognition of same-sex unions labeled “marriages” in foreign jurisdictions. A prevailing community attitude is one “held by . . . a majority of the people.” Merriam-Webster Online Thesaurus, <http://www.merriam-webster.com/thesaurus/prevailing> (last visited on July 31, 2009). Recent polling data, however, shows that New Yorkers are sharply divided on the question of whether the institution of marriage should be fundamentally redefined to include same-sex couples. *See* Quinnipiac University Polling Institute, <http://www.quinnipiac.edu/x1318.xml?ReleaseID=1299> (last visited on July 31, 2009). Thus, there is no *prevailing* community attitude on this issue. If anything, it can fairly be said that at least half of the community strongly opposes the recognition of same-sex unions as “marriages.” *Cf. Langan v. St. Vincent’s Hosp. of New York*, 25 A.D.3d 90, 95 (2d Dept. 2005) (hereafter *Langan I*) (“There is . . . a substantial segment of the population of this state that wishes to preserve traditional concepts of marriage as a unique institution confined solely to one man and one woman”).

Robles, 7 N.Y.3d 338, 357 (2006) (“New York’s statutory law clearly limits marriage to opposite-sex couples”). Respondents do not directly dispute the Legislature’s unbroken understanding of marriage as the union of one man and one woman. And their few empty attempts to undermine that policy are ineffective.

The Intervenors-Respondents emphasize that the New York Assembly has recently passed a bill to redefine marriage. Inter. Br. at 35. But unenacted legislation does not dictate public policy. See *Glaser*, 276 N.Y. at 301 (“[A] State can have no public policy except what is to be found in its Constitution and laws”). And the Intervenors-Respondents do not provide any basis for concluding that it does. Thus, despite recent attempts to redefine marriage in New York, the legislative policy regarding the essential structure of that institution remains, as it has always been, the union of a man and a woman. If anything, this recent legislative discussion about marriage demonstrates another reason why this Court should not extend comity to foreign-created same-sex relationships. As this Court instructed in *Hernandez*, “the present generation [of New Yorkers] should have a chance to decide the [same-sex “marriage”] issue through its . . . Legislature.” See *Hernandez*, 7 N.Y.3d at 366. They are currently in the process of debating this important issue of social policy. This Court should thus allow the people to work it out for themselves, rather than judicially importing same-sex “marriage” into New York.

The Intervenor-Respondents and State Respondents also point to a few statutes that provide limited benefits, such as hospital visitation, to “domestic partners.” Inter. Br. at 35-36; State Br. at 30-31; *see also* N.Y. Pub. Health Law § 2805-q (allowing domestic partners hospital visitation); N.Y. Pub. Health Law § 4201 (allowing domestic partners to dispose of each other’s remains). But these few statutes do not even purport to change the Legislature’s policy on marriage. Neither do they come close to creating a comprehensive legal relationship for same-sex couples. They merely grant limited, discrete benefits to domestic partners—both same-sex and opposite-sex couples alike. Thus, these few narrow statutes do not undermine 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.

In short, despite Respondents’ arguments to the contrary, New York’s public policy resoundingly declares that the basic structure of marriage is the union of one man and one woman.

E. Respondents Urge This Court To Issue An Activist Ruling By Using Comity To Import Same-Sex “Marriages” Into New York.

In an ironic twist, Respondents suggest that Taxpayers ask this Court to usurp the legislative prerogative and issue an “activist” ruling. State Br. at 20, 27; Inter. Br. at 32. But nothing could be further from the truth. Taxpayers simply ask this Court to acknowledge and affirm comity’s limitations. Comity does not allow

the judiciary to import a fundamentally and structurally different union into New York. See Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 B.Y.U. L. Rev. 1855, 1919-20 (2008) (hereafter Wardle, *Comity*) (acknowledging the importance of “[p]reserving the authority of law-makers to decide novel policy issues including whether . . . to allow or recognize new forms of domestic relations”). As the Second Department has noted, a judicial decision recognizing an out-of-state same-sex union, “no matter how circumscribed, will be taken as judicial imprimatur of same-sex marriages and [will] constitute a usurpation of powers expressly reserved by our Constitution to the Legislature.” *Langan I*, 25 A.D.3d at 95. Taxpayers thus urge this Court to acknowledge comity’s inherent limitations and leave the same-sex “marriage” debate in the province of the Legislature.

Moreover, Taxpayers urge not only judicial restraint, but also executive-branch restraint. DCS officials admittedly enacted their new policy in a bold attempt to bring so-called “civil marriage equality” to New York. (*See A. 48.*) Taxpayers merely ask this Court to strike down the executive branch’s overreaching and restore these important policy decisions where they belong—to the Legislature. Thus, notwithstanding Respondents’ suggestions, Taxpayers are

not champions of judicial activism, but instead, of the judiciary’s affirming executive-branch restraint.

Despite their misunderstandings about the application of comity, the Intervenors-Respondents correctly assert that “New York holds the institution of marriage in . . . high regard.” Inter. Br. at 60. And because this State fervently respects that institution, *see Fearon*, 272 N.Y. at 272, this Court should not allow it to be fundamentally transformed through an improper extension of comity. *See Wardle, Comity*, 2008 B.Y.U. L. Rev. at 1869 (noting that “[c]omity is not a neutral principle when it comes to acceptance or rejection of controversial domestic relations,” such as domestic partnerships, civil unions, or same-sex “marriages,” because its extension aids the legal importation of these institutions into the recognizing state). In short, a conscientious, restrained application of comity requires this Court to invalidate DCS’s inappropriate extension of it.

II. DCS’s Policy Violates Section 123-b Of The State Finance Law.

The State Respondents contend that, regardless of whether New York recognizes same-sex unions labeled “marriages” by foreign jurisdictions, DCS’s application of its new “spousal”-benefits policy does not violate Section 123-b of the State Finance Law. State Br. at 46. But as demonstrated herein, their various arguments in support of this point ignore the undisputed facts and the governing law, and, for the following reasons, should be rejected.

A. DCS Cannot Lawfully Interpret The Term “Spouse” To Include The Same-Sex Partners Included Within Its New Policy.

The State Respondents assert that the term “spouse” as used in Section 164 of the Civil Service Law should be defined broadly to include anyone who is “married.” State Br. at 41. By offering this generic definition of “spouse,” the State Respondents seek to avoid the obvious: defining “spouse” necessarily depends on the definition of “marriage.”

It is undisputed under New York law that the word “marriage” refers to the union of “opposite-sex couples.” *Hernandez*, 7 N.Y.3d at 357. The evidence of this “clear[]” definition of “marriage” is scattered throughout New York law, demonstrated by the Legislature’s repeated use of sex-specific terms such as wife, husband, bride, and groom. *See id.*; N.Y. Dom. Rel. Law § 12 (“[T]he parties must solemnly declare . . . that they take each other as husband and wife”); N.Y. Dom. Rel. Law § 15(1)(a) (requiring clerks to obtain information from “the groom” and “the bride”); N.Y. Dom. Rel. Law § 230(2) (“An action . . . for divorce or separation may be maintained only when,” among other things, “[t]he parties have resided in this state as husband and wife”).

Given the irrefutable definition of “marriage” under New York law, it necessarily follows that the related term “spouse” means a husband or wife in a marriage between one man and one woman. *See, e.g., Matter of Cooper*, 149 Misc.2d 282, 287-88 (Sup. Ct. Kings Co. 1990) (noting that a “spouse” is a

husband or wife in a relationship involving “people of the opposite sex” and refusing to include in that definition “persons of the same sex who opt to live in a ‘spousal relationship’”), *aff’d*, 187 A.D.2d 128 (2d Dept. 1993); *Raum v. Rest. Assocs., Inc.*, 252 A.D.2d 369, 375 (1st Dept. 1998) (finding no “merit to plaintiff’s argument that the word ‘spouse’ . . . should be read to include . . . same-sex partners”). Thus, the State Respondents’ arguments would necessarily require this Court to judicially redefine well-established terms under New York law.

“The primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature.” N.Y. Stat. Law § 92. Here, the Legislature authorized DCS to extend benefits to “spouses.” “At the time of the drafting of these statutes, the thought that the . . . spouse would be of the same sex as the [employee] was simply inconceivable.” *Langan I*, 25 A.D.3d at 92 (construing the term “spouse” in the wrongful-death statute). Thus, the Legislature without question did not intend that spousal benefits be issued in the manner authorized under DCS’s new policy. Because the Legislature’s intent is the “primary consideration” when interpreting statutes, this Court should conclude that the statutory term “spouse” does not include same-sex partners (regardless of whether they enter a union labeled “marriage” in a foreign jurisdiction).

The State Respondents also assert that this Court should defer to DCS’s interpretation of the term “spouse.” State Br. at 44. But that argument fails for at

least three reasons. First, DCS’s policy is not, as alleged by the State Respondents, a “specific application of a broad statutory term,” which is entitled to deference from the judiciary. State Br. at 41 (quoting *Matter of O’Brien v. Spitzer*, 7 N.Y.3d 239, 242 (2006)). In *O’Brien*, 7 N.Y.3d at 241-42, the case relied upon by the State Respondents, a *specific* person requested that government officials defend him from legal challenge, and the government officials, after reviewing the *specific* facts and circumstances, denied the request for assistance. *Id.* But here, in contrast, DCS has issued a blanket policy purporting to recognize, as spouses, all partners to same-sex unions deemed “marriages” in foreign jurisdictions. That does not qualify as a “specific application of a broad statutory term,” and thus this Court should not grant deference to DCS’s actions under these circumstances.

Second, even if this Court were to give deference to DCS’s interpretation of “spouse,” it cannot condone a construction that flatly contradicts the plain meaning of that term under New York law. *See Matter of Police Ass’n of City of Mount Vernon v. New York State Pub. Employment Relations Bd.*, 126 A.D.2d 824, 825 (3d Dept. 1987) (stating that the judiciary cannot approve an agency’s interpretation of a statute if it is “unreasonable”). Third, this Court cannot approve DCS’s interpretation of “spouse” because it conflicts with New York’s public policy regarding marriage and spousal benefits. *See id.* (stating that the judiciary

cannot approve an agency’s interpretation of a statute if it conflicts with “matters of public policy”).

In short, DCS cannot interpret the word “spouse,” which has a well-settled meaning under New York law, to include same-sex partners who have entered legal unions in other jurisdictions.

B. DCS Did Not Attempt To Create A New Class Of “Dependents,” But Even If It Did, It Acted Unlawfully In Doing So.

For the first time in this litigation, DCS now contends that it has the authority to grant “dependent” benefits to the same-sex couples included within its new policy regardless of their marital status. State Br. at 46. The glaring problem with that argument is that DCS did not purport to create a new set of benefits for “dependents.” Its policy expressly and unambiguously “recognize[d], *as spouses*, the parties to any same sex marriage performed in jurisdictions where that marriage is legal.” (A. 46.) And throughout this litigation, DCS steadfastly maintained that it “simply interpret[ed] the term ‘spouse’ in Civil Service Law § 164.” (*See* Appellate Division Brief of Defendants-Respondents New York State Department of Civil Service and Nancy G. Groenwegen at 31.) Thus, this novel argument is little more than a *post hoc* justification, with no basis in fact, for DCS’s unlawful disbursement of “spousal” benefits.

As discussed above, both comity and rules of statutory construction prohibit DCS from doing what they have done here—granting spousal benefits to same-sex

partners who have entered into unions labeled “marriages” in foreign jurisdictions. Thus, by issuing its policy, DCS “is now causing” a “misapplication” of state funds. *See* N.Y. State Fin. Law § 123-b(1). And the State Respondents’ new legal arguments, which engage in conjecture about DCS’s purported authority to grant benefits to other “dependents,” are irrelevant to the issues before this Court. Regardless of whether DCS could have taken other actions that might have lawfully awarded benefits to these same-sex partners as “dependents,” they most assuredly did not do so here.

But even if DCS attempted to create a new class of “dependents,” it cannot grant benefits to same-sex partners as “dependents” based solely on the fact that the couple entered a union considered “marriage” in a foreign jurisdiction. DCS’s authority to grant benefits to dependents is limited and does not apply to these circumstances.⁶ The State Respondents admit that in offering health benefits to dependents, DCS stands on the same footing as private insurers who, in addition to giving benefits to spouses and children, may provide benefits to “other persons

⁶ In arguing that the Legislature intended to give DCS broad authority to include these same-sex partners as “dependents,” the State Respondents rely only on statements from executive-branch officials, a former Governor and former DCS official. State Br. at 46-47. They do not cite any evidence confirming that the Legislature agreed with the sentiments of those executive-branch officials. Moreover, nearly all the former Governor’s and former DCS official’s comments reference the breadth of DCS’s authority to determine the *categories and types of benefits* provided (rather than authority to redefine or expansively interpret *who is eligible* for coverage). *See, e.g.*, Governor’s Message to ch. 461, *reprinted in* 1956 N.Y. State Legis. Annual 418, 419-20 (attached at page 47 of the State Respondents’ Addendum). In short, this evidence does not support the State Respondents’ contention that DCS has broad authority to include same-sex partners as “dependents” simply because they enter unions labeled “marriages” in foreign jurisdictions.

chiefly dependent upon [the employee] for support and maintenance.” *See* N.Y. Ins. Law §§ 4235(f), 4305(c); *see also* State Br. at 48-49. But simply because a same-sex couple has entered a legal union in a foreign jurisdiction does not mean that they are unilaterally or mutually dependent “for support and maintenance.” Without evidence of dependency, DCS cannot classify a same-sex partner as a dependent. Indeed, that is why DCS requires domestic partners, in order to receive coverage as dependents, to verify that they have “share[d] responsibility for each other’s . . . financial obligations . . . for at least . . . 6 months.” *See* NYSHIP Eligibility Worksheet (attached at page 64 of the State Respondents’ Addendum). Here, DCS does not require a similar showing from the same-sex couples included under its new policy, and thus, it cannot lawfully classify them as “dependents” for health coverage.

Furthermore, DCS did not take any of the requisite steps to create a new class of dependents. For starters, DCS officials did not contract with its insurance providers to provide benefits to a new class of dependents. *See* N.Y. Civ. Serv. Law § 162; *cf.* Jane Gottlieb, *PEF Agrees to Domestic Partner Benefits*, Albany Times Union at B2 (September 28, 1994) (attached at page 52 of the State Respondents’ Addendum) (discussing the contract negotiations that preceded the creation of domestic partners as a new class of dependents). Neither did DCS officials comply with the notice or rulemaking requirements for promulgating a

new agency rule. *See* N.Y. Const. art IV, § 8; N.Y. A.P.A. Law § 202(1). While the lower courts in this case found that these requirements did not apply to a policy interpreting the term “spouse,” those requirements would apply to a policy creating a new class of “dependents.” *See Roman Catholic Diocese of Albany v. New York State Dep’t of Health*, 66 N.Y.2d 948, 951 (1985) (defining an agency rule as “a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme”). Of course, the reason none of these steps were taken is because DCS did not intend to create a new class of dependents, but instead, to redefine the term “spouse.”

In sum, then, DCS did not attempt to create insurance coverage for a new class of “dependents,” and even if it did, its actions in doing so were unlawful.

C. The Unlawful Expenditures Authorized Under DCS’s New Spousal Policy Would Not Have Necessarily Occurred Under Its Domestic-Partner Coverage.

The State Respondents also suggest that DCS’s new policy has not caused any unlawful expenditure because the disbursements that have been given to same-sex couples under its policy would have nevertheless been expended under its domestic-partner coverage. State Br. at 45 (arguing that “the only ‘practical effect’ of DCS’s [policy] was to relieve [same-sex] couples of the burden of establishing domestic partner status”). But their vague and unspecified arguments on that point are unsound.

Notably, these arguments rest on a flawed premise. The State Respondents apparently assume that they do not violate Section 123-b of the State Finance Law if the unlawfully disbursed funds would have otherwise been expended through alternative means. But that is not a valid defense under Section 123-b. That Section prohibits a government official from “caus[ing] a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property.” N.Y. State Fin. Law § 123-b(1). Thus, a government official violates Section 123-b if she expends funds in an unlawful manner. It is irrelevant whether she would have otherwise expended those funds through different means; that fact, even if true, does not justify her already-committed unlawful expenditure of public funds.

Moreover, the State Respondents’ arguments ignore the many important differences between spousal eligibility under DCS’s new policy and domestic-partner eligibility. Simply put, a person who qualifies for one does not necessarily qualify for the other. Among other things, domestic partners must not be “related by blood,” and they must have “resided together in the same residence for at least . . . 6 months.” NYSHIP Eligibility Worksheet (attached at page 64 of the State Respondents’ Addendum). But these requirements and limitations are not imposed on spouses. First, as demonstrated by *May’s Estate*, 305 N.Y. at 493, a husband can qualify as the spouse of his wife even if he is related to her by blood. Second,

a husband qualifies as the spouse of his wife immediately after marriage; he need not ever reside with her, not to mention for a six-month period. Thus, a same-sex couple's entering a union considered "marriage" in a foreign jurisdiction does not automatically render them eligible for domestic-partner coverage. And particularly if the couple had not resided together before their legal union, they are unquestionably *not* eligible for domestic-partner coverage immediately after entering their union.

Moreover, some same-sex couples who have entered unions considered "marriages" in other jurisdictions might decide, for myriad personal reasons, not to take the affirmative step of registering for domestic-partner coverage. The Intervenors-Respondents have proffered an example of this. In August 2005, they entered a legal union that Canada defines as "marriage"; yet they chose not to obtain domestic-partner coverage even though they were paying additional funds to maintain separate health-insurance coverage for one of them. (A. 121-22.) It was not until DCS changed its policy in 2007 that they started obtaining spousal coverage under NYSHIP. (A. 122.) According to the Intervenors-Respondents, they did not seek domestic-partner coverage because they thought it "disrespected" their relationship by "calling [themselves] domestic partners." (A. 121.) Thus, the Intervenors-Respondents plainly show that not all same-sex couples who enter legal unions deemed "marriages" in other jurisdictions will obtain benefits under

the domestic-partner coverage. This directly undermines DCS's assertion that the unlawful expenditures authorized under its new policy would have also occurred under its domestic-partner coverage.

In sum, then, the State Respondents' new arguments about "dependents" and domestic-partner coverage are irrelevant distractions. They do not provide a basis for avoiding the main question before this Court: whether DCS acted unlawfully in granting spousal benefits to same-sex couples who have entered legal unions considered "marriages" in foreign jurisdictions.

CONCLUSION

DCS acted unlawfully by recognizing the legal unions of and granting benefits to same-sex couples who have entered into unions labeled “marriages” by jurisdictions that have redefined that institution. Taxpayers respectfully request that this Court reverse the Appellate Division’s decision and remand with instructions to enter judgment in their favor.

Dated: August 3, 2009

Respectfully submitted,



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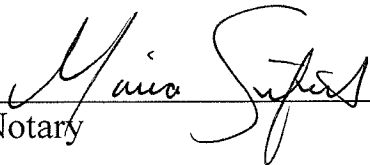
I, Jeana Hallock, a person over the age of 18 and not a party to this action, affirm under the penalties of perjury that on August 3, 2009, I served three copies of the attached *Reply Brief of Plaintiffs-Appellants* on all parties by sending true and accurate copies via United Parcel Service Overnight Delivery to:

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Dated: August 3, 2009


 Jeana Hallock

Signed before me this the 3rd day of August, 2009,
 in Scottsdale, Arizona.


 Notary



MARIA SIFERT
 Notary Public - Arizona
 Maricopa County
 Expires 02/28/2011