

COURT OF APPEALS - STATE OF NEW YORK

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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.*

-----X

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**NOTICE OF MOTION  
FOR AN ORDER  
GRANTING LEAVE  
TO APPEAL**

Index No: 4078/07  
Albany County  
Supreme Court

PLEASE TAKE NOTICE that upon the attached attorney affirmation of Brian W. Raum, dated February 10, 2009, and the papers included herewith, the undersigned will move this Court, pursuant to 22 NYCRR 500.22, at the courthouse thereof, located at 20 Eagle Street, Albany, New York 12207, on the 23rd day of February, 2009, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting Plaintiffs-Appellants leave to appeal to the Court of Appeals in accordance with CPLR 5602(a)(1)(i), and for such other and further relief as this Court may deem just and proper.

Dated: February 10, 2009

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Respectfully submitted,



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**AFFIRMATION  
IN SUPPORT  
OF MOTION**

Index No: 4078/07  
Albany County  
Supreme Court

I, Brian W. Raum, an attorney duly admitted to practice law in the State of New York, affirm the following under the penalties of perjury:

1) I am an attorney with the Alliance Defense Fund, counsel for Plaintiffs-Appellants (“Taxpayers”). As such, I am familiar with the facts and circumstances of this case as well as the papers and proceedings in this matter.

2) I submit this affirmation in support of Taxpayers’ motion pursuant to CPLR 5602(a)(1)(i) for leave to appeal to the Court of Appeals from a final Opinion and Order of the Appellate Division, Third Department, which held that a

state executive-branch agency and official did not act unlawfully by recognizing same-sex “marriages” solemnized in other jurisdictions and treating partners to those unions as “spouses” under New York law.

3) This affidavit sets forth the information required by 22 NYCRR 500.22(b) and the grounds supporting the motion for an order granting leave to appeal. Copies of the appellate record and all briefs submitted to the Appellate Division have been provided together with this affirmation. The Appellate Division’s decision is attached hereto as Exhibit A, and the Albany County Supreme Court’s decision is attached hereto as Exhibit B.

Procedural History:

4) In Spring 2007, Defendants-Respondents New York State Department of Civil Service and its President Nancy G. Groenwegen (collectively referred to as “DCS”) issued a Policy Memorandum, which stated in pertinent part: “[DCS] determine[s] that for purposes of benefits eligibility under NYSHIP [New York State Health Insurance Program] and all other benefit plans administered by its Employee Benefits Division, it [will] recognize as spouses partners in same sex marriages legally performed in other jurisdictions.” R. 47.

5) Taxpayers commenced this action in the Albany County Supreme Court on May 23, 2007, and filed an Amended Verified Complaint on June 29, 2007. R. 35. Under their First Cause of Action (Violation of New York State

Finance Law § 123-b), Taxpayers assert that DCS, by implementing its Policy Memorandum, has caused and is continuing to cause “a wrongful expenditure, misappropriation, misapplication, or other illegal or unconstitutional disbursement of State funds or State property to same-sex ‘spouses’ purportedly ‘married’ outside the State of New York.” R. 37. Taxpayers further contend that implementation of DCS’s Policy Memorandum violates the separation-of-powers doctrine by “attempt[ing] to redefine the term[s] ‘marriage’ and ‘spouse’ as found in applicable State legislation and case law to include members of foreign same-sex ‘marriages.’” R. 38.

6) In late September 2007, DCS and Defendants-Intervenors-Respondents filed motions to dismiss. The Albany County Supreme Court issued its Decision and Order on March 3, 2008, granting those motions and dismissing Taxpayers’ claims. The Supreme Court based its holding exclusively on the Fourth Department’s decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dept. 2008), which “concluded that a valid same-sex marriage performed in Canada was entitled to recognition in New York.” R. 8. After acknowledging the *Martinez* ruling to be “binding” over it, the Supreme Court held that “[t]he [P]olicy [M]emorandum issued by the New York State Department of Civil Service Employee Benefits Division in which it recognized, as spouses, the parties to any

same sex marriage, performed in jurisdictions where such marriage is legal, is both lawful and within its authority.” R. 9-10.

7) The Appellate Division affirmed the Supreme Court’s order on January 22, 2009. Only three Justices joined the majority opinion, which began its analysis as follows:

While [same-sex “marriage”] is relatively novel, there are longstanding rules of law that have guided our courts in determining whether persons validly married elsewhere will be considered married in New York. Rooted ultimately in principles of comity and choice of law that give controlling effect to the laws of other jurisdictions *unless they would do violence to some strong public policy of this [S]tate*, the well-settled marriage recognition rule recognizes as valid a marriage considered valid in the place where celebrated.

Exhibit A at 2-3 (quotations and citations omitted; emphasis added). Ultimately, the majority rejected Taxpayers’ contention that DCS cannot recognize out-of-state same-sex “marriages” because it “would do violence to some strong public policy of this State” by altering the fundamental components—a man and a woman—of marriages recognized in New York. Exhibit A at 5-6.

8) The majority then rejected Taxpayers’ claim that DCS violated separation-of-powers principles by interpreting the statutory term “spouse”—which has a well-settled legislative definition that includes only a husband or a wife in an opposite-sex marriage—to include same-sex partners who have obtained a “marriage” license from a foreign jurisdiction. At times, the majority recognized the merit in this argument by, for example, noting previous Appellate Division

decisions which “observed that, absent a legislative redefinition, the term ‘legal spouse’ [can]not reasonably be interpreted to include same-sex partners.” Exhibit A at 7 n.1. But, in the end, the majority deviated from this precedent, concluding that “[o]nce an out-of-state same-sex marriage is recognized in New York . . . , each of its parties [is] ‘a party to a marriage’ and, thus, a ‘legal spouse’ who would be entitled to the benefits, rights and obligations of that status.” Exhibit A at 7. In reaching this conclusion, the majority did not acknowledge (and perhaps did not appreciate) that its newfound application of comity principles judicially redefined the term “legal spouse.”

9) Two Justices concurred in the result but were unwilling to join the majority’s decision because it “chang[ed] longstanding law that affects all of the state’s citizens.” Exhibit A at 8. In critiquing the majority’s decision, the concurring Justices noted the “potentially expansive implications of the majority’s approach,” Exhibit A at 9, citing as support a November 2008 Circular Letter from the New York State Insurance Department ordering all “insurance companies doing business in New York to recognize out of state same-sex marriages or face unfair practice and/or discrimination charges” Exhibit A at 9 n.2. Relying on this Court’s decision in *Hernandez v. Robles*, 7 N.Y.3d 338, 361, 366 (2006), the concurrence reasoned that “[t]he Legislature is the governmental body best able to comprehensively and cogently address the issues in this emerging field.” Exhibit

A at 9. For these important reasons, the concurring Justices disagreed with the majority's resolution of this case.

10) The concurring Justices' alternative analytical approach deferred to DCS's "discretion in defining . . . the terms spouse and dependent children," Exhibit A at 8, even though, as the majority aptly recognized, "the term 'legal spouse' [can]not reasonably be interpreted to include same-sex partners." Exhibit A at 7 n.1. Thus, as the majority also stated, the concurrence's approval of DCS's unreasonable statutory interpretation allowed that executive agency to "improperly intrude into the Legislature's domain," thereby violating separation-of-powers principles. Exhibit A at 7 n.1. In short, while the concurrence astutely recognized that the majority's change of "longstanding law" created "potentially expansive implications" best decided by the legislature, the concurring Justices endorsed a separation-of-powers violation and, like the majority, were unable to properly resolve the issues before them.

11) Taxpayers now seek an order from this Court granting permission to appeal pursuant to CPLR 5602(a)(1)(i).

Timeliness of this Motion:

12) A copy of the Appellate Division's Opinion and Order, entered on January 22, 2009, was served on Taxpayers, via overnight mail, with a notice of entry, on January 22, 2009. The notice of entry is attached hereto as Exhibit C.

Jurisdiction:

13) The Appellate Division's order, attached hereto as Exhibit A, is a final determination in this action and is not appealable as of right. This Court therefore has jurisdiction to review this matter pursuant to CPLR 5602(a)(1)(i).

Questions Presented for Review:

14) Do executive agencies and officials violate common-law comity principles and cause illegal disbursements of public funds by recognizing and granting benefits based upon out-of-state same-sex "marriages"?

15) Do executive agencies and officials exceed their constitutional authority, violate separation-of-powers principles, and cause unconstitutional disbursements of public funds by recognizing and granting benefits based upon out-of-state same-sex "marriages"?

Preservation of Questions Presented:

16) Taxpayers preserved the questions presented by raising them in their Amended Verified Complaint. Taxpayers argued the comity issue as part of their First Cause of Action, contending that DCS's acts were "illegal . . . , against public policy, [and] otherwise contrary to law." R. 37. This issue was addressed by the Supreme Court. R. 8. It was also addressed by the Appellate Division. Exhibit A at 2-6.

17) Taxpayers argued the separation-of-powers issue as part of their First and Second Causes of Action, stating that DCS, as an executive-branch agency, “violate[d] the separation of powers doctrine” by “attempt[ing] to redefine the term[s] ‘marriage’ and ‘spouse’ as found in applicable State legislation and case law to include members of foreign same-sex ‘marriages.’” R. 38. This issue was briefly addressed by the Supreme Court. R. 8-9. It was also addressed by the Appellate Division. Exhibit A at 7-8.

The Questions Presented Merit Review by This Court:

18) In light of the criteria listed in 22 NYCRR 500.22(b)(4), this case warrants review by this Court. As will be explained fully herein, the issues presented in this appeal are novel and of public importance. In addition, the issues present a conflict with prior decisions of this Court. Consequently, this Court should grant Taxpayers leave to appeal.

Novel Issues:

19) This Court has never addressed whether comity principles mandate government recognition of an out-of-state same-sex “marriage” in New York. Neither does this Court’s precedent provide definitive guidance on how to resolve that issue. This appeal will allow the Court to address this important issue for the first time and provide uniform guidance to the lower courts.

20) All prior decisions from this Court addressing comity and marriage recognition have involved out-of-state marriages between a man and a woman. *See, e.g., Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980). Here, however, DCS has ordered the recognition of out-of-state unions between persons of the same sex. This Court has yet to address this wholly distinct issue: whether an out-of-state legal relationship that does not have the fundamental building blocks of a New York marriage—a man and a woman—can be recognized as a “marriage” in New York? This case provides an opportunity for this Court to resolve this emerging nuance of common-law comity principles.

21) Furthermore, this Court has never addressed whether, consistent with separation-of-power principles, executive-branch agencies and officials have authority to determine which out-of-state unions will be recognized as “marriages” in New York. Nevertheless, this Court has recognized that marriage issues are generally addressed by the legislative branch. *See Fearon v. Treanor*, 272 N.Y. 268, 271-72 (1936); *Hernandez*, 7 N.Y.3d at 361, 366. And this case provides an opportunity for this Court to clarify the role of executive-branch officials in addressing issues of marital recognition.

22) Thus, this Court should grant Taxpayers leave to appeal in order to address the novel issues presented in this case.

Issues of Public Importance:

23) The issues raised in this case threaten to (1) alter the fundamental components of the marital relationship in New York, (2) destroy New York's sovereignty to determine the fundamental components of the marital relationship, (3) affect the myriad legal rights and obligations flowing from the marital relationship, (4) allow executive-branch agencies and officials to invade the legislature's plenary power over marriage, and (5) nullify the legislature's policy decision to limit marital benefits to relationships between one man and one woman.

24) As recognized by the Appellate Division's concurring Justices, expanding comity principles to require government recognition of out-of-state same-sex "marriages" has already had, and will continue to have, far-reaching effects on New York society. This expansive application of comity principles effectively ushers same-sex "marriage" into New York through judicially created common law. Every same-sex couple wanting to be "married" in New York (even though New York does not allow such unions) can take a daytrip to Canada or Connecticut, get "married", and New York will be required to recognize it. As a result, this expansive application of comity has begun to transform the State of New York into a society with both opposite-sex marriages and same-sex "marriages," all of which must be recognized by the State; it has fundamentally

altered the structure of that most basic social institution—one man and one woman. Regardless of whether one thinks this is a positive or negative societal change, it is undeniable that through the expansive application of comity, the change has started to occur. And it is troubling, regardless of one’s personal views on same-sex “marriage,” to allow such a fundamental change to occur in the absence of legislative authority.<sup>1</sup>

25) Expanding comity principles to require recognition of out-of-state same-sex “marriages” effectively nullifies New York’s sovereign decision to define marriage as the union of one man and one woman. It abdicates New York’s sovereignty over marriage, favoring instead laws promulgated in jurisdictions that define marriage in a fundamentally different way than New Yorkers. In essence, it allows the “marriage” laws of foreign jurisdictions like Canada or Massachusetts—which have eradicated the basic man-woman construct—to govern here in the Empire State. Thus, this comity issue is far from an abstract legal concept; barring legislative action on this issue, it will determine the immediate future of marriage in New York.

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<sup>1</sup> Lambda Legal Education and Defense Fund, attorneys for Defendants-Intervenors-Respondents, have unequivocally stated their plan to assist same-sex couples who receive “marriage” licenses from foreign jurisdictions “to win full recognition of their newly[acquired] status in their home [s]tate.” H.R. Rep. No. 104-664, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911 (Legislative Report discussing the Federal Defense of Marriage Act). They intend to use the extension of comity principles to import same-sex “marriage” into New York—a direct effort to reform the State’s laws and public policy in the absence of legislative approval.

26) The judicial creation of same-sex “marriage” in New York will have countless ripple effects throughout everyday life; it is of momentous and far-reaching public importance. Whole aspects of New York society must change and respond. Government officials, employers, insurance companies, health-care providers, courts, attorneys, accountants—to name a few—must adapt their practices if same-sex “marriages” are to be recognized in New York. Divorces, inheritance rights, adoptions, pension benefits, property rights, taxation, and many other legal rights, benefits, and obligations will be changed by the recognition of out-of-state same-sex “marriages.”

27) This newly imposed expansion of comity principles has already begun to have a widespread effect in many facets of state law. For the first time, New York Supreme Courts have exercised their jurisdiction to grant divorces for same-sex couples who obtained “marriage” licenses in other jurisdictions. *See Beth R. v. Donna M.*, 19 Misc.3d 724 (Sup. Ct. N.Y. Cty. 2008); *C.M. v. C.C.*, 21 Misc.3d 926 (Sup. Ct. N.Y. Cty. 2008). At least one New York Surrogate has broken with precedent and determined that the decedent’s same-sex partner was the sole distributee because the couple had been “married” in Canada. *See Matter of the Estate of H. Kenneth Ranftle*, No. 4585-2008 (N.Y.L.J. Feb. 4, 2009). Attached hereto as Exhibit D. Furthermore, at least one New York Family Court has ruled that a partner of a same-sex couple did not need to be pre-certified as a qualified

adoptive parent (as she ordinarily would need to be under applicable law) because the couple had previously obtained a “marriage” license from another jurisdiction and thus were considered to be “married” under New York law. *See In re Donna S.*, 2009 WL 69341 (Fam. Ct. Monroe Cty. Jan. 6, 2009). Attached hereto as Exhibit E. These decisions show that the unprecedented application of comity principles has begun to create the legal reality of same-sex “marriage” in New York.

28) The vast overexpansion of comity has forced even private companies and corporations to recognize out-of-state same-sex “marriages.” For example, as noted in the Appellate Division’s concurring opinion, the New York Insurance Department has issued a directive mandating that all insurance companies doing business in New York must recognize out-of-state same-sex “marriages.” *See* 2008 N.Y. St. Ins. Dept. Circular Letter No. 27 (Nov. 21, 2008). Attached hereto as Exhibit F. Given the widespread effect of this important issue, New Yorkers need the finality and consistency that only a decision from this Court can bring.

29) Permitting, as the Appellate Division has, executive agencies and officials to determine which out-of-state legal relationships will be recognized as “marriages” in New York transfers policy-making authority from the legislature to the executive branch. The legislature possesses “plenary power” to exert the “fullest control” over issues involving marriage. *Fearon*, 272 N.Y. at 271-72; *see*

also N.Y. Dom. Rel. Law §§ 1- 61. By ordering that out-of-state same-sex “marriages” must be recognized in New York, DCS has usurped the legislature’s power over marriage and thus violated separation-of-powers principles. This violation of a fundamental constitutional principle is an important issue, calling for resolution by this Court. Thus, this Court should grant leave to appeal and declare that executive agencies and officials lack the authority to determine which out-of-state legal relationships will be recognized as “marriages” in New York.

30) Furthermore, forcing the government to recognize out-of-state same-sex “marriages” undermines the legislature’s policy decision to limit marital benefits to relationships between one man and one woman. “The extension of [marital] benefits entails a consideration of social and fiscal policy more appropriately left to the Legislature.” *Langan v. State Farm Fire & Casualty*, 48 A.D.3d 76, 79 (3rd Dept. 2007).<sup>2</sup> Yet, an expansive application of comity principles effectively abolishes the legislature’s social and fiscal policy

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<sup>2</sup> As this Court has recognized, many biological and social reasons support the legislature’s decision to limit marital benefits to relationships between one man and one woman. That decision is neither arbitrary nor “merely a by-product of historical injustice.” *Hernandez*, 7 N.Y.3d at 361. It is “based on innate, complementary, procreative roles, a function of biology.” *Hernandez v. Robles*, 26 A.D.3d 98, 104 (1st Dept. 2005), *aff’d*, 7 N.Y.3d at 338. Only unions between a man and a woman result in the natural procreation of children. *See Hernandez*, 7 N.Y.3d at 359 (recognizing that one of the “important function[s] of marriage is to create more stability and permanence in the relationships that cause children to be born”); *Mirizio v. Mirizio*, 242 N.Y. 74, 81 (1926) (reasoning that marriage “relationship[s] . . . exist with the result and for the purpose of begetting offspring”). Moreover, relationships between a man and a woman produce certain child-rearing advantages. *See Hernandez*, 7 N.Y.3d at 359 (“Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like”).

determinations by mandating that marital benefits be extended to same-sex couples. This result, as recognized by the Appellate Division's concurring opinion, inappropriately infringes on the realm of the legislature.

31) In sum, this Court should grant Taxpayers leave to appeal to address the issues of public importance presented in this case.

Conflict with Prior Decisions of this Court:

32) The Appellate Division's approval of DCS's Policy Memorandum conflicts with this Court's decision in *Hernandez*. To be sure, *Hernandez* did not address the precise questions at issue in this case: *Hernandez* held that the state legislature did not violate the New York Constitution by defining marriage as the union of one man and one woman; whereas, this case presents questions of common-law comity and executive-branch authority concerning marriage recognition. Nevertheless, this Court in *Hernandez* spoke extensively about changing the fundamental components of marriage in New York—one man and one woman—which is precisely the result of the Appellate Division's decision in this case.

33) In *Hernandez*, this Court stated its "conclusion" that "any expansion of the traditional definition of marriage should come from the Legislature." *Hernandez*, 7 N.Y.3d at 361. This Court similarly remarked that "the present generation should have a chance to decide [the same-sex 'marriage'] issue through

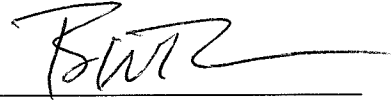
its elected representatives [*i.e.*, the legislature].” *Id.* at 366. Here, however, the Appellate Division’s decision has effectively ushered same-sex “marriage” into New York, thus altering the fundamental components of marriage through judicial fiat, and robbing this “present generation” of New Yorkers of its opportunity to decide the same-sex “marriage” issue through its elected legislators. This judicial restructuring of marriage in New York directly violates part of this Court’s decision in *Hernandez*. The lower courts of this State cannot accomplish indirectly what this Court has ruled they cannot do directly—namely, the redefinition of marriage. This Court must intervene to correct this conflict between the Appellate Division’s decision and its own precedent.

34) This Court should therefore grant Taxpayers leave to appeal to address the conflict between the Appellate Division’s decision in this case and this Court’s decision in *Hernandez*.

WHEREFORE, for all the above reasons, I respectfully request that this Court issue an order granting Taxpayers leave to appeal to the Court of Appeals from the order of the Appellate Division, Third Department, entered on January 22, 2009.

Dated: February 10, 2009.

Respectfully submitted,



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## AFFIRMATION OF SERVICE

I, Brian W. Raum, an attorney duly licensed in the State of New York, affirm under the penalties of perjury that the following is true and correct:

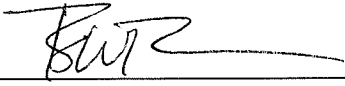
That on the 10th day of February 2009, I served copies of the foregoing Notice of Motion, Attorney Affirmation in Support, and supporting papers by depositing true copies with the United Parcel Service, via *Next Day Air* overnight service, pre-paid, addressed as follows:

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those being the addresses designated on the latest papers served by them in this action.

  
\_\_\_\_\_  
Brian W. Raum, Esq.