November 10, 2006

VIA FEDERAL EXPRESS

Hon. Thomas J. McNamara
Acting Justice of the Supreme Court, Albany County
65 South Broadway – Room 210
Saratoga Springs, NY 12866

Re: Index No. 5896/06 – *Godfrey et al. v. Hevesi*

Dear Justice McNamara:

I am an attorney with Lambda Legal, co-counsel with Kramer Levin Naftalis & Frankel LLP to proposed Defendants-Intervenors Peri Rainbow and Tamela Sloan. Please find enclosed a courtesy copy of the *Notice of Defendants-Intervenors' Motion to Dismiss and Affirmations, Affidavits, and Exhibits in Support of Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction*, along with *Defendants-Intervenors' Memorandum of Law in Support of Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction.* These papers were filed and served today on all parties in the above-captioned matter. The motion is noticed for December 8, 2006.

Proposed Defendants-Intervenors filed their motion to intervene in this action on October 27, 2006. The parties to the proceeding have submitted letters advising the Court that they have no objection to intervention, copies of which are attached as Exhibit A to the accompanying Affirmation of Susan L. Sommer, dated November 9, 2006. Though as yet the Court has not ruled on the motion to intervene, proposed Defendants-Intervenors file this motion to dismiss and opposition to plaintiffs' motion for a preliminary injunction so as not to cause delay in the proceeding or prejudice to their ability to be heard. In the event the motion to intervene is denied, proposed Defendants-Intervenors respectfully request that they be permitted to file these submissions as *amici curiae.*

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Pursuant to the local rules, we have requested oral argument and would be happy to appear if it would be helpful to the Court's consideration.

Sincerely,

Susan L. Sommer

Enclosures

cc *(fed. ex.)*:

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

MARGARET GODFREY, ROSEMARIE JAROSZ, GEORGE V. IMBURGIA and JOSEPH ROSSINI,

Plaintiffs,

- against -

ALAN G. HEVESI, in his official capacity as the New York State Comptroller and Sole Trustee of New York State and Local Retirement System,

Defendant,

-and-

PERI RAINBOW and TAMELA SLOAN,

Defendants-Intervenors.

Index No. 5896/06

Hon. Thomas J. McNamara

Oral Argument Requested

DEFENDANTS-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Defendants-Intervenors Peri Rainbow and Tamela Sloan ("Defendants-Intervenors") submit this Memorandum of Law in opposition to plaintiffs' motion for preliminary injunction, which seeks to impair Defendants-Intervenors' right to pension benefits they have paid for and earned over the course of their public employment. Defendants-Intervenors also submit this Memorandum of Law in support of their motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR Rule 3211(a)(7) and for lack of taxpayer standing under State Finance Law ("Finance Law") Section 123-b.[1]

INTRODUCTION

This action is an unwarranted attack against the rights of lesbian and gay New York State public employees to receive future vested pension and retirement benefits they have earned for their families, and against a public official who is simply doing his job in confirming that New York law requires him to uphold these rights. The Alliance Defense Fund, an Arizona-based religious advocacy organization, filed the complaint and motion for preliminary injunction in this action on behalf of four purported New York taxpayer plaintiffs (hereinafter collectively referred to as the "ADF"). The ADF seeks to enjoin New York State Comptroller Alan G. Hevesi (the "Comptroller") from properly applying controlling New York law requiring that he accord legal respect to valid out-of-state

[1] Defendants-Intervenors filed their motion to intervene in this action on October 27, 2006. The parties to the proceeding have submitted letters advising the Court that they have no objection to intervention, attached as Exhibit A to the accompanying Affirmation of Susan L. Sommer, dated November 9, 2006 ("Sommer Aff."). Though the Court has not yet ruled on the motion to intervene, Defendants-Intervenors file this motion to dismiss and opposition to plaintiffs' motion for a preliminary injunction so as not to cause delay in the proceeding or prejudice to their ability to be heard. In the event the motion to intervene is denied, Defendants-Intervenors respectfully request that this Memorandum of Law and accompanying affirmation and exhibits be accepted as submissions of *amici curiae*.

marriages between same-sex couples for purposes of administering retirement and pension funds.

This lawsuit threatens to deprive Defendants-Intervenors, same-sex spouses who are both employees of New York State and who validly married in Canada, and other lesbian and gay public employees and their spouses of retirement benefits in which they have a vested interest and that may be critical to them in the future. The ADF sues the Comptroller in his official capacity as trustee of the New York State and Local Retirement System (the "Retirement System") for doing no more than following longstanding New York common law requiring that a marriage validly entered into out-of-state be accorded legal respect in New York even if the marriage could not be obtained under New York law. Under this well-settled rule, the Retirement System must recognize the valid out-of-state marriages of same-sex couples like Defendants-Intervenors to determine eligibility for retirement and pension benefits.

The ADF's meritless complaint should be dismissed for failure to state a cause of action. The ADF also cannot meet the stringent requirements for a preliminary injunction. First, even if the complaint is not dismissed outright, as it should be, the ADF is still unlikely ultimately to succeed on the merits of its claim. Second, the ADF cannot establish imminent irreparable harm based on the Comptroller's mere confirmation that he will adhere to New York law in connection with the future administration of the pension system. Indeed, it is highly unlikely that the Retirement System will be called upon to make any pension disbursements to a same-sex spouse of a public employee before a final judgment issues, eliminating any need for injunctive relief. And third, a balancing of the equities decidedly favors denying injunctive relief to the ADF.

Defendants-Intervenors and other same-sex families like them who count on their vested pension benefits stand to suffer harm if an injunction is granted far greater than any arising from an imperceptible impact on the public fisc in the unlikely event that disbursements become due before a final judgment.

This action should be recognized for what it is — a bald maneuver to impair the rights of lesbian and gay New York public employees by those who cannot countenance that government officials are applying New York law evenhandedly to same-sex couples. Indeed, the ADF has not even demonstrated standing under Finance Law Section 123-b to challenge the Comptroller's essentially non-fiscal determination that governing New York law requires respecting out-of-state marriages for Retirement System purposes. Accordingly, the complaint should be dismissed with prejudice and the motion for preliminary injunction should be denied.

FACTUAL BACKGROUND

A. The Defendants-Intervenors

Defendants-Intervenors are New York State employees and residents Peri Rainbow and Tamela Sloan, who are one another's spouses.[2] Ms. Rainbow is 45 years old, and Ms. Sloan is 46 years old. Rainbow Aff. ¶ 2; Sloan Aff. ¶ 2. The couple has been in a committed, loving relationship for more than six years. Rainbow Aff. ¶ 5. They live together in Stone Ridge, New York, with their 11-year-old daughter, Cecilia,

[2] More detailed information about Ms. Rainbow and Ms. Sloan appears in their affidavits dated October 26, 2006, filed in support of their intervention motion. Copies of their affidavits, along with the Affirmation of Alphonso B. David in Support of Intervention, dated October 27, 2006, are attached to the accompanying Affirmation of Susan L. Sommer and are expressly incorporated and relied upon in Defendants-Intervenors' present submissions. *See* Affidavit of Peri Rainbow ("Rainbow Aff."), Affidavit of Tamela Sloan ("Sloan Aff."), and Affirmation of Alphonso B. David ("David Aff."), attached as Exhs. B, C and D respectively to Sommer Aff.

who they adopted out of the New York State foster care system four years ago. Rainbow Aff. ¶¶ 2, 10-11; Sloan Aff. ¶ 4. Ms. Rainbow and Ms. Sloan share everything in their lives and all family responsibilities. Rainbow Aff. ¶¶ 7-12; Sloan Aff. ¶¶ 4, 6. They have taken whatever steps they can to provide legal and financial protections to one another and their daughter. Rainbow Aff. ¶¶ 7-16, 21; Sloan Aff. ¶¶ 4-6, 11.

In a ceremony attended by family and friends, they were validly married on August 22, 2005, in Ontario, Canada, where same-sex couples have been able legally to marry since 2003. Rainbow Aff. ¶ 13; Sloan Aff. ¶ 5; Sommer Aff. ¶ 5.

Ms. Rainbow is a professor of women's studies, psychology, and education studies at the State University of New York at New Paltz. She has been a state employee for more than 20 years and is a participant in the Retirement System. Rainbow Aff. ¶¶ 1, 3-4. Ms. Sloan is the Dean of Students at West Park Union Free School, a public high school that provides education and counseling to students placed through the Department of Social Services and Certified State Education. She has been a state employee for the past two years and has participated in the Retirement System during that time. Sloan Aff. ¶ 1-2. After the couple married in Canada, Ms. Rainbow immediately designated Ms. Sloan as her spouse to receive benefits under her pension. Rainbow Aff. ¶ 15. Ms. Sloan made the same designation for Ms. Rainbow's benefit. Sloan Aff. ¶ 6.

This litigation threatens vested pension benefits that Ms. Rainbow and Ms. Sloan have earned over years of service to New York State. It also threatens interests each has as a spouse of a state employee to spousal benefits and protections provided under the Retirement System. *See* Rainbow Aff. ¶¶ 17-20; Sloan Aff. ¶¶ 6-10; David Aff. ¶¶ 20-32. These include an accidental death benefit paid to the spouse of an employee killed as

the result of an on-the-job accident and a cost-of-living adjustment to the pension collected by the surviving spouse of a deceased retired employee. Rainbow Aff. ¶ 18; Sloan Aff. ¶ 7-8; David Aff. ¶¶ 25-26. These benefits, described more fully in Section B below, would be available to Ms. Rainbow or Ms. Sloan as the survivor of the other only if their marriage is respected. A preliminary injunction would, without warrant, impair important benefits that they count on to be there for them and their family if tragedy should strike and as they plan for the future. Rainbow Aff. ¶¶ 14, 18-19; Sloan Aff. ¶¶ 6-10.

B. The Determination By The Comptroller That The Retirement System Must Accord Legal Respect To Valid Out-Of-State Marriages Of Public Employees To Same-Sex Spouses

In October 2004 the Comptroller issued a letter opinion confirming his legal obligation to respect marriages of same-sex couples entered into in Canada. The opinion came in response to the query of a State employee about the legal and financial implications for Retirement System purposes if the employee and his same-sex partner should determine to marry in Canada. *See* Sommer Aff., Exh. G (October 13, 2004 letter from the Office of the New York State Comptroller).

Lesbian and gay couples have been legally permitted to wed in Canada since 2003, when Ontario began according same-sex partners the right to marry, followed swiftly by other Canadian provinces and then by nationwide law. *See* Sommer Aff. ¶¶ 5-6. The requirements and process to enter into marriage in Canada are indistinguishable for same-sex and different-sex couples. *Id.* at ¶ 7. Furthermore, Canada has no residency or citizenship requirements to marry there. *Id.* at ¶ 8. Thus U.S. citizens like Ms. Rainbow and Ms. Sloan may legally marry their same-sex (or different-sex) partners in

Canada, and many have. *Id.* at ¶ 9. Same-sex couples may also marry in Massachusetts,[3] Spain, Belgium, the Netherlands, and, soon, South Africa. *Id.* at ¶¶ 10-11.

The Comptroller confirmed in his October 2004 letter that long-standing common law principles require New York to respect marriages validly entered into in other jurisdictions even if those marriages would not be valid if entered into in New York. *See* Sommer Aff., Exh. G. As the Comptroller confirmed, this principle applies with full force to marriages between same-sex couples obtained in Canada, even though such couples are not permitted to marry here. *Id.*

The Comptroller also noted that the New York State Attorney General issued an advisory opinion in March 2004 to the same effect, confirming that "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." *See* Op. Att'y Gen. No. 2004-1, March 3, 2004 (Sommer Aff., Exh. F).

In addition to the Attorney General and the Comptroller, a number of New York municipalities, including New York City, Albany, Buffalo, Ithaca, Nyack, Rochester, and Brighton, as well as Westchester County, have similarly publicly confirmed that, consistent with the marriage recognition rule, these local governments will respect marriages of same-sex couples validly performed outside the State. Sommer Aff. ¶¶ 14-15. Public and private employers across the State are likewise respecting extra-territorial

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[3] Unlike Canada, Massachusetts does place statutory limitations on marriages there by out-of-state residents, so New York same-sex couples have not been free to marry in Massachusetts. *See Cote-Whitacre v. Department of Public Health*, 446 Mass. 350 (2006). However, as explained in Point I below, if a validly married Massachusetts same-sex couple moves or travels to New York, their marriage would also be entitled to respect in this State under the marriage recognition rule.

marriages of same-sex couples in New York, as are numerous corporations that conduct business in New York. *Id.* at ¶¶ 16-20.

The Comptroller's letter opinion outlined the consequences and benefits under the Retirement System if a public employee is married. *See* Sommer Aff., Exh. G. These include a spouse's right to receive a death benefit if a public employee is killed in an accident while on the job. *See* Retirement and Social Security Law ("RSSL") §§ 61(d), 361, 509 and 607. In addition, if a retired employee designates a spouse to receive continued pension benefits after the employee dies, the spouse is entitled to a cost-of-living adjustment to the benefits. *See* RSSL §§ 78-a and 378-a. Retirement benefits are also deemed marital property to which the non-employee spouse has rights in the event of a separation or divorce or in certain other circumstances. *See, e.g., Majauskas v. Majauskas,* 61 N.Y.2d 481 (1984) (vested rights in pension plan are marital property); Domestic Relations Law ("DRL") § 236, Part B; RSSL § 803-a; Estates, Powers and Trusts Law ("EPTL") § 5-1.1-A(b)(1)(G); David Aff. ¶ 30. These are valuable rights on which spouses like Ms. Rainbow and Ms. Sloan rely in planning for their future. *See* Rainbow Aff. ¶ 14; Sloan Aff. ¶ 6; David Aff. ¶¶ 24-32.

ARGUMENT

On its face, the complaint fails to state a cause of action as a matter of law, justifying dismissal under CPLR Rule 3211(a)(7). *See, e.g., Paley v. Rosner*, 65 N.Y.2d 736, 738 (1985) (motion to dismiss properly granted where complaint fails to state cause of action as matter of law).

The ADF also cannot establish entitlement to a preliminary injunction. A petitioner has the "burden in seeking a preliminary injunction to show a likelihood of

success on the merits, a danger of irreparable injury if provisional relief is withheld and a balance of equities in their favor." *Schulz v. New York*, 217 A.D.2d 393, 396 (3d Dep't 1995) (denying preliminary injunction motion to movant asserting taxpayer claim under Finance Law § 123-b) (citing *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988)).

"Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant.'" *Nalitt v. City of New York,* 138 A.D.2d 580, 581 (2d Dep't 1988) (quoting *First Natl. Bank v. Highland Hardwoods*, 98 A.D.2d 924, 926 (3d Dep't 1983)). Thus, "[a] movant's burden of proof on a motion for a preliminary injunction is particularly high." *Council of City of New York v. Giuliani*, 248 A.D.2d 1, 4 (1st Dep't), *appeal dismissed in part, denied in part,* 92 N.Y.2d 938 (1998). The ADF cannot demonstrate that it meets *any* of the three requirements for a preliminary injunction and thus fails to carry its burden of establishing a right to this drastic remedy.

I.

The ADF Fails To State A Cause Of Action Against The Comptroller As A Matter Of Law And Likewise Cannot Demonstrate A Likelihood Of Success On The Merits

Settled New York common law requires that the valid out-of-state marriages of couples like Defendants-Intervenors be accorded legal respect, including for purposes of the Retirement System. In confirming that the Retirement System will respect such marriages, the Comptroller has done no more than acknowledge what New York law demands and what Defendants-Intervenors and other married lesbian and gay public

employees are entitled to as of right. The ADF's claim that the longstanding marriage recognition rule does not apply when the rights of these families are at stake contravenes longstanding New York principles of common law. Nor did the decision of the Court of Appeals in *Hernandez v. Robles,* 7 N.Y.3d 338 (2006), which held that the State Constitution does not require permitting same-sex couples to marry *within* the State, in any way change the distinct requirement that out-of-state marriages that could not be obtained here nonetheless be accorded legal respect.

A. As A Matter Of Law, The ADF Cannot Prevail On Its Claim That The Comptroller Acted *Ultra Vires* In Determining That Valid Out-Of-State Marriages Between Same-Sex Couples Must Be Respected For Purposes Of The Retirement System

Under well-established New York law, a validly performed out-of-state marriage must be recognized as valid in New York. *See, e.g., Mott v. Duncan Petroleum Trans.,* 51 N.Y.2d 289, 293 (1980); *In re Estate of May*, 305 N.Y. 486, 490 (1953) ("[I]n the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad, the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated."); *Thorp v. Thorp,* 90 N.Y. 602, 605 (1882) ("[T]he validity of a marriage contract is to be determined by the law of the State where it is entered into. If valid there, it is to be recognized as such in the courts of this State").

Under this rule, *even where the marriage is expressly prohibited or invalid under New York statute*, it is nonetheless entitled to legal respect within New York if valid in the jurisdiction in which it was entered. *See, e.g., Mott,* 51 N.Y.2d at 293 ("It has long been settled law that although New York does not itself recognize common-law

marriages . . . a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted") (internal citations omitted).

Thus, for example, common law marriages, although prohibited by the Legislature since 1933, are respected from other jurisdictions. *Id.*; *Coney v. R.S.R. Corp.*, 167 A.D.2d 582, 583 (3d Dep't 1990); *Dozack v. Dozack*, 137 A.D.2d 317, 318 (3d Dep't 1988). New York likewise respects a valid out-of-state marriage between an uncle and a niece, though such a marriage would be invalid, void, and subject to criminal penalty under DRL Section 5(3) if celebrated here. *May*, 305 N.Y. at 492-93. Similarly, although a proxy marriage — one concluded at a ceremony attended by only one of the parties — cannot be contracted in New York pursuant to DRL Section 12, such a marriage will be deemed valid in New York if valid where performed. *See Fernandes v. Fernandes*, 275 A.D. 777, 777 (2d Dep't 1949); *In re Will of Valente*, 18 Misc. 2d 701, 705 (Sur. Ct. Kings County 1959). And New York will respect an out-of-state marriage of parties too young under DRL Section 7(1) to marry here. *See Hilliard v. Hilliard*, 24 Misc. 2d 861, 863 (Sup. Ct. Greene County 1960).

Moreover, a marriage validly executed in a foreign nation that could not be obtained here — such as the Canadian marriage of Defendants-Intervenors — is entitled to the same strong presumption of validity in New York as one contracted in another state. *See, e.g., Van Voorhis v. Brintnall*, 86 N.Y. 18, 24 (1881) ("it is a general rule of law that a contract entered into in another State *or country*, if valid according to the law of that place, is valid everywhere") (emphasis added). *See also Valente*, 28 Misc. 2d at 702 (Italian proxy marriage); *Bronislawa K. v. Tadeusz K.*, 90 Misc. 2d 183, 184 (Fam. Ct. Kings County 1977) (validity of Polish marriage determined under laws of Poland).

In particular, Canadian marriages for decades have been recognized as valid by New York courts. *See In re White*, 129 Misc. 835, 836 (Sur. Ct. Erie County 1927) ("validity of the [marriage] ceremonial must be tested, not by . . . the laws of this state, but by the laws of the place where the ceremony took place, which was the province of Ontario"); *Donohue v. Donohue*, 63 Misc. 111, 112 (N.Y. Sup. Ct. 1909) ("The parties were competent to contract a lawful marriage in the Province of Ontario, Canada; and the marriage was lawful there, and, therefore, is valid in this State.").

This rule of recognition is stronger than ordinary comity principles, although it shares common roots in respect for other jurisdictions. *See Van Voorhis,* 86 N.Y. at 25 ("By the universal practice of civilized nations the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated") (*quoting Cropsey v. Ogden*, 11 N.Y. 228, 236 (1854)). Under a standard comity analysis, New York courts "apply the laws of other States where the application of those laws does not conflict with New York's public policy." *Crair v. Brookdale Hosp. Med. Ctr.*, 94 N.Y.2d 524, 528-29 (2000). In assessing New York's public policy in the general comity inquiry, courts "look to the law as expressed in statute and judicial decision and to the prevailing attitudes of the community." *Ehrlich-Bober & Co. v. University of Houston,* 49 N.Y.2d 574, 580 (1980).

In contrast, the marriage recognition rule — rooted as well in the paramount importance of the marriage contract to individuals and society — permits no such comparative policy analysis. With only two exceptions, the rule *requires* recognition of marriages valid where contracted *regardless* of whether the DRL would permit such marriages or whether New York's law or public policy otherwise coincides with that of

the foreign jurisdiction. *See Mott*, 51 N.Y.2d at 292-93; *May*, 305 N.Y. at 491-93; *Bronislawa K.*, 90 Misc. 2d at 184-85 (contrasting "sophisticated" principles considered in comity or full faith and credit analysis with clear "*lex locus*" rule requiring recognition of marriages valid where contracted).

Completely ignoring this deeply rooted body of New York common law, the ADF places exclusive reliance on *Ehrlich-Bober*, a case having nothing to do with marriage that applied general comity principles in the context of "a wholly commercial transaction." 49 N.Y.2d at 582. *See* Attorney Affirmation in Support of Motion for Preliminary Injunction and Temporary Restraining Order, submitted by ADF ("Raum Aff.") ¶ 22. Notably, the ADF makes no mention of the controlling cases applying the marriage recognition rule both before and after *Ehrlich-Bober*. Indeed, subsequent to *Ehrlich-Bober*, the Court of Appeals confirmed the vitality of the distinct marriage recognition rule, holding that "[t]he law to be applied in determining the validity of . . . an out-of-State marriage is the law of the State in which the marriage occurred." *Mott*, 51 N.Y.2d at 292. In the years since, the Third Department, along with other Appellate Division Departments, has reiterated and applied the rule numerous times. *See, e.g., In re Estate of Yao You-Xin*, 246 A.D.2d 721, 721 (3d Dep't 1998); *In re Estate of Gates*, 189 A.D.2d 427, 432 (3d Dep't 1993); *Coney*, 167 A.D.2d at 583; *Dozack*, 137 A.D.2d at 318. *See also, e.g., In re Catapano*, 17 A.D.3d 672, 672 (2d Dep't 2005); *Katebi v. Hooshiari*, 288 A.D.2d 188, 188 (2d Dep't 2001); *Lancaster v. 46 NYL Partners*, 228 A.D.2d 133, 141 (1st Dep't 1996).[5] Thus while general comity principles might call for

[5] The ADF attempts to divert the Court's attention further from the controlling body of New York case law calling for recognition of out-of-state marriages by citing decisions from *other* states addressing *those* jurisdictions' approaches. *See* Raum Aff. ¶ 26. Many

reference to the "public policy" of New York to resolve a conflict between this State's and another jurisdiction's laws, that is decidedly not the approach followed under the marriage recognition rule.[6]

Instead, only two narrow exceptions have been held to limit the marriage recognition rule, neither of which applies here. The first is where a statute explicitly declares that a given class of marriages, when concluded in another jurisdiction, will be considered void in New York. *See May*, 305 N.Y. at 492-93; *Van Voorhis*, 86 N.Y. at 26 ("prohibition by positive law" constitutes exception to marriage recognition rule). New York has no such statute. As discussed below, contrary to the ADF's suggestion, this exception is *not* triggered by *Hernandez's* holding that the DRL's prohibition on marriages in-state between same-sex couples does not violate the New York Constitution.

The second exception is if an out-of-state marriage is "offensive to the public sense of morality to a degree regarded generally with abhorrence." *May,* 305 N.Y. at

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of those cases are cited for propositions consistent with New York's requirement that out-of-state marriages be recognized here unless repugnant to New York public policy. More to the point, however, is that the only standards for respecting out-of-state marriages that govern here are *New York's*.

[6] Even if ordinary comity principles rather than those specific to recognition of marriages applied, out-of-state marriages between same-sex partners would still be required to be respected in New York. Under the comity standard articulated in *Ehrlich-Bober*, a court must compare New York's public policy with that of the foreign jurisdiction to determine which conflicting law should control. 49 N.Y.2d at 580. This approach does not mean, however, simply disregarding the foreign law if inconsistent with New York's. "[I]f New York statutes or court opinions were routinely read to express fundamental policy, choice of law principles would be meaningless. Courts invariably would be forced to prefer New York law over conflicting foreign law on public policy grounds." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 79 (1993). In light of New York's long-standing respect for same-sex relationships, coupled with its exceptionally strong public policy calling for recognition of valid out-of-state marriages, the ADF cannot show that respecting Defendants-Intervenors' out-of-state marriage for Retirement System purposes would be contrary to public policy. *See* Sommer Aff. ¶¶ 21-27.

493. This abhorrence exception requires an overwhelming social consensus that a marriage is patently repugnant to the morality of the community. *Id.* The exception is so narrow that, throughout the lengthy history of the marriage recognition rule, only polygamous and closely incestuous marriages have been held to meet its stringent criterion. *Van Voorhis*, 86 N.Y. at 26 (exception applies in cases "of incest or polygamy coming within the prohibitions of natural law"); *Earle v. Earle*, 141 A.D. 611, 613 (1st Dep't 1910) ("the *lex loci contractus* governs as to the validity of the marriage, unless the marriage be odious by common consent of nations, as where it is polygamous or incestuous by the laws of nature"); *People v. Ezenou*, 155 Misc. 2d 344, 346 (Sup. Ct. Bronx County 1992) (polygamous marriage not accorded respect).

This exception too does not remotely govern here. As evidenced by its laws and judicial decisions, New York State increasingly regards same-sex partnerships with respect and tolerance, negating the consensus of abhorrence that the ADF would have to demonstrate to invoke this narrow exception to the marriage recognition rule. *See* Sommer Aff. ¶¶ 21-27. The same-sex relationships of public employees in the State are already respected and accorded protection in a variety of ways. This includes, for example, recognition of out-of-state marriages not only by the Comptroller but also by other public officials, municipal and county governments, unions, and private entities around the State. Sommer Aff. ¶¶ 12-20. Moreover, all three branches of State government provide health insurance benefits to domestic partners of State employees, as do numerous local governments. Sommer Aff. ¶¶ 21, 24. And public employees are free to designate their same-sex partners — whether their married spouses or not — as their beneficiaries for a variety of purposes under the Retirement System. *See, e.g.*, RSSL §§

77, 90; *De Deo v. McCall*, 255 A.D.2d 683 (3d Dep't 1998). There is certainly no social consensus in New York that same-sex relationships are abhorrent to public policy.

With marriage comes emotional and financial stability for spouses and any children, which supports a strong presumption of the validity of a marriage to protect these family ties. *See, e.g., Amsellem v. Amsellem*, 189 Misc. 2d 27, 29 (Sup. Ct. Nassau County 2001) ("[T]he presumption of marriage . . . is one of the strongest presumptions known to the law.") (citing *In re Estate of Lowney*, 152 A.D.2d 574, 576 (2d Dep't 1989)) (internal citation omitted). Where, as here, the "party actually challenging the validity of the marriage is a total stranger to the marital relation, the presumption becomes even stronger." *Seidel v. Crown Indus.*, 132 A.D.2d 729, 730 (3d Dep't 1987). "[A] stranger to the marital relationship has a heavy burden to establish its invalidity." *Meltzer v. McAnns Bar & Grill*, 85 A.D.2d 826, 826 (3d Dep't 1981). The ADF taxpayer plaintiffs, complete strangers to the couples whose marriages are gratuitously attacked, cannot meet this heavy burden.

B. *Hernandez v. Robles* Does Not Alter Application Of The Marriage Recognition Rule

Contrary to the ADF's argument, the decision of the Court of Appeals in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), does not invalidate the out-of-state marriages of Defendants-Intervenors and other similarly situated same-sex couples. *Hernandez* determined only (1) that the DRL does not on its face allow same-sex couples to marry *within* this State, and (2) that this restriction is not so irrational as to be unconstitutional. *See id.* at 357, 360. The decision did not address or apply the entirely separate body of law used to determine whether a marriage that is permitted and valid in another jurisdiction must be recognized in New York.

Further, neither of the holdings in *Hernandez* triggered either the positive law prohibition or abhorrence exceptions to the marriage recognition rule or otherwise altered the Comptroller's obligation to apply the rule to accord respect to out-of-state marriages of lesbian and gay public employees. While the plurality and concurring opinions in *Hernandez* concluded that any changes in New York's own marriage rules had to be made by the Legislature, there is nothing in either opinion to suggest that the Court was issuing an immutable "definition" of marriage positively prohibiting respect for a valid *out-of-state marriage* between same-sex partners. *See, e.g., id.* at 366 (plurality op.); *id.* at 379 (Graffeo, J., concurring).

Nor was there anything in either opinion suggesting that marriages of same-sex couples are "abhorrent" to public policy and not accorded respect under the marriage recognition rule. In fact, all of the judges of the Court of Appeals agreed that the Legislature could or perhaps *should* change the DRL to permit same-sex couples to marry. *See id.* at 358-59 ("The question is not, we emphasize, whether the Legislature must or should continue to limit marriage in this way; of course the Legislature may . . . extend marriage or some or all of its benefits to same-sex couples.") (plurality op.); *see id.* at 379 ("It may well be that the time has come for the Legislature to address the needs of same-sex couples and their families, and to consider granting these individuals additional benefits through marriage. . . .") (Graffeo, J., concurring); *see id.* at 396 (Kaye, C.J., dissenting).

The ADF mistakenly claims that a "definitional" aspect of gender difference in marriage is somehow so basic and fundamental that it bars the State from recognizing the marriage of a same-sex couple even if permitted by a respected sister jurisdiction. As

Massachusetts, Canada, Spain, the Netherlands, Belgium and, soon, South Africa demonstrate, same-sex couples can and do *marry*. Simply saying these are not marriages "by definition" does not make it so.

Nor does *Hernandez* say any such thing. The "definition" of marriage upheld in *Hernandez* is no more than the requirement embodied in the DRL for what types of marriages may be solemnized within New York. *See id.* at 357. The New York Legislature has not spoken on the question of what foreign marriages must be *respected* in New York under the common law marriage recognition rule. The Court's deference to the Legislature in "defining" marriages to be performed within the State thus offers no ground to ignore the settled body of law governing recognition of marriages performed out of the State.

The Court of Appeals' decision simply confirms that there is a difference between New York and Canadian law, a situation that New York law addresses through the marriage recognition rule.[7] Indeed, it is necessary to invoke the marriage recognition rule only *because* of a difference between New York's marriage rules and those of other jurisdictions. To conflate the DRL's restriction of marriage to different-sex couples with the separate question of whether an out-of-state marriage of a same-sex couple must be respected would literally eliminate the marriage recognition rule. Under such reasoning any out-of-state marriage not affirmatively *permitted* by the DRL would, by definition, not be *recognized* in New York. That is simply not the law.

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[7] It is instructive that the Attorney General—who represents Comptroller Hevesi in the present action – and the Mayor of New York City, both of whom defended the marriage ban challenged in *Hernandez*, have nonetheless continued to acknowledge that the marriage recognition rule requires respect for valid out-of-state marriages of same-sex couples.

The trial court in *Funderburke v. Dep't of Civil Serv.*, 13 Misc. 3d 284 (Sup. Ct. Nassau County), *appeal docketed*, No. 2006-7589 (2d Dep't July 11, 2006), upholding denial of recognition to a Canadian marriage between same-sex partners, made exactly the error the ADF urges upon this Court. With virtually no analysis, *Funderburke* conflated *Hernandez*'s ruling denying an affirmative constitutional right to marry in New York State with the distinct issue of application of the marriage recognition rule to valid out-of-state marriages. *Id.* at 286. The *Funderburke* decision is on appeal; its faulty conclusion should not be followed here.[8]

Its error is well illustrated by *May*, 305 N.Y. 486. There, the Court of Appeals held that the marriage between an uncle and a niece who traveled to Rhode Island to marry must be respected in New York, their home state, even though uncle/niece marriages are *expressly prohibited, deemed void*, and *subject to criminal penalty* under New York DRL Section 5(3). Despite these positive prohibitions — none of which have been enacted in New York in connection with marriages between same-sex couples — the Court of Appeals nonetheless concluded that the marriage recognition rule must still apply to grant legal respect to the Rhode Island marriage:

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[8] *Langan v. St. Vincent's Hospital*, 25 A.D.3d 90 (2d Dep't 2005), inaptly relied on by the ADF, did not at all call into question the validity under New York law of marriages between same-sex couples entered into elsewhere. *Langan* concerned a party to a Vermont civil union – not, as at issue in this case, a marriage—who sought to bring a wrongful death claim as a spouse of his deceased partner. The Appellate Division declined under choice of law rules to treat parties to a civil union as "married." The court reasoned that equating a civil union with a marriage would "create a relationship never intended by the State of Vermont in creating civil unions or by the decedent or the plaintiff in entering into their civil union." *Id.* at 95. In contrast, the ADF is challenging the validity under New York law not of civil unions but of *marriages* entered into in jurisdictions like Canada, where same-sex couples wed on exactly the same terms and enter into exactly the same marital relationship that other married couples do. *See* Sommer Aff. ¶ 7.

> As section 5 of the New York Domestic Relations Law . . . does not expressly declare void a marriage of its domiciliaries solemnized in a foreign State where such marriage is valid, the statute's scope should not be extended by judicial construction. . . . Indeed, had the Legislature been so disposed it could have declared by appropriate enactment that marriages contracted in another State — which if entered into here would be void — shall have no force in this State. . . . [A]bsent any New York statute expressing clearly the Legislature's intent to regulate within this State marriages of its domiciliaries solemnized abroad, there is no 'positive law' in this jurisdiction which serves to interdict the . . . marriage in Rhode Island. . . .

May, 305 N.Y. at 492-93.

While some other states have enacted positive laws prohibiting recognition of out-of-state marriages between same-sex couples, New York, significantly, has not. The Legislature has not elected to "interdict" out-of-state marriages between same-sex couples; the courts are not empowered to do so. *Id.* at 493. *See also Hilliard*, 24 Misc. 2d at 863 (though underage marriage would be void under DRL Section 7(1) if entered into in New York, such marriage entered into in Georgia must be respected here in absence of express statutory prohibition against recognizing out-of-state marriage of underage partners).

This principle is also illustrated by the historical respect accorded in New York to extra-territorial marriages obtained to avoid this State's one-time restriction on remarriage after divorce. Until its repeal by the New York Legislature in 1966, DRL Section 8 prohibited an adulterous spouse from remarrying until three years following a divorce unless granted permission of the court. *See, e.g., Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44, 48-49 (1970); L. 1966, ch. 254. Many New Yorkers barred under this provision from remarrying in New York traveled to other jurisdictions to avoid DRL

Section 8 and entered into a new marriage. A long string of New York cases upheld these extra-territorial marriages as valid in New York, notwithstanding that the parties to them had evaded an express New York prohibition on the marriages within the State. The courts concluded that under the marriage recognition rule, because the Legislature had not provided by positive law that such marriages when obtained *out-of-state* were prohibited, they were required to be respected here. *See, e.g., Farber*, 26 N.Y.2d at 55 (upholding validity in New York of Florida common law marriage of divorcee prohibited from remarrying under New York law); *Thorp*, 90 N.Y. 602 (marriage obtained in Pennsylvania in evasion of New York divorce decree held valid); *Van Voorhis*, 86 N.Y. at 32-33 (marriage of divorcee who traveled to Connecticut to evade remarriage prohibition held valid in New York; DRL "does not in terms prohibit a second marriage in another State, and it should not be extended by construction" of the courts to forbid its recognition here).

C. The Comptroller Avoided An Unconstitutional And Unjust Result By Following The Marriage Recognition Rule And Confirming That Out-Of-State Marriages Of Same-Sex Couples Must Be Respected For Purposes Of The Retirement System

Far from acting *ultra vires*, as the ADF claims, the Comptroller merely confirmed that he would abide by what New York law requires — that the marriages of couples like Defendants-Intervenors be respected for purposes of the Retirement System. Defendants-Intervenors and other couples like them are married spouses entitled to be respected as such under the relevant provisions of the RSSL and other statutes governing spousal retirement benefits. *See, e.g.,* RSSL §§ 61(d), 78-a, 361, 378-a, 509 and 607. These public employees have served the State and its residents and earned entitlement to the benefits of the Retirement System. They and their families need these benefits every bit

as much as other public employees whose valid out-of-state marriages are unquestioned. It would be an injustice to disregard the venerable marriage recognition rule when it comes to respecting the marriages of these valued public employees.

Indeed, any different interpretation of the statutory and common law would give rise to an unconstitutional result; the Comptroller wisely and appropriately avoided such an impermissible outcome by his unbiased application of the marriage recognition rule. It is a fundamental tenet of construction that laws be construed to "avoid[] injustice, hardship, constitutional doubts or other objectionable results." *In re Jacob*, 86 N.Y.2d 651, 667 (1995) (quotations omitted) (construing adoption statutes to permit second-parent adoption by same-sex partner of child's legal parent). *See also Braschi v. Stahl*, 74 N.Y.2d 201, 208 (1989) ("where doubt exists as to the meaning of a term, and a choice between two constructions is afforded, the consequences that may result from the different interpretations should be considered," and term should be construed "to avoid objectionable consequences and to prevent hardship or injustice").

Under the marriage recognition rule the Comptroller would be required to respect for Retirement System purposes an out-of-state common law marriage, uncle/niece marriage, proxy marriage or underage marriage, even though those marriages are prohibited within New York. To single out for unfavorable treatment under the RSSL the marriages of lesbian and gay public employees like Defendants-Intervenors, while simultaneously respecting other out-of-state marriages that likewise could not be obtained

in New York, would violate equal protection, a result that the Comptroller properly avoided.[9]

For the foregoing reasons, the ADF fails to state a claim and certainly cannot show a likelihood of success on the merits. The complaint should be dismissed and the motion for preliminary injunction should be denied.

II.

The ADF Cannot Demonstrate That Irreparable Harm Will Occur If A Preliminary Injunction Does Not Issue And That The Balancing Of The Equities Tips In Favor Of Granting An Injunction

In addition to its failure to state a claim and to demonstrate a likelihood of success on the merits, the ADF cannot carry its burden to show it can satisfy the second and third prongs of the preliminary injunction standard. The ADF cannot demonstrate the required irreparable harm or "detriment[] to the public interest," Finance Law Section 123-e(2), if a preliminary injunction does not issue. Nor can it show that a balancing of the equities tips in its favor rather than in favor of the public employees whose rights it seeks to impair.

The preliminary injunction must be denied for the simple reason that there is no imminent likelihood that pension and retirement payments will be paid to the same-sex spouse of a public employee before a final judgment could issue. To be entitled to a preliminary injunction the ADF must "establish that a real threat of irreparable injury

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[9] Given that a straightforward application of the marriage recognition rule requires affirming the Comptroller's determination, these constitutional ramifications need not even be reached. Should they be taken into account, however, there should be no confusion with the distinct issue addressed in *Hernandez*—whether the State Constitution is violated by prohibiting same-sex couples from marrying *within* New York. The *Hernandez* Court did not at all consider the different constitutional issue here—whether equal protection would be violated by uneven application of the marriage recognition rule to out-of-state marriages that are prohibited from taking place in New York.

exists by factual demonstration. Mere apprehension or conjectural injury, or injury of an inconsequential nature will not qualify as irreparable injury." *Bisca v. Bisca*, 108 Misc. 2d 227, 231 (Sup. Ct. Nassau County 1981). "To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (internal quotations omitted). This the ADF cannot do.

The Comptroller has confirmed that not a single individual is currently receiving or has applied for disbursements from the Retirement System by virtue of their status as a same-sex spouse. *See* Sommer Aff. ¶ 29. Furthermore, there are a number of conditions precedent before the Retirement System would need to honor such a claim, making the likelihood of any disbursements before a final judgment in this action extremely small.

For example, before an accidental death benefit would be required to be paid, a public employee participating in the Retirement System married to a same-sex spouse would (a) have to die in the line of duty, (b) as the result of an accident, (c) in which they were not at fault. *See* RSSL §§ 61(a), 509(a), 607(a). The remote possibility that such a tragedy could strike before a judgment on the merits falls far short of an "actual and imminent" threat warranting the drastic remedy of a preliminary injunction.

Moreover, if a married lesbian or gay public employee were accidentally killed in the line of duty during the pendency of this case, the balancing of the equities would overwhelmingly favor denying the preliminary injunction and allowing the widowed spouse of the government servant to receive the statutory benefits. Certainly in the

catastrophic — and fortunately highly unlikely — event that Ms. Rainbow or Ms. Sloan were killed on the job, the equities would strongly tilt in favor of honoring the State's commitment to pay an accidental death benefit to the survivor. The inconsequential impact on the public fisc if accidental death benefits were paid to a widowed same-sex spouse would be far outweighed by the hardship to the surviving family member denied this benefit because of the ADF's meritless litigation. Thus in *Schulz v. State of New York*, 217 A.D.2d 393 (3d Dep't 1995), the Appellate Division did not permit claimed taxpayer expense to outweigh the loss to the individuals who would suffer if an injunction issued — in that case students who would not be permitted to attend a designated school during the pendency of the taxpayer challenge. *Id.* at 397.

While the chances of the accidental death benefit being triggered before a final judgment in this action are extremely low, the chances of the cost-of-living adjustment being due to a surviving same-sex spouse before judgment are essentially nil. Before a cost-of-living payment would be owed to a widowed spouse beneficiary, their public employee husband or wife must: first, exercise the option to have pension benefits continue after their death for the benefit of their spouse, *see, e.g.*, RSSL § 78-a(g); second, retire, *see, e.g.*, RSSL § 78-a(a); third, predecease the beneficiary spouse, *see, e.g.*, *id.*; and fourth, have retired *at least five to ten years earlier*, depending on their age or situation at retirement, *see, e.g.*, RSSL § 78-a(a). Thus the cost of living adjustment would not conceivably become due to a same-sex surviving spouse until at the earliest more than five to ten years into the future. Granting a preliminary injunction to prohibit payments years down the road would be an abuse of discretion.

While these Retirement System entitlements are very important vested rights that should not be impaired for Defendants-Intervenors and others like them, there is no imminent detriment to the public that could possibly necessitate the preliminary injunctive relief the ADF seeks. Granting a preliminary injunction would succeed only in casting a cloud over the valid marriages of same-sex New York couples and assaulting the dignity and privacy of lesbian and gay public employees like Ms. Rainbow and Ms. Sloan. No legitimate purpose is served by the ADF's demand for an injunction.

III.

The ADF Has Not Demonstrated Standing Under Finance Law Section 123-b

It is apparent that this case has little to do with taxpayer expenditures or the public fisc and far more to do with the ADF's mission to prevent lesbian and gay New Yorkers from receiving legal respect for their valid out-of-state marriages. Beyond the ADF's failure to state a claim is the question whether it even has standing in the first place under Finance Law Section 123-b to challenge the Comptroller's determination that out-of-state marriages of lesbian and gay public employees are entitled to be respected for Retirement System purposes. *See, e.g, Rudder v. Pataki*, 93 N.Y.2d 273, 281 (1999) (Section 123-b does not confer standing to obtain judicial scrutiny of essentially non-fiscal government determinations even though they have "some relationship to expenditures"); *Kennedy v. Novello,* 299 A.D.2d 605, 607 (3d Dep't 2002) (plaintiffs lacked standing under Section 123-b because "dispositive activity challenged here is the state's nonfiscal determination that the procedures in question fell within practice of optometry and not the necessarily concomitant decision" to use taxpayer funds to provide Medicaid reimbursement); *Beresford Apts., Inc. v. City of New York*, 238 A.D.2d 218, 219 (1st Dep't 1997) ("A

taxpayer's suit is not a vehicle for correcting technical or procedural irregularities by governmental bodies or for reviewing determinations supposedly made in violation of law"). Because the Comptroller is addressing the standing issue in his concurrently filed papers, Defendants-Intervenors do not elaborate on it here. Defendants-Intervenors respectfully submit, however, that Finance Law Section 123-b should not be read to offer a vehicle for attacks on governmental respect of the legal rights of lesbian and gay New York residents validly married in other jurisdictions.

CONCLUSION

For the foregoing reasons, Defendants-Intervenors respectfully request that their motion to dismiss the complaint with prejudice be granted and the ADF's motion for a preliminary injunction be denied.

Dated: November 10, 2006
New York, New York

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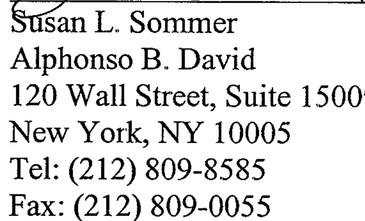
By: 
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CERTIFICATION OF SERVICE

I, Nick Tarasen, hereby certify that on November 10, 2006 I served a copy of the attached DEFENDANTS-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION upon all parties by forwarding the same via Federal Express to:

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