

*Supreme Court of the State of New York
Appellate Division: Second Judicial Department*

MARGARET GODFREY, ROSEMARIE JAROSZ, AND JOSPEH ROSSINI,

Plaintiffs-Appellants

DOC. NO: 2007-4303

-against-

ANDREW J. SPANO, in his official capacity as the Westchester County Executive,

Defendant-Respondent

-and-

MICHAEL SABATINO AND ROBERT VOORHEIS,

Defendants-Intervenors-Respondents

**PLAINTIFFS-APPELLANTS'
REPLY BRIEF**

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ARGUMENT

I. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS UNDER SECTION 51 OF THE GENERAL MUNICIPAL LAW.

Section 51 of the General Municipal Law provides an avenue by which a taxpayer can challenge misconduct by a county official. Both Spano and Defendants-Intervenors incorrectly portray the relevant legal authority for establishing standing under Section 51. They both seek to implement narrow requirements, contending, for example, that Plaintiffs *must* include “special allegations of waste tied to corruption,”¹ and that Plaintiffs must allege “fraud, collusion, corruption, or bad faith.” Spano’s Br. at 21-22; Defendants-Intervenors’ Br. at 40-41. But Spano and Defendants-Intervenors have not painted a complete picture of the requirements for standing under Section 51.

A. Section 51 Permits Suit By Taxpayers To Challenge Three Different Categories Of Unlawful Government Conduct, And Each Category Applies To Plaintiffs’ Claims.

Section 51 permits suits by taxpayers to enjoin at least three types of illegal conduct by public officials: (1) illegal conduct that is fraudulent or wasteful, (2) illegal conduct that imperils the public interest or inflicts a public injury, *or* (3) illegal conduct where the public official completely lacks power under the law to

¹ Defendants-Intervenors incorrectly imply that CPLR 3016(b) requires Plaintiffs to include detailed and specific “allegations of malfeasance.” Defendants-Intervenors’ Br. at 41. That rule does not apply here because Plaintiffs do not allege, nor need they allege, that Spano engaged in fraud. *See* CPLR 3016(b) (applying “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust[,] or undue influence”).

do the complained-of acts. *See Stahl Soap Corp. v. City of New York*, 5 N.Y.2d 200, 204 (1959). Spano and Defendants-Intervenors, in a somewhat scattered fashion, acknowledge all the different types of illegal government conduct that may be challenged under Section 51, but they erroneously attempt to cumulate these separate characteristics into one lengthy list of requirements. This “cumulative” approach, however, is not supported by the case law.

The first category of Section 51 claims apply “when the acts complained of are fraudulent[] *or* a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes.” *Mesivta of Forest Hills Institute, Inc. v. City of New York*, 58 N.Y.2d 1014, 1016 (1983) (emphasis added). In order to assert this first type of Section 51 claim, a plaintiff must complain of *either* (1) fraudulent and illegal government activity *or* (2) wasteful and illegal government activity.² Here, Plaintiffs do not allege that Spano acted fraudulently but, instead, complain that he engaged in wasteful and illegal government conduct. These allegations are sufficient to establish standing under Section 51.

As part of their Section 51 claim, Plaintiffs contend that Spano acted “illegally.” R. 40. Plaintiffs allege illegality in at least three ways: (1) a violation

² Plaintiffs need not allege fraud, collusion, corruption, or bad faith in order to plead a valid claim for injunctive relief under Section 51, and the cases relied upon by Spano and Defendants-Intervenors do not establish that allegations of fraud or collusion are required. *See In re Sanitation Garage Brooklyn Dists. 3 and 3A*, 822 N.Y.S.2d 97, 102-03 (2nd Dept. 2006) (dismissing a Section 51 claim because the plaintiffs “failed to allege that some government official acted corruptly or fraudulently, *or* engaged in illegal activities”) (emphasis added).

of home rule principles, (2) a violation of the separation of powers doctrine, and (3) a violation of state law by ordering the recognition of “marriages” that are not entitled to recognition in New York. Plaintiffs further assert that Spano’s illegal conduct has caused or will cause the waste of public funds. R. 40, 64. This waste of public funds occurs in at least two ways: (1) by causing the County of Westchester to pay marital-type benefits directly to same-sex couples who are not lawfully entitled to receive them, and (2) by causing the County of Westchester to afford other marital-type benefits to same-sex couples, thus creating unmerited tax/cost benefits to these couples and, concomitantly, reducing the county’s tax revenues.³ These allegations of illegality and waste of public funds are sufficient to state a valid cause of action under Section 51.

In an effort to refute Plaintiffs’ standing to bring these claims, Spano inaccurately asserts that “the plaintiffs concede that they do not object to any tangible results of the executive’s policy, such as the payment of benefits to same-sex couples (married or otherwise).” Spano’s Br. at 27.⁴ Plaintiffs, however, have made no such concession. In fact, far from conceding anything, Plaintiffs

³ It must be remembered that the lower court granted Spano’s and Defendants-Intervenors’ motions to dismiss. Thus, Plaintiffs did not have the benefit of discovery to explore the precise nature of the public waste caused by Executive Order 3. Moreover, Plaintiffs’ allegations are presumed to be true and need not be established by evidence. *See Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 303 (2001).

⁴ As support for this erroneous assertion, Spano misleadingly cites an irrelevant portion of Plaintiffs’ brief, namely, their analysis of general comity principles.

vehemently object to the tangible results of Executive Order 3, which include the unlawful granting of marital benefits to same-sex couples on the basis of their out-of-state “marriages.”

Plaintiffs’ allegations also fall under the second type of Section 51 claims. In recognizing these claims, the Court of Appeals has stated: “To be entitled to [injunctive] relief, when waste or injury is not involved, it must appear that in addition to being an illegal official act[,] the threatened act is such as to imperil the public interests or calculated to work public injury or produce some public mischief.” *Korn v. Gulotta*, 72 N.Y.2d 363, 372 (1988). According to this case, then, a plaintiff asserts a Section 51 claim when he (1) requests injunctive relief, (2) alleges that the public official acted illegally, and (3) alleges that the official’s conduct “imperil[s] the public interests *or* [is] calculated to work public injury or produce some public mischief.” *See id.*

Plaintiffs clearly satisfy these three requirements. First, they are seeking injunctive (as opposed to monetary) relief. *See* R. 41.⁵ Second, Plaintiffs allege

⁵ If Plaintiffs had sought to impose *personal monetary liability* against Spano (rather than requesting injunctive relief), they would have been required to include allegations of fraud or corruption. *See Stewart v. Scheinert*, 47 N.Y.2d 826, 828 (1979) (“[U]nder [Section 51] personal liability arises only if the illegal acts were collusive, fraudulent, or motivated by personal gain.”); *Daly v. Haight*, 156 N.Y.S. 538, 542 (2nd Dept. 1915) (“[I]t is only when the waste or injury is by collusion or otherwise . . . that the court shall enforce the restitution and recovery, and also, in its discretion, declare the official responsible financially therefor.”); *Duffy v. Longo*, 616 N.Y.S.2d 760, 762-63 (2d Dept. 1994) (dismissing the plaintiffs’ Section 51 claim for failure to allege “collusion, fraud, or personal gain” because “[t]he plaintiffs [did] not maintain th[e] action to prevent waste, but to compel the restitution of money”); *Clowes v.*

that Spano acted “illegally.” *See* R. 40. Third, Executive Order 3 imperils the public interest by (1) subverting the will of the people and removing from the legislature the power to define which unions will be recognized as marriages in New York, (2) radically altering New York society without legislative approval, and (3) adopting a county approach to an issue of statewide concern (i.e., the recognition of marriage). *See Fearon v. Treanor*, 272 N.Y. 268, 272 (1936) (noting that marriage “constitutes an institution involving the highest interest of society”). Thus, even if a waste of public funds was not involved in this case, Plaintiffs have properly asserted a claim under Section 51.

Plaintiffs’ allegations also satisfy the third category of Section 51 claims. The third category allows a plaintiff to bring a claim under Section 51 where he alleges that “there is a total lack of power in defendants, under the law, to do the acts complained of.” *Kaskel v. Impellitteri*, 306 N.Y. 73, 79 (1953). Plaintiffs assert that Defendant Spano’s conduct is unlawful because he exceeded his authority (both as a county official, i.e., a home rule violation, and an executive official, i.e., a separation of powers violation) and thus lacked the power to order Westchester County officials to recognize same sex “marriages” performed in

Pulver, 691 N.Y.S.2d 649, 653 (3rd Dept. 1999) (noting the “general rule” “that in order to impose personal liability upon a public official pursuant to General Municipal Law § 51, a taxpayer must establish that the official’s actions were both illegal and fraudulent, collusive, or motivated by personal gain”). But because Plaintiffs seek only injunctive and declaratory relief, they need not include such allegations. *See Kaskel v. Impellitteri*, 306 N.Y. 73, 79 (1953) (acknowledging that in situations where “no corruption or fraud is charged,” a plaintiff may nevertheless maintain an action under Section 51).

other jurisdictions. It is clear, then, that even if this case did not involve waste of public funds or peril to the public interest, Plaintiffs still have asserted a valid claim under Section 51.⁶

B. Spano Incorrectly Presumes That The Mandates Of Executive Order 3 Will Result In The Granting Of Marital Benefits Only To County Employees.

In arguing that Plaintiffs lack standing under Section 51, Spano states: “[T]o the extent the Plaintiffs argue that health and death benefits cannot be afforded to same-sex married couples, such an argument is specious, as it is clearly within the County’s legal authority to set compensation and provide health benefits to its employees.” Spano’s Br. at 23. The flawed premise of this argument, variations of which are found repeatedly throughout both Spano’s and Defendants-Intervenors’ briefs, is that the enforcement of Executive Order 3 will grant marital benefits *only* to Westchester County employees who have entered into same-sex “marriages” in other jurisdictions. But that grossly misapprehends the breadth of this order, which grants all sorts of marital benefits (not just health and death

⁶ Spano’s argument that “Plaintiffs’ allegations would more properly take the form of an Article 78 proceeding” ignores the question before the Court. Spano’s Br. at 20. Both Article 78 of the CPLR and Section 51 of the General Municipal Law provide avenues by which a party can challenge unlawful government action, and Spano acknowledges as much in his brief. *See id.* at 21 (“General Municipal Law § 51 permits a taxpayer to maintain an action against certain government officials[.]”). The issue before the Court is whether Plaintiffs have asserted a proper claim under Section 51, and neither the availability of relief under Article 78 nor Plaintiffs’ strategic choice to forego that route is relevant to this issue.

benefits) to a broad group of people (not just Westchester County employees).⁷ Indeed, Defendants-Intervenors have candidly acknowledged the broad scope of Executive Order 3, stating that “[t]he effect of the Executive Order is to ensure that validly married lesbian and gay Westchester *public employees and residents* receive County benefits afforded on the basis of marital status.” Defendants-Intervenors’ Br. at 8 (emphasis added).

Executive Order 3 explicitly requires “every department, board, agency, and commission of the County of Westchester . . . to recognize same sex marriages lawfully entered into outside the state of New York . . . for the purposes of extending and administering *all rights and benefits* belonging to these couples.” R. 67 (emphasis added). Compliance with this order will result in benefits being unlawfully extended to many Westchester citizens (not just county employees); it benefits any resident same-sex couple who interacts with any Westchester department, board, agency, or commission by mandating that the county official recognize the couple’s out-of-state “marriage.” Suppose an individual who has entered into an out-of-state same-sex “marriage” applies to a Westchester County agency for some type of county-administered benefit. Under the mandates of

⁷ Spano suggests that this case is a mere challenge to a county’s decision to grant health or death benefits to its employees. *See Slattery v. City of New York*, 686 N.Y.S.2d 683, 686 (Sup. Ct. N.Y. County), *aff’d*, 697 N.Y.S.2d 603 (1st Dept. 1999). To be sure, health and death benefits are a part of the marital benefits that will be unlawfully given to same-sex couples under Executive Order 3. But to suggest that Plaintiffs’ claims are limited in this sense is to ignore every paper filed by Plaintiffs in this action.

Executive Order 3, this individual must be treated as if he or she was married and given any rights afforded on the basis of that legal status. It is thus clear that Spano's order will cause marital benefits to be unlawfully given to more than just county employees, and, accordingly, Spano's argument to that effect, *see* Spano's Br. at 23-27, is baseless and unpersuasive.⁸

C. Plaintiffs Need Not Satisfy General Standing Requirements Or Common Law Taxpayer Standing Requirements For The Court To Evaluate Their Home Rule Arguments.

Spano and Defendants-Intervenors contend that Plaintiffs have not satisfied the requirements of general standing or common law taxpayer standing that are necessary to assert a cause of action under Section 10 of the Municipal Home Rule Law or Article 9, Section 2 of the State Constitution. Spano's Br. at 36-38; Defendants-Intervenors' Br. at 45-47. But Plaintiffs need not establish standing to assert a stand-alone claim under these statutory and constitutional provisions. As part of Plaintiffs' Section 51 claim, they assert that Spano acted "illegally" by issuing Executive Order 3 in violation of home rule principles. *See* R. 40. Because these allegations fit under Plaintiffs' Section 51 claim, there is no need to establish a separate cause of action under the Municipal Home Rule Law or the

⁸ Spano's misapprehension of the breadth of Executive Order 3 also undermines his argument that "any determination made by this Honorable Court in this instance would be merely advisory." Spano's Br. at 27. Because Executive Order 3 will result in the granting of marital benefits to a broad group of same-sex couples (not merely those who are county employees), a ruling by this Court will certainly not be advisory as contended by Spano.

State Constitution. Consequently, Plaintiffs need not satisfy the requirements of either general standing or common law taxpayer standing.

D. If Plaintiffs Lack Standing To Bring Their Claims, The Court Must Vacate The Judgment Of The Lower Court.

Both Spano and Defendants-Intervenors argue that Plaintiffs lack standing to pursue their claims. Spano and Defendants-Intervenors presumably think that this argument provides an alternative basis upon which to affirm the lower court's decision. But that simply is not true. Questions of standing involve the Court's jurisdiction to decide the merits of a case. *Lacks v. Lacks*, 41 N.Y.2d 71, 74 (1976). If a plaintiff lacks standing to bring a claim, the Court lacks jurisdiction to decide the merits. *See id.* Thus, if Plaintiffs lack standing here, this Court cannot affirm the lower court's decision on the merits; instead, the lower court's decision must be vacated, and the case must be dismissed without a ruling on the merits.

II. SPANO'S ISSUANCE OF EXECUTIVE ORDER 3 VIOLATES HOME RULE PRINCIPLES.

Spano contends that because Executive Order 3 is not "formal legislation," it cannot violate home rule principles. Spano's Br. at 39. Not surprisingly, Spano, like the lower court, cites no authority for this assertion because it is an illogical position unsupported by law.⁹ There is abundant legal authority indicating that an

⁹ Although Defendants-Intervenors boldly state that Plaintiffs' position on this issue is "plainly wrong," *see* Defendants-Intervenors' Br. at 48 n.14, it is telling that Defendant-Intervenors cannot cite a single case showing Plaintiffs' allegedly "plain" error.

executive order has the full force and effect of law. *See Doe v. Rosa*, 606 N.Y.S.2d 522, 525 (Sup. Ct. N.Y. County 1993) (“[I]t is proper to treat an Executive Order as operating ‘with full force of law’”); *Clark v. Cuomo*, 66 N.Y.2d 185, 193 n.1 (1985) (Jasen, J., dissenting) (stating that “an Executive Order has complete effect as if a law had been passed by the legislative branch”) (quotations omitted); *see also* 81A C.J.S. *States* § 130b¹⁰ (noting that “[a] proclamation of the [head executive official, i.e., an executive order], when duly promulgated and filed, occupies a position comparable to laws regularly passed by the legislature” and has “the force and effect of law”); Tara L. Branum, *President or King: The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 6-7 (2002) (acknowledging that “a congressional study has defined executive orders as ‘directives or actions by the [head executive official]’ that have the ‘force and effect of law’”); *Gillyard v. Delta Health Group, Inc.*, 757 So.2d 601, 603 (Fla. Dist. Ct. App. 2000) (“A [head executive official’s] executive order *is not* a law, but it has the force and effect of law.”); *Alexander v. Adjutant General’s Office*, 858 P.2d 1222, 1226 (Kan. Ct. App. 1993) (“[A]n executive order issued by the [head executive official] occupies the same position as a

¹⁰ Corpus Juris Secundum is a legal encyclopedia that uses American case law to provide an overview of almost all areas of law.

statute”).¹¹ Thus, when engaging in home rule analysis, there is no need to distinguish between executive orders and formally enacted legislation.¹²

Furthermore, adopting the legal principle advocated by Spano (i.e., that the issuance of an executive order can never amount to a home rule violation) will license innumerable home rule violations by local executive branch officials while prohibiting them by local legislatures. Perhaps an example will expose the absurdity of this position. It is without question a violation of home rule principles for the Yonkers City Counsel to enact an ordinance defining marriage to include same-sex couples. *See Slattery v. City of New York*, 686 N.Y.S.2d at 686. But,

¹¹ Spano relies on the Third Department’s decision in *Citizens Utility Bd. v. State*, 700 N.Y.S.2d 297 (3rd Dept. 1999), which is entirely inapposite here. In that case, the claimant brought a substantive due process claim against the State. *Id.* at 298. Substantive due process requires the claimant to demonstrate that some sort of “vested right” had been unlawfully infringed or removed by the State. *Id.* This analysis is entirely inapplicable and unpersuasive here, where there is no discussion of vested rights. Moreover, the statement in *Citizens Utility Board* that “[e]xecutive orders are merely voluntary arrangements or directions for implementing legislative enactments,” *id.*, does not apply here. Executive Order 3 is neither a “voluntary arrangement” nor does it “implement[]” any “legislative enactments.” First, Executive Order 3 expressly commands all Westchester County officials to recognize out-of-state same-sex “marriages”; it does not suggest that compliance is voluntary. Second, Executive Order 3 does not implement a “legislative enactment.” The only state legislative enactments regarding marriage conflict with the mandates of Executive Order 3. *See Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006) (limiting marriage to unions between opposite-sex couples). And even according to Spano’s own argument, Executive Order 3 was not attempting to comply with any “legislative enactment,” but only with the judicially created marriage-recognition rule. Thus, the *Citizens Utility Board* case provides no assistance to the Court.

¹² Defendants-Intervenors assert that an executive order cannot violate the Municipal Home Rule Law because it does not qualify as a “local law,” as defined in the statute. Defendants-Intervenors’ Br. at 48. This argument does not advance their defense at all because regardless of whether Executive Order 3 violates the Municipal Home Rule Law, it clearly violates the constitutional home rule provision, which is not limited in application to “local laws” (i.e., legislative branch) but broadly applies to all the “powers of local governments” (i.e., all government branches). *See* N.Y. CONST. art IX, § 2.

according to Spano, it would not amount to a home rule violation if the Mayor of Yonkers issued an executive order defining marriage to include same-sex couples. Such a result, without question, is absurd and cannot be rationally explained.

To avoid violating home rule principles, a county executive must act both (1) in a realm that has been delegated to the county government (i.e., his action must relate to county property, affairs, or government, or to some other realm of enumerated authority) and (2) in a manner that is not inconsistent with state law. *See* N.Y. MUN. HOME RULE LAW § 10(1); *Jancyn Mfg. Corp. v. Suffolk County*, 71 N.Y.2d 91, 96 (1987). Spano has failed to satisfy either requirement. *See* Spano's Br. at 39-40. First, as demonstrated in Section I.B. of this brief, the mandates of Executive Order 3 reach much broader than simply the "property, affairs, or government" of Westchester County; rather, the order requires Westchester officials to recognize the out-of-state "marriages" of all resident same-sex couples and to grant them all the legal benefits afforded by marriage. Spano cites no authority indicating that the State has given him any authority regarding the recognition of marriage. Second, Executive Order 3 is inconsistent with State law. New York defines marriage to include only unions between opposite-sex couples, but, in contrast, Spano has ordered the recognition of same-sex "marriages" performed out of state. This mandate conflicts directly with the State's legislation

and policies regarding marriage. Because Spano cannot satisfy either of the two requirements, the Court must find that he violated home rule principles.

Furthermore, both Spano's and Defendants-Intervenors' briefs fail to adequately analyze the preemption issue. Spano's Br. at 39-40; Defendants-Intervenors' Br. at 49-53. First, they do not acknowledge the well-established precept that "[t]he legislative intent to preempt need not be express." *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217 (1987). Second, they do not refute the fact that issues relating to marriage — especially the definition and recognition of that social institution — have been preempted by the State. *See Fearon*, 272 N.Y. at 272; *see also* Plaintiffs-Appellants' Br. at 20-24. Third, and most importantly, they fail to acknowledge that by even acting in such a preempted realm, Spano has violated home rule principles (regardless of "whether or not [his actions] actually conflict with a State-wide statute"). *See Albany Area Builders Assoc. v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989).

Indeed, at least one state court has already acknowledged that a local government's tampering with the institution of marriage "would be impermissible under home rule law principles." *Slattery*, 686 N.Y.S.2d at 686. This Court should find that such a home rule violation occurred here.

III. SPANO'S ISSUANCE OF EXECUTIVE ORDER 3 VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Defendants-Intervenors contend that Plaintiffs cannot assert their separation of powers argument on appeal because it was not presented to the lower court. Defendants-Intervenors' Br. at 53. At least six times in Plaintiffs' Amended Complaint, they allege that Spano unlawfully "legislated" through the issuance of Executive Order 3. R. 40-41. The obvious implication of these allegations is that Spano — who is an executive branch official without authority to legislate — violated the separation of powers doctrine. To say that Plaintiffs did not raise this claim requires an excessively narrow reading of the pleadings, which is rejected under the law. *See Themed Restaurants, Inc. v. Zagat Survey, Inc.*, 781 N.Y.S.2d 441, 448 (Sup. Ct. N.Y. County 2004) (noting "the general theory of notice pleading and the New York rule that a pleading is to be construed liberally in favor of the plaintiff").¹³

Spano asserts at least four meritless arguments in an effort to defend his separation of powers violation. First, he cites authority establishing the general legality of executive orders. *See Spano's Br.* at 18. This case law is inapplicable here. Plaintiffs do not dispute that executive orders can be proper executive tools

¹³ Defendants-Intervenors erroneously assert that a separation of powers violation occurs "only when an executive has taken steps towards implementation of a comprehensive plan or regulatory system." *See Defendants-Intervenors' Br.* at 54. This supposedly "blanket rule" is a wholly arbitrary requirement created by Defendants-Intervenors, and the cases cited in their brief proclaim no such blanket rule.

in many instances, but this case does not illustrate such a lawful exercise of executive power. Instead, Plaintiffs assert that Executive Order 3 amounts to an unlawful usurpation of the legislature's prerogatives.

Second, Spano suggests that an executive order, because it is not formal legislation, cannot violate the separation of powers doctrine. *See id.* This suggestion is incredible and without support. To refute this baseless argument, the Court need look no further than the unconstitutional executive order in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case, the Court held that the President's executive order violated the separation of powers doctrine because it was "incompatible with the express or implied will of Congress." *Id.* at 637 (Jackson, J., concurring). It is thus clear that the issuance of an executive order can violate the separation of powers doctrine, and Spano's argument to the contrary is without merit.

Third, in another futile attempt to defend his separation of powers violation, Spano relies upon his broad authority "[t]o see that the laws of the state pertaining to the affairs and government of the county, the acts and resolution of the County Board[,] and duly enacted local laws are executed and enforced within the county." Spano's Br. at 17 (quoting Laws of Westchester County § 110.11). Spano's reliance on this broad grant of authority in the county law does not negate his separation of powers violation. The Court of Appeals has acknowledged that an

executive official, in seeking to defend against a separation of powers claim, must demonstrate that “the legislature . . . *specifically* delegate[d] that power to him.” *Subcontractors Trade Assoc. v. Koch*, 62 N.Y.2d 422, 429-30 (1984). A “general” grant of power to an executive ordinarily cannot justify his excessive actions. *See id.* at 427. Moreover, this county law authorizes Spano to enforce only a small subset of state laws, particularly those “pertaining to the affairs and government of the county.” Laws of Westchester County § 110.11. But Executive Order 3 reaches beyond the affairs of the county and, by dictating which sort of out-of-state unions will be recognized as “marriages,” creeps into a prerogative of the State.

Fourth, Spano seeks to avoid the illegality of his actions by arguing that his directive to recognize out-of-state same-sex “marriages” applies only “to the maximum extent allowed by law.” *See Spano’s Br.* at 35 n.5. He cannot circumvent the illegality of his actions simply by adding this clause to Executive Order 3. When seriously considered, the argument is revealed as quite silly. Consider an instance where a government official orders his subordinates to distribute illegal narcotics “to the maximum extent allowed by law.” This directive, in and of itself, is nonsensical and oxymoronic. It is impossible to engage in illegal activity to the maximum extent available under the law; one must simply refrain from acting. Aside from giving credence to an irrational order, agreeing with this argument sets bad policy. Allowing a government official to

avoid liability for this reason would encourage him to issue any sort of orders he pleases. So long as the official directs his subordinates to act only “to the maximum extent allowed by law,” he can insulate any unlawful directive from legal attack. This is not a message the Court wants to send to government officials.

Finally, it is important to note that Spano explicitly acknowledges the Court of Appeals’ steadfast belief that “the present generation should have a chance to decide the [same-sex “marriage”] issue through its elected officials.” Spano’s Br. at 10-11, 33 (quoting *Hernandez*, 7 N.Y.3d at 366). By stating as much, the Court of Appeals has acknowledged that the official recognition of same-sex “marriage” in New York (should it occur) is not to be implemented by the courts but, instead, must come via the legislature.¹⁴

IV. THE MARRIAGE-RECOGNITION RULE DOES NOT APPLY TO OUT-OF-STATE UNIONS BETWEEN SAME-SEX COUPLES.

A. Precedent Demonstrates That The Common Law Marriage-Recognition Rule Does Not Apply To Same-Sex Unions.

Defendants-Intervenors repeatedly refer to the marriage-recognition rule as “binding” or “controlling” precedent over this case. Defendants-Intervenors’ Br. at 7, 13, 14. But, despite Defendants-Intervenors’ attempts to mischaracterize the

¹⁴ Defendants-Intervenors rely heavily on the Third Department’s decision in *Saratoga County Chamber of Commerce v. Pataki*, 740 N.Y.S.2d 733, 737 (3rd Dept. 2002). Defendants-Intervenors’ Br. at 54. That case involved a struggle for power between the state and federal governments (i.e., two wholly separate jurisdictions) and presented the Third Department with grave issues of federalism. In the present case, however, all the relevant government powers are confined within the State of New York and, thus, the analysis in *Pataki* is inapposite here.

relevant precedent, they cannot avoid the undeniable fact that no appellate court has ever applied the marriage-recognition rule to a same-sex union and, accordingly, that the marriage-recognition rule does not control this case.¹⁵ Thus, Plaintiffs are not, as alleged by Defendants-Intervenors, “ask[ing] the Court to ignore decades of binding precedent”; instead, they are asking the Court to recognize the marriage-recognition rule for what it is: a common law principle by which New York courts have historically recognized out-of-state marriages between opposite-sex couples, not a vehicle by which to flank the legislative process, sneak same-sex “marriages” into New York, and unwittingly force such unions on the general public.

Both Spano and Defendants-Intervenors stress that others — including the Attorney General, the State Comptroller, and two lower courts — have already concluded that the marriage-recognition rule applies to same-sex unions. But none of this legal “authority” requires this Court to follow suit.¹⁶ First and foremost,

¹⁵ Defendants-Intervenors’ mischaracterizations extend to Plaintiffs’ arguments as well. For example, Defendants-Intervenors state that Plaintiffs present “belittling claims” implying that Mr. Sabatino and Mr. Voorheis are akin to giraffes and zebras. *See* Defendants-Intervenors’ Br. at 24. Such a ridiculous assertion raises concerns about whether Defendants-Intervenors actually read Plaintiffs’ brief. Plaintiffs did not in any way personally demean or belittle Defendants-Intervenors, or imply that they are animals; Plaintiffs simply presented an analogy to further their argument regarding the innate definition of marriage. To suggest that Plaintiffs did otherwise is disingenuous at best.

¹⁶ In support of their argument, Defendants-Intervenors discuss the “strong presumption” afforded to marriage under the law. Defendants-Intervenors’ Br. at 18. The presumption applies when a party to the litigation questions whether a marriage actually occurred. *See Amsellem v. Amsellem*, 730 N.Y.S.2d 212, 214 (Sup. Ct. Nassau County 2001). Here, however, Plaintiffs are

these sources are not binding on this Court. Furthermore, at least two lower courts have addressed the very same issue and concluded that the marriage-recognition rule does not apply to same-sex unions. See *Funderburke v. New York State Dep't of Civ. Serv.*, 822 N.Y.S.2d 393, 394 (Sup. Ct. Nassau County 2006); *Martinez v. Monroe Cmty. College*, No. 05/00433 (Sup. Ct. Monroe County July 27, 2006).

To the extent there is any relevant authority from the appellate courts on this issue, those courts have repeatedly refused to recognize out-of-state unions between same-sex couples. See *Langan v. St. Vincent's Hosp. of New York*, 802 N.Y.S.2d 476, 477 (2nd Dept. 2005) (refusing to recognize an out-of-state civil union of a same-sex couple); *Langan v. State Farm Fire & Cas.*, -- N.Y.S.2d -- , 2007 WL 4530994, at *1 (3rd Dept. December 27, 2007) (holding that “[t]he doctrine of comity [did] not require New York to recognize [decedent’s civil union]”) (a copy of this decision is attached as Exhibit A). Consider, for example, the recently issued decision in *Langan*, 2007 WL 4530994. In that case, the court concluded that “[t]he doctrine of comity [did] not require New York to recognize [decedent’s civil union].” *Id.* at *2. The court reasoned:

While parties to a civil union may be spouses, and even legal spouses, in Vermont, New York is not required [by the principles of comity] to extend to such parties all of the benefits extended to marital spouses.

not contesting whether these out-of-state same-sex “marriages” actually occurred or whether these “marriages” are recognized in the foreign jurisdictions where they were performed. Plaintiffs effectively concede that issue and, instead, argue that those unions are not entitled to recognition in New York. Thus, the marriage presumption raised by Defendants-Intervenors does not apply here.

The extension of benefits entails a consideration of social and fiscal policy more appropriately left to the Legislature.

Id. This reasoning and analysis is fully applicable and persuasive here.

Defendants-Intervenors attempt to distinguish the *Langan* cases on the basis that those cases involved same-sex couples who had entered into civil unions (as opposed to “marriages”) in other jurisdictions. In essence, then, Defendants-Intervenors wish to afford decisive weight to the label that the foreign jurisdiction attaches to its same-sex unions. The implications of this argument, if seriously considered, are untenable. This line of reasoning creates the anomalous result that those same-sex couples joined in Vermont (i.e., a jurisdiction that denominates its same-sex unions as “civil unions”) are not entitled to recognition in (or marital benefits from) New York, while same-sex couples joined in Canada (i.e., a jurisdiction that denominates its same-sex unions as “marriages”) are entitled to recognition in (and marital benefits from) New York. Surely the issuance of marital benefits, in particular, and the doctrine of comity, in general, were never meant to hinge on an arbitrary factor such as the label selected by a foreign jurisdiction for the unions of same-sex couples. This Court should thus find that the *Langan* cases are persuasive and controlling in the present context, and resist Defendants-Intervenors’ simplistic distinction of these cases because, as

demonstrated above, this sort of reasoning leads to bizarre results unsupported by legal authority.¹⁷

What Spano and Defendants-Intervenors are essentially asking this Court to do is to expand the common law marriage-recognition rule in an unprecedented manner. As acknowledged by Defendants-Intervenors, when this Court is asked to expand or alter the common law, it has a duty to “cautiously and intelligently” consider whether to do so. *See* Defendants-Intervenors’ Br. at 31 (quoting *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 291 (2007)). Defendants-Intervenors dismissively assert that Plaintiffs “cobbled together” reasons why the marriage-recognition rule should not be extended to same-sex unions. But, far from putting forth some mix-and-match analytical hodgepodge, what Plaintiffs have presented is a logical and rational argument to aid the Court in discharging its analytical duty to cautiously consider a request to expand a common law principle into unchartered legal waters. And, despite half-hearted attempts to do so, neither Spano nor Defendants-Intervenors have been able to undermine Plaintiffs’ four

¹⁷ Defendants-Intervenors also contend that the marriage-recognition rule should apply to same-sex unions because “judicial interpretations of legally significant terms must keep pace with ‘contemporary realities.’” Defendants-Intervenors’ Br. at 25. This argument ignores relevant case law in which this Court has interpreted “legally significant terms” in accordance with their originally intended meanings. *See Langan*, 802 N.Y.S.2d at 477 (stating that “[a]t the time of the drafting of these statutes, the thought that the surviving spouse would be of the same sex as the decedent was simply inconceivable”); *Matter of Cooper*, 592 N.Y.S.2d 797, 798-99 (2nd Dept. 1993) (refusing to expand the “traditional definition” of the word “spouse” to “include homosexual life partners”).

proffered reasons why the marriage-recognition rule does not apply to same-sex unions.

In a last-ditch effort to extend application of the marriage-recognition rule, Defendants-Intervenors assert that the refusal to extend the marriage-recognition rule to same-sex unions violates the Sexual Orientation Non-Discrimination Act (“SONDA”) and the constitutional guarantee of equal protection. Defendants-Intervenors’ Br. at 37-38. There is no merit to the contention that refusing to extend the marriage-recognition rule would violate SONDA. First, and most importantly, SONDA does not apply to Executive Order 3. SONDA governs in limited situations, most notably, over the actions of “employers.” *See* N.Y. EXEC. LAW § 296 (applying in other contexts not relevant here, including public accommodations, housing accommodations, real estate transactions, and educational institutions). But, in issuing Executive Order 3, Spano was not acting in his capacity as employer, and, as demonstrated in Section I.B. of this brief, the order clearly applies to more than just county employees. Thus, it is clear that SONDA does not even apply here. Second, Defendants-Intervenors provide no authority suggesting that a court’s refusal to extend a common law principle (or, more fundamentally, the refusal to extend comity to the acts of another jurisdiction) has ever been found to violate a state statute.

Defendants-Intervenors' equal protection argument is also baseless. The Court of Appeals has already found that defining marriage to exclude same-sex couples does not violate the equal protection clause of the State Constitution, *see Hernandez*, 7 N.Y.3d at 365, and, by logical extension, neither does the refusal to recognize out-of-state same-sex "marriages." All the legitimate and rational reasons for limiting marriage to opposite-sex couples, *see Hernandez*, 7 N.Y.3d at 359-60 (acknowledging the desire "to create more stability and permanence in the relationships that cause children to be born [i.e., opposite-sex unions]" and the desire "for children to grow up with both a mother and a father"), apply equally to the refusal to recognize same-sex "marriages" performed in other jurisdictions. Additionally, at least two other rational reasons exist for refusing to recognize these out-of-state unions: (1) the Court does not want to effectuate a fundamental social change (as discussed below) in the absence of legislative approval, and (2) the Court does not want to forfeit the State's autonomy to define marriage for itself.

B. Applying The Marriage-Recognition Rule To Same-Sex Unions Will Morph The Rule Into A Judicially Instituted Means For Effectuating Social Change.

Defendants-Intervenors argue, without analysis, that "application of the marriage recognition rule [to same-sex unions] does not impose 'social change.'" Defendants-Intervenors' Br. at 32-34. The Court should disregard this

unsupported assertion. Indeed, it is undeniable that expansive social change will result from applying the marriage-recognition rule to same-sex unions. In essence, New York's decision to define marriage for itself as a sovereign state would be nullified. Every same-sex couple wishing to be "married" in New York (even though New York does not sanction such unions) could take a daytrip to Canada, get married, and New York would be required to recognize it. The State of New York would ultimately become a society with both opposite-sex marriages and same-sex "marriages," all of which must be recognized equally. Regardless of whether one thinks this is a positive or negative social change, it is undeniable that the change will occur. And it is surely troubling, regardless of one's personal views on same-sex "marriage," to allow such a fundamental social change to occur in the absence of (or, as in this case, in direct violation of) legislative authority.

In contrast, a fundamental social change does not occur when the marriage-recognition rule is applied to opposite-sex couples. New York courts have repeatedly recognized opposite-sex marriages performed in other states even if they would have been unlawful in New York. *See, e.g., Fisher v. Fisher*, 250 N.Y. 313 (1929). In those circumstances, the State is forced to recognize a relationship that is different *in degree* (usually in terms of blood relation or age) from those marriages sanctioned in New York, but the State is not required to recognize a relationship that is different *in kind* (i.e., one man/one woman) from lawful New

York marriages. *See, e.g., In re May's Estate*, 305 N.Y. 486, 493 (1953) (recognizing an opposite-sex marriage between an uncle and his niece — a relationship that differed in terms of consanguinity, but not in kind, from marriage as defined in New York). An out-of-state opposite-sex union satisfies the traditional definition of marriage and furthers the procreative and child-rearing policies undergirding that social institution. *See Hernandez*, 7 N.Y.3d at 359-60. Thus, forcing New York to recognize such opposite-sex unions, unlike forcing the State to recognize same-sex unions, does not radically alter the composition of marriage in New York.

C. General Comity Principles Establish That New York Does Not Recognize Same-Sex “Marriages” Performed In Other Jurisdictions.

Because the marriage-recognition rule does not apply to same-sex unions, general principles of comity jurisprudence govern this Court’s analysis. Defendants-Intervenors grossly misapprehend (or mischaracterize) Plaintiffs’ argument on this point. According to Defendants-Intervenors, Plaintiffs argue that “the Court of Appeals has abandoned the [marriage-recognition] rule altogether in favor of a general comity test.” Defendants-Intervenors’ Br. at 34. This characterization of Plaintiffs’ argument is outlandish.

Plaintiffs do not assert that the Court of Appeals has explicitly displaced the marriage-recognition rule; instead, Plaintiffs clearly contend that because the

marriage-recognition rule does not apply to same-sex unions, this Court must default to the general principles of comity jurisprudence outlined by the Court of Appeals. *See Langan*, 2007 WL 4530994, at *2 (applying general comity principles to determine whether New York should recognize a same-sex union performed in another jurisdiction). And, as demonstrated in Plaintiffs’ initial brief, New York comity jurisprudence establishes that Spano has acted unlawfully in mandating the recognition of same-sex “marriages” performed in other jurisdictions. *See id.* (declaring that under the general principles of comity jurisprudence, “New York is not required to extend to [couples who have entered into Vermont civil unions] all of the benefits extended to marital spouses”).¹⁸

CONCLUSION

Plaintiffs have demonstrated that Spano violated Section 51 of the General Municipal Law, and they request the relief identified in their initial brief.

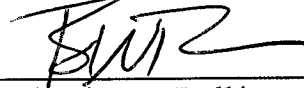
¹⁸ Both *Cooney v. Osgood Machinery*, 81 N.Y.2d 66, 78-80 (1993) (discussing the choice-of-law public policy exception), and *Welsbach Electric Corp. v. MasTec North America*, 7 N.Y.3d 624, 628-29 (2006) (analyzing a contractual choice-of-law clause) — cases cited by Defendants-Intervenors — involve choice-of-law principles not at issue here and, thus, these cases are irrelevant.

Dated: January 16, 2008

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CERTIFICATE OF COMPLIANCE

I, Brian W. Raum, certify that this brief was prepared on a computer using a 14 point, proportionally spaced Times New Roman typeface, with double-spaced lines. The total number of words in the brief, inclusive of point headings and footnotes, and exclusive of pages containing the Table of Contents, Table of Authorities, Proof of Service, and Certificate of Compliance is 6,966. This number was obtained using the word count feature of Microsoft Word.

Dated: January 16, 2008



Brian W. Raum, Esq.

AFFIRMATION OF SERVICE BY NEXT-DAY AIR

RE: *Margaret Godfrey, Rosemarie Jarosz, and Joseph Rossini v. Andrew J. Spano, in his official capacity as the Westchester County Executive, and Michael Sabatino and Robert Voorheis, Docket No. 2007-4303.*

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

That on the 16th day of January 2008, I served two copies of Plaintiffs-Appellants' Reply Brief on counsel for Defendant-Respondent and Defendants-Intervenors-Respondents, by depositing the same with United Parcel Service for next day delivery addressed as follows:


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