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*Court of Appeals  
State of New York*

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**MARGARET GODFREY, ROSEMARIE JAROSZ,  
and JOSEPH ROSSINI,**

*Plaintiffs-Appellants*

**-against-**

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

*Defendant-Respondent*

**-and-**

**NEW YORK STATE COMPTROLLER,**

*Defendant-Intervenor-Respondent*

**-and-**

**MICHAEL SABATINO AND ROBERT VOORHEIS,**

*Defendant-Intervenor-Respondent*

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**BRIEF OF AMICUS CURIAE  
THE NEW YORK STATE ASSOCIATION OF COUNTIES  
IN SUPPORT OF DEFENDANT-RESPONDENTS**

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## I.

### **INTRODUCTION**

The present case involves the constitutionality and legality of an executive order made by County Executive Andrew J. Spano for the purpose of unifying and clarifying Westchester County policy regarding an issue of departmental administration. Specifically plaintiff-appellants appeal from a Decision and Order of the Appellate Division of the New York State Supreme Court for the Second Judicial Department, dated December 30, 2008, which affirmed the Judgment of the Supreme Court, Westchester County (Hon. Joan B. Lefkowitz), dated April 16, 2007, and entered April 17, 2007, which granted defendant's cross motion dismissing the appellant's amended complaint and declared that the Executive Order No. 3 of 2006 was a valid exercise of the County Executive's power, was not an illegal act, and does not violate the State Constitution or the Municipal Home Rule Law. Amicus believes that the Appellate Division properly affirmed the Westchester County Supreme Court's judgment.

## II.

### ARGUMENT

#### **A. The Executive Order was legally and constitutionally executed.**

##### ***1. History of County Executive Authority in Westchester County:***

In understanding where the powers of the County Executive derive and how those powers should be interpreted it is important to recognize the historic constitutional and statutory framework of said powers.

Article 9 of the New York State Constitution crafts the broad authority of local government corporations. Specifically applicable to the case at hand, Article 9, Section 1, Sub. (h)(1) states, “Counties other than those wholly included within a city shall be empowered by general law, or by special law enacted upon county request pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of county government on their own.” We must therefore look to section two of Article 9 in order to understand how the constitutional authority provided in section one is derived. Section two, Sub. (a) of the New York State Constitution states that, “The legislature shall provide for the creation and organization of local governments in such a manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.” More specifically, Section two, Sub (b), states, “Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: (3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local

legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.”

The New York State Legislature, in following these constitutional provisions, enacted particular State laws to provide for the creation and organization of local governments, including; General Municipal Law, Municipal Home Rule Law, County Law and Alternative County Government Law, just to name a few.

The County Executive was not a position explicitly provided for in the New York State Constitution. For the majority of counties in New York, excluding only Nassau, Westchester and Monroe counties, the Alternative County Government Law, Chapter 11-B of the Consolidated Laws of New York, Article 4 empowers a county to create the position of County Executive and in addition lists the powers and duties of said position. However, according to Article 1, Section 2 of Chapter 11-B of the Alternative County Government Law, “This chapter shall apply to all counties, except that: (2) It shall not affect the form of government in operation in a county which shall have heretofore adopted or shall hereafter adopt an alternative form of county government pursuant to any law other than this chapter...” This is important as according to the Uniform County Laws Commission, the organization in charge of the initial drafting of this section of law, “The Alternative County Government Law does not affect the counties of Nassau or Westchester which already operate under their own alternative forms by charter...”<sup>1</sup> Westchester County is one of the few counties where the county charter was enacted by

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<sup>1</sup> See Alternative County Government Law, Chapter 11-B, Article 1, Section 1, Westlaw Historical and Statutory Notes, 1952 Declaration by the Uniform County Law Commission, Paragraph 3

the State Legislature as opposed to an enactment of the County Legislature or Board of Supervisors pursuant to a state statute.

The Westchester County Charter was enacted by the Laws of 1937 which was some 15 years before the enactment of the Laws of 1952, Chapter 834 which created the Alternative County Government Law. Chapter 617, Laws of 1937, section 1, now chapter 101 of the County Charter, empowered Westchester County with the authority to adopt the form of government explicitly provided. Contained within the provisions of Chapter 617 of the Laws of 1937 were sections 15-20, now Chapter 110 of the County Charter, which lays out the creation, powers and duties of the County Executive in Westchester County. Section 110.01 states, “There shall be a County Executive who shall be elected from the county at large at the general election held the year following the presidential election...” Next, section 110.11, sets forth the powers and duties of the County Executive. “The County Executive shall be the chief executive and administrative officer of the county and the official head of the county government. It shall be the duty of the County Executive: 1. To supervise, direct and control, subject to law and the provisions of this act and local laws, the administrative services and departments of the county;...6. To see that the laws of the state, pertaining to the affairs and government of the county, the acts and resolutions of the County Board and duly enacted local laws are executed and enforced within the county;...10. To perform all such duties as may be prescribed for him in this act, or other law, or by act of the County Board.”

It is therefore the Westchester County Executive’s duty to “supervise, direct and control” Westchester County’s departments subject to State law and other provisions of the act itself. It should be reemphasized that this language was originally drafted and

enacted by the State Legislature and was then adopted by Westchester County. Had the State Legislature not intended these broad powers, it would likely not have drafted the language in the particular fashion that was passed.

Notably, the phrase of “supervise, direct and control” as related to county departments, for purposes of determining what powers derive there from is an extremely broad authorization. We must therefore turn to an interpretation of supervise, direct, and control to continue our analysis of County Executive Power.

According to *Application of Combs*, 38 Misc.2d 242, 248 (Sup. Ct. 1963), “The word ‘supervision’ is not one of precise import, and implies oversight and direction, and has been held to be synonymous with the power to direct and control (Vol. 83 C.J.S., p. 900).” This case specifically referred to the term “supervise” as it relates to section 202 and 203 of the Nassau County Government Law, but said law is similar in scope to the charter provisions of Westchester County in laying out the powers and duties of a County Executive. In addition the Court went on to say that, “[t]he use of the word ‘supervise’ in section 203 conjunctively with and not disjunctively from the words ‘direction’ and ‘control’ supports a holding that the duty to ‘supervise’ is synonymous with the duty to direct and control.” *Id.*

The Court went on to state that, “It is beyond dispute that certain powers not expressly granted may be implied. Such implied powers have been held to be (1) those necessarily arising or fairly implied from, or incident to, powers expressly granted, and (2) those which are not simply convenient but indispensable to the declared objectives and purposes of such powers.” *Id.* at 246, citing *Dillon on Municipal Corporations*, Vol.

1, 5th Ed.; *McQuillan on Municipal Corporations*, Vol. 2, 3rd Ed.; *New York Trap Rock Corp. v. Town of Clarkstown*, 299 N.Y. 77, 85 N.E.2d 873.

In addition, according to Black's Law Dictionary control means "to regulate or govern."<sup>2</sup> It also should be noted that, according to Black's Law Dictionary supervision means "the act of managing, directing, or overseeing persons or projects"<sup>3</sup>, and direct means "to guide," or "to govern."<sup>4</sup>

Accordingly, the limit and extent of authority we can draw from this is that Executive powers are extremely broad. The conclusion which can be determined is that the County Executive may not act outside of those powers specifically granted, or implied from the explicit authority. Certainly from the broad powers of "supervision, direction and control" of administrative services and departments, the use of an executive order to unify county wide policy of these departments would be covered. This case does not require a court to lay out the exact parameters of these powers, as municipality's authority clearly includes the power to issue an executive order of the type in question.

## ***2. Executive Order in Controversy:***

Westchester County Executive, Andrew J. Spano, issued Executive Order 3 of 2006, issued pursuant to Chapter 110.11 of the Westchester County Charter, directed,

...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 in the same manner as the currently recognized opposite sex marriages for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law.<sup>5</sup>

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<sup>2</sup> P. Black's Law Dictionary 353 (8<sup>th</sup> ed. 2004)

<sup>3</sup> *Id.* at 1479

<sup>4</sup> *Id.* at 491

<sup>5</sup> See, Executive Order 3 of 2006 of the County of Westchester

The County Executive has wide discretion in setting administrative standards for the County. It has been reported that New York has approximately 46,500 same sex couples, one of the highest in the country.<sup>6</sup> The County Executive sought to create a uniform administrative county wide policy, in order to clarify any confusion on the issue while recognizing that this authority must be consistent with state law. It should be noted that the executive order is self limiting, in that its application is authorized to the “maximum extent allowed by state law”.

***3. Prior Execution of the County Executive Power Under Chapter 110 of the Westchester County Charter:***

The Westchester County Executive has continually provided for uniform departmental administrative policy concerning supervision, direction and control based upon the power granted under the Westchester County Charter. For instance, Executive Order No. 4 of 2002 implemented a county wide departmental policy establishing the use of employee photo identification cards in order to ensure a safe and secure work environment. In 2004, Executive Order No. 4 was established to ban mechanical, digital or electronic viewing devices or any other instrument capable of recording, storing or transmitting visual images in any indoor facility owned or operated by the county in an area where there is a reasonable expectation of privacy. Executive Order No. 3 of 2007 instituted a county wide workplace violence policy. Executive Order No.1 of 2009 implemented a county wide policy regarding best management practices for reducing nitrogen and other storm water pollutants directed at every department, board, agency and

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<sup>6</sup> Dubin, Arlene G. and Agnew, Sheila, As the Same-Sex Landscape Evolves, New York Law Journal, August 10, 2009, pg 9-10

commission. Finally Executive Order No. 3 of 2009 established another countywide policy related to anti-harassment and discrimination.

These executive orders were enacted to create uniformity in County policy and to create efficiency in the day to day running of County departments. These are no different than the Executive Order No. 3 of 2006 at controversy in this case, besides the moral agreement or disagreement with the issue itself. These Executive Orders, just as the one in question, were enacted pursuant to the County Executive powers incorporated in Chapter 110 of the Westchester County Charter.

Further, it should be noted that all of the language of these executive orders lack the explicit stricture included in the executive order in question, which limits the executive order “to the maximum extent allowed by law.” This shows an implicit understanding that state policy on same sex marriage can change and therefore, Executive Order 3 of 2006 was made with the clear intention that changes in state policy will limit the effect of the order. In addition this demonstrates that it was neither the County Executive’s intention that the Executive Order supersede State law nor was it the County Executive’s intention to extend his authority beyond the scope of his current charter powers.

#### ***4. Westchester County Has Authority to Set Compensation for its Employees:***

It is well settled law in New York State that determining salary of local government employees has been deemed to be within the realm of local government authority. “[T]he power to determine the salary of employees has been specifically conferred upon local governments by the 'home rule' article (art. IX, § 2) of the New York State Constitution”, See *Slattery v. City of New York*, 179 Misc.2d 740, 753 (Sup.

Ct. 1999) citing *Ryan v Adler*, 51 Misc 2d 816, 818, *affd* 28 AD2d 920 (2d Dept 1967), *affd* 21 NY2d 815 (1968).

This authority also includes the determination of employment benefits. “In turn, health insurance benefits are a form of compensation 'encompassed within the definition of terms and conditions of employment' (*Matter of Police Assn. v New York State Pub. Empl. Relations Bd.*, 126 AD2d 824, 825 (3d Dept 1987)) In light of the broad grant of power given to local governments in this area (*see, McMillen v Browne*, 14 NY2d, at 330-331), absent absolute conflict with statutory or constitutional authority, the courts should not intervene where the salary and benefits accorded to municipal employees are at issue.” *Slattery* at 753-754.

A ruling to overturn the instant Executive Order would surely place a limitation on County authority and call into question other such executive orders or local laws throughout the state related to the salary and benefits of county employees.

**B. There is No Valid Claim Set Forth Under General Municipal Law Section 51:**

General Municipal Law Section 51 sets out a cause of action entitled “Prosecution of officers for illegal acts”. The cause of action set forth in section 51 provides that: “All officers...and other persons acting, or who have acted, for and on behalf of any county...in this state, and each and every one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers...or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county”.

A showing of mere illegality, however, has been deemed not enough; *see, Kaskel v Impellitteri*, 306 NY 73, 78 (1953), *See also Western N. Y. Water Co. v City of Buffalo*,

242 NY 202, 207 (1926). When waste or injury is not involved, the purported illegal act must be such as to imperil the public interests or calculated to work public injury or produce some public mischief. See, *Altschul v. Ludwig*, 216 N.Y. 459, 467; see, also, *Hurley v. Tolfree*, 308 N. Y. 358, 364-365.

Since salary and benefits of county employees has been determined to be within the broad range of county power and because of the self limiting clause within Executive Order 3 of 2006, “to the maximum extent allowed by law”, the executive order is obviously a legal act of the Westchester County Executive. This was the conclusion by the Supreme Court of Westchester County and upheld by the Appellate Division, Second Department in prior proceedings of this action.

In *Mesivta of Forest Hills Institute, Inc. v. City of New York*, 58 N.Y.2d 1014, 462 N.Y.S.2d 433 (1983), a failure to observe particular statutory provisions did not constitute fraud or illegality necessary to support a taxpayer action pursuant to General Municipal Law Section 51. There the court held that “[t]o hold otherwise “would subject the discretionary action of all local officers and municipal bodies to review by the courts at the suit of the taxpayers, a result which would burden the courts with litigation, without increasing the efficiency of local administration” *Id.* at 1016, citing *Talcott v City of Buffalo*, 125 NY 280, 288. Here, there is no illegality, or even a failure to observe statutory provisions, but only an executive order within the confines of administrative authority.

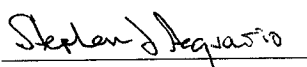
According to *Wein v. City of NY*, 80 Misc.2d 894, 365 NYS2d 955 (1975) citing, *Gusdore Corp. v Michaels*, 13 Misc 2d 762, affd 8 AD2d 663; *Berkey v Downing*, 68 Misc 2d 595, affd 39 AD2d 1008, “It is axiomatic that courts do not sit in judgment on

questions of administrative discretion and do not interfere with the conduct of municipal officials, absent fraud, collusion, corruption or bad faith.” The courts, therefore, have recognized wide discretion for administrative decision making and will refuse to interfere unless a particular instance or instances of fraud, collusion, corruption or bad faith accompanied that decision. Without such a showing the Westchester County Executive Order should be upheld.

### CONCLUSION

The County Executive found it necessary to protect constituent interests, and exercise his administrative discretion while recognizing that this authority must be consistent with State law. If the Plaintiffs-Appellants do not approve of the way in which the County Executive is performing his legally recognized duties, pursuant to the State constitution, State legislation, and County charter, a valid remedy exists in our system of government through the legislative process.

Respectfully submitted,



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