

SUP. CT. WESTCHESTER COUNTY
INDEX NO. 16894/2006

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The Court of Appeals
State of New York

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NEW YORK STATE
COURT OF APPEALS

MARGARET GODFREY, ROSEMARIE JAROSZ, AND JOSPEH 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,

Defendants-Intervenors-Respondents

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ARGUMENT

I. COMITY PRINCIPLES PROHIBIT A COUNTY EXECUTIVE FROM ORDERING THAT ALL COUNTY DEPARTMENTS, BOARDS, AGENCIES, AND COMMISSIONS RECOGNIZE SAME-SEX UNIONS CONSIDERED “MARRIAGES” BY FOREIGN JURISDICTIONS.

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

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

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

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

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

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

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

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

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

¹ Additionally, the Intervenors-Respondents, relying on one sentence from the *May's Estate* decision, urge this Court to apply the following standard: application of the public-policy exception depends on whether an out-of-state union is "offensive to the public sense of morality to a degree regarded generally with abhorrence." *See* Inter. Br. at 33 (quoting *May's Estate*, 305 N.Y. at 493). But as Taxpayers explained in their opening brief, this language from *May's Estate* merely expressed the well-established common-law principle that "incestuous" marriages outside the lineal line (parent-child) or the first degree of the collateral line (brother-sister) are not prohibited by natural law. *See* Taxpayers' Br. at 23-24. That narrowly focused statement cannot be extrapolated outside that context to express a general rule for marriage-recognition cases. Respondents, however, have failed to indicate why this lone sentence should form the basis of this Court's analysis of the public-policy exception. Moreover, quantifying and analyzing the "public sense of morality" would take the judiciary far outside its general realm of competence. The Court should thus avoid this unworkable standard.

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

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

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

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

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

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

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

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

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

relationships that cause children to be born; and marriage's goal of encouraging children to grow up with both a mother and a father). *See* Taxpayers' Br. at 40-43.

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

Taxpayers' discussion of the distinction between structural characteristics and regulatory requirements also exposes a failed attempt by the Intervenor-Respondents to mischaracterize Taxpayers' position. The Intervenor-Respondents erroneously contend that Taxpayers argue "that the recognition question should be controlled by New York's statutory provisions for who may marry here." Inter. Br. at 3. But Taxpayers have made no such argument, and their discussion of the structural-regulatory distinction plainly shows that they have not. As part of that discussion, Taxpayers readily acknowledge that this State often recognizes out-of-state marriages that do not conform to New York's statutory provisions for who may marry here. *See, e.g.*, Taxpayers' Br. at 37-38. So the Intervenor-Respondents lack any basis for this gross mischaracterization of Taxpayers' arguments.⁴

⁴ The State Respondents also attempt to mischaracterize Taxpayers' comity arguments, erroneously alleging that Taxpayers have argued that marriage-recognition principles do not apply to "New York domiciliaries who travel to other jurisdictions." State Br. at 20. But Taxpayers have not made that argument. Instead, Taxpayers have indicated that one of the factors this Court should consider, in determining whether to apply comity in an unprecedented way, is whether the recognition at issue would affect the "status" of its own citizens. *See* Taxpayers' Br. at 49-50; *see also* *People v. Baker*, 76 N.Y. 78, 86 (1879); Story, Commentaries on the Conflict of Laws at 187, § 112. Here, Spano's Executive Order directs his subordinates to "recognize same sex marriages lawfully entered into outside the State of New York in the same manner as they currently recognize opposite sex marriages." (A. 71.) That Executive Order thus directly relates to the "status" of state domiciliaries, and the Court should consider this fact when determining whether this extension of comity improperly encroaches on the prerogatives of the State Legislature.

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

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

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

the public will.” *Kraut*, 38 N.Y.2d at 452. This Court should thus decline Respondents’ suggestions to look beyond statewide legislatively enacted law as a source of public policy.

There is a particular problem with attempting to glean public policy from the three statewide executive-branch officials’ opinions and directives regarding the recognition of same-sex unions considered “marriages” in foreign jurisdictions. *See* Inter. Br. at 35; State Br. at 31. When those officials indicated that same-sex unions considered “marriages” in other jurisdictions should be recognized in New York, they purported to interpret common-law principles of comity. (*See* A. 96-98, 101-02.) Hence, they were not expressing public policy, but an incorrect understanding of comity principles. It would thus be improper to rely on these erroneous legal conclusions as expressions of New York’s public policy.

Respondents also argue that the “controlling public policy” is found in the common-law preference for recognizing out-of-state marriages. *See* State Br. at 17; Inter. Br. at 48. But it is circular to suggest that, in determining whether comity should be withheld under the public-policy exception, the controlling public policy is found in the general common-law rule favoring the recognition of foreign marriages. If the Court were to adopt that analytical approach, the public-policy exception would never apply because the general rule would swallow that

exception. This Court should not adopt an analytical approach that would render the public-policy exception meaningless.⁵

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

In New York, “[i]n all cases . . . marriage has always been considered as the union of a man and a woman[.]” *B. v. B.*, 78 Misc.2d 112, 117 (Sup. Ct. Kings Co. 1974); *see also Anonymous*, 67 Misc.2d at 984. This Court in *Hernandez* recently affirmed that long-standing structure of marriage in this State. *See Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006) (“New York’s statutory law clearly limits marriage to opposite-sex couples”). Respondents do not directly dispute the Legislature’s unbroken understanding of marriage as the union of one man and one woman. And their few empty attempts to undermine that policy are ineffective.

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

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

The Intervenors-Respondents and State Respondents also point to a few statutes that provide limited benefits, such as hospital visitation, to “domestic partners.” Inter. Br. at 35-36; State Br. at 30-31; see also N.Y. Pub. Health Law § 2805-q (allowing domestic partners hospital visitation); N.Y. Pub. Health Law §

4201 (allowing domestic partners to dispose of each other’s remains). But these few statutes do not even purport to change the Legislature’s policy on marriage. Neither do they come close to creating a comprehensive legal relationship for same-sex couples. They merely grant limited, discrete benefits to domestic partners—both same-sex and opposite-sex couples alike. Thus, these few narrow statutes do not undermine the more than two hundred years of unbroken history during which the Legislature has uniformly understood marriage as the union of one man and one woman.

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

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

In an ironic twist, Respondents suggest that Taxpayers ask this Court to usurp the legislative prerogative and issue an “activist” ruling. State Br. at 20, 27; Inter. Br. at 32. But nothing could be further from the truth. Taxpayers simply ask this Court to acknowledge and affirm comity’s limitations. Comity does not allow the judiciary to import a fundamentally and structurally different union into New York. See Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 B.Y.U. L. Rev. 1855, 1919-20 (2008) (hereafter Wardle, *Comity*)

(acknowledging the importance of “[p]reserving the authority of law-makers to decide novel policy issues including whether . . . to allow or recognize new forms of domestic relations”). As the Second Department has noted, a judicial decision recognizing an out-of-state same-sex union, “no matter how circumscribed, will be taken as judicial imprimatur of same-sex marriages and [will] constitute a usurpation of powers expressly reserved by our Constitution to the Legislature.” *Langan I*, 25 A.D.3d at 95. Taxpayers thus urge this Court to acknowledge comity’s inherent limitations and leave the same-sex “marriage” debate in the province of the Legislature.

Moreover, Taxpayers urge not only judicial restraint, but also municipal restraint. By issuing his Executive Order, Spano unnecessarily meddled with a subject matter—marriage—that belongs to the State Legislature and that demands statewide uniformity. *See Albany Area Builders Assoc. v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989) (indicating that the State Legislature generally preempts areas of the law that require “State-wide uniformity”). Taxpayers merely ask this Court to strike down a county official’s overreaching and restore these important policy decisions where they belong—to the State Legislature. Thus, notwithstanding Respondents’ suggestions, Taxpayers are not champions of judicial activism, but instead, of the judiciary’s affirming municipal restraint.

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

II. TAXPAYERS HAVE PROPERLY ASSERTED CLAIMS UNDER SECTION 51 OF THE GENERAL MUNICIPAL LAW.

Section 51 of the General Municipal Law provides an avenue for taxpayers to challenge misconduct by county officials. In his brief, Spano portrays an exceedingly narrow standard for asserting a claim under Section 51. Spano Br. at 12, 17. But as will be demonstrated herein, Spano has not painted an accurate picture of those requirements.

A. Section 51 Permits Suits By Taxpayers To Challenge Three Different Categories Of Unlawful Government Conduct, And Each Category Applies To Taxpayers' 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 public injury; or (3) illegal conduct where the public official lacks power under the law to do the complained-of acts. *See Stahl Soap Corp. v. City of New York*, 5 N.Y.2d 200, 204 (1959). As will be demonstrated herein, Taxpayers' allegations fall squarely within all three of these categories. While Spano acknowledges all the different types of illegal government conduct that may be challenged under Section 51, he attempts to make these separate categories into a list of mandatory requirements. This approach, however, is not supported by case law.

1. Taxpayers Allege That Spano's Actions Are Illegal And Cause The Waste of Public Funds.

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). 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. Here, Taxpayers do not allege that Spano acted fraudulently, but instead,

assert that he engaged in wasteful and illegal government conduct. These allegations are sufficient to state a meritorious claim under Section 51.

As part of their Section 51 claim, Taxpayers specifically allege that Spano acted “illegally.” (A. 46.) And as demonstrated in their opening brief, Taxpayers assert illegality in at least two ways: (1) a violation of comity principles by ordering the recognition of foreign unions that are not entitled to recognition in New York; and (2) a violation of home-rule principles by unnecessarily acting in an area of the law—marriage—that has been preempted by the State Legislature.

Taxpayers further assert that Spano’s illegal conduct has caused or will cause the waste of public funds. (A. 43, 45, 46.) These allegations properly state a cause of action under Section 51. Nevertheless, both Spano and the State Respondents belabor this point, futilely arguing that Taxpayers have neither alleged nor proven the expenditure of public funds. Spano Br. at 12-17; State Br. at 54. Yet those arguments do not withstand scrutiny.

a. Taxpayers Need Not Prove The Expenditure Of Public Funds.

This case is an appeal from the Supreme Court’s granting of a motion to dismiss; thus, Taxpayers need not prove the allegations in their Amended Complaint. When reviewing a case in that procedural posture, this Court “accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the

facts as alleged fit within any cognizable legal theory.” *Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 303 (2001).

Here, contrary to Spano’s assertions, *see* Spano Br. at 13, Taxpayers’ Amended Complaint contains numerous allegations regarding the unlawful expenditure of taxpayer funds in connection with the Executive Order. (*See* A. 42-43 (alleging that Spano “has caused, and is causing, public mischief including but not limited to expending County funds”); A. 45 (alleging that Spano’s unlawful “[E]xecutive [O]rder has resulted and will continue to result in the illegal disbursement of County funds”); A. 46 (alleging that Spano “has spent and will spend County tax revenue”).) This Court should accept those allegations as true and accord Taxpayers the benefit of every possible favorable inference. In short, given the procedural posture of this case, Taxpayers need only allege (which they have done), and need not actually prove, the waste of public funds.⁶

b. “The Maximum Extent Allowed By Law” Clause Does Not Prevent The Illegal Expenditure Of Funds.

In his brief, Spano repeatedly stresses that the Executive Order, by its express terms, limits the recognition of foreign unions “to the maximum extent

⁶ It is thus irrelevant whether Taxpayers produced evidence to rebut statements by County officials regarding the expenditure of funds in connection with this Executive Order. *See* State Br. at 54-55. On a motion to dismiss, all Taxpayers’ allegations are deemed true and need not be supported by evidence. *Arnav Indus.*, 96 N.Y.2d at 303.

allowed by law.” *See, e.g., Spano Br. at 20, 22, 23, 24.* He thus reasons that implementation of that Executive Order, because it applies only “to the maximum extent allowed by law,” cannot result in the unlawful expenditure of funds.

But in all his discussions about the “maximum extent allowed by law” clause, he does not explain how, in light of his order, County employees will know that New York comity jurisprudence *does not extend* recognition to same-sex unions considered “marriages” in foreign jurisdictions, and will thus refrain from recognizing those unions and extending marital benefits to persons involved in them. He apparently assumes that his subordinates possess the legal expertise to look beyond the general mandate in his Executive Order—to recognize these out-of-state unions—discern that it violates the law, and decide not to obey it. But there is no basis for that assumption. Neither will County employees know that an executive order concerning marriage, like the one at issue here, violates home-rule limitations and, for that additional reason, decide not to obey it. Thus, Spano’s reliance on the “maximum extent allowed by law” clause does not insulate his actions from legal challenge under Section 51.⁷

⁷ The State Respondents mischaracterize Taxpayers’ arguments concerning the “maximum extent allowed by law” clause. *See State Br. at 52-53.* Taxpayers do not contend, as suggested by the State Respondents, that “the County employees will misconstrue [the Executive Order] as requiring *unlawful* recognition.” *See State Br. at 52.* Instead, Taxpayers assert that subordinate County employees will follow the general mandate in the Executive Order, which itself requires unlawful recognition.

c. The Executive Order Affects A Broad Range Of Same-Sex Couples, And Not Just Those Who Are Employed By The County.

Spano argues that Taxpayers cannot demonstrate a waste of public funds because the County has the “legal authority to set compensation and provide health benefits to its employees.” Spano Br. at 14-17. The flawed premise of this argument is Spano’s unsupported belief that his Executive Order *affects only County employees* who have entered same-sex unions labeled “marriages” by foreign jurisdictions. But that assumption misapprehends the breadth of the Executive Order, which is not limited in its application to only County employees.

The challenged Executive Order 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.” (A. 71 (emphasis added).) Compliance with this order thus requires all County departments, boards, agencies, and commissions to recognize all same-sex unions considered “marriages” in other jurisdictions. It applies broadly to all qualifying couples whenever they interact with any County department, board, agency, or commission, and it requires the County to recognize those persons as “married” and grant them “all rights and benefits” afforded by that legal status.

Spano attempts to read a limitation into the Executive Order—that it applies only to County employees—which simply does not exist.

A simple example illustrates that the Executive Order applies to persons who are not employed by the County. Suppose a man who has entered into an out-of-state same-sex union applies to the Westchester Department of Social Services for a county-administered benefit such as Medicaid insurance. The Executive Order mandates that this man be treated as if he is “married” and given any rights, including more favorable Medicaid insurance coverage, afforded by that legal status. Thus, the Executive Order will cause the unlawful disbursement of public funds to more than just County employees, and Spano’s arguments to the contrary are unfounded.

d. The Unlawful Expenditures Authorized Under The Executive Order Would Not Have Necessarily Been Given To Domestic Partners.

The State Respondents argue that the Executive Order does not result in the unlawful expenditure of funds because all benefits and expenditures conferred to same-sex couples under the Executive Order would have in any event been given to domestic partners. State Br. at 54. But this argument, like those presented by Spano, incorrectly assumes that the Executive Order applies only to County employees. Thus, even if true, it does not absolve Spano’s actions from scrutiny

under Section 51 because, as discussed above, the Executive Order results in the unlawful expenditure of funds to non-County employees.

But even assuming that the Executive Order applies only to County employees, the State Respondents' argument nevertheless fails. Importantly, this argument rests on a flawed foundation. The State Respondents apparently assume that they do not violate Section 51 if public funds disbursed in an unlawful manner could have otherwise been lawfully distributed to domestic partners. But Section 51 prohibits "illegal official acts." *See* N.Y. Gen. Mun. Law § 51. Thus, Spano violates Section 51 if he wastes public funds by expending them in an unlawful manner. It is irrelevant whether he might have taken different actions to expend those funds in a lawful manner. That fact, even if true, does not justify his already-committed unlawful expenditure of public funds.

In any event, the State Respondents have not shown that the benefits and expenditures unlawfully conferred to same-sex couples under the Executive Order would have nevertheless been given as domestic-partner benefits. Simply put, same-sex couples who enter legal unions considered "marriages" in foreign jurisdictions do not necessarily qualify for domestic-partner coverage in Westchester County. For employment benefit purposes, the County has apparently adopted the definition of "domestic partner" used by the State in administering NYSHIP. (A. 106.) That definition requires, among other things, that domestic

partners have “resided together in the same residence for at least . . . 6 months.” NYSHIP Eligibility Worksheet (attached at page 64 of the State Respondents’ Addendum). But that residency requirement need not be satisfied by same-sex couples who enter legal unions considered “marriages” in foreign jurisdictions. Under the Executive Order, a same-sex couple is treated as “married” immediately after entering into their union; they need not ever reside with each other, not to mention for a six-month period. Thus, a same-sex couple’s entering a union considered a “marriage” in a foreign jurisdiction does not automatically render them eligible for domestic-partner coverage. And particularly if the couple had not resided together before their legal union, they are unquestionably *not* eligible for domestic-partner coverage immediately after entering their union.

Moreover, some same-sex couples who have entered unions considered “marriages” in other jurisdictions might decide, for myriad personal reasons, not to take the affirmative step of registering for domestic-partner coverage. The Intervenors-Respondents in the *Lewis* case have proffered an example of this. In August 2005, they entered a legal union that Canada defines as “marriage”; yet they chose not to obtain domestic-partner coverage even though they were paying additional funds to maintain separate health-insurance coverage for one of them.

(L.A. 121-22.)⁸ According to them, they did not seek domestic-partner coverage because they thought it “disrespected” their relationship by “calling [themselves] domestic partners.” (L.A. 121.) Thus, their situation plainly shows that not all same-sex couples who enter legal unions deemed “marriages” in other jurisdictions will obtain benefits under the domestic-partner coverage.

In sum, Taxpayers’ allegations of wasteful and illegal conduct assert a proper cause of action under the first category of Section 51 claims. And Respondents’ opposing arguments all lack merit.

2. Taxpayers Allege That Spano’s Actions Are Illegal, Imperil The Public Interest, And Cause Public Mischief.

Taxpayers’ allegations also fall squarely within the second type of Section 51 claims. In recognizing these claims, this Court 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). Thus, a plaintiff asserts this type of 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

⁸ Citations designated “L.A.” are referencing the appendix submitted in the *Lewis v. New York State Department of Civil Service* appeal.

“imperil[s] the public interests or [is] calculated to work public injury or produce some public mischief.” *See id.*

Taxpayers satisfy these three requirements. First, they are seeking injunctive (as opposed to monetary) relief. (*See* A. 47.) Second, as discussed above, Taxpayers allege that Spano acted “illegally.” (*See* A. 46). Third, Taxpayers have alleged that the Executive Order imperils the public interest and causes “public mischief.” (*See* A. 42, 45, 46.) More specifically, the Executive Order imperils the public interest and causes public mischief by (1) unlawfully extending comity to out-of-state unions that should not be recognized in New York, (2) expending public funds based on this unlawful extension of comity, (3) importing a structurally different union into New York without legislative approval, (4) fundamentally transforming the institution of marriage in New York through the improper extension of comity, and (5) adopting a county approach to an issue of statewide concern involving marriage. Thus, even if the Court were to find that this case does not involve the waste of public funds, Taxpayers have nevertheless asserted a proper claim under Section 51.

In arguing this point, Spano incorrectly asserts that Taxpayers must include “detailed and specific” allegations of “corruption” or “fraud.” Spano Br. at 18, 23. His error on this point, like some of his other confusion on the standard for stating a claim under Section 51, likely results from failing to distinguish between claims

for monetary damages and claims for injunctive relief. Had Taxpayers sought to impose personal monetary liability against Spano (rather than requesting injunctive relief), they would have been required to include specific 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*, 170 A.D. 469, 475 (2d 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”).⁹ But Taxpayers seek only injunctive and declaratory relief; thus, they did not need to include such allegations.

3. Taxpayers Allege That Spano Lacked The Authority To Issue An Executive Order Regarding Marriage.

Taxpayers’ allegations also fall under the third category of Section 51 claims. That category permits claims where the plaintiff 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). Taxpayers assert that Spano lacked

⁹ *See also Duffy v. Longo*, 207 A.D.2d 860, 863-64 (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. Pulver*, 258 A.D.2d 50, 55-56 (3d 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”).

the power to do the complained-of actions; more specifically, he lacked the authority under home-rule principles to order County employees to recognize same-sex unions labeled “marriages” by foreign jurisdictions. Thus, even if the Court were to find that this case does not involve the waste of public funds or peril to the public interest, Taxpayers have nevertheless asserted a valid claim under Section 51.

B. Taxpayers Need Not Establish A Separate Cause Of Action Under The Municipal Home Rule Law Or The State Constitution To Raise Their Home-Rule Arguments.

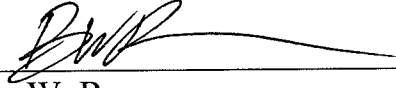
Spano contends that Taxpayers have not satisfied the general requirements of standing or common-law-taxpayer standing to assert a cause of action under Section 10 of the Municipal Home Rule Law or Article 9, Section 2 of the State Constitution. Spano Br. at 33. But as mentioned in their opening brief, Taxpayers have not pursued their home-rule argument as a stand-alone claim. *See* Taxpayers’ Br. at 5 n.2. Instead, Taxpayers have argued that the violation of home-rule principles is one way in which Spano’s conduct amounts to an “illegal official act,” challengeable under Section 51 of the General Municipal Law. *See* N.Y. Gen. Mun. Law § 51. Thus, because these home-rule arguments are part of the Section 51 claim, Taxpayers need not assert an independent cause of action under the Municipal Home Rule Law or the State Constitution to raise their home-rule arguments.

CONCLUSION

Spano acted unlawfully by ordering all county departments, boards, agencies, and commissions to recognize same-sex unions labeled “marriages” by jurisdictions that have redefined that institution. Taxpayers respectfully request that this Court reverse the Appellate Division’s decision and remand with instructions to enter judgment in their favor.

Dated: August 3, 2009

Respectfully submitted,



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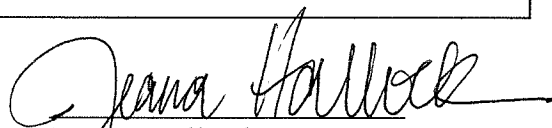
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AFFIDAVIT OF SERVICE

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

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Dated: August 3, 2009


 Jeana Hallock

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


 Notary



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