

SUP. CT. ALBANY COUNTY  
INDEX NO. 4078/07

*To be Argued by:* SUSAN L. SOMMER  
*Time Requested:* 15 Minutes

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

*To be Argued by:* SUSAN L. SOMMER  
*Time Requested:* 15 Minutes

---

# Court of Appeals

STATE OF NEW YORK

---

KENNETH J. LEWIS, DENISE A. LEWIS, ROBERT C. HOUCK, JR., and ELAINE A. HOUCK,  
*Plaintiffs-Appellants,*

-against-

THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND NANCY G. GORENWEGEN, in her official  
capacity as President of the New York State Department of Civil Service,

*Defendants-Respondents,*

-and-

PERI RAINBOW and TAMELA SLOAN,  
*Defendants-Intervenors-Respondents*

---

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,  
*Defendants-Intervenors-Respondents.*

---

## **BRIEF FOR DEFENDANTS-INTERVENORS-RESPONDENTS IN RESPONSE TO *AMICUS* SUBMISSIONS**

---

SUSAN L. SOMMER  
LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC.  
120 Wall Street, Suite 1500  
New York, New York 10005  
Telephone: (212) 809-8585  
Facsimile: (212) 809-0055

JEFFREY S. TRACHTMAN  
JOSHUA GLICK  
MICHAEL B. EISENKRAFT  
JASON M. MOFF  
KRAMER LEVIN NAFTALIS & FRANKEL LLP  
1177 Avenue of the Americas  
New York, New York 10036  
Telephone: (212) 715-9100  
Facsimile: (212) 715-8000

*Attorneys for Defendants-Intervenors-Respondents*

September 24, 2009

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

ARGUMENT ..... 4

I. UNDER THE LAWS OF RESPECTED SISTER JURISDICTIONS, MARRIAGE HAS BEEN DEFINED TO INCLUDE UNIONS OF SAME-SEX COUPLES, CALLING FOR APPLICATION OF NEW YORK’S LONGSTANDING MARRIAGE RECOGNITION RULE TO HONOR THESE VALIDLY ENTERED MARRIAGES..... 4

II. THE COURT SHOULD REJECT THE CONFERENCE’S INVITATION TO ABANDON THE LONGSTANDING MARRIAGE RECOGNITION RULE IN FAVOR OF AN ARBITRARY AND UNWORKABLE STANDARD..... 10

III. THE LEGISLATURE HAS NOT PRECLUDED BY POSITIVE ENACTMENT RECOGNITION OF OUT-OF-STATE MARRIAGES OF SAME-SEX COUPLES, AND THE MARRIAGES ACCORDINGLY ARE ENTITLED TO RESPECT ..... 15

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

### CASES

<i>Chambers v. Ormiston</i> , 935 A.2d 956 (R.I. 2007).....	5
<i>C.M. v. C.C.</i> , 21 Misc. 3d 926 (Sup. Ct. N.Y. County 2008).....	5
<i>Cunningham v. Cunningham</i> , 206 N.Y. 341 (1912).....	12
<i>Hilliard v. Hilliard</i> , 24 Misc. 2d 861 (Sup. Ct. Greene County 1960).....	12
<i>In re Estate of May</i> , 305 N.Y. 486 (1953).....	11, 12, 15, 16
<i>Martin v. Dwelly</i> , 6 Wend. 9 (N.Y. 1830).....	6
<i>Med. Bus. Assocs., Inc. v. Steiner</i> , 183 A.D.2d 86 (2d Dep’t 1992).....	8
<i>Millington v. Southeastern Elevator Co.</i> , 22 N.Y.2d 498 (1968).....	8
<i>People ex rel. Barry v. Mercein</i> , 3 Hill 399 (N.Y. Sup. Ct. 1842).....	6
<i>People v. Liberta</i> , 64 N.Y.2d 152 (1984).....	8
<i>Rozell v. Rozell</i> , 281 N.Y. 106 (1939).....	9
<i>Stanton v. Stanton</i> , 421 U.S. 7 (1975).....	9

<i>State Farm Mut. Auto. Ins. Co. v. Westlake</i> , 35 N.Y.2d 587 (1974) .....	8
<i>Thorp v. Thorp</i> , 90 N.Y. 602 (1882) .....	12
<i>Udall v. Kenney</i> , 3 Cow. 590 (N.Y. Sup. Ct. 1824) .....	6
<i>Van Voorhis v. Brintnall</i> , 86 N.Y. 18 (1881) .....	12

**NEW YORK STATUTES**

Est. Powers and Trusts Law § 4-1.1 .....	13
Est. Powers and Trusts Law § 5-1.1 .....	13
Pub. Health Law § 4201 .....	14
Worker’s Comp. Law § 16 .....	13

**OTHER STATUTES**

Mass. Gen. Laws ch. 207, § 4 .....	14
Mass. Gen. Laws ch. 272, § 15 .....	14

**MISCELLANEOUS**

William Blackstone, 1 <i>Commentaries</i> .....	7
Family Watch International, <a href="http://www.familywatchinternational.org/fwi/index.cfm">http://www.familywatchinternational.org/fwi/index.cfm</a> (last visited Sept. 23, 2009) .....	1

Hendrik Hartog, <i>Man &amp; Wife in America: A History</i> (Harvard University Press 2000).....	7
Isabel Marcus, <i>Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State</i> , 37 Buff. L. Rev. 375 (1988-89).....	7
New York State Catholic Conference: Our Agenda, <a href="http://www.nyscatholic.org/pages/our_agenda/show_issues.asp?issue=Family%20Life/Respect%20Life">http://www.nyscatholic.org/pages/our_agenda/show_i ssues.asp?issue=Family%20Life/Respect%20Life</a> (last visited Sept. 23, 2009) .....	1
New Yorkers for Constitutional Freedoms, <a href="http://www.nycf.info/mission">http://www.nycf.info/mission</a> (last visited Sept. 23, 2009) .....	1
New Yorkers for Constitutional Freedoms, Redefining the Meaning of Marriage, <a href="http://www.nycf.info/position-papers/same-sex-marriage">http://www.nycf.info/position-papers/same-sex- marriage</a> (last visited Sept. 23, 2009) .....	1
Opinion of Attorney General Patrick Lynch to R.I. Board of Governors for Higher Education (Feb. 20, 2007), <i>available at</i> <a href="http://www.glad.org/uploads/docs/advocacy/RIAttorneyGeneral_Statement.pdf">http://www.glad.org/uploads/docs/ advocacy/RIAttorneyGeneral_Statement.pdf</a> .....	5
Opinion of Attorney General Patrick Lynch to R.I. General Treasurer (Oct.19, 2004), <i>available at</i> <a href="http://www.patrickclynch.com/pdf/101904%20Lynch%20Opin%20to%20Tavares.pdf">http://www.patrickclynch.com/pdf/101904%20 Lynch%20Opin%20to%20Tavares.pdf</a> .....	5
Reva B. Siegel, <i>“The Rule of Love” : Wife Beating as Prerogative and Privacy</i> , 105 Yale L.J. 2117 (1996).....	7

## PRELIMINARY STATEMENT

The Defendants-Intervenors-Respondents in both captioned actions (collectively, “Intervenors”)<sup>1</sup> submit this brief pursuant to Rule 500.12(f) of this Court in response to the *amicus* briefs of the New York Catholic Conference (the “Conference”), Family Watch International (“FWI”) and New Yorkers for Constitutional Freedoms (“NYCF”) (collectively, “Appellants’ *amici*”).

Appellants’ *amici* are three organizations opposed to marriage rights for same-sex couples.<sup>2</sup> All three effectively concede that, under New York’s longstanding marriage recognition rule, marriages of same-sex couples validly entered in sister jurisdictions like Massachusetts, Vermont, Connecticut and Canada are entitled to legal respect in New York.<sup>3</sup> Indeed, as demonstrated in the briefs of Respondents and of the *amici* supporting

---

<sup>1</sup> Unless otherwise noted, this brief uses the same abbreviated references to parties and briefs as previously defined in Intervenors’ brief dated July 16, 2009 (“Intervenors’ Br.”).

<sup>2</sup> The Conference and NYCF are religiously affiliated organizations with missions to advocate against marriage rights for same-sex couples. *See* New York State Catholic Conference: Our Agenda, [http://www.nyscatholic.org/pages/our\\_agenda/show\\_issues.asp?issue=Family%20Life/Respect%20Life](http://www.nyscatholic.org/pages/our_agenda/show_issues.asp?issue=Family%20Life/Respect%20Life) (last visited Sept. 23, 2009); New Yorkers for Constitutional Freedoms, <http://www.nycf.info/mission> (last visited Sept. 23, 2009); New Yorkers for Constitutional Freedoms, Redefining the Meaning of Marriage, <http://www.nycf.info/position-papers/same-sex-marriage> (last visited Sept. 23, 2009). FWI similarly advocates against rights for same-sex couples. *See* <http://www.familywatchinternational.org/fwi/index.cfm> (last visited Sept. 23, 2009).

<sup>3</sup> *See, e.g.*, Conference Br. at 3-4 (contending not that the marriage recognition rule bars respect for marriages of same-sex couples but rather that the rule should be set aside in the cases currently before the Court); NYCF Br. at 1-3 (same); FWI Br. at 2-3 (same).

affirmance of the appellate decisions below — and as has been held in all lower court rulings in force in the State — principled application of the governing rule requires recognition of out-of-state marriages of same-sex couples.

Because the mission of Appellants' *amici* is unsupported by New York law, they resort to the same types of arguments Appellants propound, including that: (1) marriages of same-sex couples obtained under the laws of sister jurisdictions “by definition” cannot be viewed as marriages at all (*see, e.g.*, NYCF Br. at 1; FWI Br. at 6); (2) this Court should set aside the tried and true marriage recognition rule when it comes to the marriages of lesbian and gay couples in favor of unsound standards fashioned exclusively for the purpose of disrespecting the marriages of these couples (*see, e.g.*, Conference Br. at 4; *see also* NYCF Br. at 11); and (3) notwithstanding this Court's precedent and the common law marriage recognition rule to the contrary, the Legislature should be required specifically to authorize recognition of out-of-state marriages that could not be obtained here before others in the State, including Executive branch agencies, may give respect to these marriages (*see, e.g.*, NYCF Br. at 11; FWI Br. at 7).

These and other arguments advanced by Appellants' *amici* have been thoroughly rebutted in the briefing already filed by Respondents, as well as

in the briefs of *amici* supporting affirmance of the rulings below, which include:

- the New York State Bar Association (“State Bar”);
- the New York State Association of Counties;
- the City of New York;
- the New York City Bar Association;
- the New York State United Teachers;
- Conflicts of Laws Scholars Lea Brilmayer of Yale Law School; Herma Hill Kay of Berkeley Law, University of California; Andrew Koppelman of Northwestern University Law School; Erin O’Hara of Vanderbilt University Law School; Kermit Roosevelt III of University of Pennsylvania Law School; Joseph William Singer of Harvard Law School; and Tobias Barrington Wolff of University of Pennsylvania Law School and Harvard Law School (“Conflicts Scholars”); and
- the American Civil Liberties Union; the New York Civil Liberties Union; Empire State Pride Agenda; Marriage Equality New York; the Lesbian, Gay, Bisexual & Transgender Community Center; and the LOFT (“Civil Rights Groups”).

Intervenors respectfully refer the Court to those submissions for fuller discussion of the issues and respond here only briefly to the main arguments raised by Appellants’ *amici*.

## ARGUMENT

### I.

#### **UNDER THE LAWS OF RESPECTED SISTER JURISDICTIONS, MARRIAGE HAS BEEN DEFINED TO INCLUDE UNIONS OF SAME-SEX COUPLES, CALLING FOR APPLICATION OF NEW YORK'S LONGSTANDING MARRIAGE RECOGNITION RULE TO HONOR THESE VALIDLY ENTERED MARRIAGES**

Several of Appellants' *amici* offer variations on Appellants' theme that marriages of same-sex couples by "definition" or "structurally" are not actually marriages and so are not subject to recognition as such in New York. *See* FWI Br. at 6; NYCF Br. at 1; *see also* Lewis Br. at 35-51; *Godfrey* Br. at 34-49. NYCF, for example, in an extended discussion of the chemical properties of NaCl, suggests that calling the legal union of a same-sex couple "marriage" is like defying the laws of chemistry by calling a sodium molecule "pepper." NYCF Br. at 5-6. But the laws at issue in this case are the laws promulgated by governments empowered to define the civil institution of marriage in their jurisdictions, and, foremost, those devised by this State calling for presumptive respect for marriages validly entered elsewhere even if not meeting New York's legal definitions for who may wed.

*Amici's* arguments ignore the reality that five U.S. states and seven nations, including four jurisdictions ranged along our State's borders, now or

soon will permit same-sex couples to marry under their laws.<sup>4</sup> These jurisdictions draw no “definitional” or “structural” distinctions between the marriages of different-sex or same-sex couples, maintaining the same laws and provisions governing entry into marriage and the rights and responsibilities of married couples regardless of the sexes of the spouses. *See* Intervenors’ Br. at 51. Whether Appellants and their *amici* choose to call these marriages “pepper” or anything else does not change the legal reality that they are indeed civil marriages valid where entered and hence subject to New York’s marriage recognition rule.<sup>5</sup>

---

<sup>4</sup> *See* Civil Rights Group Br. at 18-19 n.7.

<sup>5</sup> FWI claims that a Rhode Island decision, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007), addressing a petition for divorce from a Massachusetts marriage of a same-sex couple, is relevant here. But *Chambers* addressed the limited statutory jurisdiction of Rhode Island’s Family Court to grant the divorce and did not purport to rule on the extent to which out-of-state marriages of same-sex couples would be entitled to respect under Rhode Island comity principles. *See id.* at 958, 967. “[C]onsiderations of comity . . . do not come into play if the court lacks jurisdiction over the case before it.” *Id.* at 963 n.14. *See C.M. v. C.C.*, 21 Misc. 3d 926, 930-31 (Sup. Ct. N.Y. County 2008) (noting limited nature of *Chambers* ruling and its lack of relevance to proceeding for divorce of a same-sex couple in New York’s Supreme Court, a court of general jurisdiction). Rhode Island’s Attorney General, directly considering the question whether out-of-state marriages of same-sex couples are entitled to respect in that state, has concluded that the marriages should be accorded comity. *See* Opinion of Attorney General Patrick Lynch to R.I. Board of Governors for Higher Education (Feb. 20, 2007), *available at* [http://www.glad.org/uploads/docs/advocacy/RIAttorneyGeneral\\_Statement.pdf](http://www.glad.org/uploads/docs/advocacy/RIAttorneyGeneral_Statement.pdf); *see also* Opinion of Attorney General Patrick Lynch to R.I. General Treasurer (Oct. 19, 2004), *available at* <http://www.patrickclynch.com/pdf/101904%20Lynch%20Opin%20to%20Tavares.pdf>.

Furthermore, the premise of these arguments, that there is one “core, fundamental, and unchanged structure of marriage in New York” (*Lewis* Reply Br. at 5-6), is wrong as a matter of history. In fact, the “structure” of marriage has changed considerably over time, from an institution defined, for example, by coverture, to its present legal structure in which spouses share identical legal rights and obligations regardless of their sexes.

Until well into the 19th century, marriage in New York meant the complete merger of a woman’s legal identity into that of her husband, under the prevailing doctrine of coverture. As described in 1830, “the wife . . . and her husband constitute but one person.” *Martin v. Dwelly*, 6 Wend. 9 (N.Y. 1830). *See also People ex rel. Barry v. Mercein*, 3 Hill 399, 407 (N.Y. Sup. Ct. 1842) (“The very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband.”) (citation and quotations omitted); *Udall v. Kenney*, 3 Cow. 590 (N.Y. Sup. Ct. 1824) (“[A] husband, in virtue of his marriage, becomes absolute owner of the goods and chattels of his wife.”). The husband’s absolute control over his wife even meant that a woman had limited recourse in response to “restraint” by her husband. *See Mercein*, 3 Hill at 408 (“[T]he courts of law will still permit the husband to restrain the wife of her liberty in case of any gross misbehavior.”) (citation and quotations omitted); *see*

also Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *Yale L.J.* 2117, 2123-24 (1996) (describing common law view that because husband was legally liable for his wife’s misbehavior, he also possessed power physically to “chastis[e]” or “restrain” her) (quoting William Blackstone, 1 *Commentaries* \*445).

This conception of marriage, in which a married woman’s independent legal existence was obliterated, prevailed over a long span of our nation’s history and was understood to be so intrinsic to marriage as to be “part of ‘the natural order of things.’” Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 *Buff. L. Rev.* 375, 392 (1988-89) (citation omitted). *See also* Hendrik Hartog, *Man & Wife in America: A History* 102-03 (Harvard University Press 2000) (describing 19th century perception of coverture “as a simple and sincere expression of human natures” and “based on unchanging scriptural truth”). These since-discredited assumptions that natural law dictates a fundamental, unchanging vision of marriage are, of course, echoed in the contention of Appellants and their *amici* that the

spouses' sexes dictate a supposed unchanging, "definitional," structure of marriage.<sup>6</sup>

The subsequent century saw fundamental shifts in once entrenched beliefs about "core," "structural" elements of marriage and the role the sexes of the spouses must play in the institution's legal structure. These changes, many of which came about through decisional law rather than legislative enactment, transformed, among other things, rules regarding interspousal immunity,<sup>7</sup> the doctrine of necessities,<sup>8</sup> loss of consortium,<sup>9</sup> and sexual relations between spouses.<sup>10</sup> As this Court observed decades ago, "[t]he modern family . . . is far different in structure, status and internal social and

---

<sup>6</sup> Notably, even the Conference concedes there is no credence under contemporary New York standards to Appellants' claim that "natural law" precludes recognition of marriages of same-sex couples. See Conference Br. at 9-10 n.7. Compare Lewis Br. at 56-58, with Intervenors' Br. at 52-54.

<sup>7</sup> See, e.g., *State Farm Mut. Auto. Ins. Co. v. Westlake*, 35 N.Y.2d 587, 591 (1974) ("No longer is it considered contrary to public policy for one spouse to sue another for damages for personal injuries.").

<sup>8</sup> See, e.g., *Med. Bus. Assocs., Inc. v. Steiner*, 183 A.D.2d 86, 91 (2d Dep't 1992) (describing traditional doctrine under which only husbands were obligated to support the family as "an anachronism that no longer fits contemporary society") (citations and quotations omitted).

<sup>9</sup> See, e.g., *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 505 (1968) (rejecting traditional doctrine that husbands but not wives could recover for loss of consortium, in order to "remove the discrimination in the existing law").

<sup>10</sup> See, e.g., *People v. Liberta*, 64 N.Y.2d 152, 162-67 (1984) (rejecting traditional doctrine that husband had legal right to forcible sexual relations with his wife and was immune from prosecution for rape).

legal relationship than the family of ancient times.” *Rozell v. Rozell*, 281 N.Y. 106, 109 (1939). *See also Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (“No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”).

The historical record thus illustrates the fallacy in claiming that there is an unchanged core structure of marriage precluding application of the marriage recognition rule to unions of same-sex spouses. Rather, marriage as an institution has evolved considerably over time and around the globe. The marriage recognition rule provides the analytic framework to determine which marriages from other jurisdictions differ so much in their attributes that they should not be respected here. Appellants’ *amici* do not suggest that New York automatically should deny recognition to marriages entered under the laws of nations that do not treat both spouses with equality, thus violating what is now a “core” structural aspect of marriage in New York. Unless recognition of such a foreign marriage is barred by express statute or so repugnant to our policy that recognition must be denied, it is honored here. Appellants’ *amici* offer no legitimate reason to consider marriages of same-sex spouses validly entered in sister jurisdictions unworthy of application of New York’s settled rule of recognition.

## II.

### **THE COURT SHOULD REJECT THE CONFERENCE'S INVITATION TO ABANDON THE LONGSTANDING MARRIAGE RECOGNITION RULE IN FAVOR OF AN ARBITRARY AND UNWORKABLE STANDARD**

The Conference proposes replacing New York's long-established marriage recognition rule with an ad hoc standard permitting legal respect for an out-of-state marriage that could not have been performed in this State on only a retrospective basis, once the marriage has ended through death of a spouse or dissolution. Under the Conference's proposal, out-of-state marriages would be denied respect on a prospective basis so long as the couple leads their lives together and interacts with third-parties, becoming a cognizable marriage in New York only when the relationship draws to a close and issues relating to inheritance rights, survivor's benefits or divorce arise. *See* Conference Br. at 13.

There has never been even a whisper in New York case law supporting this approach. Instead, as explained in the briefs of Intervenors and the Conflicts Scholars, the unifying theme in the marriage comity jurisprudence is that out-of-state marriages are honored unless the relations between the spouses are so condemned as to provoke criminal sanction — not the case for relations between same-sex partners. *See* Intervenors' Br. at 33-34, 38, 53-54; Conflicts Scholars' Br. at 9-22. Not only is the

Conference's approach without basis in the case law, but it also is inconsistent with the underlying purposes of the marriage recognition rule, would undermine settled reliance on the existing rule, and would produce singularly poor public policy.

First, the Conference's approach should be seen for what it is — an entirely ad hoc standard never before followed or even alluded to in this State's precedents. New York courts have never hinged determination of whether an out-of-state marriage should be accorded respect on whether prospective or only retrospective recognition is being sought. This is a distinction entirely of the Conference's creation, designed only to deny respect to valid marriages of same-sex couples. Indeed, the Conference concedes that this approach is “unstated” and not anywhere “explicit” in New York precedent (Conference Br. at 3-4) or even “consistent” with “the reasoning” of any New York decision regarding marriage recognition (*id.* at 14). It further concedes that the longstanding rule articulated in *In re Estate of May*, 305 N.Y. 486 (1953), “appears to admit of no exceptions other than” where recognition is prohibited by express statutory decree or overwhelming public policy treating the marriage as abhorrent (Conference Br. at 6). The Conference also admits that the standard it urges would require the Court to

“reformulate” the longstanding rule that otherwise grants respect to the marriages at issue (*id.* at 3-4).<sup>11</sup>

It is no wonder the Conference’s proposed standard has not the slightest footing in New York law, given how ill-conceived a policy it would establish. The current rule of recognition provides stability to families and third-parties who rely on the recognition New York affords to validly entered marriages, and encourages reciprocity in the respect accorded laws and statuses among jurisdictions with which New York and its inhabitants interact. The rule avoids cross-border disparities in treatment, so that a marriage entered into or recognized in a jurisdiction across our borders, like Canada, Vermont, Massachusetts or Connecticut, is honored when a member of the family, or other third-party with whom the couple interacts, crosses into New York. *See, e.g.*, Intervenors’ Br. at 54-60; Conflicts Scholars’ Br. at 6-7; State Bar Br. at 11-12.

---

<sup>11</sup> The Conference places heavy reliance on *Cunningham v. Cunningham*, 206 N.Y. 341 (1912), claiming the 1912 decision demonstrates this Court “has refused to recognize a valid out-of-State marriage that did not fall into either of the exceptions” to the marriage recognition rule (Conference Br. at 7). *Cunningham* in fact involved an unconsummated, unlicensed marriage between a forty-year-old man and a girl under the age of eighteen, which the Court suggested was *invalid both where entered, in New Jersey*, as well as in New York. *See Cunningham*, 206 N.Y. at 345-46. *Cunningham* thus did not refuse recognition to a marriage determined to be valid where entered. To the extent that *dicta* in the opinion may suggest any variance from New York’s place of celebration rule, it has been understood to be inconsistent with this Court’s prior precedents and to have been repudiated by *May*. *See, e.g., Hilliard v Hilliard*, 24 Misc. 2d 861, 863 (Sup. Ct. Greene County 1960) (*Cunningham*, “which would seem to have overlooked the earlier cases of *Van Voorhis [v. Brintnall]*, 86 N.Y. 18 (1881) and *Thorp [v. Thorp]*, 90 N.Y. 602 (1882) — by implication has been overruled by *May*”).

The Conference's approach would undermine these goals. It would, for example, give sanction to bigamous marriages. Under the Conference's "retrospective" recognition rule, a person could validly marry a same-sex spouse in Massachusetts, then move to New York and marry a different-sex spouse here without having first dissolved the initial Massachusetts marriage. New York would not recognize the Massachusetts marriage as valid so long as the spouses are alive and the marriage remains in force, but would recognize it upon death or dissolution. One can imagine the chaos that would ensue upon the death of the common spouse in terms, for example, of inheritance rights, entitlement to death benefits and powers to determine disposition of remains. Which surviving spouse would inherit if the common spouse dies intestate? *See* Est. Powers and Trusts Law § 4-1.1(a) (providing priority in inheritance to surviving "spouse"). Would either or both of the surviving spouses be entitled to a right of election if the decedent leaves a will? *See* Est. Powers and Trusts Law § 5-1.1 (giving "surviving spouse" right of election to portion of decedent's estate). Which would be entitled to worker's compensation or other death benefits? *See* Worker's Comp. Law § 16 (1-a (2)) (providing for death benefits to decedent's "surviving spouse"). Which would be empowered to make burial

decisions? *See* Pub. Health Law § 4201(2)(a)(ii) (giving “decedent’s surviving spouse” priority in right to control disposition of remains).

Furthermore, countless conflicts also would arise while all spouses are alive and both marriages remain intact. For example, spouses to the second, New York, marriage would be subject to bigamy prosecutions in states respecting the original marriage, and the New York marriage would be deemed void on that basis in those jurisdictions. *See, e.g.*, Mass. Gen. Laws ch. 272, § 15 (polygamy is criminal offense punishable by up to five years imprisonment); Mass. Gen. Laws ch. 207, § 4 (marriage contracted while party has spouse still living deemed void). A rule leading to disrespect for marriages legally obtained in *our* State would constitute especially poor public policy. Moreover, third-parties, such as creditors, who have relied in good faith on the validity of one or the other marriage, would stand to have their legitimate interests diluted or denied under the Conference’s proposed standard.

Indeed, these considerations illustrate why the marriage recognition rule long has been the law in New York, and why it should not be abandoned now to satisfy Appellants’ and *amici*’s ideological agenda. The rule provides certainty and stability to couples who commit to one another by validly marrying under the laws of sister jurisdictions. It preserves that

commitment, and offers a bright line basis on which third-parties can rely in dealing with the family.

### III.

**THE LEGISLATURE HAS NOT PRECLUDED  
BY POSITIVE ENACTMENT RECOGNITION  
OF OUT-OF-STATE MARRIAGES OF SAME-SEX  
COUPLES, AND THE MARRIAGES  
ACCORDINGLY ARE ENTITLED TO RESPECT**

Appellants' *amici*, like Appellants themselves, argue that validly entered out-of-state marriages of same-sex couples may not be respected here unless the Legislature affirmatively mandates recognition for such marriages.<sup>12</sup> But this contention turns settled standards on their head. This Court made crystal clear in *May* that the common law marriage recognition rule is the prevailing default standard unless and until the Legislature affirmatively abrogates the rule by enactment of a statutory prohibition against recognition of a particular type of out-of-state marriage. “[A]bsent any New York statute expressing clearly the Legislature’s intent to regulate within this State marriages of its domiciliaries solemnized abroad, there is no ‘positive law’ in this jurisdiction which serves to interdict

---

<sup>12</sup> See, e.g., NYCF Br. at 11 (suggesting that existing rule “should be adapted” to require Legislature explicitly to endorse common law rule of recognition when it comes to marriages of same-sex couples); FWI Br. at 13 (arguing that separation of powers is violated when the executive branch follows the common law rule of recognition rather than waiting for Legislature affirmatively to authorize marriage in New York).

the . . . marriage in Rhode Island” between uncle and niece. *May*, 305 N.Y. at 493.

As explained in Intervenors’ brief and in other briefs submitted in these appeals, there would be no need for a comity rule in New York if the Legislature’s restriction of a type of marriage performed within the State were deemed automatically to preclude recognition of that type of marriage when validly entered in another jurisdiction. While the Legislature thus far does not permit same-sex couples to enter into civil marriage within New York, it has never prohibited recognition of such marriages validly entered elsewhere, leaving the common law rule of recognition intact. *See* Intervenors’ Br. at 29-33, 35.

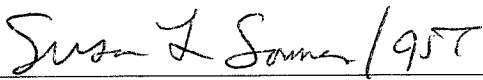
### **CONCLUSION**

Appellants’ *amici*, like Appellants themselves, fail to demonstrate that the lower courts misapplied the marriage recognition rule in upholding the determinations of the State DCS and Westchester County Executive to honor out-of-state marriages of same-sex couples for purposes of government administration. Given that New York law requires respect for validly entered out-of-state marriages of same-sex couples, Appellants’ *amici* advocate that the Court simply abandon the long-settled rule of recognition. They urge the Court to adopt in its stead irrational standards fashioned solely

to deny married lesbian and gay couples the protections given them by their government and the courts, to which these families are entitled under the law. The efforts of Appellants and their *amici* should be rejected, and the decisions below should be affirmed.

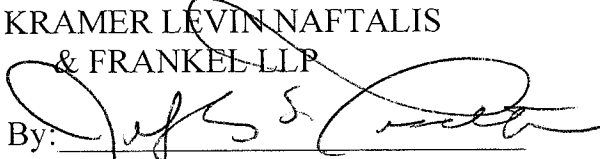
Dated: New York, New York  
September 24, 2009

LAMBDA LEGAL DEFENSE  
AND EDUCATION FUND

By:   
Susan L. Sommer

120 Wall Street, Suite 1500  
New York, New York 10005  
(212) 809-8585

KRAMER LEVIN NAFTALIS  
& FRANKEL LLP

By:   
Jeffrey S. Trachtman  
Joshua Glick  
Michael B. Eisenkraft  
Jason M. Moff

1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9100

*Attorneys for Lewis Defendants-  
Intervenors-Respondents Peri Rainbow and  
Tamela Sloan and Godfrey Defendants-  
Intervenors-Respondents Michael Sabatino  
and Robert Voorheis*