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

TO BE ARGUED BY BRIAN W. RAUM
15 MINUTES REQUESTED

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

KENNETH J. LEWIS, DENISE A. LEWIS,
ROBERT C. HOUCK, JR., AND ELAINE A. HOUCK,

Plaintiffs-Appellants

DOC. NO: _____

-against-

THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND
NANCY G. GROENWEGEN, 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

BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUES

(1) Whether a state executive agency violates the separation of powers doctrine by issuing a policy memorandum ordering the recognition of all out-of-state same-sex "marriages"?

The Supreme Court, Albany County, held that a state executive agency does not violate the separation of powers doctrine by issuing a policy memorandum ordering the recognition of all out-of-state same-sex "marriages."

Plaintiffs-Appellants argue on appeal that the Supreme Court, Albany County, incorrectly decided this issue.

(2) Whether a state executive agency violates the law by mandating the disbursement of public funds in the form of insurance benefits to partners of same-sex couples who have been "married" in other jurisdictions?

The Supreme Court, Albany County, held that a state executive agency does not violate the law by mandating the disbursement of public funds in the form of insurance benefits to partners of same-sex couples who have been "married" in other jurisdictions.

Plaintiffs-Appellants argue on appeal that the Supreme Court, Albany County, incorrectly decided this issue.

(3) Whether a state executive agency violates Article VII, Section 8 of the State Constitution by using public funds to aid former Governor Spitzer's personal political objective of creating "civil marriage equality"?

The Supreme Court, Albany County, held that a state executive agency does not violate Article VII, Section 8 of the State Constitution by using public funds to aid former Governor Spitzer's personal political objective of creating "civil marriage equality."

Plaintiffs-Appellants argue on appeal that the Supreme Court, Albany County, incorrectly decided this issue.

(4) Whether a state executive agency violates Article IV, Section 8 of the State Constitution and Section 202 of the State Administrative Procedures Act by issuing a memorandum changing the agency's policy regarding the recognition of out-of-state same-sex "marriages"?

The Supreme Court, Albany County, held that a state executive agency does not violate Article IV, Section 8 of the State Constitution and Section 202 of the State Administrative Procedures Act by issuing a memorandum changing the agency's policy regarding the recognition of out-of-state same-sex "marriages."

Plaintiffs-Appellants argue on appeal that the Supreme Court, Albany County, incorrectly decided this issue.

STATEMENT OF THE CASE

On May 23, 2007, Plaintiffs-Appellants Kenneth J. Lewis, Denise A. Lewis, Robert C. Houck, Jr., and Elaine A. Houck (collectively referred to as "Plaintiffs") filed this suit against Defendants-Respondents New York State Department of Civil Service ("DCS") and its President, Nancy G. Groenwegen ("Groenwegen"), (collectively referred to as "DCS"), challenging the issuance of and directives contained in DCS's May 1, 2007, Employee Benefits Division Policy Memorandum ("Policy Memorandum"). (R. 17) Plaintiffs asserted four causes of action pursuant to Section 123 of the State Finance Law, contending that DCS (1) unlawfully mandated the issuance of public funds to those who are not legally entitled to receive them, (2) violated the separation of powers doctrine, (3) unlawfully used public funds to aid the personal political objectives of certain

executive officials, and (4) illegally promulgated an agency rule or regulation. (R. 21-24) Plaintiffs sought both injunctive and declaratory relief, asking the trial court to enjoin DCS from enforcing the directives contained in its Policy Memorandum and to declare its issuance to be unlawful. (R. 24)[1]

On September 12, 2007, Defendants-Intervenors-Respondents Peri Rainbow and Tamela Sloan (collectively referred to as "Intervenors") filed a motion to intervene in this case. (R. 51) On September 19, 2007, DCS filed a motion to dismiss this case pursuant to CPLR 3211(a)(7). (R. 74) One week later, on September 26, 2007, Intervenors filed their own motion to dismiss, asserting essentially the same arguments as DCS. (R. 141)

In response, on November 14, 2007, Plaintiffs filed a cross-motion for summary judgment pursuant to CPLR 3211(c). (R. 346) The motions to dismiss and the cross-motion for summary judgment were fully briefed, and on March 3, 2008, the trial court issued its decision, granting summary judgment in favor of DCS. (R. 5) The trial court, based exclusively on the Fourth Department's decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dept. 2008), erroneously held that "[t]he [P]olicy [M]emorandum issued by the New York State Department of Civil Service Employee Benefits Division in which it recognized, as

[1] Plaintiffs filed an amended complaint on June 29, 2007. (R. at 34.) The amended complaint did not alter Plaintiffs' four substantive causes of action. (R. at 37-40.)

spouses, the parties to any same sex marriage, performed in jurisdictions where such marriage is legal, is both lawful and within its authority." (R. 9-10)

The trial court's decision was entered in Albany County Clerk's office on March 13, 2008. (R. 424) DCS served Plaintiffs with notice of entry on April 3, 2008. (R. 422) Plaintiffs served their notice of appeal on April 11, 2008, and it was received by the clerk on April 15, 2008. (R. 2)

STATEMENT OF FACTS

In March 2004, then-Attorney General Eliot Spitzer ("Spitzer") issued an informal opinion, concluding, among other things, that "New York law presumptively requires that parties to [out-of-state same-sex "marriages"] must be treated as spouses for purposes of New York law." (R. 168) Sometime prior to October 2004, DCS adopted a policy in direct conflict with Spitzer's informal opinion. (R. 377 (acknowledging that in October 2004 a DCS-administered insurance plan did "not recognize same-sex marriages for the purpose of spousal coverage")) In that policy, DCS stated that it would refuse, for purposes of spousal health benefit coverage, to recognize same-sex "marriages" solemnized in other jurisdictions. (R. 377)

In November 2006, Spitzer was elected Governor of New York. *See Eliot Spitzer Elected New York Governor*, FOX NEWS (November 7, 2006), http://www.

foxnews.com/story/0,2933,228013,00.html (last visited on June 11, 2008).[2] On February 14, 2007, Spitzer appointed Groenwegen to serve as President of DCS. *See Governor Eliot Spitzer and Lieutenant Governor David Paterson Announce Administration Officials*, NEW YORK STATE, http://www.ny.gov/governor/press/0214071.html (last visited on June 11, 2008). Shortly after assuming her new position, Groenwegen promulgated the Policy Memorandum at issue in this case, which, without legal explanation, altered DCS's policy regarding the recognition of same-sex "marriages" performed out of state. (R. 47)

The Policy Memorandum begins with a short discussion of DCS's former policy. (R. 47) Then, without any mention of the relevant statutes or any attempt at legal justification, the Policy Memorandum states: "[DCS] determine[s] that for purposes of benefits eligibility under NYSHIP [New York State Health Insurance Program] and all other benefit plans administered by its Employee Benefits Division, it [will] recognize as spouses partners in same sex marriages legally performed in other jurisdictions." (R. 47) The Policy Memorandum also states that the new policy "applies to *all* health benefit plans provided under NYSHIP" and that "[r]ecognition of these [same-sex 'spouses'] is *mandatory* for the State and all other entities participating in NYSHIP[.]" (R. 47) (emphasis added)

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[2] In March 2008, Spitzer resigned from his position as Governor. *See* Michael M. Grynbaum, *Spitzer Resigns, Citing Personal Failings*, NEW YORK TIMES (March 12, 2008), *available at* http://www.nytimes.com /2008/03/12/nyregion/12cnd-resign.html?hp (last visited on June 11, 2008).

A few days before the mandates in the Policy Memorandum went into effect, Groenwegen revealed the political impetus behind DCS's new policy, stating: "This policy furthers *Governor Spitzer's* recently announced intention to create civil marriage equality for all New Yorkers. Health insurance benefits are an important part of the advantages and protections extended to married couples regardless of sex." (R. 49) (emphasis added) Shortly thereafter, Plaintiffs instituted this suit to enjoin enforcement of this new policy and to declare it to be unlawful. (R. 5)

SUMMARY OF THE ARGUMENT

DCS's issuance of the Policy Memorandum violated the law in at least four ways. First, DCS violated the separation of powers doctrine. DCS issued its Policy Memorandum in direct contravention of both the New York Domestic Relations Law and Section 164 of the Civil Service Law. By doing so, DCS directly usurped the legislature's authority and unilaterally nullified the will of the people. This callused disregard for the legislature's policies amounts to a separation of powers violation.

Second, DCS mandated the unlawful disbursement of funds to individuals (*i.e.*, partners of same-sex couples who have obtained "marriage" licenses from other jurisdictions) who are not legally entitled to receive them. Comity principles

dictate that these out-of-state same-sex "marriages" should not be recognized in New York. The Fourth Department's *Martinez* decision—which mandates recognition of these same-sex "marriages"—conflicts with this Court's precedent, and in any event, is an unpersuasive legal opinion. This Court should not follow that nonbinding decision, but should instead conclude that the marriage-recognition rule does not apply to "marriage" licenses issued by other jurisdictions to same-sex couples.

Third, DCS violated Article VII, Section 8 of the State Constitution. Article VII, Section 8 prohibits the use of public funds for the benefit of favored individuals or enterprises furnishing no corresponding benefit to the State. DCS violated that constitutional provision by using public funds for the express purpose of aiding former Governor Spitzer's political objective of creating "civil marriage equality." (R. 49)

Fourth, DCS violated Article IV, Section 8 of the State Constitution and Section 202 of the State Administrative Procedures Act ("State APA"). Those constitutional and statutory provisions obligate state executive agencies to comply with certain procedural requirements before promulgating a new agency rule. DCS's Policy Memorandum set forth a fixed, general principle to be uniformly applied without regard to other facts or circumstances; it thus amounted to an agency rule. The interpretive-statement exception to the State APA does not apply

because the Policy Memorandum was not merely explanatory, but instead, implemented a profound change in the law.

The trial court thus erred in finding that DCS's issuance of its Policy Memorandum was "both lawful and within its authority." (R. 9-10) This Court should reverse that decision.

ARGUMENT

I. DCS VIOLATED THE SEPARATION OF POWERS DOCTRINE BECAUSE THE MANDATES IN ITS POLICY MEMORANDUM CONFLICT WITH AND EXCEED LEGISLATIVE POLICY.

DCS's actions are incompatible with the legislature's pronouncements concerning marriage and spousal benefits. "One of the fundamental principles of government . . . is the distribution of governmental power into three branches—the executive, legislative and judicial—to prevent too strong a concentration of authority in one person or body." *Under 21 v. City of New York*, 65 N.Y.2d 344, 355 (1985). "The separation of powers requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 107 (2004) (alterations and quotations omitted). "No single branch of government may assume a power, especially if assumption of that power might erode the genius of [the separation of powers] system." *Rapp v. Carey*, 44 N.Y.2d 157, 167 (1978);

see also Under 21, 65 N.Y.2d at 356 (prohibiting any branch of government from "arrogat[ing] unto itself" powers residing in another branch). A separation of powers violation occurs even if the erosion of one branch's powers is not great. *Rapp*, 44 N.Y.2d at 167.

The separation of powers doctrine prohibits executive agencies and officials—like DCS and Groenwegen—from exceeding, altering, or acting in conflict with legislative policy determinations. The executive branch is "empowered to implement and enforce legislative pronouncements." *Subcontractors Trade Assoc. v. Koch*, 62 N.Y.2d 422, 427 (1984). But "executive action in enforcing such legislation may not go beyond stated legislative policy" by issuing an order "not embraced by th[at] policy." *Broidrick v. Lindsay*, 39 N.Y.2d 641, 645-46 (1976). Plainly stated, a separation of powers violation occurs "when the [e]xecutive [1] acts inconsistently with the [l]egislature, or [2] usurps its prerogatives." *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985); *see also Under 21*, 65 N.Y.2d at 359 ("[A]n executive may not usurp the legislative function by enacting social policies not adopted by the [l]egislature."); *Fullilove v. Beame*, 48 N.Y.2d 376, 379 (1979) (invalidating executive action where the executive assumed a task that was "not a prerogative of the executive, but rather of the legislative branch"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the [executive] takes measures incompatible with the express

or implied will of [the legislature], [its] power is at its lowest ebb"). Here, DCS has violated the separation of powers doctrine in two ways, by acting inconsistently with the legislature, and by usurping the legislature's authority.

A. DCS Acted Inconsistently With The Legislature.

DCS has acted inconsistently with two sets of legislative pronouncements: (1) the New York Domestic Relations Law and (2) Section 164 of the Civil Service Law. The Domestic Relations Law clearly defines marriage in New York as a union between one man and one woman. *See* N.Y. DOM. REL. LAW § 12 (stating that the parties to be married "must solemnly declare . . . that they take each other as *husband* and *wife*") (emphasis added); N.Y. DOM. REL. LAW § 15(1)(a) (requiring town and city clerks to obtain specified information from "the groom" and "the bride"); *see also Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006). But, in direct contrast to the legislative definition of marriage, DCS's Policy Memorandum directs all participants in NYSHIP to recognize out-of-state same-sex "marriages." This directly conflicts with the legislature's prescribed definition of marriage.

DCS's Policy Memorandum also conflicts with Section 164 of the Civil Service Law. That statute authorizes DCS to provide health insurance benefits to state employees, their "spouse[s]," and "dependent children." N.Y. CIV. SERV. LAW § 164. The well-settled definition of "spouse" includes only a husband or a

wife in an opposite-sex marriage. *See Matter of Cooper*, 592 N.Y.S.2d 797, 798-99 (2nd Dept. 1993). Every court to interpret the term "spouse," as used in various New York statutes, has defined that term as a party to a marriage between one man and one woman. *See, e.g., Valentine v. American Airlines*, 791 N.Y.S.2d 217, 218 (3rd Dept. 2005) (interpreting "spouse," as used in the workers' compensation statute, to exclude same-sex partners); *Langan v. St. Vincent's Hosp. of New York*, 802 N.Y.S.2d 476, 477 (2nd Dept. 2005) ("*Langan I*") (interpreting "spouse," as used in the wrongful death statute, and noting that it was "simply inconceivable" to think "that the surviving spouse would be of the same sex as the decedent"); *Raum v. Restaurant Assocs., Inc.*, 675 N.Y.S.2d 343, 344 (1st Dept. 1998) (finding no "merit to plaintiff's argument that the word 'spouse' in [the wrongful-death statute] should be read to include . . . same-sex partners"); *Cooper*, 592 N.Y.S.2d at 798-99 (interpreting "spouse," as used in the elective share statute, and refusing to expand the "traditional definition" of that term to "include homosexual life partners").

Acting without regard for this well-settled definition of "spouse," DCS has directed all participants in NYSHIP to provide health benefits to individuals who cannot qualify as "spouses" under New York law (*i.e.*, partners of same-sex "marriages" solemnized in other jurisdictions). The executive branch is not an island unto itself; it cannot sweep aside the legislature's clear directives, and act according to its own politically motivated desire to create "civil marriage equality"

in New York. (R. 49) Because DCS has acted inconsistently with the clear will of the legislature, this Court should conclude that DCS has violated the separation of powers doctrine.

B. DCS Exceeded Its Authority And Usurped The Role Of The Legislature.

By declaring that all participants in NYSHIP must *recognize* same-sex "marriages" performed out of state, DCS has "go[ne] beyond stated legislative policy" and usurped the role of the legislature. *See Broidrick*, 39 N.Y.2d at 645-46. DCS does not have authority to declare which unions will be *recognized* as valid marriages in New York. It is well settled that marriage issues, including the regulation and recognition thereof, are exclusively addressed by the legislative branch. *See Fearon v. Treanor*, 272 N.Y. 268, 272 (1936). The Court of Appeals has particularly recognized that "the [l]egislature in dealing with the subject of marriage has *plenary* power." *Id.* at 271 (emphasis added); *see also Hernandez v. Robles*, 805 N.Y.S.2d 354, 359 (1st Dept. 2005), *aff'd*, 7 N.Y.3d 338 (2006). It is thus undisputable that the legislature, not the executive, has the exclusive power to determine which unions will be recognized as marriages in New York. And DCS, by issuing this mandate to recognize out-of-state same-sex "marriages," has exceeded the realm of its authority and usurped the role of the legislature. *See Rapp*, 44 N.Y.2d at 160, 165 (invalidating executive action that "reache[d] beyond the implementation of existing legislation," "assume[d] the power of the

[l]egislature to set [s]tate policy in an area of concededly increasing public concern," and effectuated a "nullification" of the legislature's policy).

What makes DCS's usurpation of legislative power particularly troubling is that it has "assume[d] the power of the [l]egislature to set [s]tate policy in an area of *concededly increasing public concern*." *See id.* at 160 (emphasis added). Marriage is "an institution involving the highest interests of society"; it "creat[es] the most important relation in life, . . . having more to do with the morals and civilization of a people than any other institution." *Fearon*, 272 N.Y. at 272; *see also Mirizio v. Mirizio*, 242 N.Y. 74, 81 (1926) (stating that marriage "is the foundation upon which must rest the perpetuation of society and civilization"). Marriage, as *the* fundamental building block of society, is primarily "about the well-being of children and society." *Hernandez*, 805 N.Y.S.2d at 360 (stating that "[m]arriage laws are not primarily about adult needs for official recognition and support"); *see also Hernandez*, 7 N.Y.3d at 359 (acknowledging the "undisputed assumption that marriage is important to the welfare of children"). The Court of Appeals has recognized that (1) marriage "exist[s] with the result and for the purpose of begetting offspring [*i.e.*, procreation]," *Mirizio*, 242 N.Y. at 81, and (2) it involves "transmitting [life's] complex influences direct to posterity [*i.e.*, child rearing]," *Fearon*, 272 N.Y. at 273. This Court must not allow the executive branch to determine which unions will be recognized as marriages in New York.

Rather than allowing the legislature's policy, which embodies the will of the people, to prevail in this all-important, society-defining debate on the recognition of same-sex "marriage," DCS has unilaterally promulgated its Policy Memorandum, usurped the legislature's authority, and overridden the will of the people. *See Hernandez*, 7 N.Y.3d at 366 (stating that "the present generation should have a chance to decide the issue [of same-sex "marriage"] through its elected representatives"). Worse still, the Policy Memorandum does not merely "go beyond" the legislature's policy, *see Broidrick*, 39 N.Y.2d at 645-46; it effectively nullifies it, *see Rapp*, 44 N.Y.2d at 164-65. By requiring that all NYSHIP participants recognize same-sex "marriages" issued out of state, DCS has destroyed the legislature's policy decision to limit the institution of marriage, and all the benefits thereof, to unions between one man and one woman.[3] And perhaps worst of all, DCS has usurped and nullified legislative policy for the express purpose of furthering former Governor Spitzer's personal political agenda. (*See* R. 49)

To be sure, the legislature has authorized DCS to define and interpret the term "spouse" for purposes of administering the state health insurance program. *See* N.Y. CIV. SERV. LAW § 164. DCS, however, in issuing its Policy

[3] As if this usurpation of legislative power was not bad enough in and of itself, it is made worse in light of the fact that the Court of Appeals recently acknowledged that any changes to the definition of marriage should come from the legislature (and thus, by implication, not from the unauthorized use of executive authority). *See Hernandez*, 7 N.Y.3d at 366.

Memorandum, was not interpreting, applying, or defining the law, but instead, was unlawfully engaging in a politically motivated, underhanded effort to create "civil marriage equality" via the executive branch. (*See* R. 49) The Policy Memorandum does not purport to engage in any sort of interpretation; it does not mention any of the relevant statutes or regulations; and it does not employ any traditional methods of statutory construction. (*See* R. 47) It thus appears that DCS was not engaged in legal interpretation, but rather, was unilaterally declaring its own policy and thereby usurping the role of the legislature.

Even if it could be said that DCS was attempting to interpret the controlling statutes, this Court should nevertheless find that DCS exceeded its authority in doing so. Administrative agencies may not interpret or implement statutes in a manner that "reaches beyond" or is otherwise "inconsistent[] with" existing legislation. *See Rapp*, 44 N.Y.2d at 160; *Clark*, 66 N.Y.2d at 189. As was previously demonstrated, however, DCS applied the governing statutes in a manner that conflicts with and exceeds the controlling legislative authority. Moreover, administrative agencies may not interpret the law to conflict with the plain language of governing statutes. *See Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980) (noting that an agency's interpretation of a statute, in the form of a regulation, holds no weight if it "runs counter to the clear wording of a statutory provision"). Yet, DCS's alleged interpretation of the governing statutes

conflicts with the plain language of the Domestic Relations Law and Section 164 of the Civil Service Law. *See, e.g.*, *Valentine*, 791 N.Y.S.2d at 218; *Langan I*, 802 N.Y.S.2d at 477; *Raum*, 675 N.Y.S.2d at 344; *Cooper*, 592 N.Y.S.2d at 798-99. Accordingly, regardless of whether DCS was attempting to apply the relevant statutes, or whether it was engaged in politically motivated policy setting, this Court should find that DCS exceeded its authority and violated the separation of powers doctrine.

II. DCS UNLAWFULLY ORDERED THE DISBURSEMENT OF PUBLIC FUNDS IN THE FORM OF INSURANCE BENEFITS TO SAME-SEX PARTNERS WHO HAVE BEEN "MARRIED" IN OTHER JURISDICTIONS.

The legislature has authorized DCS to issue health benefits to the "spouse" of an eligible employee. *See* N.Y. CIV. SERV. LAW § 164. However, DCS has acted illegally in exercising this authority—by ordering the unlawful disbursement of public funds. Specifically, the Policy Memorandum orders the distribution of citizens' tax dollars, in the form of state health insurance benefits, to a group of recipients (*i.e.*, partners of same-sex couples who were "married" outside New York) who are not legally entitled to receive them.

To the extent DCS was attempting to construe the governing statutes, its interpretation is not entitled to any deference from this Court. "An administrative agency's interpretation of [a] statute it is charged with implementing is entitled to varying degrees of judicial deference depending upon the extent to which the

interpretation relies upon the special competence the agency is presumed to have developed in its administration of the statute." *Matter of Rosen v. Public Employee Relations Bd.*, 72 N.Y.2d 42, 47 (1988). "Deference is generally accorded to an administrative agency's interpretation of statutes it enforced when the interpretation involves some type of specialized knowledge." *Belmonte v. Snashall*, 2 N.Y.3d 560, 565 (2004); *accord Kurcsics*, 49 N.Y.2d at 459.

"By contrast, where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency." *Claim of Gruber*, 89 N.Y.2d 225, 231 (1996); *see also Van Teslaar v. Levine*, 35 N.Y.2d 311, 318 (1974) (stating that the "general construction of statutory language" "is not materially aided by administrative expertise and there is no . . . reason . . . for the courts to defer to the agency"). "In such circumstances, the judiciary *need not accord any deference* to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent." *Gruber*, 89 N.Y.2d at 231-32 (emphasis added). Here, the interpretation of the word "spouse" is one of pure statutory construction, and does not involve any specialized knowledge or factual evaluation. This Court need not defer to DCS's untenable "interpretation" of that statutory term.

As was previously demonstrated, the term "spouse" has been traditionally understood, and unanimously interpreted by the courts, to mean a party to a marriage between one man and one woman. *See, e.g.*, *Valentine*, 791 N.Y.S.2d at 218; *Langan I*, 802 N.Y.S.2d at 477; *Raum*, 675 N.Y.S.2d at 344; *Cooper*, 592 N.Y.S.2d at 798-99. DCS's "interpretation" of this term, as including same-sex partners who have been "married" in other jurisdictions, is farfetched and without support. Thus, as a matter of statutory construction and precedent, it is clear that DCS has acted unlawfully in mandating that health benefits be given to same-sex partners.

DCS supposes that the directives in its Policy Memorandum are lawful because the same-sex couples in question have been "married" in other jurisdictions. This argument raises issues of comity, requiring this Court to determine whether New York must recognize such out-of-state same-sex "marriages."

A. Comity Principles Require That New York Not Recognize Out-Of-State Same-Sex "Marriages."

The doctrine of comity requires that the State *not recognize* same-sex "marriages" performed in other jurisdictions. New York comity jurisprudence has undergone major alterations over the years, beginning with a theory that was very deferential to the laws and actions of other sovereigns, *see Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110 (1918); *Mertz v. Mertz*, 271 N.Y. 466, 467 (1936)

(acknowledging that "[o]nly exceptional circumstances justify a State in refusing[,] on the theory of public policy, to enforce a right acquired in another State"), and eventually moving to the prevailing theory that rejects the laws and actions of other sovereigns if they conflict with New York public policy, *see Crair v. Brookdale Hosp. Med. Ctr.*, 94 N.Y.2d 524, 528-29 (2000).

The Court of Appeals settled New York's ever-changing comity jurisprudence with its decision in *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574, 580 (1980). In that case, the Court stated that "[w]hatever the New York rule may once have been, . . . [t]oday . . . the determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and [New York] policy prevails in case of conflict." *Id.* Put plainly, New York will give effect to the laws and actions of other states only "where the application of those laws does not conflict with New York's public policy." *Crair*, 94 N.Y.2d at 528-29. The United States Supreme Court concurs with this approach, acknowledging that government actions "affecting the status of persons . . . [are] recognized as valid in every [jurisdiction], unless contrary to the policy of its own law." *Hilton v. Guyot*, 159 U.S. 113, 127 (1895).

The issue here then becomes whether New York must give effect to the marriage laws of other states and countries. Comity principles dictate that the

State need not give effect to out-of-state "marriages" that conflict with its own public policy. *See id.* New York's policy on marriage is clear: it is a vital social institution that consists of the union of one man and one woman.[4] *See Hernandez*, 7 N.Y.3d at 357. Any sovereign entity that defines marriage to include the union of same-sex couples exhibits a marriage policy contrary to that of New York. Because of this direct clash of fundamental policies, New York cannot recognize same-sex "marriages" performed out of state. *See Ehrlich-Bober & Co.*, 49 N.Y.2d at 580 (stating that New York "policy prevails in case of conflict"). Refusing to extend comity is particularly appropriate here because the application of that doctrine would effectively nullify what the Court of Appeals has declared to be the will of the people—that marriage is the union of one man and one woman.

The Fourth Department's *Martinez* decision incorrectly concluded that recognition of out-of-state same-sex "marriages" does not conflict with New York's public policy. *Martinez*, 850 N.Y.S.2d at 743. The *Martinez* court reasoned as follows: "The Court of Appeals [in *Hernandez*] noted that the [l]egislature *may* enact legislation recognizing same-sex marriages and, in our view, the Court of Appeals thereby indicated that the recognition of [same-sex] marriage[s] is not against the public policy of New York." *Id.* But the mere fact

[4] It bears repeating that the public policy at issue here is New York's policy regarding marriage, and not its policy regarding the benefits and privileges bestowed upon same-sex couples. Because New York is asked to give effect to out-of-state laws involving marriage (not those involving health benefits), it is marriage policy (rather than health benefits policy) that is relevant to this comity analysis.

that the legislature *may* enact prospective legislation does not indicate that it is "not against public policy." Public policy is determined by enacted legislation, not permissible legislation. *See Estate of Cairo*, 29 N.Y.2d 527, 528 (1971) ("[T]he [l]egislature in enacting statute . . . set forth [] public policy"); *Balcerzak v. DNA Contracting, LLC*, 802 N.Y.S.2d 324, 327 (Sup. Ct. Kings County 2005) (defining "[p]ublic policy [as] the laws of the state and its interpretation by the courts"). One can imagine many examples of permissible legislation—legalizing prostitution, for one—that are decidedly against New York's public policy. Thus the *Martinez* court's reasoning on this public policy issue is unpersuasive.

B. The Fourth Department's Ill-Reasoned *Martinez* Decision Conflicts With Third Department Precedent, And Should Not Be Followed By This Court.

The trial court, in upholding DCS's Policy Memorandum, relied almost exclusively on the Fourth Department's application of the "marriage-recognition rule" in *Martinez*. (R. 8-9) This Court, however, should decline to follow the Fourth Department's ill-reasoned decision. The *Martinez* decision conflicts with precedent from other appellate divisions, including decisions issued by this Court. *Martinez*'s simplistic discussion and application of the marriage-recognition rule does not explore important policy considerations before applying that rule to same-sex "marriages." The Fourth Department broke new ground; it is the first New

York appellate court to apply the marriage-recognition rule to "marriage" licenses issued to same-sex couples. This Court should not follow its misguided course.

This Court, unlike the Fourth Department, has refused to recognize out-of-state same-sex unions solemnized in other jurisdictions. Recently, in *Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105 (3rd Dept. 2007) ("*Langan II*"), the plaintiff relied on his out-of-state same-sex civil union as a basis for claiming death benefits available to a surviving spouse. This Court concluded that "[t]he doctrine of comity [did] not require New York to recognize [decedent's civil-union partner] as [his] surviving spouse for death benefits purposes." *Id.* at 107. This Court reasoned:

> While parties to a civil union may be spouses, and even legal spouses, in Vermont, New York is not required [by the principles of comity] to extend to such parties all of the benefits extended to marital spouses. The extension of benefits entails a consideration of social and fiscal policy more appropriately left to the Legislature.

Id. at 108. *Langan II* thus makes it clear that this Court will not recognize partners to out-of-state same-sex unions as "spouses" (even if their unions are sanctioned by a foreign government).

The Second Department has likewise refused to recognize same-sex "marriages" and other out-of-state same-sex unions. In *Matter of Cooper*, 592 N.Y.S.2d at 801, for example, the Second Department stated that it would not recognize any right under the spousal elective-share statute when the basis for that

right was founded on "homosexual marriages." *Id.* (alterations omitted). Moreover, in *Langan I*, 802 N.Y.S.2d at 477, the Second Department declined to recognize an out-of-state same-sex civil union as a basis for asserting a spousal wrongful-death claim. Thus, the Second and Third Departments have repeatedly refrained from recognizing out-of-state same-sex unions, even those that are solemnized in and recognized by a foreign entity. It thus appears that the Fourth Department's *Martinez* decision is an anomaly—a nonbinding decision that should not be ratified here.

Neither this Court's decision in *Langan II* nor the Second Department's decisions in *Cooper* or *Langan I* can be ignored simply because those cases involved same-sex "civil unions" rather than same-sex "marriages." This distinction would place decisive weight on the label selected by a foreign government, rather than the substance of the relationship at issue. The implications of this reasoning, if seriously considered, are untenable. This line of reasoning would create the peculiar result that those same-sex couples joined in Vermont (*i.e.*, a jurisdiction that denominates its same-sex unions as "civil unions") are not entitled to recognition in New York, while same-sex couples joined in Massachusetts or Canada (*i.e.*, jurisdictions that denominate their same-sex unions as "marriages") are entitled to recognition in New York. It would be illogical to conclude that the doctrine of comity hinges on the label selected by a

foreign jurisdiction for its same-sex unions. This Court should thus find that *Langan II*, *Cooper*, and *Langan I* are persuasive on this issue, and resist a simplistic distinction of these cases that leads to bizarre results which defy logic.

In addition to conflicting with the case law from this Department, the *Martinez* decision is not persuasive in its own right. *See Martinez*, 850 N.Y.S.2d at 742. The Fourth Department did not acknowledge, and perhaps failed to appreciate, that it was expanding legal precedent by applying the marriage-recognition rule to same-sex unions. The *Martinez* court rotely applied the marriage-recognition rule without considering the policies underlying that rule or the far-reaching social change effected by the rule's expansion to same-sex "marriages." This is an important legal question that demands a thorough and methodical analysis—one not conducted by the Fourth Department.

The minimal analysis contained in the *Martinez* decision exhibits serious flaws. As was previously shown, the Fourth Department was seriously misguided in concluding that "the recognition of [same-sex 'marriages'] is not against the public policy of New York." *See id.* at 743. Moreover, the *Martinez* court incorrectly held that the government's refusal to recognize out-of-state same-sex "marriages" violates Section 296 of the State Executive Law, which forbids an employer from discriminating based on an employee's "sexual orientation." *See id.* This holding ignores relevant legislative history. The legislature, in enacting

the Sexual Orientation Non-Discrimination Act ("SONDA"), which added "sexual orientation" as a protected class under Section 296 of the State Executive Law, expressly stated that SONDA did not either require or prohibit "marriage" rights for same-sex couples; simply stated, SONDA did not impact the same-sex "marriage" issue. *See* SONDA, 2002 Session Law News of N.Y., ch. 2, § 1, Legislative Findings and Intent, A1971; *see also* Jay Weiser, *Foreword: The Next Normal — Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 53 (2004) (noting that SONDA's legislative history specifically disclaimed any intent to affect the issue of marriage). Thus the *Martinez* court's discussion of Section 296 of the State Executive Law is unfounded and misplaced. In sum, then, this Court need not follow the Fourth Department's ill-reasoned decision.

C. The Marriage-Recognition Rule Does Not Apply To Same-Sex Unions, Even If Denominated A "Marriage" By Another Jurisdiction.

The marriage-recognition rule states that "[t]he law to be applied in determining the validity of . . . an out-of-[s]tate marriage is the law of the [s]tate in which the marriage occurred." *Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980); *accord In re May's Estate*, 305 N.Y. 486, 490 (1953) ("[T]he legality of a marriage between persons . . . is to be determined by the law of the place where it is celebrated."). The marriage-recognition rule does not apply to same-

sex "marriages" because (1) same-sex unions, by definition, do not qualify as marriages in New York, (2) at the time this common law rule developed, the courts did not contemplate the inclusion of same-sex unions within its scope, and (3) the marriage-recognition rule was intended to promote legal stability and to achieve equity in particular cases, not to be an engine for radical social change.

1. Same-Sex Unions, By Definition, Do Not Qualify As Marriages in New York.

Marriage, by definition, is "the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law." *See* MERRIAM-WEBSTER ONLINE DICTIONARY, at http://www.m-w.com/dictionary/marriage (last visited on June 11, 2008). From time immemorial, the opposite-sex component of marriage—that is, the union of one man and one woman—has remained the core of its definition. *See, e.g.*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1740) (defining marriage as "that honourable contract that persons of different sexes make with one another"); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1830) (defining marriage as "[t]he act of uniting a man and woman").

The law has likewise recognized that marriage necessarily involves the union of a man and a woman. For example, the United States Supreme Court has acknowledged that the "holy estate of matrimony" consists of "the union for life of

one man and one woman." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Similarly, the New York courts, including the Court of Appeals, have recognized that marriage at its core involves "a personal relation between a man and woman." *Fearon*, 272 N.Y. at 272; *see id.* ("There are, in effect, three parties to every marriage, the man, the woman and the State."); *Hernandez*, 7 N.Y.3d at 361 (acknowledging the "accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex"); *id.* at 367 (Graffeo, J., concurring) (noting that the "historical conception of marriage" is the "union between a man and a woman"); *Langan I*, 802 N.Y.S.2d at 479 (acknowledging the "traditional concept[] of marriage" as "a unique institution confined solely to one man and one woman"); *B v. B*, 355 N.Y.S.2d 712, 716 (Sup. Ct. Kings County 1974) ("In all cases, . . . marriage has always been considered as the union of a man and a woman."). Tellingly, "no court, state or federal, has ever held that marriage, traditionally understood, extends to same-sex couples." *Hernandez*, 805 N.Y.S.2d at 367 (Catterson, J., concurring).

Defining the institution of marriage as a union between one man and one woman is neither arbitrary nor "merely a by-product of historical injustice. Its history is of a different kind." *Hernandez*, 7 N.Y.3d at 361. This traditional definition is "based on innate, complementary, procreative roles, a function of

biology." *Hernandez*, 805 N.Y.S.2d at 360. It is undeniable that only unions between a man and a woman result in the natural procreation of children. The institution of marriage serves to "create more stability and permanence in the relationships that cause children to be born." *Hernandez*, 7 N.Y.3d at 359. Moreover, the joining of a man and a woman (rather than two persons of the same sex) creates the optimal environment for raising children. "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Id.* Indeed, many historical, biological, and social reasons demonstrate why marriage consists of the union of one man and one woman.

Because the institution of marriage, by definition, includes only unions between one man and one woman, the marriage-recognition rule does not apply to any same-sex union, even if denominated a "marriage" by a foreign legislature; those unions simply do not qualify for marriage status in New York. New York's fundamental social institutions, such as marriage, have basic structural characteristics and unalterable definitions, which cannot be changed based upon the laws of other sovereign entities. In sum, this Court should conclude that the marriage-recognition rule does not apply because same-sex unions, no matter how denominated by a foreign legislature, are simply not marriages in New York. *See Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 501 (Sup. Ct. Queens County 1971)

(refusing to recognize a "marriage" between two men because one of "the two basic requirements for a marriage contract, *i.e.*, a man and a woman" was missing).

2. The Courts That Created The Marriage-Recognition Rule Did Not Contemplate The Inclusion Of Same-Sex "Marriages" Within Its Scope.

The judicially created marriage-recognition rule developed long ago, as far back as the 1800s. *See, e.g.*, *Van Voorhis v. Brintnall*, 86 N.Y. 18, 26 (1881); *Thorp v. Thorp*, 90 N.Y. 602, 605 (1882). At that time, it is undeniable that no court applying the marriage-recognition rule would have "contemplated the possibility of same-sex marriage," much less intended for such unions to be included within the scope of that rule. *See Hernandez*, 7 N.Y.3d at 367-68 (Graffeo, J., concurring) (discussing the legislature's intent with regard to marriage "more than a century ago"); *see also Langan I*, 802 N.Y.S.2d at 477 ("At the time of the drafting of these statutes [many decades ago], the thought that the surviving spouse would be of the same sex as the decedent was simply inconceivable").

At that time, all contemporary sources—including dictionaries, judicial opinions, and New York statutes—defined marriage as the union of one man and one woman. *See, e.g.*, JAMES KNOWLES, A CRITICAL PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE (1851) (defining marriage as "[t]he act of uniting a man and woman"); *Murphy*, 114 U.S. at 45 (defining the "holy estate of matrimony" as "the union for life of one man and one woman"); *Fearon*, 272 N.Y.

at 272 (acknowledging that every marriage is a contract between a man, a woman, and the State); *Hernandez*, 7 N.Y.3d at 367-68 (Graffeo, J., concurring) (noting that the Domestic Relations Law, which was enacted "more than a century ago," demonstrates that "the [l]egislature viewed marriage as a union between one woman and one man"). Accordingly, the clear meaning of "marriage," as used in the marriage-recognition rule, did not include same-sex unions, and thus, it is improper to include those unions within the scope of that rule.

3. Policy Considerations Indicate That The Marriage-Recognition Rule Does Not Apply To Same-Sex "Marriages."

"[T]he law must be interpreted by the [c]ourts in the light of common sense rules." *Davies v. Davies*, 62 N.Y.S.2d 790, 793 (Dom. Rel. Ct. 1946); *see also Lehman v. Lehman*, 102 N.Y.S.2d 931, 933 (Dom. Rel. Ct. 1951) ("[A]ll law must be construed sensibly, so that the moral and ethical intent of the law is given flesh and blood."). It is especially important for a court—when applying a common law principle, and particularly when extending a common law principle into unchartered legal waters—to consider the policy underlying that judicially created rule of law. *See Santangelo v. State*, 71 N.Y.2d 393, 396-97 (1988) (reviewing and evaluating the policy and rationale for a common law rule before extending its

application to a new class of individuals), *superseded by* N.Y. GEN. MUN. LAW § 205-e.[5]

The marriage-recognition rule is premised on the general principle of contract law that "a contract entered into in another [s]tate or country, if valid according to the law of that place, is valid everywhere." *Van Voorhis*, 86 N.Y. at 24. *Cf. Fearon*, 272 N.Y. at 271 (noting that marriage, as a contractual relationship, "certainly[] does differ from ordinary common-law contracts"). The rule developed in order "to prevent the great inconvenience and cruelty of bastardizing . . . [out-of-state] marriages, and to avoid the public mischief which would result from the loose state in which people so situated would live." *Van Voorhis*, 86 N.Y. at 26; *see also Haviland v. Halstead*, 34 N.Y. 643 (1866). At its heart, therefore, the marriage-recognition rule was instituted to avoid the "public mischief" that inures when uncertainty surrounds the marital status of couples. A common law principle rooted in such a policy—while a valid means of limiting the

[5] Plaintiffs' believe that applying the marriage-recognition rule to out-of-state same-sex "marriages" is a vast extension of that rule. But even if this Court disagrees with this premise, it should nevertheless consider the policy implications of applying the marriage-recognition rule in the present circumstances, to ensure that it does not inflict "injustice" or create "disorder . . . in public affairs." *See Bank of New York v. Ansonia Assocs.*, 656 N.Y.S.2d 813, 816 (Sup. Ct. New York County 1997) ("[E]ven controlling principles of law should not be rotely applied without consideration of whether application of those principles would work an injustice in the circumstances presented."); *Teuchtler v. Board of Assessors*, 404 N.Y.S.2d 498, 501 (Sup. Ct. Jefferson County 1977) ("The courts should not act so as to cause disorder and confusion in public affairs even though there may be a strict legal right.").

"public mischief" associated with ambiguously recognized marital unions—cannot (and was never intended to) function as a conduit for far-reaching social change.

The marriage-recognition rule is also grounded in comity principles. *See Langan I*, 802 N.Y.S.2d at 484. Comity is not a blanket rule of law that uniformly applies to compel the courts to recognize an entire class of out-of-state unions. *See Ehrlich-Bober & Co.*, 49 N.Y.2d at 580 ("[C]omity is not a rule of law, but one of practice, convenience and expediency. It does not . . . compel a particular course of action.") (quotations and citations omitted). Instead "comity requires . . . scrutiny in each case of the particular facts [and] sovereign interests." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 (1987). New York courts have occasionally chosen, based on their particularized analysis of the sovereign and equitable considerations in a case, to recognize certain out-of-state marriages between one man and one woman. *See, e.g.*, *May's Estate*, 305 N.Y. at 493 (recognizing a marriage between an uncle and his niece because "such marriage [was] solemnized . . . in accord with the ritual of the Jewish faith in a [s]tate whose legislative body . . . declared such a marriage to be 'good and valid in law'"). But the courts have never applied comity principles to import an entire category of legislatively disapproved marriages into New York,

thereby overriding the State's sovereignty over fundamental issues like the structure of marriage, and ushering in a radical societal change.[6]

This Court must not underestimate the expansive societal change that will result from applying the marriage-recognition rule to same-sex "marriages" solemnized out of state. Counsel for Intervenors, Lambda Legal Defense and Education Fund, has unequivocally stated its plan "to assist same-sex couples who travel to [other states] to obtain a marriage license to win full recognition of their newly[]acquired status in their home [s]tate." H.R. Rep. No. 104-664, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911 (Legislative Report discussing the Federal Defense of Marriage Act); *see also* Make Change, Not Lawsuits, http://www.freedomtomarry.org/pdfs/ca_joint_advisory.pdf (last visited on June 11, 2008) (A memorandum from Lambda Legal and its allied organizations encouraging same-sex couples to "get married in California[,] . . . claim the name[,] and act like what you are—married"). Thus Lambda and its clients clearly intend to use the marriage-recognition rule as a tool to import same-sex "marriage" into New York—a direct effort to reform the State's laws and public policy.

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[6] By way of example, no court has ever suggested that the decision in *May's Estate*, 305 N.Y. at 493, created a broad rule requiring the State to recognize all out-of-state incestuous marriages. To the contrary, incestuous marriages have long been held to fall outside the marriage-recognition rule. *Martinez*, 850 N.Y.S.2d at 743. *May's Estate* is thus an anomalous decision confined to its unique facts. This example underscores the individualized, case-by-case nature of comity, in general, and the marriage-recognition rule, in particular.

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

In contrast, a fundamental social change does not occur when the marriage-recognition rule is applied to marriages between one man and one woman. New York courts in the past have recognized particular out-of-state marriages between one man and one woman even if the couple's marriage would not have been sanctioned in New York. *See, e.g.*, *Fisher v. Fisher*, 250 N.Y. 313 (1929). In those circumstances, the State recognizes a relationship that is different *in degree* (usually in terms of blood relation or age) from those marriages sanctioned in New York, but, unlike with same-sex "marriages," the State is not recognizing a relationship that is different *in kind* (*i.e.*, one man/one woman) from lawful New York marriages. *See, e.g.*, *May's Estate*, 305 N.Y. at 493 (recognizing an out-of-

state marriage between an uncle and his niece—a relationship that differed in terms of consanguinity, but not in kind, from marriage as defined in New York). An out-of-state marriage between one man and one woman conforms to New York's marital structure, and furthers the procreative and child-rearing policies undergirding that social institution. Forcing the State to recognize such unions does not radically alter the composition of marriage in New York.

Taking into consideration the narrow, particularized, stability-promoting nature of the marriage-recognition rule, this Court should refuse to apply that rule in the context of same-sex "marriages." When courts apply that rule to marriages between one man and one woman (indeed the only context in which it properly applies), it functions according to its intended policy—by cloaking particular out-of-state marriages with a sense, albeit incomplete, of certainty. *See Van Voorhis*, 86 N.Y. at 26 (noting that there are exceptions to the marriage-recognition rule). But when courts improperly attempt to apply that rule across the board to same-sex "marriages," it acts as a bulldozer of social engineering—by declaring (without legislative authorization) that out-of-state same-sex unions are valid "marriages" in New York even though the legislature has not approved such unions. *See Hernandez*, 805 N.Y.S.2d at 364 (Catterson, J., concurring) ("Any change in [the] frequently articulated heterosexual construct [of marriage] would be a revolution in the law"); *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 965 (Mass.

2003) (noting that the recognition of same-sex "marriages" "marks a significant change in the definition of marriage"). Policy considerations thus demonstrate that the marriage-recognition rule should not be extended to same-sex unions.

For the foregoing reasons, the marriage-recognition rule does not apply to same-sex unions. Because the marriage-recognition rule does not apply, general principles of comity jurisprudence govern. As was previously demonstrated, however, comity principles prohibit DCS from recognizing same-sex "marriages" performed in other jurisdictions. Therefore, DCS acted illegally by declaring that all participants in NYSHIP must grant health benefits to those who have entered into same-sex "marriages" outside New York.

III. DCS VIOLATED ARTICLE VII, SECTION 8 OF THE STATE CONSTITUTION BY UNLAWFULLY USING PUBLIC FUNDS TO AID THE SPITZER ADMINISTRATION'S POLITICAL OBJECTIVE OF RECOGNIZING SAME-SEX "MARRIAGE" IN NEW YORK.

DCS has violated Article VII, Section 8 of the State Constitution by using public funds to aid former Governor Spitzer's personal goal of creating "civil marriage equality" in New York. (*See* R. 49) Article VII, Section 8 provides that "[t]he money of the state shall not be given . . . in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given . . . in aid of any individual, or public or private corporation or association, or private undertaking." N.Y. CONST. art VII, § 8.

That constitutional provision "derives from the 'general rule that the legitimate object of raising money by taxation is for public purposes and the proper needs of government.'" *People v. Ohrenstein*, 531 N.Y.S.2d 942, 956 (Sup. Ct. New York County 1988) (quoting *Weismer v. Village of Douglas*, 64 N.Y. 91, 99 (1876)), *aff'd*, 549 N.Y.S.2d 962 (1st Dept. 1989), *aff'd*, 77 N.Y.2d 38 (1990). "Public funds are trust funds and as such are sacred and are to be used only for the operation of government." *Stern v. Kramarsky*, 375 N.Y.S.2d 235, 239 (Sup. Ct. New York County 1975). In short, Article VII, Section 8 "was intended to curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no corresponding benefit or consideration to the State." *Teacher's Ass'n, Cent. High Sch. Dist. No. 3 v. Board of Educ., Cent. High Sch. Dist. No. 3, Nassau County*, 312 N.Y.S.2d 252, 254 (2nd Dept. 1970). Here, DCS has violated Article VII, Section 8 by acting with the express purpose of using public funds for the benefit of politically favored individuals, namely, those in Governor Spitzer's administration.

The courts have specifically interpreted Article VII, Section 8 to prohibit the use of public funds by government officials for partisan political purposes. "[P]artisan political activity is . . . not a public purpose for which [s]tate funds may be constitutionally expended." *Ohrenstein*, 531 N.Y.S.2d at 958. "[A] [s]tate agency supported by public funds . . . cannot advocate [its] favored position . . . So

long as [it is] an arm of the state government [it] must maintain a position of neutrality and impartiality." *Stern*, 375 N.Y.S.2d at 239; *see also Schultz v. State*, 86 N.Y.2d 225, 234 (1995) (noting that a government agency's use of public moneys for a partisan cause falls within the prohibition of Article VII, Section 8). "No agency may misuse any such funds for promoting its own opinions, whims or beliefs, irrespective of the high ideals or worthy causes it espouses, promotes or promulgates." *Stern*, 375 N.Y.S.2d at 239-40.

The executive branch's role in New York's tripartite government system is to "expedite all . . . measures as may be resolved upon by the legislature[] and . . . [to] take care that the laws are faithfully executed." *See* N.Y. CONST. art IV, § 3. This governmental role, while no doubt expansive, does not permit high-ranking executive officials to use administrative agencies to pursue their own political aspirations, *see Stern*, 375 N.Y.S.2d at 239-40, especially those in direct conflict with the legislature's duly enacted laws. Here, it is clear that DCS—by issuing its Policy Memorandum for the express purpose of "further[ing] Governor Spitzer's . . . intention to create civil marriage equality" in New York, (R. 49) which is a goal at direct odds with current legislative policy, *see Hernandez*, 7 N.Y.3d at 357—was acting outside its duty to "faithfully execute[]" the laws enacted by the legislature. Instead, the Policy Memorandum embodies an administrative agency's unlawful attempt to further former Governor Spitzer's partisan political agenda to

achieve the recognition of same-sex "marriage" in New York. If, however, that change in state policy is to occur, it must be ushered in by the legislature, and until that occurs, executive branch officials cannot use administrative agencies (and, by extension, the public's money) to further their personal political objectives.

A violation of Article VII, Section 8 occurs even if the giving or using of public funds is indirect. *See Stern*, 375 N.Y.S.2d at 239 (stating that Article VII, Section 8 prohibits any improper expenditure of funds, even indirect expenditures "through the use of government employees or facilities"); *State v. Upstate Storage, Inc.*, 535 N.Y.S.2d 246, 248 (3rd Dept. 1988) (acknowledging that the government's actions in "releasing a contractual obligation without due consideration," while not constituting a direct expenditure of tax dollars, amounts to "a gift of public funds" as prohibited by Article VII, Section 8). DCS's unlawful issuance of its Policy Memorandum has resulted in both the direct and indirect use of taxpayer money: (1) public funds have been and will continue to be directly and unlawfully given to same-sex couples who have been "married" in other jurisdictions; and (2) public funds have been indirectly expended through the unlawful use of government staff, facilities, and supplies to further former Governor Spitzer's personal agenda. *See Stern*, 375 N.Y.S.2d at 239.

In short, DCS violated Article VII, Section 8 of the State Constitution by unlawfully using public moneys in support of a private political undertaking.

IV. DCS VIOLATED ARTICLE IV, SECTION 8 OF THE STATE CONSTITUTION AND SECTION 202 OF THE STATE APA BY PROMULGATING A NEW AGENCY RULE WITHOUT SATISFYING THE PROCEDURAL RULEMAKING REQUIREMENTS.

DCS has violated the rulemaking requirements of the State Constitution and the State APA. Article IV, Section 8 of the State Constitution provides: "No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state." N.Y. CONST. art IV, § 8. Similarly, Section 202 of the State APA provides: "Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule." N.Y. A.P.A. LAW § 202(1). The State APA recognizes, in pertinent part, that a "rule" includes "each agency statement, regulation or code of general applicability that implements or applies law . . . or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof." N.Y. A.P.A. LAW § 102(2)(a).

A. DCS's Policy Memorandum Qualifies As A Rule.

The threshold issue when analyzing this claim is whether DCS's Policy Memorandum constitutes a rule or regulation subject to the rulemaking requirements. The Court of Appeals has adopted the same standard for

determining whether an agency order amounts to a rule or regulation for purposes of both Article IV, Section 8 of the State Constitution and Section 202 of the State APA. The test, as articulated by the Court of Appeals, is that "only a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme . . . constitutes a rule or regulation . . . ." *See Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951 (1985) (establishing this test for purposes of Article IV, Section 8); *Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301 (1994) (noting that this same "criterion for constitutional filing purposes" applies when "determining what constitutes a 'rule' under the State [APA]"). This Court has more succinctly stated this test, defining a rule as "a mandatory procedure that is applied across the board without discretion." *Pallette Stone Corp. v. State of New York Office of Gen. Servs.*, 665 N.Y.S.2d 457, 460 (3rd Dept. 1997).

DCS's Policy Memorandum satisfies the definition of a rule or regulation. It declares a fixed, general principle that DCS will "recognize as spouses partners in same sex marriages legally performed in other jurisdictions." (R. 47) This broad principle applies to all "benefits eligibility" determinations "under NYSHIP and all other benefit plans administered by [DCS's] Employee Benefits Division." (R. 47) This "mandatory" directive applies "across the board without discretion." *See Pallette Stone Corp.*, 665 N.Y.S.2d at 460. The Policy Memorandum expressly

states, without any room for administrative discretion, that "[r]ecognition of these spouses is *mandatory* for the State and all other entities participating in NYSHIP." (R. 47) (emphasis added) Such a mandatory, across-the-board directive, by definition, applies "without regard to other facts and circumstances relevant to the regulatory scheme of the statute [DCS] administers," *see Roman Catholic Diocese of Albany*, 66 N.Y.2d at 951, and thus qualifies as an administrative rule, *see Alca Indus. v. Delaney*, 92 N.Y.2d 775, 778 (1999) (noting that "blanket requirement[s]" and procedures that are "uniformly applied" constitute "rules"); *Pallette Stone Corp.*, 665 N.Y.S.2d at 460.

The Court of Appeals has prescribed at least three general principles for determining whether an agency statement qualifies as a rule or regulation, and all of these principles indicate that DCS's Policy Memorandum is in fact a rule. First, the Court of Appeals has drawn a "distinction between ad hoc decision making based on individual facts and circumstances, and rulemaking, [which includes] any kind of . . . quasi-legislative norm or prescription [that] establishes a pattern or course of conduct for the future." *Alca Indus.*, 92 N.Y.2d at 778 (quotations omitted). The Policy Memorandum does not involve ad hoc decision making after the weighing of individual considerations. Instead, it is a quasi-legislative declaration that establishes a settled future course of conduct, namely, that DCS

and all entities participating in NYSHIP *must* recognize each and every out-of-state same-sex "marriage" regardless of the individual circumstances of each applicant.

Second, the Court of Appeals has generally found that a flexibly applied, discretion-conferring directive does not amount to a rule. In *New York City Transit Authority v. New York State Department of Labor*, 88 N.Y.2d 225, 229-30 (1996), the Court held that a state agency's promulgated guidelines did not amount to a rule or regulation because the "guidelines at issue vest[ed] inspectors with significant discretion, . . . allow[ed] for flexibility in the imposition of penalties," were "considered . . . on a case-by-case basis," and ultimately "depend[ed] on inspectors' independent exercise of their professional judgment." *Id.* The Policy Memorandum at issue here, however, has none of those characteristics. DCS officials have not been given any flexibility or discretion in applying the directives of the Policy Memorandum. To the contrary, the Policy Memorandum expressly states, without conferring any sort of discretion, that recognition of these same-sex "marriages" is "mandatory." (R. 47)

Third, the Court of Appeals has generally found that a rigid, blanket policy—such as the one at issue here—constitutes a rule. In *Schwartfigure*, 83 N.Y.2d at 301, the Court held that a "rigid" policy, which "applied across-the-board to all claimants without regard to individualized circumstances," satisfied the definition of a rule. *Id.* Here, the Policy Memorandum invariably applies to all

partners of same-sex "marriages" solemnized in other jurisdictions. Accordingly, this Court should find that, like the agency directive in *Schwartfigure*, DCS's Policy Memorandum is a rule for purposes of both Article IV, Section 8 of the State Constitution and Section 202 of the State APA.

B. The Interpretive-Statement Exception To The State APA Does Not Apply To DCS's Policy Memorandum.

The State APA lists certain categories of agency statements that do not qualify as "rules" for purposes of that statute. The trial court incorrectly concluded that the interpretive-statement exception applied to DCS's Policy Memorandum. (R. 9) This Court should reject that conclusion as unfounded under the relevant case law.

The interpretive-statement exception to the State APA includes "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory." N.Y. A.P.A. LAW § 102(2)(b)(iv). Two requirements must be satisfied for this exception to apply. First, the Policy Memorandum must actually interpret the law. Second, it must "have no legal effect but [be] merely explanatory." *Id.* Neither of these requirements is satisfied here.

First, as was previously discussed, DCS's Policy Memorandum does not contain legal interpretation. The one-page Policy Memorandum does not even purport to interpret the law, much less include any legal authority or analysis

supporting DCS's alleged "interpretation." *Cf. HMI Mech. Sys. Inc. v. McGowan*, 716 N.Y.S.2d 426, 428 (3rd Dept. 2000) (finding that the interpretive-statement exception applied where the challenged "notice relie[d] on existing regulations and laws for its stated conclusions"). Instead, it is an expression of DCS's policy, dictated by the political agenda of former Governor Spitzer, and thus is not a legal interpretation of any sort.

Second, even if it could be said that the Policy Memorandum contained legal interpretation, DCS cannot demonstrate that the Policy Memorandum is "merely explanatory" and has "no legal effect." *See* N.Y. A.P.A. LAW § 102(2)(b)(iv). The courts have generally found agency orders to be explanatory, interpretive statements where they merely restate (with minor clarifications of) already existing policies or legal principles. *See Burns v. New York State Office of Vocational and Educ. Servs.*, 650 N.Y.S.2d 421, 423 (3rd Dept. 1996) (finding that the agency's policy satisfied the interpretive-statement exception because it merely "restate[d] the eligibility criteria set forth by Congress . . . and ha[d] no legal effect standing alone"); *New York Health Plan Ass'n, Inc. v. Levin*, 723 N.Y.S.2d 819, 821-22 (Sup. Ct. Albany County 2001) (finding that the interpretive-statement exception applied because the agency's letter was simply "a reminder of a policy which . . . had been followed by the [d]epartment . . . for at least one year").

DCS's Policy Memorandum, however, did not simply restate or clarify already-established legal standards or policies, but rather, it implemented a completely new policy with a concrete legal effect that cannot be described as "explanatory." Prior to the issuance of the Policy Memorandum, DCS's policy was to deny benefit requests by same-sex couples who had been "married" out of state. (R. 377) The former policy conformed to the legislature's clear intent in using the term "spouse." *See, e.g.*, *Valentine*, 791 N.Y.S.2d at 218; *Langan I*, 802 N.Y.S.2d at 477; *Raum*, 675 N.Y.S.2d at 344; *Cooper*, 592 N.Y.S.2d at 798-99. But DCS, in a bold political move to "create civil marriage equality," (*see* R. 49) issued its Policy Memorandum, unilaterally declaring, in direct contravention of its former policy, that it will recognize out-of-state same-sex "marriages." This new policy results in the issuance of health benefits to same-sex couples who were previously unable to obtain them. Thus, far from explaining or clarifying the existing law, the Policy Memorandum declared new rights and effected a profound legal change.

The Court of Appeals' analysis in *Cubas v. Martinez*, 8 N.Y.3d 611 (2007), demonstrates that the interpretive-statement exception does not apply here. In that case, the Court applied the interpretive-statement exception because the challenged agency directive did "not create or deny substantive rights [to] members of the public—*i.e.*, it [did] not provide that some people are eligible and some ineligible

for [a state benefit]." *Id.* at 621. Here, however, DCS's Policy Memorandum directly *creates substantive rights* for members of the public, specifically, same-sex couples who have been "married" in other jurisdictions. The Policy Memorandum declares that such individuals are *eligible* to receive—and actually mandates that they must receive—state-issued health benefits. Accordingly, the analytical principles in *Cubas* demonstrate that the interpretive-statement exception does not apply here.

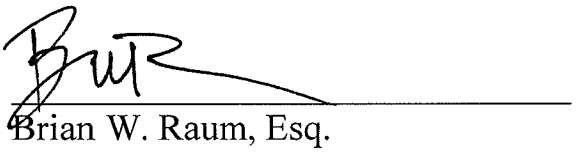
In sum, because DCS's Policy Memorandum constitutes a rule, and because it does not satisfy the interpretive-statement exception, DCS must comply with the constitutional and statutory rulemaking requirements. It is undisputed, however, that DCS did not file the Policy Memorandum with the Secretary of State, publish it as a rule, or allow an opportunity for public comment. *See* N.Y. CONST. art IV, § 8; N.Y. A.P.A. LAW § 202(1). This Court must therefore conclude that the issuance of the Policy Memorandum violated Article IV, Section 8 of the State Constitution and Section 202 of the State APA.

CONCLUSION

DCS violated the law by mandating all NYSHIP participants to "recognize as spouses partners in same sex marriages legally performed in other jurisdictions." (R. 47) Plaintiffs respectfully request that this Court reverse the trial court's decision and remand with instructions to enter judgment in favor of Plaintiffs. As relief, Plaintiffs request that this Court (1) order a permanent injunction prohibiting DCS from enforcing the mandates in its Policy Memorandum and (2) declare DCS's issuance of the Policy Memorandum and the mandates contained therein to be unlawful.

Dated: June 12, 2008

Respectfully submitted,



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AFFIRMATION OF SERVICE

I, Brian W. Raum, an attorney duly licensed to practice law in the State of New York, affirm under the penalty of perjury that on June 12, 2008, I served two copies of the attached *Brief of Plaintiffs-Appellants* and one copy of the *Record on Appeal* on all parties by sending true and accurate copies via Federal Express Overnight Delivery to:

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DATED: JUNE 12, 2008

BRIAN W. RAUM