SUPREME COURT – STATE OF NEW YORK
COUNTY OF BRONX

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In the Matter of

MARTIN J. GOLDEN, SERPHIN R. MALTESE, JAMES N. TEDISCO, DANIEL J. BURLING, BRIAN M. KOLB, MICHAEL R. LONG, SHAUN MARIE LEVINE, DUANE MOTLEY, JASON MCGUIRE, STEPHEN P. HAYFORD, WILLIAM C. BANUCHI, SR., ANGEL D. RODRIGUEZ, PIYALI DUTTA, WILLIAM CARLSON, NICOLE CARLSON, AND FRANCES VELLA-MARRONE,

Index No: _____

VERIFIED ARTICLE 78 PETITION

Petitioners,

-against-

DAVID A. PATERSON, *in his official capacity as Governor of the State of New York,*

Respondent.

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Petitioners Martin J. Golden, Serphin R. Maltese, James N. Tedisco, Daniel J. Burling, Brian M. Kolb, Michael R. Long, Shaun Marie Levine, Duane Motley, Jason McGuire, Stephen P. Hayford, William C. Banuchi, Sr., Angel D. Rodriguez, Piyali Dutta, William Carlson, Nicole Carlson, and Frances Vella-Marrone ("Petitioners"), by counsel, state the following in support of their Verified Article 78 Petition:

I. PARTIES

1. Petitioner Martin J. Golden is a resident and taxpayer of the State of New York. Mr. Golden is Senator for New York's 22nd Senate District. He resides in Brooklyn County, New York.

2. Petitioner Serphin R. Maltese is a resident and taxpayer of the State of New York. Mr. Maltese is Senator for New York's 15th Senate District. He resides in Queens County, New York.

3. Petitioner James N. Tedisco is a resident and taxpayer of the State of New York. Mr. Tedisco is Assemblyman for New York's 110th Assembly District. He resides in Schenectady County, New York.

4. Petitioner Daniel J. Burling is a resident and taxpayer of the State of New York. Mr. Burling is Assemblyman for New York's 147th Assembly District. He resides in Wyoming County, New York.

5. Petitioner Brian M. Kolb is a resident and taxpayer of the State of New York. Mr. Kolb is Assemblyman for New York's 129th Assembly District. He resides in Ontario County, New York.

6. Petitioner Michael R. Long is a resident and taxpayer of the State of New York. Mr. Long is the Chairman of the Conservative Party of New York State. He resides in Kings County, New York.

7. Petitioner Shaun Marie Levine is a resident and taxpayer of the State of New York. Ms. Levine is the Executive Director of the Conservative Party of New York State. She resides in Albany County, New York.

8. Petitioner Duane Motley is a resident and taxpayer of the State of New York. Mr. Motley is the executive director of New Yorkers for Constitutional Freedoms. He resides in Monroe County, New York.

9. Petitioner Jason McGuire is a resident and taxpayer of the State of New York. Mr. McGuire serves on the staff of New Yorkers for Constitutional Freedoms. He resides in Livingston County, New York.

10. Petitioner Stephen P. Hayford is a resident and taxpayer of the State of New York. Mr. Hayford serves on the Steering Committee for the Coalition to Save Marriage in New York. He resides in Albany County, New York.

11. Petitioner William C. Banuchi, Sr., is a resident and taxpayer of the State of New York. Mr. Banuchi is the Executive Director of the Marriage and Family Savers Institute. He resides in Orange County, New York.

12. Petitioner Angel D. Rodriguez is a resident and taxpayer of the State of New York. He resides in Bronx County, New York.

13. Petitioner Piyali Dutta is a resident and taxpayer of the State of New York. She resides in Schenectady County, New York.

14. Petitioner William Carlson is a resident and taxpayer of the State of New York. He resides in Albany County, New York.

15. Petitioner Nicole Carlson is a resident and taxpayer of the State of New York. She resides in Albany County, New York.

16. Petitioner Frances Vella-Marrone is a resident and taxpayer of the State of New York. She resides in Kings County, New York.

17. Respondent David Paterson ("Paterson") is Governor of the State of New York. He maintains an office at the State Capitol, Albany, NY 12224. Petitioners bring this suit against Paterson in his official capacity as the highest executive branch official for the State of New York.

II. BACKGROUND

18. On May 14, 2008, Paterson's Counsel David Nocenti ("Nocenti"), acting under the direction of Paterson, issued an Executive Directive ("Executive Directive") ordering all state

agencies and their counsel "to conduct a review of [their] policy statements and regulations, and those statutes whose construction is vested in [those] agenc[ies], to ensure that terms such as 'spouse,' 'husband,' and 'wife' are construed in a manner that encompasses legal same-sex marriages[.]" Pet. Ex. A at 1 (A copy of the May 14, 2008, Executive Directive from David Nocenti to all state agency counsel).

19. In the Executive Directive, Nocenti instructed the agencies that "[i]n many instances, comity can be extended to legal same-sex marriages through an internal memorandum or policy statement directing staff on the construction of relevant terms in [a] statute or regulation." Pet. Ex. A at 2. Nocenti acknowledged, however, that "[i]n other cases, regulatory changes may be necessary" to ensure that the state agencies recognize all out-of-state same-sex "marriages." Pet. Ex. A at 2. In conclusion, Nocenti instructed all state agency counsel to "follow up with [him], in writing, by June 30, 2008, to indicate what actions [they] have taken in response to []his memo, and any potential legal problems that have come to [their] attention." Pet. Ex. A at 2.

20. On May 17, 2008, Paterson issued a videotaped message in which he stated that his administration's issuance of the Executive Directive demonstrated "a strong step toward marriage equality." *See* Jeremy W. Peters, "New York to Back Same-Sex Unions from Elsewhere," NEW YORK TIMES (May 29, 2008), *available at* http://www.nytimes.com /2008/05/29/nyregion/29marriage.html?ex=1212724800&en=6d4cc0628aceb54e&ei=5070&emc =eta1.

21. On May 29, 2008, Paterson held a press conference to discuss the Executive Directive. During that conference, Paterson acknowledged that he ordered the issuance of the

Executive Directive. *See* Pet. Ex. B (A DVD containing a video of Paterson's May 29, 2008, press conference).

22. Implementation of the Executive Directive will have a widespread effect on New York state law. It will affect, for example, laws involving health benefits, *see* N.Y. INS. LAW § 4235; property, *see* N.Y. ABAND. PROP. LAW § 208; education, *see* N.Y. EDUC. LAW § 561; and contracts, *see* N.Y. GEN. MUN. LAW § 800; to name a few.

23. Implementation of the Executive Directive will require action by, or otherwise impact, most state agencies. The Executive Directive expressly acknowledges that "regulatory changes may be necessary" to implement the mandates contained therein. *See* Pet. Ex. A at 2. A sampling of state agencies affected by the Executive Directive includes the Department of Audit and Control, *see* N.Y. COMP. CODES R. & REGS. tit. 2, § 13.2; the Department of Correctional Services, *see* N.Y. COMP. CODES R. & REGS. tit. 7, § 200.3; the Education Department, *see* COMP. CODES R. & REGS. tit. 8, § 27-1.1; and the Department of Health, *see* COMP. CODES R. & REGS. tit. 10, § 415.3.

24. Implementation of the Executive Directive will cause the expenditure of funds throughout the entire State, in every county and municipality. It will include, for example, governmental expenditures for insurance benefits, *see* N.Y. INS. LAW § 4304; COMP. CODES R. & REGS. tit. 11, § 362-4.2; financial assistance to needy families, *see* COMP. CODES R. & REGS. tit. 18, § 369.1; financial assistance under the home energy assistance program, *see* COMP. CODES R. & REGS. tit. 18, § 393.3; COMP. CODES R. & REGS. tit. 18, § 393.4; and payment calculations for state income taxes, *see* COMP. CODES R. & REGS. tit. 20, § 151.10.

25. Petitioners file this Article 78 Petition, pursuant to Section 123 of the New York State Finance Law, to challenge Paterson's issuance of the Executive Directive. Petitioners

contend that Paterson acted beyond his authority in issuing the Executive Directive. Petitioners additionally allege that the implementation of the Executive Directive will cause a wrongful expenditure of state funds. Petitioners thus seek immediate declaratory and injunctive relief, asking this Court to enjoin Paterson from enforcing the Executive Directive and to declare its issuance to be unlawful.[1]

III. LEGAL ARGUMENT

26. Article 78 of the New York Civil Practice Law and Rules provides an expedited mechanism to challenge the actions of a government body or officer. Article 78 permits Petitioners to challenge an executive official's action because he "proceeded, is proceeding[,] or is about to proceed without or in excess of jurisdiction." N.Y. C.P.L.R. LAW § 7803(2). Petitioners assert that Paterson, in issuing the Executive Directive, proceeded in excess of his lawful authority. Petitioners also contend that all state executive agencies will proceed in excess of their lawful authority if they implement Paterson's Executive Directive.

27. Section 123-b of the New York State Finance Law states as follows:

> [A]ny person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property . . . .

[1] Petitioners are entitled to both injunctive and declaratory relief under Section 123-b(1) of the New York State Finance Law. Petitioners are additionally entitled to a preliminary injunction under Section 123-e(2) of the New York State Finance Law. Furthermore, Petitioners need not demonstrate the traditional requirements necessary for a preliminary injunction, such as irreparable harm, because the cause of action created under Section 123 of the State Finance Law furthers the public interest (rather than mere private concerns). *See State v. Terry Buick, Inc.*, 520 N.Y.S.2d 497, 500 (Sup. Ct. Dutchess County 1987) ("Traditional concepts of irreparable damage . . . do not govern this public interest field.")

N.Y. STATE FIN. LAW § 123-b(1). Petitioners assert that Paterson, in issuing the Executive Directive, has caused, is now causing, and is about to cause a wrongful expenditure or illegal disbursement of state funds.

28. Petitioners contend that Paterson's Executive Directive (1) constitutes an unlawful use of executive power, which violates the separation of powers doctrine, and (2) mandates an unlawful grant of public funds to those who are not legally entitled to receive them.

A. PATERSON VIOLATED THE SEPARATION OF POWERS DOCTRINE BECAUSE THE MANDATES IN HIS EXECUTIVE DIRECTIVE CONFLICT WITH AND EXCEED LEGISLATIVE POLICY.

29. Paterson has violated the separation of powers doctrine. His actions are incompatible with the legislature's pronouncements concerning marriage. "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.

30. The separation of powers doctrine prohibits executive agencies and officials—like Paterson—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 Executive [1] acts inconsistently with the Legislature, 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 Legislature."); *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, Paterson has violated the separation of powers doctrine in two ways, by acting inconsistently with the legislature, and by usurping the legislature's authority.

1. Paterson Acted Inconsistently With The Legislature.

31. Paterson has acted inconsistently with the legislature's pronouncements in the New York Domestic Relations Law. The Domestic Relations Law, as interpreted by the Court of Appeals, defines marriage in New York to include only unions 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"); *Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006). But, in direct contrast to the legislative definition of marriage, Paterson's Executive Directive orders all state agencies and

their legal counsel to recognize same-sex "marriages" performed in other jurisdictions. Thus, the Executive Directive squarely conflicts with the legislature's prescribed definition of marriage.

32. Paterson has also acted inconsistently with well-established legislative definitions of terms like "spouse," "husband," and "wife." The Executive Directive instructs all state agencies "to ensure that terms such as 'spouse,' husband' and 'wife' are construed in a manner that encompasses legal same-sex marriages." *See* Pet. Ex. A at 1. In contrast, however, the "traditional 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). Indeed, every court to interpret the term "spouse," as used in various New York statutes, has defined that term in accordance with its traditional definition. *See, e.g., 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"); *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"); *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").

33. Paterson, in authorizing the Executive Directive, acted without regard for the legislature's policy determinations on marriage or the uncontroverted definition of legislative terms like "spouse," "husband," and "wife." The executive branch is not an island unto itself; it cannot sweep aside the legislature's clear directives and act according to its own political

predilections. Because Paterson has acted inconsistently with the clear will of the legislature, this Court should conclude that he violated the separation of powers doctrine.

34. Implementation of the Executive Directive will require state executive agencies to alter the legislative meaning of terms like "spouse," "husband," and "wife." The Executive Directive expressly acknowledges that "regulatory changes may be necessary" to implement the mandates contained therein. *See* Pet. Ex. A at 2. These regulatory changes will directly conflict with the courts' interpretation of those statutory and regulatory terms. Thus implementation of the Executive Directive requires state agencies to act inconsistently with the legislature's will as expressed in state law.

2. Paterson Exceeded His Authority And Usurped The Role Of The Legislature.

35. By declaring that all state agencies must "ensure that terms such as 'spouse,' 'husband' and 'wife' are construed in a manner that encompasses legal same-sex marriages" performed in other jurisdictions, *see* Pet. Ex. A at 2, Paterson has "go[ne] beyond stated legislative policy" and usurped the role of the legislature. *See Broidrick*, 39 N.Y.2d at 645-46. Simply put, he does not have authority to declare which unions will be recognized as valid marriages in New York.

36. 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 Legislature 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. Yet Paterson, by issuing his mandate to recognize same-sex "marriages" performed out of state, has exceeded the realm of his 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 Legislature to set State policy in an area of concededly increasing public concern," and effectuated a "nullification" of the legislature's policy).

37. What makes Paterson's usurpation of legislative power particularly troubling is that he has "assume[d] the power of the Legislature to set State policy in an area of *concededly increasing public concern*," *see id.* at 160 (emphasis added), rather than some trifling, insignificant matter. 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").

38. 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 usurp the legislature's policy-oriented role by determining which unions will be recognized as marriages in New York.

39. Rather than allowing the legislature's policy (*i.e.*, the will of the people) to prevail in this all-important, society-defining debate on the recognition of same-sex "marriage," Paterson has unilaterally promulgated his Executive Directive, seized 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 Executive Directive did not merely "go beyond" the legislature's policy, *see Broidrick*, 39 N.Y.2d at 645-46; it effectively nullified it, *see Rapp*, 44 N.Y.2d at 164-65. By requiring that all state agencies recognize same-sex "marriages" performed out of state, Paterson 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.[2]

40. In light of the newly issued Executive Directive, the legislature's decision to limit marriage, and its corresponding benefits, to unions between one man and one woman has become irrelevant. Every New York same-sex couple wishing to be "married" can drive to Canada and obtain a "marriage" license. The Executive Directive mandates that the State of New York recognize each and every one of those out-of-state "marriages," and requires the State to provide a vast array of government-issued funds and benefits to couples who have entered into those out-of-state unions. Thus, by issuing the Executive Directive, Paterson has effectively nullified the will of the legislature. Furthermore, this legislative eradication reaches far beyond the definition of marriage; it affects legal issues dealing with health benefits, *see* N.Y. INS. LAW

[2] As if this assumption 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.

§ 4235; property, *see* N.Y. ABAND. PROP. LAW § 208; education, *see* N.Y. EDUC. LAW § 561; and contracts, *see* N.Y. GEN. MUN. LAW § 800; to name a few. It is thus clear that Paterson's issuance of the Executive Directive violates the separation of powers doctrine.

B. IMPLEMENTATION OF THE EXECUTIVE DIRECTIVE RESULTS IN THE UNLAWFUL DISBURSEMENT OF PUBLIC FUNDS TO SAME-SEX PARTNERS WHO HAVE BEEN "MARRIED" IN OTHER JURISDICTIONS.

41. Implementation of the Executive Directive will result in the distribution of public funds to a group of recipients (*i.e.*, same-sex couples who were "married" outside New York) who are not legally entitled to receive them under state law. Thus the state agencies' execution of the Executive Directive violates Section 123-b of the New York State Finance Law. *See* N.Y. STATE FIN. LAW § 123-b (authorizing "an action for equitable or declaratory relief . . . against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause . . . any . . . illegal or unconstitutional disbursement of state funds").

42. Paterson has directed all state agencies "to ensure that terms such as 'spouse,' 'husband' and 'wife' are construed in a manner that encompasses legal same-sex marriages" performed in other jurisdictions. *See* Pet. Ex. A at 1. Yet, those terms have been traditionally understood and unanimously interpreted by the courts to mean only a husband or a wife in an opposite-sex marriage. *See, e.g.*, *Raum*, 675 N.Y.S.2d at 344; *Valentine*, 791 N.Y.S.2d at 218; *Langan I*, 802 N.Y.S.2d at 477; *Cooper*, 592 N.Y.S.2d at 798-99. Thus, interpreting those terms to include same-sex partners who have been "married" in other jurisdictions contradicts the governing legal authority.

43. Paterson nevertheless asserts that the orders in the Executive Directive are lawful because the same-sex couples in question have been "married" in another jurisdiction. This

argument raises an important comity issue, *i.e.*, whether the State of New York must recognize out-of-state same-sex "marriages."

1. New York Comity Jurisprudence Requires That The State Not Recognize Same-Sex "Marriages" Performed Out Of State.

44. "[T]he determination of whether effect is to be given foreign [governmental acts] is made by comparing it to our own public policy; and [New York] policy prevails in case of conflict." *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574, 580 (1980). 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 v. Brookdale Hosp. Med. Ctr.*, 94 N.Y.2d 524, 528-29 (2000). The United States Supreme Court concurs with this approach, stating that "[a] judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every [jurisdiction], unless contrary to the policy of its own law." *Hilton v. Guyot*, 159 U.S. 113, 127 (1895).

45. New York is not required to give effect to out-of-state "marriages" that conflict with its public policy. *See Crair*, 94 N.Y.2d at 528-29. New York's policy on marriage is clear: it is a vital social institution that is limited to unions between one man and one woman.[3] *See Hernandez*, 7 N.Y.3d at 357. Thus, any sovereign entity that defines marriage to include the union of same-sex couples exhibits a public policy contrary to that of New York. Because of this direct clash of policies, New York cannot recognize same-sex "marriages" performed in other jurisdictions. *See Ehrlich-Bober & Co.*, 49 N.Y.2d at 580 (stating that New York "policy prevails in case of conflict").

[3] It bears repeating that the public policy at issue here is New York's policy regarding marriage, 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 government-issued benefits and privileges), it is marriage policy that is relevant to this comity analysis.

46. In sum, because New York comity law prohibits the State of New York from recognizing same-sex "marriages" solemnized in other jurisdictions, Paterson acted illegally by declaring that all state agencies must recognize the same-sex "marriages" of those who obtained "marriage" licenses out of state.

2. The *Martinez* Decision Has Not Settled This Issue Because There Are Inconsistencies Among The Decisions of The Appellate Departments.

47. The language of the Executive Directive suggests that the Fourth Department's decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dept. 2008), has settled the issue regarding recognition of out-of-state same-sex unions and thus is controlling in lower courts throughout the State.[4] Yet, *Martinez* is not the only appellate decision addressing this issue. The Executive Directive ignores the Second and Third Department decisions that have refused to recognize same-sex "marriages" and other out-of-state same-sex unions.

48. In *Matter of Cooper*, 592 N.Y.S.2d at 801, the Second Department stated that it would refuse to 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.

49. More 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. The Third Department concluded that

[4] The Executive Directive also discusses the Second Department's decision in *Funderburke v. New York State Department of Civil Service*, 854 N.Y.S.2d 466 (2nd Dept. 2008), erroneously attributing that decision to the Third Department. It is important to note, however, that *Funderburke* dismissed the case on the basis of mootness, and did not make a legal determination regarding the marriage-recognition issue. Thus, *Funderburke*—a decision based on mootness principles—is not instructive for the question before this Court.

"[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. The court reasoned:

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

Id. at 108. Thus, the Second and Third Departments have repeatedly refrained from recognizing out-of-state same-sex unions, even those that are sanctioned in and recognized by a foreign jurisdiction. It appears therefore that the Fourth Department's *Martinez* decision is an anomaly—a nonbinding decision unworthy of following here.

50. The Second and Third Department decisions in *Cooper*, *Langan I*, and *Langan II* cannot be distinguished simply because those cases involved same-sex "civil unions" rather than same-sex "marriages." This distinction would place decisive weight on a mere label rather than the substance of the relationship. The implications of this reasoning, if seriously considered, are untenable. This line of reasoning creates 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 (*i.e.*, a jurisdiction that denominates its same-sex unions as "marriages") are entitled to recognition in New York. It is unreasonable to conclude that the doctrine of comity hinges on the label selected by a foreign jurisdiction for same-sex unions. This Court should thus find that *Cooper*, *Langan I*, and *Langan II* are persuasive on this issue, and resist a simplistic distinction of these cases that leads to bizarre results that defy logic.

51. Furthermore, the Fourth Department's *Martinez* decision is not persuasive. The *Martinez* court simply assumed that the marriage-recognition rule applied to same-sex unions

without engaging in any substantive analysis on that issue. *See Martinez*, 850 N.Y.S.2d at 742. The court did not acknowledge—and perhaps failed to appreciate—that it was drastically departing from legal precedent by applying the marriage-recognition rule to same-sex unions. In addition, the *Martinez* court incorrectly concluded that the government's refusal to recognize out-of-state same-sex "marriages" violates Section 296 of the New York Executive Law, which forbids an employer from discriminating based on an employee's "sexual orientation." *See id.* at 743. This conclusion 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 Executive Law, expressly stated that SONDA did not require or prohibit "marriage" rights for same-sex couples. *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 Executive Law is unfounded and misplaced. This Court need not follow the Fourth Department's ill-reasoned decision.

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

52. The *Martinez* decision relied upon by the Executive Directive asserts that the so-called marriage-recognition rule requires the State of New York to recognize out-of-state same-sex "marriages." The marriage-recognition rule provides that "[t]he law to be applied in determining the validity of . . . an out-of-State marriage is the law of the State 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, however, does not apply to same-sex "marriages" because (1) same-sex unions, by definition, do not qualify as marriages; (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 stability and consistency in the law, not to be an engine for radical social change.

a. Same-Sex Unions, By Definition, Do Not Qualify As Marriages.

53. 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 May 29, 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").

54. 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"); *see also 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).

55. 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 opposite-sex couples 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 this Court cannot ignore the historical, biological, and social reasons why marriage is defined as the union of one man and one woman.

56. Because the institution of marriage, by definition, includes only unions between opposite-sex couples, the marriage-recognition rule does not apply to any same-sex union, even

if denominated a "marriage"; those unions simply do not qualify for marriage status. Fundamental social institutions, such as marriage, have unalterable definitions and basic characteristics—ones that cannot be changed based upon the wishes, or even the legislation, of a few sovereign entities. By way of example, suppose a small group of biology professors began calling giraffes "zebras" and publishing "scholarly" articles to that effect. The anomalous actions of these few professors would not succeed in changing the fundamental definition of a zebra any more than the decision by a few foreign legislatures to redefine marriage changes the traditional, fundamental, and innate definition that institution. *See* J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW at 188 (2003) ("A legislature can no more turn [same-sex] unions into marriages than it can turn dogs into cats.").

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

57. 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 "contemplated the possibility of same-sex marriage," much less intended for such unions to be included in 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").

58. All contemporary sources—including dictionaries, judicial opinions, and New York statutes—defined marriage as the union of a man and a woman. *See* 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 Legislature 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.

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

59. "[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 the common law "fireman's rule" before extending its application to police officers), *superseded by* N.Y. GEN. MUN. LAW § 205-e.

60. The marriage-recognition rule is premised on the general principle of contract law that "a contract entered into in another State 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"). Furthermore, the courts developed the marriage-recognition rule "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 "public mischief" associated with ambiguously recognized marital unions—cannot (and was never intended to) function as a conduit for far-reaching social change.

61. This Court must not underestimate the expansive societal change that would result from applying the marriage-recognition rule to same-sex "marriages" performed out of state. In essence New York's decision (through the legislature) 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 equally. Regardless of whether one thinks this is a positive or negative societal change, it is undeniable 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.

62. In contrast, a fundamental social change does not occur when the marriage-recognition rule is applied to opposite-sex couples. New York courts have recognized opposite-

sex marriages performed in other states even if they would have been unlawful in New York. *See, e.g., Fisher v. Fisher*, 250 N.Y. 313 (1929). In those circumstances, the State is forced to recognize a relationship that is different *in degree* (usually in terms of blood relation or age) from those marriages sanctioned in New York, but the State is not required to recognize a relationship that is different *in kind* (i.e., one man/one woman) from lawful New York marriages. *See, e.g., May's Estate*, 305 N.Y. at 493 (recognizing an opposite-sex marriage between an uncle and his niece—a relationship that differed in terms of consanguinity, but not in kind, from marriage as defined in New York). An out-of-state opposite-sex union satisfies the traditional definition of marriage and furthers the procreative and child-rearing policies undergirding that social institution. Thus, forcing New York to recognize such unions does not radically alter the composition of marriage in New York.

63. Taking into consideration the narrow stability-promoting policy underlying 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 opposite-sex couples (indeed the only context in which it properly applies), it functions according to its intended policy—by cloaking 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 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 clearly limited marriage to opposite-sex couples. *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"). Thus, policy considerations firmly indicate that the marriage-recognition rule should not be extended to same-sex unions.

IV. CONCLUSION

64. For the forgoing reasons, Petitioners respectfully request the relief sought in their Order to Show Cause, which includes a preliminary injunction, permanent injunction, and declaratory judgment against Paterson's issuance of the Executive Directive.

65. Petitioners affirm that the same or similar relief has not been requested in this Court.

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