SUPREME COURT – STATE OF NEW YORK
COUNTY OF BRONX

-------------------------------------------------------------X

*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, FRANCES VELLA-MARRONE, MICHAEL J. FITZPATRICK, AND MICHAEL W. COLE,

*Petitioners*,

-against-

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

*Respondent.*

-------------------------------------------------------------X

**Index No: 260148/08**

**Justice Lucy Billings**

# PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS-INTERVENORS' CROSS-MOTION TO DISMISS THE AMENDED COMPLAINT

Joseph A. Ruta
RUTA & SOULIOS, L.L.P.
*Attorneys for Petitioners*
1500 Broadway, 21st Floor
New York, New York 10036
Telephone: 212-997-4500
Facsimile: 212-768-0649

Brian W. Raum
Benjamin W. Bull*
James A. Campbell*
ALLIANCE DEFENSE FUND
*Attorneys for Petitioners*
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: 480-444-0020
Facsimile: 480-444-0028

* Not admitted in this jurisdiction

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .......... ii

ARGUMENT .......... 1

I. Paterson's Issuance Of The Executive Directive Conflicts With First Department Precedent Recognizing The Legislature's Exclusive Authority Over Marital Benefits and Martial Recognition .......... 1

II. The Marriage Recognition Rules Applies Only To "Marriages" As That Term Has Been Defined By New York's Common And Statutory Law .......... 3

III. Paterson's Executive Directive Is Not Compelled By The State's Sexual Orientation Non-Discrimination Law ("SONDA") Or Its Equal Protection Clause .......... 5

CONCLUSION .......... 7

## TABLE OF AUTHORITIES

### NEW YORK STATE CASES

*B v. B*,
355 N.Y.S.2d 712 (Sup. Ct. Kings County 1974) ........ 3

*Hernandez v. Robles*,
7 N.Y.3d 338 (2006) ........ 2, 3, 6

*Hernandez v. Robles*,
805 N.Y.S.2d 354 (1st Dept. 2005) ........ 2, 3, 6

*Langan v. State Farm Fire & Casualty*,
849 N.Y.S.2d 105 (3rd Dept. 2007) ........ 3, 4

*Langan v. St. Vincent's Hosp. of New York*,
802 N.Y.S.2d 476 (2nd Dept. 2005) ........ 1, 4

*Martinez v. County of Monroe*,
850 N.Y.S.2d 740 (4th Dept. 2008) ........ 4

*Matter of Cooper*,
592 N.Y.S.2d 797 (2nd Dept. 1993) ........ 1

*Raum v. Restaurant Assocs., Inc.*,
675 N.Y.S.2d 343 (1st Dept. 1998) ........ 1

*Valentine v. American Airlines*,
791 N.Y.S.2d 217 (3rd Dept. 2005) ........ 1

### STATUTES AND CONSTITUTIONAL PROVISIONS

N.Y. EXEC. LAW § 296 ........ 5

### OTHER AUTHORITIES

SONDA, 2002 Session Law News of N.Y., ch. 2, § 1, Legislative Findings and Intent, A1971 .... 5

Jay Weiser, *Foreword: The Next Normal — Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48 (2004) ........ 5

## ARGUMENT

### I. Paterson's Issuance Of The Executive Directive Conflicts With First Department Precedent Recognizing The Legislature's Exclusive Authority Over Marital Benefits and Martial Recognition[1].

In his May 14, 2008, Executive Directive, Respondent David A. Paterson (referred to as "Paterson") ordered 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* Art. 78 Pet. Ex. A at 1. In essence, this Executive Directive requires state agencies to construe these statutory and regulatory terms to include partners involved in same-sex relationships—an interpretation that conflicts with the plain, well-established meaning of those terms under New York law. *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"); *Matter of Cooper*, 592 N.Y.S.2d 797, 798-99 (2nd Dept. 1993) (interpreting "spouse," as used in the elective share statute, and refusing to expand the "traditional definition" of that term to "include homosexual life partners"). Paterson lacks the authority to alter the unambiguous meaning of these terms for the purpose of granting marital benefits to same-sex couples.

[1] Petitioners incorporate in this Memorandum of Law all arguments presented in their Opposition to Respondent's Cross-Motion to Dismiss the Amended Petition, and to the extent applicable incorporate the arguments presented here as supplement to their opposition to Respondent's Cross-Motion to Dismiss the Amended Petition.

The First Department has clearly recognized that the legislature alone has the power to redefine statutory or regulatory terms. *See Hernandez v. Robles*, 805 N.Y.S.2d 354, 358-59 (1st Dept. 2005), *aff'd*, 7 N.Y.3d 338 (2006). "Deprivation of legislative authority . . . to make important, controversial policy decisions prolongs divisiveness and defers settlement of the issue; it is a miscarriage of the political process involved in considering such a policy change." *Id.* at 359. "Hence, '[i]t is the [l]egislature that is the appropriate body to engage in the studied debate that must necessarily precede the formulation of social policy with respect to same-sex marriage and *the decision to extend any and all rights and benefits associated with marriage to same-sex couples* . . . in New York.'" *Id.* (quoting *Matter of Shields v. Madigan*, 783 N.Y.S.2d 270 (Sup. Ct. Rockland County 2004)) (emphasis added). In short, the First Department properly recognized that "what *statutory recognition*, if any, same-sex couples should receive in New York is one that must be referred to the [l]egislature in accordance with its historical role." *Id.* at 362. Paterson has violated these principles by acting outside the realm of his legitimate executive authority and in direct conflict with the legislature's proclamations regarding marriage. *Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006) ("New York's statutory law clearly limits marriage to opposite-sex couples.").

New York's legislature, acting within its province, has granted many benefits to married couples. In doing so, the legislature has consciously chosen to limit those benefits to unions of one man and one woman. Here, however, Paterson undoes that legislative policy decision; declaring instead that all the benefits and incidents of marriage should be given to same-sex couples who have obtained "marriage" licenses from foreign jurisdictions. Simply put, Paterson is trying to do indirectly (*i.e.*, grant marital benefits and recognition to same-sex couples) that which he cannot do directly. In light of the First Department's precedent affirming the

legislature's exclusive role over issues of marital recognition and benefits, Paterson's blatant disregard for the legislature's fundamental policy choices on marriage cannot be condoned. *See Hernandez*, 805 N.Y.S.2d at 358-62; *see also Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105, 108 (3rd Dept. 2007) (*Langan II*) (refusing to recognize out-of-state same-sex unions for purposes of state benefits because "[t]he extension of benefits entails a consideration of social and fiscal policy more appropriately left to the [l]egislature").

## II. The Marriage Recognition Rules Applies Only To "Marriages" As That Term Has Been Defined By New York's Common And Statutory Law.

The marriage-recognition rule applies only to "marriages" as that term has been defined by New York's common and statutory law. New York law, both statutory and common law, has always defined marriage as the union of one man and one woman. *See Hernandez*, 7 N.Y.3d at 357 ("New York's statutory law clearly limits marriage to opposite-sex couples."); *id.* 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"); *Hernandez*, 805 N.Y.S.2d at 367 (Catterson, J., concurring) ("[N]o court, state or federal, has ever held that marriage, traditionally understood, extends to same-sex couples."); *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."). Here, however, Paterson attempts to apply the marriage-recognition rule to unions which do not conform to that well-settled definition. Thus, the prerequisite for applying the *marriage*-recognition rule—the existence of a *marriage*—is not satisfied here, and this Court need not consider, as argued by Respondents-Intervenors (referred

to as "Intervenors"), *see* Resp-Inter. Mem. of Law at 13-17, the exceptions to that rule's application.

A fundamental difference exists between the *definition* of marriage—one man and one woman—and the *regulation* of marriage, which includes, for example, blood relations between spouses, age of consent, and numerous formal solemnization requirements. In the past, state courts have applied the marriage-recognition rule to out-of-state unions that satisfied New York's definition of marriage, even though they did not comply with this State's regulatory requirements. *See* Resp-Inter. Mem. of Law at 12 (discussing cases that have recognized marriages not complying with New York's consanguinity requirements, age requirements, or solemnization requirements). Yet, New York courts historically have not recognized out-of-state same-sex unions because those unions do not comply with New York's enduring definition of "marriage." *See Langan I*, 802 N.Y.S.2d at 477 (refusing to recognize an out-of-state same-sex union); *Langan II*, 849 N.Y.S.2d at 108 (refusing to extend comity to out-of-state same-sex unions).

No New York court has addressed the issue raised by Petitioners: whether the prerequisite for applying the marriage-recognition rule—a marriage as defined by this State's common and statutory law—is satisfied when the government recognizes out-of-state same-sex unions. Other courts that have considered whether the marriage-recognition rule applies to out-of-state same-sex marriages, including the Fourth Department in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dept. 2008), have bypassed the prerequisite of the rule and proceeded to analyze its two exceptions: positive law and abhorrance to public policy. Thus, Petitioners raise a novel issue with respect to Paterson's attempted application of the marriage-recognition rule, and this Court is not bound by any direct precedent on the issue.

In short, Paterson attempts to use the marriage-recognition rule where it simply has no application—to mandate the recognition of relationships that neither this State's common law nor its statutory law has ever acknowledged as satisfying the fundamental definition of marriage. This Court should not permit Paterson's egregious misuse of such a basic principle of the common law, especially when a drastic alteration of the institution of marriage in New York weighs in the balance. *See* Art. 78 Pet. at ¶ 66.

## III. Paterson's Executive Directive Is Not Compelled By The State's Sexual Orientation Non-Discrimination Law ("SONDA") Or Its Equal Protection Clause.

Respondents-Intervenors (referred to as "Intervenors") contend that Paterson's failure to issue his Executive Directive would cause the State to violate New York's Sexual Orientation Non-Discrimination Law ("SONDA") and Equal Protection Clause. There is no merit to either of these allegations.

The legislative history of SONDA belies Intervenors' assertions; it disclaims any impact on the issue of same-sex "marriage." In enacting SONDA, the legislature expressly stated that SONDA neither required nor prohibited "marriage" rights for same-sex couples; simply stated, the legislature unequivocally indicated that 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, Intervenors' reliance on SONDA is unfounded and misplaced.

Moreover, SONDA has a limited application against the state government; it does not apply, as Paterson's Executive Directive does, to all government agency actions across the board. Most notably, SONDA governs the actions of employers, public accommodations, housing

accommodations, and educational institutions. *See* N.Y. EXEC. LAW § 296. But, in issuing his Executive Directive, Paterson sweeps much more broadly than these limited areas of SONDA's application. *See* Pet. Mem. of Law in Opp. Resp. Mot. to Dis. at 6-8. Thus, SONDA does not even apply to the far-reaching areas of state agency regulation affected by Paterson's Executive Directive. It is therefore disingenuous to imply that SONDA in any way requires Paterson's actions.

Intervenors' equal protection argument is similarly baseless. The Court of Appeals has already found that defining marriage as one man and one woman does not violate the equal protection clause of the State Constitution, *see Hernandez*, 7 N.Y.3d at 365, and by logical extension, neither does the refusal to recognize out-of-state same-sex "marriages." The Court of Appeals held that rational basis review—the most deferential standard—applies under these circumstances. All the legitimate and rational reasons for limiting marriage to opposite-sex couples, *see Hernandez*, 7 N.Y.3d at 359-60 (acknowledging the desire "to create more stability and permanence in the relationships that cause children to be born [i.e., opposite-sex unions]" and the desire "for children to grow up with both a mother and a father"), apply equally to the refusal to recognize same-sex "marriage" licenses obtained from other jurisdictions. Additionally, at least two other rational reasons exist for refusing to recognize out-of-state same-sex unions: (1) to avoid effectuating through the executive branch a fundamental social change in the recognition of marital unions and the granting of marital benefits—decisions which are uniquely confided in the legislature, *see Hernandez*, 805 N.Y.S.2d at 358-62; and (2) to avoid forfeiting New York's autonomy to define marriage for itself (rather than deferring to the definitions adopted by foreign legislatures).

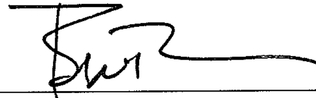
In sum, then, Intervenors' reliance on SONDA and the State Constitution's Equal Protection Clause is without merit. Paterson issued his Executive Directive as an indirect means of redefining "marriage" in New York—something he is wholly without power to do. He was not, as Intervenors contend, motivated out of a desire or a need to comply with SONDA or the State's Equal Protection Clause.

## CONCLUSION

Intervenors' cross-motion to dismiss should be denied. Paterson acted beyond his lawful authority and usurped the prerogatives of the legislature when he issued his Executive Directive. He used that Executive Directive as a means to accomplish the wholesale recognition of all out-of-state same-sex "marriages" by all state agencies for all statutory and regulatory purposes. He is without legal authority to effect such a fundamental and expansive change to the institution of marriage.

Petitioners respectfully request that this Court deny Intervenors' cross-motion to dismiss and, instead, grant the relief requested in the Article 78 Petition, which includes (1) an injunction against the enforcement of the Executive Directive and (2) a declaratory judgment proclaiming its issuance, and the mandates contained therein, to be unlawful.

Dated: July 21, 2008



Brian W. Raum, Esq.
Benjamin W. Bull*
James A. Campbell*
ALLIANCE DEFENSE FUND
*Attorneys for the Petitioners*
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: 480-444-0020
Facsimile: 480-444-0028

*Not admitted in this jurisdiction

Joseph A. Ruta
RUTA & SOULIOS, L.L.P.
*Attorneys for Petitioners*
1500 Broadway, 21st Floor
New York, New York 10036
Telephone: 212-997-4500
Facsimile: 212-768-0649

**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 July 21, 2008, I served a copy of the attached *PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS-INTERVENORS' CROSS-MOTION TO DISMISS THE AMENDED COMPLAINT* to all parties by sending a true and accurate copy via UPS Overnight Delivery to:

Andrew M. Cuomo
Monica Connell
OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK
120 Broadway, 24th Floor
New York, New York 10271

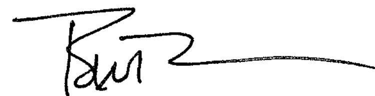
*Attorney for Paterson*

Susan L. Sommer
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, NY 10005

*Attorneys for Intervenors*

Jeffrey S. Trachtman
Norman C. Simon
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036

Dated: July 21, 2008



BRIAN W. RAUM