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INDEX NO. 4078/07

TO BE ARGUED BY BRIAN W. RAUM
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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: 504900

-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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

I. The Marriage-Recognition Rule Does Not Apply Because The Threshold Issue For Applying That Rule—The Existence Of A Marriage—Is Not Satisfied.

In its brief, DCS accuse Plaintiffs of “attempt[ing] to complicate [a] simple legal question.” (DCS’s Br. at 21) To the contrary, however, Plaintiffs’ legal position is straightforward and clear: Plaintiffs contend that the common law marriage-recognition rule does not apply under the present circumstances because same-sex unions (regardless of whether denominated as “marriages” in other jurisdictions) do not comport with the well-settled common law definition of marriage in New York. Stated differently, the *prerequisite* for applying the marriage-recognition rule—*i.e.*, the existence of a *marriage*—is not satisfied here.

A. The Marriage-Recognition Rule Is A Common Law Doctrine That Applies Only To Marriages As Defined Under The Common Law.

The so-called marriage-recognition rule is a common law construct, and as such, its application is limited by common law principles and definitions. Common law terms, especially when applied as part of a common law doctrine, must be interpreted according to their common law meanings. *See Foley v. Mobil Chem. Co.*, 647 N.Y.S.2d 374, 382 (Sup. Ct. Monroe County 1996) (noting that “the common law meaning of [a] term controls” in the absence of any indication to the contrary). New York’s common law has uniformly and without exception defined “marriage” as the union of one man and one woman. *See Matter of Estate of Jenkins*, 506 N.Y.S.2d 1009, 1011 (Sur. Ct. Queens County 1986) (defining marriage under the common law as “the civil status of one man and one woman united in law for life”); *Hernandez v. Robles*, 7 N.Y.3d 338, 361 (2006) (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 v. Robles*, 805 N.Y.S.2d 354, 367 (1st Dept. 2005) (Catterson, J., concurring), *aff’d*, 7 N.Y.3d 338 (2006) (“[N]o court, state or federal, has ever held that marriage, traditionally understood, extends to same-sex couples.”); *Langan v. St. Vincent’s Hosp. of New York*, 802 N.Y.S.2d 476, 479 (2nd Dept. 2005) (*Langan I*) (acknowledging the “traditional concept[] of marriage” as “a unique institution confined solely to one man and one woman”); *id.* at 477 (At the time of the drafting of these statutes, the thought that the surviving spouse would be of the same sex as the decedent was simply inconceivable”); *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.”).¹ Thus, application of the common law marriage-recognition rule is limited to marriages comporting with that well-established common law definition.

Marriage under New York’s common law is a relationship existing uniquely between a man and a woman. Three essential characteristics of that relationship cannot be duplicated, or even effectively mimicked, by same-sex couples. First, and most importantly, opposite-sex couples naturally procreate; whereas, same-sex couples cannot procreate without involving a third party of the opposite sex. The Court of Appeals has recognized this intuitive principle, stating that the marriage “relationship . . . exist[s] with the result and for the purpose of begetting offspring.” *Mirizio v. Mirizio*, 242 N.Y. 74, 81 (1926); *see also Hernandez*, 7 N.Y.3d at 359 (recognizing that one of the “important function[s] of marriage is to create more stability and permanence in the relationships that cause children to be born”).

Second, opposite-sex couples who procreate provide their children with two unique parents: a mother and a father. In contrast, however, same-sex couples do not provide children

¹ The Court of Appeals has recognized that New York’s statutory law also defines marriage as the union of one man and one woman. *See Hernandez*, 7 N.Y.3d at 357.

with a complementary pair of parental figures. The Court of Appeals has recognized this self-evident principle, stating that “[i]ntuition 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.” *Hernandez*, 7 N.Y.3d at 359. The Court similarly stated that marriage involves one of the “profoundest interests of human life,” namely, “transmitting [life’s] complex influences direct to posterity [*i.e.*, child rearing].” *Fearon v. Treanor*, 272 N.Y. 268, 273 (1936).

Third, opposite-sex couples share a complementary relationship—both physically and psychologically—while relationships between same-sex couples lack those complementary components. For instance, the physical complement between the sexes results in procreation. Additionally, the psychological complement creates a balanced relationship in which the unique emotional composition of a woman harmonizes, supports, and stabilizes the corresponding characteristics of a man.

These inherent characteristics of marriage are not archaic, outdated stereotypes; they reflect the innate substance of the marital union, which was known and defined at common law. The Court of Appeals has recognized that these concepts are neither arbitrary nor “merely a by-product of historical injustice.” *Hernandez*, 7 N.Y.3d at 361. Instead, these concepts are “based on innate, complementary, procreative roles, a function of biology.” *Hernandez*, 805 N.Y.S.2d at 360. Indeed, each of these fundamental characteristics of marriage provides compelling reasons for understanding and affirming New York’s common law definition of marriage as the union of one man and one woman.

Nevertheless, DCS fails to appreciate the importance of the common law definition of marriage when applying the common law marriage-recognition rule. DCS instead focuses its

attention on statutory and dictionary definitions of “marriage.”² (DCS Br. at 17, 22) As a result, its arguments are incomplete and unpersuasive because they ignore the common law basis of the marriage-recognition rule. Importantly, neither DCS nor Intervenors dispute that New York’s common law uniformly defines marriage as the union of one man and one woman, and for good reason, because it would be futile to contest this well-established common law definition.

New York’s common law definition of marriage establishes the outer limits of the marriage-recognition rule. Same-sex unions fall outside that definition; they are thus excluded from the rule’s application. Perhaps a simple illustration will elucidate the point. Applying the common law marriage-recognition rule to same-sex unions is akin to applying the common law innkeeper-liability rule to an automobile repair shop. An automobile repair shop does not qualify as an “innkeeper” under New York’s common law, *see Goncalves v. Regent Int’l Hotels, Ltd.*, 58 N.Y.2d 206, 214 (1983) (discussing an innkeeper’s liability under the common law rule); thus it is inappropriate to apply the innkeeper-liability rule under those circumstances. Similarly, here, it is uncontroverted that New York’s common law has never recognized a “marriage” between persons of the same sex, and thus, the marriage-recognition rule is wholly inapplicable.

B. The Marriage-Recognition Rule Applies To Unions That Conflict With New York’s Regulatory Requirements For Marriage, But It Does Not Apply To Unions That Conflict With New York’s Common Law Definition Of Marriage.

A fundamental difference exists between the *definition* of marriage—one man and one woman—and the *regulation* of marriage, which includes a wide-ranging plethora of requirements such as blood relations between spouses (*i.e.*, consanguinity), age of consent, and

² Statutory and dictionary definitions of marriage are relevant and persuasive, (*see* Pl’s Br. at 26); however, when applying a common law doctrine, they are not as important as the common law definition.

formal solemnization requirements. Historically, New York courts have applied the marriage-recognition rule only to out-of-state unions that satisfy the common law definition of marriage (even though they do not comply with New York's regulatory requirements). (See DCS's Br. at 12 (discussing cases that recognized marriages not complying with New York's solemnization requirements)) Yet, courts in this State traditionally have refused to recognize out-of-state unions that do not comport with New York's enduring common law definition of "marriage." See *In re May's Estate*, 305 N.Y. 486, 491 (1953) (noting that out-of-state polygamous unions are not entitled to recognition in New York); *Langan I*, 802 N.Y.S.2d at 477 (refusing to recognize an out-of-state same-sex union); *Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105, 108 (3rd Dept. 2007) (*Langan II*) (refusing to extend comity to out-of-state same-sex unions).

The common law definition of marriage in New York contains both a *quantitative* component (*i.e.*, two persons) and *qualitative* component (*i.e.*, a man and a woman). See *Hernandez*, 7 N.Y.3d at 367 (Grafteo, 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 at 716 ("In all cases, . . . marriage has always been considered as the union of a man and a woman."); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 501 (Sup. Ct. Queens County 1971) (acknowledging "the two basic requirements for a marriage contract, *i.e.*, a man and a woman"). The Court of Appeals has already acknowledged that the marriage-recognition rule does not apply to out-of-state unions that conflict with the quantitative requirement (*i.e.*, polygamous unions). See *May's Estate*, 305 N.Y. at 491 (recognizing that out-of-state polygamous marriages are not entitled to recognition in New

York). The political attempt to legalize polygamy occurred long ago in our Nation’s history, *see Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (noting the Utah territory’s attempt to legalize polygamous marriages), and the courts have already considered and refused to apply the marriage-recognition rule in that context.

Similarly, during the past few decades, social advocacy groups have attempted to legalize “marriage” between persons of the same sex. These same-sex unions—like their polygamous precursors—are another aberration from the common law construct of marriage. While polygamous unions depart from the quantitative component of the common law definition of marriage, same-sex unions deviate from the qualitative component of that definition. Courts have yet to squarely address whether the marriage-recognition rule applies to same-sex unions because the attempt to legalize “marriage” between persons of the same sex is a relatively recent occurrence. But, as with polygamous unions, this drastic departure from New York’s common law definition of marriage renders the common law marriage-recognition rule inapplicable. The conceptual similarities between applying the rule to polygamous marriages (a quantitative deviation from the common law definition) and applying the rule to same-sex unions (a qualitative deviation from the common law definition) demonstrate that out-of-state same-sex unions, like polygamous unions, are exempt from the marriage-recognition rule.

Neither DCS nor Intervenors acknowledge the distinction between New York’s common law definition of marriage and the various incidents surrounding the regulation of marriage. (DCS’s Br. at 18-20; Int’s Br. at 15) Their failure to appreciate this fundamental distinction renders their discussion misguided and unpersuasive. As previously noted, the marriage-recognition rule permits the State to recognize out-of-state unions that fail to comport with state regulatory requirements. Yet, it does not permit the State to recognize a “marriage” that

conflicts with the common law definition, either the quantitative or qualitative component. To apply the rule in that context, quite frankly, stretches the marriage-recognition rule beyond all recognition.

The marriage-recognition rule requires that “the legality of a marriage . . . is to be determined by the law of the place where it is celebrated.” *May’s Estate*, 305 N.Y. at 490. DCS and Intervenors—apparently content to forfeit New York’s sovereignty to other states and nations—argue that this rule requires courts to look to the laws of foreign jurisdictions to determine both the definitional and regulatory requirements of marriage. (DCR’s Br. at 10-11; Int’s Br. at 14-15) But that result is not dictated by precedent. Courts applying the common law marriage-recognition rule must first look inward to the common law to define relevant terms such as “marriage.” Then after satisfying that initial threshold, courts look to foreign law to determine the “legality” of the marriage, specifically, whether it complied with the foreign jurisdiction’s consanguinity, age, and solemnization requirements. The approach advocated by DCS and Intervenors ignores the common law foundation of the marriage-recognition rule and New York’s definitional core of marriage.

DCS characterizes Plaintiffs’ argument as attempted judicial activism by providing this Court with policy-oriented reasons for excluding same-sex unions from the marriage-recognition rule. (DCS’s Br. at 21) Nothing could be further from the truth. Plaintiffs do not ask this Court to judicially remake or reform the marriage-recognition rule; Plaintiffs instead ask this Court to acknowledge a logical limitation on that common law rule, namely, that it does not apply to unions conflicting with the qualitative component of New York’s common law definition of marriage. The Third Department has never faced this issue before; this case presents this Court with its first opportunity to analyze this new attempt to expand the marriage-recognition rule.

Rather than present this Court with policy-driven arguments, however, Plaintiffs have provided a reasoned approach to assist the Court in a proper understanding of the marriage-recognition rule.

C. DCS's Characterization Of The Marriage-Recognition Rule Is Wholly Inaccurate.

In its brief, DCS distorts the marriage-recognition rule, contending that “[t]he only exceptions to this rule are where the Legislature has expressly prohibited recognizing a particular kind of out-of-state marriage or where the out-of-state marriage would be ‘offensive to the public sense of morality to a degree regarded generally with abhorrence.’” (DCS’s Br. at 11) DCS’s rendition of the rule, however, contains two glaring flaws.

First, as previously discussed, the common law marriage-recognition rule applies only to marriages that comport with New York’s common law definition of marriage. This definitional requirement illustrates an instance—for which DCS fails to account—where the marriage-recognition rule does not apply.³

Second, DCS inaccurately portrays the “abhorrence” exception, stating that the exception applies “only to those marriages that are condemned by state law.” (DCS’s Br. at 12-13) But the governing case law has never made statutory condemnation a prerequisite to applying the abhorrence exception. DCS’s attempt to do so is self-serving, disingenuous, and illogical. A simple illustration will expose the absurdity of DCS’s position. Suppose another jurisdiction legally recognized “marriages” between humans and their pets. Because New York does not

³ Within the framework of the marriage-recognition rule, the precise analytical role of the common law definitional requirement can be viewed in different ways, all of which lead to the same result. On the one hand, the Court, like Plaintiffs, may view the definitional requirement as a threshold issue. On the other hand, however, the Court may view the definitional requirement as an aspect of the abhorrence exception, concluding that same-sex unions, like polygamous unions, deviate substantially from New York’s common law definition of marriage and, consequently, are abhorrent to New York’s public policy on marriage. Both analytical approaches lead to the same end: the State of New York does not recognize out-of-state same-sex “marriages” under the common law marriage-recognition rule.

have any statutory authority expressly condemning such unions, the State would be forced to recognize those “marriages” under DCS’s interpretation of the marriage-recognition rule. Such a ridiculous outcome demonstrates that DCS’s unprecedented characterization of the marriage-recognition rule lacks not only legal support but also a basis in reason.

II. *Hernandez* Requires That The Debate Over Same-Sex “Marriage” Be Decided By The New York Legislature Rather Than Through Indirect Means Such As An Executive Agency’s Policy Memorandum.

DCS and Intervenors attempt to marginalize the Court of Appeals’ decision in *Hernandez* by confining that case to extremely narrow grounds. (DCS’s Br. at 17; Int’s Br. at 16) Yet, contrary to those misguided arguments, *Hernandez* remains relevant and controlling precedent to the issues before this Court. *Hernandez* unequivocally proclaims that “the present generation should have a chance to decide the issue [of same-sex ‘marriage’] through its elected representatives.” *Hernandez*, 7 N.Y.3d at 366.⁴ This indicates that the debate over same-sex “marriage” in this State should be decided by the New York Legislature rather than through executive fiat, judicially created common law, or the laws of foreign jurisdictions. Yet DCS—seemingly discontent with that direction from the high court—unilaterally declared that the present generation of New Yorkers must recognize same-sex “marriages.” Such disregard for the Court of Appeals’ direction cannot be condoned by this Court.

In its brief, DCS attempts to invert the Court of Appeals’ clear pronouncement regarding the Legislature’s role, contending that the Legislature *must* act affirmatively to prevent the mass importation of out-of-state same-sex “marriages” into New York. (DCS’s Br. at 18) Yet again, DCS demonstrates its thorough misunderstanding of the marriage-recognition rule. To be sure, the Legislature could act, under the positive law exception to the rule, to prohibit the recognition

⁴ *Hernandez* also confirms that New York law defines marriage as the union of one man and one woman.

of out-of-state same-sex “marriages,” but the Legislature is not faced with the choice of either enacting legislation or else recognizing all out-of-state “marriages.” Instead the marriage-recognition rule, by its own terms, does not apply to out-of-state unions that fail to comport with New York’s common law definition of marriage or that otherwise drastically conflict with New York’s fundamental public policy on marriage. Thus, *Hernandez* requires legislative action to usher same-sex “marriage” into New York—a requirement that DCS ignored in issuing its Policy Memorandum—but DCS is incorrect in asserting that the Legislature must affirmatively act to prevent the influx of those out-of-state unions.

DCS compounds its misunderstanding of the Legislature’s role when it implies that the Legislature has evidenced its affirmative support for out-of-state same-sex “marriages.” (DCS’s Br. at 15-16) In essence, DCS believes that the legislature’s failure to enact a Defense of Marriage Act (“DOMA”) demonstrates that it intended to recognize same-sex “marriages” solemnized in other jurisdictions. A legislature’s failure to act, however, is an improper basis upon which to presume legislative intent. *See Mashnoux v. Miles*, 55 N.Y.2d 80, 87-88 (1982) (reasoning that “no particular significance can be attributed to the [l]egislature’s failure to adopt [statutory] amendments”). Courts have repeatedly recognized that the “failure by a [l]egislature to pass bills is not conclusive of a legislative intent.” *See, e.g., American Airlines, Inc. v. State Human Rights Appeal Bd.*, 378 N.Y.S.2d 697, 702 n.2 (1st Dept. 1976), *rev’d on other grounds, Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84 (1976). The Court of Appeals has likewise refused to conclude that the legislature’s failure to pass a bill demonstrates its intent. *See Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 432 (1969). In *Flanagan*, the Court reasoned that such an “argument rests on unsure ground” because “[n]o one knows why the [l]egislature did not pass a proposed measure.” *Id.*; *see also Ross v. Arbury*,

133 N.Y.S.2d 62, 64 (Sup. Ct. New York County 1954) (rejecting plaintiff’s argument that the legislature’s intent could be gleaned from its failure to act on proposed legislation). This Court should thus follow the Court of Appeals’ example and decline to infer legislative intent from the Legislature’s decision not to enact a state DOMA.

Both DCS and Intervenors focus on the distinction between *performing* marriages in New York and *recognizing* out-of-state marriages in New York; they seek to use that principle to avoid the obvious import of the Court of Appeals’ command that “the present generation should have a chance to decide the issue [of same-sex ‘marriage’] through its elected representatives.” *Hernandez*, 7 N.Y.3d at 366. (DCS’s Br. at 17-18; Int’s Br. at 16) In presenting this argument, they essentially urge this Court to turn a blind eye to the realities of the present situation. If the executive branch unilaterally requires the State of New York to recognize out-of-state same-sex “marriages,” droves of same-sex couples will obtain “marriage” licenses from nearby jurisdictions such as Canada or Massachusetts, and the present generation of New Yorkers will be deprived of their ordained opportunity—one mandated by the Court of Appeals—to decide the issue of same-sex “marriage” through its legislators.

III. Neither New York Executive Law Section 296(1)(a) Nor The State Equal Protection Clause Requires DCS To Recognize “Marriage” Licenses Issued To Same-Sex Couples.

Intervenors contend that DCS’s failure to adopt its Policy Memorandum would violate New York Executive Law Section 296(1)(a) and the Equal Protection Clause. (Int’s Br. at 29) As will be demonstrated herein, there is no merit to either of these allegations.

Intervenors’ Section 296 claims are unsupported. Section 296 does not, as Intervenors imply, create a blanket protection for all same-sex couples under all circumstances; instead, like other protected categories under the Executive Law, “sexual orientation” discrimination is

prohibited in a limited set of prescribed circumstances, each of which require the claimant to make a showing of invidious discrimination. Thus, in order to establish the statutory violation that Intervenors allege, they must satisfy each element of a discrimination claim under Section 296. Yet, they have not even attempted to do so, and for good reason, because they simply cannot satisfy the required showings.

A party asserting a discrimination claim under Section 296 has the initial burden of establishing a prima facie case. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004). To meet this burden, the party must show: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *Id.*; *see also Brennan v. Metro. Opera Ass'n*, 729 N.Y.S.2d 77, 81-82 (1st Dept. 2001) (outlining the prima facie showing in the context of “sexual orientation” discrimination). Putting aside the first three requirements, it is abundantly clear that the last element—circumstances giving rise to an inference of discrimination—is not satisfied here. An appropriate application of the common law marriage-rule, which excludes out-of-state unions that do not conform to New York’s common law definition of marriage, does not give rise to any inference of discrimination, and Intervenors have not alleged to the contrary.

Even if a prima facie case could be shown, a party must demonstrate that the “real reason” for the employer’s conduct was discrimination based on “sexual orientation.” *Brennan*, 729 N.Y.S.2d at 82 (citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). That party always maintains “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against [her].” *Bailey v. New York Westchester Square Med. Ctr.*, 829 N.Y.S.2d 30, 34 (1st Dept. 2007) (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S.

248, 253 (1981)). Intervenors have not identified any evidence of intentional discrimination based on their purported “sexual orientation.” *See Langan I*, 802 N.Y.S.2d at 477 (recognizing that the decision to grant monetary benefits to opposite-sex spouses “certainly” did not arise from a “discriminatory intent” to deny those benefits to a particular class of persons). Thus, Intervenors’ cursory assertions concerning a possible violation of Section 296 are little more than unsupported platitudes, lacking any legal foundation.

Moreover, as discussed in Plaintiffs’ opening brief, when the legislature established “sexual orientation” as a protected class under Section 296, it expressly disclaimed any intent to impact the issue of same-sex “marriage.” Intervenors attempt to read the legislative history narrowly, again discussing the distinction between marriages performed in New York and out-of-state marriages recognized in New York. (Int’s Br. at 31) But, despite Intervenors’ attempts to limit the obvious import of this legislative history, it remains clear that the addition of “sexual orientation” to Section 296 was not intended to impact the “marriage” issue at all, neither in-state nor out-of-state unions. Thus, Intervenors’ attempts to use Section 296 for that very purpose must be rejected.

Furthermore, Intervenors’ Section 296 claim lacks any logical basis. No legal authority supports the notion that a state nondiscrimination statute may compel a state agency to extend comity to the acts of another jurisdiction. “The doctrine of comity is not a rule of law, but one of practice, convenience and expediency. It does not of its own force compel a particular course of action. Rather, it is an expression of one State’s entirely voluntary decision to defer to the policy of another.” *Ehrlich-Bober & Co., Inc. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980). Intervenors do not provide any basis for concluding that a state nondiscrimination law compels the application of a rule of “convenience”—one which “does not of its own force compel a

particular course of action.” *See id.* Such a novel argument lacks any basis, either in case law or in logic.

Intervenors’ equal protection argument is similarly baseless. The Court of Appeals has already held that the State’s 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 electing not 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. *Id.* at 364. All the legitimate and rational reasons for limiting marriage to opposite-sex couples within the State, *see id.* 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 decision not 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).

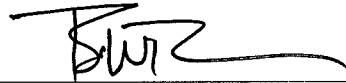
CONCLUSION

DCS violated the law by issuing its Policy Memorandum. 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: August 13, 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 August 13, 2008, I served two copies of the attached *Reply Brief of Plaintiffs-Appellants* on all parties by sending true and accurate copies via United Parcel Service Overnight Delivery to:

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