

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

- against -

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

Defendants,

- and -

PERI RAINBOW and TAMELA SLOAN,

[Proposed] Defendant-Intervenors.

Index No. 4078-07

Hon. Thomas J. McNamara

Oral Argument Requested

**DEFENDANT-INTERVENORS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY
JUDGMENT AND IN FURTHER SUPPORT OF MOTION TO DISMISS**

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Defendant-Intervenors Peri Rainbow and Tamela Sloan (“Defendant-Intervenors”) respectfully submit this memorandum of law in further support of their motion to dismiss plaintiffs’ verified complaint and in opposition to plaintiffs’ cross-motion for summary judgment.¹

PRELIMINARY STATEMENT

The Alliance Defense Fund, representing four purported New York taxpayers (collectively the “ADF”), brings this suit against the New York State Department of Civil Service (“DCS”) and its President (collectively the “DCS Defendants”). The ADF seeks to enjoin the DCS Defendants from respecting the valid out-of-state marriages of same-sex couples for purposes of providing spousal health coverage to married public employees participating in the New York State Health Insurance Program (“NYSHIP”). The ADF does not dispute that New York common law requires recognition of validly performed out-of-state marriages unless recognizing those marriages is expressly prohibited by statute or abhorrent to New York by shared public consensus. Nor does the ADF deny that same-sex couples can and do enter into valid civil marriages in Canada and a growing number of other countries around the world, as well as in Massachusetts. Further, the ADF does not dispute that Defendant-Intervenors are a same-sex couple who were legally married in Ontario, Canada and are together raising a daughter with special needs, adopted from the foster care system. Also undisputed is that public employees like the Defendant-Intervenors share the same need for health coverage as other families and are entitled to participate in NYSHIP. *See* Affidavit of Peri Rainbow dated Sept.

¹ Defendant-Intervenors moved to intervene on consent of the parties by motion filed on September 13, 2007. They respectfully request that the memorandum of law, affirmation, affidavits, and exhibits they filed on September 27, 2007 in support of their motion to dismiss be deemed submitted in opposition to the ADF plaintiffs’ cross-motion for summary judgment as well. Furthermore, in the event the pending motion to intervene is denied, Defendant-Intervenors respectfully request that this memorandum of law and all their other filings in the case be accepted and considered as *amicus* submissions.

20, 2007 (“Rainbow Aff.”) ¶¶ 1-16; Affidavit of Tamela Sloan dated Sept. 19, 2007 (“Sloan Aff.”) ¶¶ 1-7.

The ADF nevertheless asks this Court to ignore decades of binding precedent in order to serve the organization’s ideological mission to deny same-sex couples the rights they have earned and are entitled to as New York State employees and spouses. The ADF repeatedly states that New York limits recognition of out-of-state marriages to different-sex couples. But it cannot establish that either of the two exceptions to the common law rule leads to that result. Unable to reconcile the outcome it seeks with the existing marriage recognition rule, the ADF advances a series of baseless arguments as to why the rule should simply be ignored in this case. Defendant-Intervenors address these additional points below, but the short answer is that they conflict with governing law.

The marriage recognition rule itself, not the alternate theories cobbled together by the ADF, supplies the analysis the courts must follow to determine whether an out-of-state marriage unavailable here must still be respected in New York. The rule specifies how to analyze whether the Legislature has prohibited recognition of the marriage — that is, by asking whether the Legislature has *enacted an explicit positive prohibition* barring recognition. Contrary to the ADF’s suggestion, the Legislature’s limitation of marriages entered into within the State to different-sex unions does not constitute a ban on recognition of out-of-state marriages of same-sex couples — indeed, unlike a number of other states, New York’s Legislature has chosen *not* to take that step. Thus, the DCS Defendants did not violate the separation of powers doctrine or trammel legislative prerogatives by fulfilling their duty to respect those out-of-state marriages the Legislature has not expressly banned from recognition.

The marriage recognition rule also supplies the analysis the courts must follow to determine whether respecting an out-of-state marriage would violate New York public policy — that is, by determining whether the marriage is so objectionable as to be “abhorrent” in New York. No legal authority supports the ADF’s argument that the historical unavailability of a category of marriage changes the applicable analysis: the stringent “abhorrence” exception is the sole operative standard for determining whether a type of valid out-of-state marriage is so offensive that it cannot be respected in New York. The ADF’s attempts to end-run these clear and longstanding principles for evaluating out-of-state marriages should not divert the Court from applying the sole controlling test — the marriage recognition rule.

Indeed, this Court has already rejected the same arguments by the ADF in *Godfrey v. DiNapoli*, Index No. 5896-06 (Sup. Ct. Albany County Sept. 5, 2007) (McNamara, J.) (attached to Affidavit of Susan Sommer in Support of Defendant-Intervenors’ Motion to Dismiss dated Sept. 25, 2007 (“Sommer Aff.”) as Exh. D). The Court entered judgment in *DiNapoli* for the defendant State Comptroller and the same Defendant-Intervenors in this case and dismissed the ADF’s complaint, which made essentially the identical — and equally meritless — claims as here. *See DiNapoli*, slip op. at 3. The ADF cannot demonstrate any reason why the Court should now reach a different result. This Court’s analysis and decision in *DiNapoli* compel the conclusion that the ADF fails to state a claim against DCS and its President for following New York’s marriage recognition rule, just as the ADF failed to establish any claim for relief against the Comptroller in *DiNapoli* for abiding by the same law. The ADF in this case has launched yet another gratuitous attack on the rights of validly married lesbian and gay couples, and yet again this effort should be rebuffed by the Court. Accordingly, Defendant-Intervenors respectfully request that this Court dismiss the ADF’s complaint and deny the motion for summary judgment.

ARGUMENT

This case calls for a straightforward application of New York's governing marriage recognition rule. The DCS Defendants did no more than adhere to this longstanding and still vital rule by confirming in the challenged DCS policy memorandum that same-sex spouses married in jurisdictions where their marriages are legally valid are eligible for spousal health insurance coverage under NYSHIP. Like the State Comptroller's earlier determination upheld in *DiNapoli*, their conclusion that such marriages should be accorded respect in New York "is legal and not contrary to law." *DiNapoli*, slip op. at 5.

Unable to overcome the marriage recognition rule's obvious application to resolve this case, the ADF tries to prevent the Court from reaching the merits by claiming that the DCS defendants are judicially estopped from asserting that the DCS policy interpretation is lawful. But, as demonstrated below, this doctrine does not apply here, and the ADF's claims must fall on their own lack of merit. As additional smokescreens, the ADF argues that the DCS policy change did not meet State administrative procedure requirements and was a misuse of State funds for private political undertakings. Defendant-Intervenors understand that these meritless claims are refuted in depth in the DCS Defendants' papers and address them only briefly here. Defendant-Intervenors primarily respond in this memorandum of law to the ADF's arguments regarding application of the governing marriage recognition rule.

I.

The Judicial Estoppel Doctrine Has No Application To Defendant-Intervenors, Who Were Not Parties To The *Funderburke* Litigation, And Does Not Bar The Government From Correcting A Legally Flawed Policy

The ADF claims that the DCS Defendants are judicially estopped from defending the DCS policy because an earlier government administration defended a contrary policy in

Funderburke v. New York State Department of Civil Service, 13 Misc. 3d 284 (Sup. Ct. Nassau County 2006), *appeal docketed*, No. 2006-7589 (2d Dep't Aug. 3, 2006). The judicial estoppel doctrine provides that, in certain specific circumstances absent here, a party who takes a position in one proceeding and succeeds on the basis of that position may not then take a contrary position in a subsequent proceeding because its interests have changed. *See, e.g., Shapiro v. Butler*, 273 A.D.2d 657, 659 (3d Dep't 2000). That doctrine has no application in this case.

As a threshold matter, even if judicial estoppel could be construed to prevent DCS from defending its policy — and it cannot — *Defendant-Intervenors* certainly are not judicially estopped from pursuing *their* independent defense of the policy. “A party may not appropriately assert the defense of judicial estoppel unless it is demonstrated that the *the party against whom the estoppel is sought to be imposed actually procured a judgment in his favor* as a result of the inconsistent position *taken by him* in the prior proceeding.” *Chemical Bank v. Aetna Ins. Co.*, 99 Misc. 2d 803, 805 (Sup. Ct. N.Y. County 1979) (emphasis added); *see also Shapiro*, 273 A.D.2d at 659 (judicial estoppel inapplicable where defendant was not party to prior action). Defendant-Intervenors were not parties to *Funderburke* and never took a position in any prior litigation that is in any way inconsistent with their present stance. As explained in the affidavits of Ms. Rainbow and Ms. Sloan filed in this case, the Defendant-Intervenors have a pressing interest in defeating the ADF's challenge to the DCS policy — namely, their right to be respected as married spouses and to continue to receive crucial spousal health insurance coverage. They have intervened in this litigation precisely in order to defend those rights (*see* Rainbow Aff. ¶ 15-16; Sloan Aff. ¶ 7-8), and judicial estoppel poses no bar to the Court's consideration of their motion to dismiss and opposition to the ADF's summary judgment motion.

The ADF should have no greater success in estopping the government defendants from defending the current DCS policy. Under the ADF's faulty logic, if a government agency follows a policy position, however misguided or even unlawful, and then defends it in court, it and all future government administrations are forever barred from correcting course. But this is not how judicial estoppel works, nor would it be a prudent, or even constitutional, exercise of judicial authority for the courts to bind the hands of other government branches that way.

Subsequent to the flawed and widely criticized motion court decision in *Funderburke* upholding the prior DCS policy to decline recognition of out-of-state marriages of same-sex couples, DCS wisely determined that "legal and policy concerns in regard to the prior policy" call for respect for these marriages. Sommer Aff., Exh. A. See also Sommer Aff. ¶¶ 31-32. DCS's current determination that the marriage recognition rule applies to marriages of same-sex couples like Defendant-Intervenors follows the legal opinion issued years before by then Attorney General Spitzer, who, as duly elected Governor, is now responsible for setting the course of executive branch agencies. See Sommer Aff., Exh. B. The Attorney General's legal opinion has been followed by many other State and local public officials and entities and private parties in the years since it was issued, with the prior DCS administration having been the notable hold-out. See Sommer Aff. ¶¶ 18-31. DCS's current, and legally correct, policy position came in the wake of *Godfrey v. Spano*, 15 Misc. 3d 809 (Sup. Ct. Westchester County 2007), appeal docketed, No. 2007-4303 (2d Dep't April 27, 2007), yet another ADF challenge to governmental respect for out-of-state marriages of same-sex couples that was rejected by the courts. DCS's current policy has been further validated by this Court's very similar ruling in *DiNapoli*. Most recently, in its brief in the pending appeal in *Funderburke*, DCS explicitly confirms that it "agrees with appellant that the reasoning offered by the lower court . . . is plainly

incorrect” and has “no objection” to appellant’s request for vacatur of the decision. *See* Brief for the State Respondents at 10-11, *Funderburke*, No. 2006-7589 (2d Dep’t Sept. 27, 2007). In short, the positions DCS initially took in *Funderburke* have been shown to be premised on faulty law and policy, and DCS should be commended, not penalized by the courts, for switching course to adhere to New York law and cease its discrimination against gay and lesbian public employees.

These facts and circumstances simply do not justify applying judicial estoppel to the DCS Defendants. First, doing so would cause significant separation of powers concerns by infringing on the authority of this executive branch agency to carry out its statutory duties to provide and administer a health insurance plan for government employees and their spouses and dependents. *See, e.g.*, Civil Service Law (“CSL”) §§ 6(1), 7(1), 161, 164. Estoppel “may not be invoked against a governmental agency to prevent it from discharging its statutory duties.” *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 369-70 (1988). “[A] judicial estoppel preventing [defendants] from implementing [legal] requirements as they are required to do, would place the court in opposition to the elected branches of government” *Id.* at 370. Indeed, an agency is free to determine in good faith that a prior policy position was wrong. *See generally Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. Cuevas*, 276 A.D.2d 184, 187 (3d Dep’t 2000) (declining to apply estoppel to agency change in position); *Varsity Transit, Inc. v. Saporita*, 98 Misc. 2d 255, 261-62 (Sup. Ct. Kings County 1979) (“This court cannot seriously consider the argument that a municipality must remain constant . . . despite changing times and changing needs. It would be contra to public policy for the court to place its imprimatur on such a misguided, static concept.”).

This is also not the situation where a party is “playing ‘fast and loose with the courts,’” as required for a court to take the drastic step of imposing judicial estoppel. *Envtl. Concern, Inc. v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 594 (2d Dep’t 1984) (quoting *Scarano v. Central Ry. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953)). Nor is this a situation in which a party has taken inconsistent *factual* positions (as opposed to altering legal positions), another criteria for application of judicial estoppel. “The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.” *Envtl. Concern*, 101 A.D.2d at 593 (quotations and internal punctuation omitted). “The submission of a legal argument is of a different character than an inconsistent framing of one’s factual pleadings, and therefore not a basis for judicial estoppel.” *Excelsior 57th Corp. v. Kern*, 218 A.D.2d 528, 529-30 (1st Dep’t 1995) (quotations and internal citations omitted). Finally, not only have the DCS Defendants not played “fast and loose with the courts,” but they also have done nothing to prejudice the ADF plaintiffs in this litigation. The ADF, “being a legal ‘stranger’ to the prior action, . . . may not avail itself of the defense of judicial estoppel.” *Chemical Bank*, 99 Misc. 2d at 805.

In sum, neither the Defendant-Intervenors nor the DCS Defendants should be judicially estopped from defending the DCS policy. The ADF cannot hide behind this inapposite doctrine its complete failure to state a claim on the substantive merits.

II.

The Valid Out-Of-State Marriages Of Same-Sex Couples Are Entitled To Legal Respect In New York

The ADF distorts — or utterly ignores — controlling law in its campaign to deprive married same-sex New York couples of the rights and protections to which they are entitled in this State. The ADF argues that valid out-of-state marriages of same-sex couples should not be

recognized as valid in New York because (1) in the ADF's view, same-sex unions do not even qualify as marriages, and (2) the DCS Defendants — and the Court — should disregard the firmly entrenched marriage recognition rule and instead apply general principles of comity to deny respect to extra-territorial marriages of same-sex couples. Neither argument, nor any of the others propounded by the ADF, is supported by the law or public policy.

A. Because The Out-Of-State Marriages Of Same-Sex Couples Do Not Fall Under Either Exception To The Marriage Recognition Rule, The DCS Defendants Correctly Concluded That These Marriages Are Entitled To Respect For Purposes Of NYSHIP Benefits.

As this Court held in *DiNapoli*, under well-established law an out-of-state marriage valid where entered must be recognized as valid in New York, even if the marriage is expressly prohibited from occurring in New York. *See DiNapoli*, slip op. at 3; Defendant-Intervenors' Memorandum of Law in Support of Motion to Dismiss dated Sept. 25, 2007 ("Def.-Interv. Mem.") at 9-12; *see also, e.g., Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292 (1980) ("It has long been settled law that although New York does not itself recognize common-law marriages . . . a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted") (internal citations omitted). The marriage recognition rule does not differentiate between marriages of different-sex and same-sex couples, despite the ADF's efforts to suggest otherwise. Instead, only two exceptions limit the rule, neither of which applies here.

1. The Legislature Has Not Enacted Any Positive Law Precluding Recognition Of Out-Of-State Marriages Of Same-Sex Couples; Therefore The DCS Defendants Have Not Violated The Separation Of Powers Doctrine Or Acted Contrary To State Statute.

First, the marriage recognition rule will not apply if a New York statute explicitly declares that a given class of marriages, when performed in another jurisdiction, will be considered void in New York. *See* Def.-Interv. Mem. at 12-14; *In re Estate of May*, 305 N.Y.

486, 490 (1953) (recognizing Rhode Island uncle-niece marriage that, if entered here, would be void and criminal under Domestic Relations Law (“DRL”) § 5(3) and the predecessor to Penal Law § 255.25, because the Legislature had not prohibited recognition of such marriages entered out-of-state); *Van Voorhis v. Brintnall*, 86 N.Y. 18, 26 (1881) (“prohibition by positive law” constitutes exception to marriage recognition rule). Significantly, New York has no such statute withholding recognition here for out-of-state marriages of same-sex couples.

The ADF nonetheless contends that the DCS Defendants violate the separation of powers doctrine by following a recognition policy, which, as the ADF would have it, conflicts with Legislative mandates set down in the DRL and CSL § 164. According to the ADF, these statutes preclude recognition of the marriages of same-sex couples such as the Defendant-Intervenors. But these statutory provisions do no such thing.

Hernandez v. Robles, 7 N.Y.3d 338, 357 (2006), confirmed that the DRL does not permit marriages of same-sex couples *within* New York. But the DRL notably does not address, much less preclude, recognition of such marriages validly performed elsewhere. *See also DiNapoli*, slip op. at 4. CSL § 164, moreover, in fact *supports* the DCS Defendants’ authority to extend benefits to the same-sex spouses of state employees. The ADF itself concedes that “[t]hat statute authorizes Defendants to provide health insurance benefits to state employees, their ‘spouse[s],’ and ‘dependent children.’” Pls.’ Mem. in Opp. to Defs.’ and Prop. Def.-Interv.’s Mots. to Dismiss and in Supp. of Pls.’ Cross-Mot. for SJ dated Nov. 9, 2007 (“ADF Mem.”) at 11. The CSL does not specify who qualifies as a legal “spouse.” To answer that question, the DCS Defendants properly turned to the marriage recognition rule to determine that those in valid out-of-state marriages whose recognition here is not prohibited by express statute or “abhorrent” qualify as “spouses” entitled to benefits under CSL § 164. This is no different than the very

similar determination by the State Comptroller, upheld in *DiNapoli*, that the terms “spouse” and “widow/widower” in the Retirement and Social Services Law (“RSSL”) should be interpreted using the marriage recognition rule to include those who had entered into valid out-of-state marriages with same-sex partners. *See DiNapoli*, slip op. at 2 n.1 (analyzing RSSL §§ 61, 78-a, 378-a, 509, 607).²

The Court of Appeals made clear in *May* that, short of the extraordinary situation where a marriage is regarded with “abhorrence,” *only* the Legislature — not the courts or, for that matter, DCS — may stop operation of the marriage recognition rule. Moreover, as *May* further held, the Legislature overrides the common law recognition rule *only* by enacting a statute explicitly providing that a category of out-of-state marriages will not be recognized in this State — not merely by prohibiting or even rendering void and criminalizing such marriages if they occur here:

As section 5 of the New York Domestic Relations Law . . . does not expressly declare void a marriage of its domiciliaries solemnized in a foreign State where such marriage is valid, the statute’s scope should not be extended by judicial construction. . . . Indeed, had the Legislature been so disposed it could have declared by appropriate enactment that marriages contracted in another State — which if entered into here would be void — shall have no force in this State. . . . [A]bsent any New York statute expressing clearly the Legislature’s intent to regulate within this State marriages of its domiciliaries solemnized abroad, there is no ‘positive law’ in this jurisdiction which serves to interdict the . . . marriage in Rhode Island. . . .

May, 305 N.Y. at 492-93.

² This also is fully consistent with the Court of Appeals’s instruction that judicial interpretation of statutory terms keep pace with contemporary realities. *See, e.g., Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 211-12 (1989) (defining “family member” in rent control provision to include same-sex partner in light of contemporary realities, even though enacting Legislature in 1946 would not have contemplated this definition); *In re Jacob*, 86 N.Y.2d 651, 668-89 (1995) (construing adoption statute to allow second parent adoptions by “unmarried person[s]” in same-sex relationships, notwithstanding that “[t]o be sure, the Legislature that last codified [the statute] in 1938 may never have envisioned [such] families”).

The ADF thus gets the law completely backwards when it contends that any *recognition* of out-of-state marriages between same-sex couples must come from the Legislature. *See* ADF Mem. at 12. Instead, the *denial of recognition* to out-of-state marriages between same-sex couples must come from the Legislature. So long as the Legislature has chosen not to overrule the common law marriage recognition rule as applied to same-sex couples, it remains the default and controlling principle. *See* Stat. Law § 301(b) (“The common law is never abrogated by implication, but on the contrary it must be held no further changed than the clear import of the language used in a statute absolutely requires.”).

Thus, contrary to the ADF’s contention, the DCS Defendants have not “usurped” the role of the Legislature in violation of the separation of powers doctrine (ADF Mem. at 13) by applying the common law marriage recognition rule. Because the Legislature has issued no specific counter-directive, DCS and the courts are bound to apply that rule here.

2. Marriages By Same-Sex Couples Do Not Trigger The Abhorrence Exception To The Marriage Recognition Rule, The Governing Standard For Determining If Recognition Of A Marriage Is Contrary To Public Policy.

Second, the marriage recognition rule will not apply if an out-of-state marriage is “offensive to the public sense of morality to a degree regarded generally with abhorrence.” *May*, 305 N.Y. at 493. The abhorrence exception sets an exceptionally high bar for withholding recognition to a valid out-of-state marriage. It requires an overwhelming social consensus that a marriage is repugnant to the community, a criterion so stringent that, throughout the long history of the marriage recognition rule, only polygamous and closely incestuous marriages have been held to trigger it. *See* Def.-Interv. Mem. at 14-15; *May*, 305 N.Y. at 491; *DiNapoli* slip op. at 4.

In the face of overwhelming proof that this standard could not possibly be met in New York — including the holdings in *DiNapoli* and *Spano*, passage by the State Assembly of a

Governor-sponsored bill to allow same-sex couples to marry within the State, and the widespread respect in New York for same-sex couples' marriages and relationships more generally — the ADF has finally abandoned any effort explicitly to satisfy this stringent standard. *See* Def.-Interv. Mem. at 14-15; Sommer Aff. ¶¶ 18-40. Given the ADF's inability to demonstrate that the positive law or abhorrence exceptions to application of the marriage recognition rule apply here, this case should go no further. The DCS Defendants followed State law in determining to respect the valid marriages of same-sex couples for NYSHIP purposes.

B. The ADF Cannot Evade The Governing Marriage Recognition Rule With Its Proclamation That “By Definition” A Civil Marriage Of A Same-Sex Couple Is Not A “Marriage.”

Confronted with the inevitable conclusion that the marriage recognition rule compels dismissal of its complaint, the ADF resorts to the *ipse dixit* that marriage, by “definition,” cannot include same-sex couples and so the marriage recognition rule should not even come into play. This contention takes different forms in the ADF's memorandum of law, ranging from arguments that historical conceptions of marriage found in entirely different contexts foreclose application of the marriage recognition rule here (ADF Mem. at 19-20, 22-23), to the insulting assertion that granting legal respect to marriages of same-sex couples is like calling a “giraffe” a “zebra” (*id.* at 21), to dire warnings that providing spousal health insurance to couples like Defendant-Intervenors is “bulldoz[ing] social engineering” (*id.* at 25). These belittling claims are an injustice to families like the Rainbow-Sloans, who are not “giraffes” but valued New York public employees, parents working hard to give their adopted child a second chance on childhood and the future, and indisputably spouses in a legally valid *marriage* under Canadian law.

Furthermore, none of the ADF's contentions displace the guiding legal principle here: that because the out-of-state marriages of same-sex couples like Defendant-Intervenors (a) are

legally valid in sister jurisdictions, (b) not barred from recognition in New York by a positive Legislative prohibition, and (c) not abhorrent by shared public consensus, they are indeed entitled to legal respect here. The ADF's lengthy discussion of the purportedly universal and fundamental "definition" of marriage as limited to different-sex couples (ADF Mem. at 19-22) ignores the undeniable reality that same-sex couples can and do legally marry in numerous jurisdictions, including Canada, Massachusetts, the Netherlands, Belgium, Spain, and South Africa (*see* Sommer Aff. ¶¶ 12-17), as well as the widespread consensus within New York among both public and private actors to respect the valid out-of-state marriages of same-sex couples (*see id.* at ¶¶ 18-32).

Thus the marriage recognition question cannot be answered by consulting antique dictionaries, published in an age when same-sex couples could not marry, that describe "marriage" as involving a "husband and wife." ADF Mem. at 19-22.³ Nor can it be answered by the cases cited by the ADF having nothing to do with the marriage recognition rule or New York's treatment of out-of-state marriages. For example, *Hernandez*, heavily relied on by the ADF, addressed the entirely distinct question of who may marry *within* New York. *See Hernandez*, 7 N.Y.3d at 357. As this Court noted in *DiNapoli*, "the determination in *Hernandez* did not answer the question raised here. Rather, the question of whether same-sex marriages valid in the jurisdiction where performed should be recognized in New York is an outgrowth of the determination that the law in New York does not compel the State to sanction same-sex

³ Although legal standards and precedents, not dictionary definitions, govern this case, the contemporary dictionary the ADF itself cites as an authority on the definition of "marriage" actually *supports* application of the marriage recognition rule in this context. *See* ADF Mem. at 19. The ADF misleadingly quotes only selectively from the Merriam-Webster Online Dictionary, which goes on to define "marriage" as "the state of being married to a person of the same sex in a relationship like that of a traditional marriage" (emphasis added), as well as in entirely gender-neutral terms, as "the mutual relation of married persons, . . . the institution whereby individuals are joined in a marriage." *See* Merriam-Webster Online Dictionary, Definition of marriage, <http://www.m-w.com/dictionary/marriage> (last visited on December 19, 2007).

marriage.” *DiNapoli*, slip op. at 4. Likewise *Murphy v. Ramsey*, 114 U.S. 15 (1885), and *Fearon v. Treanor*, 272 N.Y. 268 (1936), also relied on by the ADF, had nothing to do with the common law marriage recognition rule.

The ADF further relies on a line of cases that are plainly inapplicable because they involved same-sex couples who were never married in *any* jurisdiction. See *Langan v. St. Vincent’s Hospital of N.Y.*, 25 A.D.3d 90, 94-95 (2d Dep’t 2005) (surviving party to Vermont civil union could not bring New York wrongful death action because not considered married under Vermont law), *appeal dismissed*, 6 N.Y.3d 890 (2006); *Valentine v. American Airlines*, 17 A.D.3d 38, 39-40 (3d Dep’t 2005) (unmarried domestic partner could not receive worker’s compensation death benefits as “spouse”); *Raum v. Restaurant Assocs., Inc.*, 252 A.D.2d 369 (1st Dep’t 1998) (unmarried domestic partner could not bring wrongful death action as “spouse”); *In re Estate of Cooper*, 187 A.D.2d 128 (2d Dep’t 1993) (unmarried domestic partner not entitled to claim “spouse’s” elective share of estate). Indeed, this Court noted in *DiNapoli* that in *Langan* (as in the other cases relied on by the ADF), “the issue of recognition of a foreign same-sex marriage was not raised or addressed.” *DiNapoli*, slip op. at 5. In fact, the results in all these cases would have been the same had an unmarried *different*-sex couple similarly sought to invoke the benefits or protections of marriage. See, e.g., *In re Estate of Huyot*, 245 A.D.2d 513, 514 (2d Dep’t 1997) (different-sex parties who never married “were not each other’s spouse,” so survivor could not claim spouse’s right of election under New York law).

The issue then is not whether same-sex couples like Defendant-Intervenors have “marriages” — undeniably they do have marriages that are legally valid in the sister jurisdictions where they were entered — but whether their marriages must be respected in New York. Now that many jurisdictions offer civil marriage to same-sex couples, the term “spouse” must be

interpreted under New York's marriage recognition rule, just as DCS has done, to apply to these legally married couples.

C. The Marriage Recognition Rule Remains Vital To This Day And The Controlling Standard That Governs The Legal Respect Due To Out-Of-State Marriages Of Same-Sex Couples.

In another variation on its theme, the ADF claims that because the common law marriage recognition rule first evolved when there were not yet marriages of same-sex couples, the rule can have no currency now. According to the ADF, the policy rationales underlying the rule — to avoid the conflicts that arise when the marital status of a couple is uncertain — do not apply if the marriage is between spouses of the same sex. *See* ADF Mem. at 23. In an effort to confuse the analysis further, the ADF claims that general comity principles, not the rule evolved by the courts specifically to deal with precisely the issue here, should govern. *See id.* at 26. These arguments, however, do not change the fact that the marriage recognition rule remains the governing legal standard, regardless of whether the marriage's availability in other jurisdictions is of recent or older vintage.

1. Application Of The Marriage Recognition Rule Here Is Consistent With The Policy Rationales Underlying It.

The marriage recognition rule is a firmly embedded common law principle, dating back centuries, *see Scrimshire v. Scrimshire*, 161 Eng. Rep. 782, 790 (Consistory Ct. 1752), yet still vital today. It is predicated on the unique personal nature of the marital contract: “[M]arriage is of a nature . . . widely differing from ordinary contracts . . . producing interests, attachments and feelings, partly from necessity, but mainly from a principle in our nature, which, together, form the strongest ligament in human society . . .” *Dickson v. Dickson's Heirs*, 9 Tenn. (1 Yer.) 110, 1826 WL 438, at *2 (1826), *cited in Van Voorhis*, 86 N.Y. at 20. *See also Persad v. Balram*, 187 Misc. 2d 711, 715 (Sup. Ct. Queens County 2001) (“[W]hile a marriage ‘is declared a civil

contract for certain purposes . . . it is not thereby made synonymous with the word contract, employed in the common law or statutes.’ . . . A marriage, because of its unique status and substance, differs significantly from ordinary contracts. . . . It is an ‘institution’ about which the state is ‘deeply concerned’ and takes a profound interest in protecting.” (citations omitted). Given the weighty personal commitment that marriage entails, the marriage recognition rule promotes certainty and stability for the parties who choose to marry and avoids the necessity for intrusive, case-by-case evaluations of the validity of marriages across state or national lines. *See* Def.-Interv. Mem. at 11.

The ADF emphasizes the marriage recognition rule’s connection to the policy preference for rearing children within a marital setting. *See* ADF Mem. at 24. But concerns for promoting childrearing within marriage only *support* applying the marriage recognition rule to same-sex married couples, many of whom, like the Defendant-Intervenors, are raising children. The personal attachments and commitment underlying marriage and need for family stability and certainty are no less weighty for same-sex married couples than for others. Whether New York allows a particular couple to marry here or not, the State recognizes the great importance of treating those married elsewhere as married in New York through the common law marriage recognition rule, subject only to the rule’s narrow exceptions.⁴

It is immaterial that same-sex couples only recently have been able to enter into civil marriages in other jurisdictions, calling for application of a common law rule that has evolved to apply in many contexts to many kinds of marriages. *See* Def.-Interv. Mem. at 10-11. “[I]t is the

⁴ It is a fallacy to suggest that the marriage recognition rule hinges entirely on policy concerns about children born to couples whose marital status would otherwise be uncertain. The courts routinely apply the rule without even reference to whether the couple in question has children. *See, e.g., In re Estate of Catapano*, 17 A.D.3d 672 (2d Dep’t 2005) (holding that petitioner was entitled to letters of administration as surviving spouse in Pennsylvania common law marriage despite no indication that couple had children together); *Coney v. R.S.R. Corp.*, 167 A.D.2d 582, 583 (3d Dep’t 1990) (holding that common law marriage obtained during 3-day sojourn in Georgia gave rise to entitlement to spousal workers’ compensation benefits, with no indication that couple had children together).

strength of the common law to respond, albeit cautiously and intelligently, to the demands of commonsense justice in an evolving society.” *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 291 (2007) (holding that common law tort of conversion “must keep pace with the contemporary realities of widespread computer use”) (citations omitted). The marriage recognition rule governs fully in this context.

The ADF’s claim that the rule was never intended “as a conduit for far-reaching social change” is yet another red herring. ADF Mem. at 24. Already built into the rule itself is the method for taking such concerns into account and, in rare situations, overriding the State’s very strong policy preference for respecting out-of-state marriages. First, the Legislature remains free to make the policy determination that a particular type of extra-territorial marriage should not be respected in this State and then (subject to constitutional constraints) to pass legislation prohibiting recognition. In that case, the explicit statutory prohibition overrides the marriage recognition rule. *See* Point I.A.1. above. Second, even in the absence of such a clear Legislative pronouncement, the courts still may decline to accord respect to a marriage if it is of a type abhorrent in New York by shared social consensus. As discussed above, and already determined by this Court, marriages of same-sex couples do not meet this stringent requirement for non-recognition. *See* Point I.A.2. above.

Moreover, the rule contemplates that even those marriages entered into in other jurisdictions by New Yorkers intentionally *evading* prohibitions on marriage in this State will be accorded comity. New York’s leading precedent, *May*, involved just such a situation, in which an uncle and a niece who were New York residents traveled to Rhode Island to marry even though their marriage was *expressly prohibited, deemed void, and a criminal offense* under DRL § 5(3) and the Penal Law. Despite these positive prohibitions — none of which have been

enacted in New York in connection with marriages between same-sex couples — the Court of Appeals nonetheless concluded that the marriage recognition rule must still apply to dictate legal respect to the Rhode Island marriage. *See May*, 305 N.Y. at 492-93.

This principle is particularly illustrated by the respect accorded in New York to extra-territorial marriages obtained to avoid this State's one-time restriction on remarriage after divorce. Until its amendment by the New York Legislature in 1966, DRL § 8 severely restricted the ability of an adulterous spouse to remarry following a divorce. *See, e.g., Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44, 48-49 (1970); Alan D. Scheinkman, Practice Commentaries, McKinney's Cons. Laws of N.Y., DRL § 6, C6:2 (1999). Many New Yorkers barred under this provision from remarrying in New York traveled to other jurisdictions to avoid the restriction and enter into a new marriage. A long string of cases upheld these extra-territorial marriages as valid in New York, notwithstanding that the parties to them had evaded an express New York prohibition on the marriages within the State. Thus a spouse barred by DRL § 8 from remarrying in New York "with impunity could go to a foreign jurisdiction — as countless have in the past — and there remarry. . . . [I]f the remarriage would be valid there, it would be valid here." *Almodovar v. Almodovar*, 55 Misc. 2d 300, 301 (Sup. Ct. Bronx County 1967).⁵

This case law illustrates New York's strong public policy favoring stability and predictability in determining marriage validity even when the marriage in question is expressly

⁵ *See also Farber*, 26 N.Y.2d at 55 (upholding validity in New York of Florida common-law marriage of divorcee prohibited from remarrying under New York law); *Moore v. Hegeman*, 92 N.Y. 521, 524-25 (1883) ("The statute . . . prohibiting the marriage of the guilty party can have no effect beyond the territorial limits of this State. Where the laws of another State do not prohibit such marriage by a party divorced its validity cannot be questioned in this State."); *Thorp v. Thorp*, 90 N.Y. 602, 606 (1882) (marriage validly obtained in Pennsylvania in evasion of New York law must be regarded as valid in New York); *Van Voorhis*, 86 N.Y. at 32-33 (marriage of divorcee who traveled to Connecticut to evade remarriage prohibition held valid in New York; DRL "does not in terms prohibit a second marriage in another State, and it should not be extended by construction" of courts to forbid its recognition here); *In re Estate of Peart*, 277 A.D. 61, 69 (1st Dep't 1950) (noting line of cases recognizing validity of second marriages obtained out-of-state to evade New York prohibition on remarriages).

barred within the State and the couple acts to *evade* the restriction. Thus, application of the marriage recognition rule here does not impose “social change” — it merely follows the State’s long-held policy as embodied in the common law and not altered by the Legislature.

2. Although The Marriage Recognition Rule, Not A General Comity Test, Specifically Governs Here, The Out-Of-State Marriages Of Same-Sex Couples Are Entitled To Respect Regardless Of The Rule Applied.

Given that the marriage recognition rule dooms its case, the ADF makes a last ditch effort to claim that the Court of Appeals has abandoned the rule altogether in favor of a general comity test that pays no deference to other jurisdictions. The ADF contends that the Court of Appeals effected this dramatic departure from the centuries-old rule with *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574 (1980). But that case concerned application of general comity principles in the context of “a wholly commercial transaction.” *Id.* at 582. *Ehrlich-Bober* did not even mention the longstanding, distinctive doctrine that applies in the marriage context, much less purport to supplant it with a newly developed comity rule. In short, *Ehrlich-Bober* has no relevance to this case.

Notably the ADF disregards the many controlling cases applying the marriage recognition rule *after Ehrlich-Bober*. Indeed, subsequent to *Ehrlich-Bober*, the Court of Appeals confirmed the vitality of the distinct marriage recognition rule, holding 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*, 51 N.Y.2d at 292. In numerous later cases the Appellate Division has followed the Court of Appeals’ marriage recognition precedents and confirmed that the rule remains the standard for conferring respect on an out-of-state marriage. *See, e.g., In re Estate of Yao You-Xin*, 246 A.D.2d 721, 721 (3d Dep’t 1998); *In re Estate of Gates*, 189 A.D.2d 427, 432 (3d Dep’t 1993); *Coney*, 167 A.D.2d at 583; *Dozack v. Dozack*, 137 A.D.2d 317, 318

(3d Dep't 1988); *Catapano*, 17 A.D.3d at 672; *Katebi v. Hooshiari*, 288 A.D.2d 188, 188 (2d Dep't 2001); *Lancaster v. 46 NYL Partners*, 228 A.D.2d 133, 141 (1st Dep't 1996). The ADF's invitation to this Court to ignore the appellate courts' numerous pronouncements that the marriage recognition rule is the law is patently improper. This Court is obviously bound to follow controlling precedents unequivocally applying the marriage recognition rule as the choice of law test that governs recognition of foreign marriages.

In any event, even if the general, non-marital comity principles of *Ehrlich-Bober* rather than those specific to recognition of marriages were applicable, respect for out-of-state marriages between same-sex partners *still* would be required in New York. The ADF grossly mischaracterizes how New York's general comity standards operate. Under the comity principle articulated in *Ehrlich-Bober*, a court must compare New York's public policy with that of the foreign jurisdiction to determine which conflicting law should control. *Ehrlich-Bober*, 49 N.Y.2d at 580. This approach does not permit simply disregarding the foreign law if inconsistent with New York's. "[I]f New York statutes or court opinions were routinely read to express fundamental policy, choice of law principles would be meaningless. Courts invariably would be forced to prefer New York law over conflicting foreign law on public policy grounds." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 79 (1993).

Instead, in determining whether recognition of valid foreign marriages would violate New York's public policy, even under general choice of law rules, a court still would apply a standard similar to the "abhorrence" exception: "In view of modern choice of law doctrine, resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious." *Id.* at 79. *See also Welsbach Elec. Corp. v. MasTec North America, Inc.*, 7 N.Y.3d 624, 628-29 (2006) (following *Cooney*). In light of New York's longstanding respect for same-

sex relationships, coupled with its exceptionally strong public policy calling for recognition of valid out-of-state marriages, the ADF could not possibly demonstrate that respecting the marriages of same-sex couples for NYSHIP purposes would be “obnoxious” to public policy.

D. The DCS Policy Comports With The Non-Discrimination Requirements Of SONDA And New York’s Constitutional Guarantee Of Equal Protection.

As demonstrated above, under the marriage recognition rule the DCS policy is “legal and not contrary to law.” *DiNapoli*, slip op. at 5. The ADF’s request that the Court jettison that venerable rule and create a double-standard where the out-of-state marriage involved is between spouses of the same sex contravenes not only the rule itself but also New York’s Sexual Orientation Non-Discrimination Act (“SONDA”), Executive Law § 296(1)(a), and the State Constitution’s guarantee of equal protection, N.Y. Const., art. I, § 11. Defendant-Intervenors demonstrated in their earlier memorandum of law that denying benefits to married lesbian and gay public employees while simultaneously conferring the benefits on those with other out-of-state marriages that likewise could not be obtained in New York discriminates on the basis of sex and sexual orientation in violation of these non-discrimination guarantees. *See* Def.-Interv. Mem. at 15-17.

The ADF again puts misplaced reliance on *Hernandez* to defend against the palpable discrimination entailed in treating as valid marriages that are even *criminalized* in New York, such as those between an uncle and a niece, while refusing to treat as valid marriages widely entered into by same-sex couples in sister jurisdictions just across New York’s borders. *See* ADF Mem. at 15 n.4. This Court has already recognized that *Hernandez* addressed statutory and constitutional questions only regarding marriages allowed *within* the State (*see DiNapoli* slip op. at 4), not the distinct question whether applying a double-standard to out-of-state marriages based on a person’s sex and sexual orientation violates SONDA or the Constitution. There is not

even a legitimate or rational basis for conditioning spousal health benefits to public employees in out-of-state marriages on whether the employees are heterosexual, gay, or lesbian. To do so would violate SONDA and the right to equal protection.

* * * *

In sum, the DCS policy to respect the marriages of couples like Defendant-Intervenors and extend NYSHIP spousal benefits to them accords with the governing marriage recognition rule and State anti-discrimination guarantees. The ADF's claims for violation of State Finance Law § 123-b and the separation of powers doctrine are without merit and should be dismissed.

III.

The DCS Policy Does Not Violate Administrative Procedure Requirements Or Constitute Use Of State Funds In Aid Of A Private Undertaking

For the reasons asserted in Defendant-Intervenors' opening memorandum (at 18-19) and the memoranda of law filed by the DCS Defendants, the ADF's remaining claims of violation of administrative notice requirements and prohibitions on use of State funds for private undertakings are completely without merit and should be dismissed.


CONCLUSION

For the foregoing reasons and those asserted in Defendant-Intervenors' other papers, the ADF's complaint should be dismissed, the ADF's motion for summary judgment should be denied, and a declaration should be entered in favor of all defendants.

Dated: December 20, 2007
New York, New York

LAMBDA LEGAL DEFENSE
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By: _____


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Peri Rainbow and Tamela Sloan*

CERTIFICATION OF SERVICE

I, Nick Tarasen, being not a party to this proceeding and being over the age of eighteen, hereby certify that on December 20, 2007, I served a copy of the attached DEFENDANT-INTERVENORS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF MOTION TO DISMISS upon all parties by forwarding the same via overnight Federal Express to:

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Nick Tarasen



Lambda Legal
making the case for equality

VIA OVERNIGHT FEDERAL EXPRESS

December 20, 2007

Hon. Thomas J. McNamara
Acting Justice of the Supreme Court, Albany County
65 South Broadway – Room 210
Saratoga Springs, NY 12866

Re: *Lewis v. New York State Department of Civil Service*
Index No. 4078-07

Dear Justice McNamara:

With co-counsel Kramer Levin Naftalis & Frankel, LLP, we represent Defendant-Intervenors Peri Rainbow and Tamela Sloan in the above-captioned action.

We enclose a courtesy copy of Defendant-Intervenors' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Further Support of Motion to Dismiss, both of which are returnable on January 4, 2008.

Respectfully submitted,

Susan L. Sommer

Encl.

cc: Brian W. Raum, Esq.
Richard Lombardo, Esq.
Jeffrey S. Trachtman, Esq.



Lambda Legal
making the case for equality

VIA OVERNIGHT FEDERAL EXPRESS

December 20, 2007

Hon. Charles E. Diamond
Chief Clerk
Albany County Supreme Court
Albany County Courthouse, Room 102
16 Eagle Street
Albany, NY 12207

Re: *Lewis v. New York State Department of Civil Service*
Index No. 4078-07 (McNamara, J.)

Dear Clerk Diamond:

Please find enclosed for filing in the above-captioned action the original of Defendant-Intervenors' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Further Support of Motion to Dismiss, both of which are returnable on January 4, 2008.

Please also find enclosed an additional copy of the memorandum, accompanied by a self-addressed stamp envelope, to be file stamped and returned.

Sincerely,

Nick Tarasen
Legal Assistant

Encl.

cc: Brian W. Raum, Esq.
Richard Lombardo, Esq.
Jeffrey S. Trachtman, Esq.