SUPREME COURT – STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

Index No: 4078/07

-against-

Justice Thomas J. McNamara

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,

-and-

PERI RAINBOW AND TAMELA SLOAN,

Proposed Defendants-Intervenors.

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ALBANY, N.Y.
COUNTY COURTS

PLAINTIFFS' REPLY TO DEFENDANTS' AND PROPOSED DEFENDANTS-INTERVENORS' RESPONSES TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs Kenneth J. Lewis, Denise A. Lewis, Robert C. Houck, Jr., and Elaine A. Houck (collectively referred to as "Plaintiffs") present this reply to Defendants' and Proposed Defendants-Intervenors' responses to Plaintiffs' cross-motion for summary judgment. Plaintiffs assert that neither Defendants nor Proposed Defendants-Intervenors have presented any reason why this Court should refrain from granting Plaintiffs' request for summary judgment on all four of their claims.[1] Plaintiffs therefore ask this Court to declare that Defendants' Policy Memorandum (1) constitutes an unlawful use of executive power (i.e., a violation of the separation of powers doctrine), (2) mandates an unlawful grant of public funds to those who are not legally entitled to receive them (i.e., a violation of Section 123-b of the State Finance Law), (3) comprises an unlawful use of public funds to aid the personal political objectives of certain executive officials (i.e., a violation of Article VII, Section 8 of the State Constitution), and (4) constitutes an unlawful promulgation of an agency rule or regulation (i.e., a violation of Article IV, Section 8 of the State Constitution and Section 202 of the State Administrative Procedures Act ("State APA")). Alternatively, Plaintiffs have at the very least stated four cognizable causes of action, and therefore, this Court must deny Defendants' and Proposed Defendants-Intervenors' motions to dismiss.

[1] Plaintiffs object to Proposed Defendants-Intervenors' continual reference to "the ADF" as if it were a party to this lawsuit. This inflammatory approach demeans Plaintiffs' interests and mischaracterizes the nature of this case.

ARGUMENT

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

Defendants have violated the separation of powers doctrine by acting inconsistently with the legislature's clear pronouncements regarding marriage and "spousal" benefits. Three undisputed facts lead inevitably to this conclusion. First, "the Legislature in dealing with the subject of marriage," including the regulation and recognition thereof, "has *plenary* power." *See Fearon v. Treanor*, 272 N.Y. 268, 271 (1936) (emphasis added). Second, marriage as defined in the State of New York does not include the union of same-sex couples. *See Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006). Third, the term "spouse," as unanimously interpreted by the courts, does not include partners of same-sex couples (regardless of whether their unions are recognized by other jurisdictions). *See Langan v. State Farm Fire & Cas.*, -- N.Y.S.2d -- , 2007 WL 4530994, at *1 (3rd Dept. December 27, 2007) (holding that the "parties to civil unions are not legal spouses" under workers' compensation law) (a copy of this decision is attached as Exhibit A); *Valentine v. American Airlines*, 791 N.Y.S.2d 217, 218 (3rd Dept. 2005); *Langan v. St. Vincent's Hosp. of New York*, 802 N.Y.S.2d 476, 477 (2nd Dept. 2005); *Raum v. Restaurant Assocs., Inc.*, 675 N.Y.S.2d 343, 344 (1st Dept. 1998); *Matter of Cooper*, 592 N.Y.S.2d 797, 798-99 (2nd Dept. 1993). Defendants, however, by issuing their Policy Memorandum, have ignored and acted in direct contravention of these well-established precepts.

In order to defeat Plaintiffs' separation of powers claim, Defendants and Proposed Defendants-Intervenors emphasize that this case involves New York's recognition of out-of-state unions rather than the recognition of marriages performed in the State of New York. By doing so, they attempt to integrate principles of comity jurisprudence, i.e., a judicially created doctrine

involving the recognition of foreign laws and the acts of other sovereign states and countries, into a separation of powers analysis where it does not belong. Separation of powers questions ask whether the New York executive branch has (1) "act[ed] inconsistently with the [l]egislature," or (2) "usurp[ed] its prerogatives." *See Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985). Thus, separation of powers issues focus on the actions and policies of the executive and legislative branches of the New York government. Evaluation of a judicially created doctrine concerned with the laws and actions of other sovereign jurisdictions is irrelevant when analyzing an issue that focuses on the congruency of the executive's and the legislature's actions.

Instead, the separation of powers question before this Court considers the validity of the executive branch's decision to recognize (and grant benefits based upon) the out-of-state "marriages" of same-sex couples, in light of (1) the legislature's plenary power over marriage issues, (2) the legislature's defining of marriage to exclude the union of same-sex couples, and (3) the legislature's limiting of benefits to "spouses" (a term that has been uniformly interpreted to exclude same-sex couples).[2] Given these explicit legislative pronouncements, this Court should hold that Defendants violated the separation of powers doctrine by acting inconsistently with the legislature and by usurping its prerogatives.

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[2] Defendants and Proposed Defendants-Intervenors argue as if DCS has unfettered authority to interpret the term "spouse" as used in Section 164 of the Civil Service Law. In response to these arguments, Plaintiffs first and foremost reiterate that Defendants were not attempting to interpret the term "spouse" when they issued their Policy Memorandum. But, even assuming the Court finds that Defendants were engaged in interpretation, it is a fundamental principle of New York law that an administrative agency may not define or interpret the law in a manner that conflicts with the plain language of governing statutes. *See Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980). Neither may an administrative agency interpret or implement statutes in a manner that "reaches beyond" or is "inconsistent[] with" existing legislation. *See Rapp v. Carey*, 44 N.Y.2d 157, 160 (1978); *Clark*, 66 N.Y.2d at 189. Defendants have violated both of these precepts. A "spouse," as defined under New York law, does not include a same-sex partner (whether "married" or otherwise), *see Langan*, 2007 WL 4530994, at *1; *Valentine*, 791 N.Y.S.2d at 218; *Langan*, 802 N.Y.S.2d at 477; *Raum*, 675 N.Y.S.2d at 344; *Cooper*, 592 N.Y.S.2d at 798-99, and Defendants, by interpreting the term "spouse" in such an unprecedented manner, have contradicted the plain language of the statute and reached beyond their executive prerogatives.

Defendants and Proposed Defendants-Intervenors also make much of the fact that the legislature has not passed a state DOMA ("Defense of Marriage Act"), contending that this fact alone conclusively demonstrates the legislature's intent to recognize same-sex "marriages" performed in other jurisdictions. But this is an improper basis upon which to presume legislative intent. *See Mashnouk v. Miles*, 55 N.Y.2d 80, 87-88 (1982) (reasoning that "no particular significance can be attributed to the Legislature's failure to adopt [statutory] amendments"). The courts have repeatedly recognized that the "failure by a Legislature 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 rejected the argument 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 "[t]his argument rests on unsure ground" because "[n]o one knows why the Legislature 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, and noting that "[t]he rules of statutory construction on implications from legislative inaction must be applied cautiously, particularly . . . where there is no record indicating the reasons for the disposition of them"). This Court should follow the example set by the Court of Appeals and likewise accord no weight to the mere fact that the legislature has not enacted a state DOMA.

For the foregoing reasons, this Court should grant summary judgment to Plaintiffs on their separation of powers claim.

II. DEFENDANTS VIOLATED SECTION 123-B OF THE STATE FINANCE LAW BY ORDERING THE UNLAWFUL DISBURSEMENT OF PUBLIC FUNDS TO SAME-SEX PARTNERS WHO HAVE BEEN "MARRIED" IN OTHER JURISDICTIONS.

The Policy Memorandum orders the distribution of public funds — in the form of state health insurance benefits — to a group of recipients (i.e., partners of same-sex couples who have been "married" outside New York) who are not legally entitled to receive them. The legislature has authorized Defendants to issue health benefits to the "spouse" of an eligible employee. *See* N.Y. CIV. SERV. LAW § 164. Defendants allege that they have interpreted the term "spouse" to include partners in same-sex unions who have been "married" in other jurisdictions. And Plaintiffs, in response to this argument, continue to assert that Defendants, when issuing their Policy Memorandum, were not engaging in any sort of statutory construction but, instead, were implementing a politically driven policy to create so-called "civil marriage equality for all New Yorkers." *See* Pl. Am. Compl. Exhibit B. But, even assuming Defendants were in fact engaged in statutory interpretation, their interpretation of the word "spouse" is not entitled to *any* deference from the Court. *See Claim of Gruber*, 89 N.Y.2d 225, 231-32 (1996) (giving no deference "where the question [was] one of pure statutory reading and analysis"); *Van Teslaar v. Levine*, 35 N.Y.2d 311, 318 (1974) (stating that the "general construction of statutory language" "is not materially aided by administrative expertise and there is no . . . reason . . . for the courts to defer to the agency").

An administrative agency's interpretation of the governing statutes must not conflict with the plain language of those statutes. *See Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980). The term "spouse" has been traditionally understood, and unanimously interpreted by the courts, to mean only a husband or a wife in an opposite-sex marriage. *See, e.g.*, *Langan*, 2007 WL 4530994, at *1; *Valentine*, 791 N.Y.S.2d at 218; *Langan*, 802 N.Y.S.2d at 477; *Raum*,

675 N.Y.S.2d at 344; *Cooper*, 592 N.Y.S.2d at 798-99. Defendants' "interpretation" of this term — as including same-sex partners who have been "married" in other jurisdictions — conflicts with this case law and is without other support in the law.

Both Defendants and Proposed Defendants-Intervenors wish to sweep away the deluge of appellate authority declaring that same-sex partners do not qualify as "spouses" under New York law. Defendants' Mem. in Opp. to Plaintiffs' Cross-Motion at 10 n.8; Proposed Defendants-Intervenors' Mem. in Opp. to Plaintiffs' Cross-Motion at 15. They argue that all of those cases are irrelevant in the present context because those cases did not involve same-sex couples who were "married" in other jurisdictions. *See id.* The implications of this argument, if seriously considered, are untenable. Consider only the recently issued Third Department decision in *Langan*, 2007 WL 4530994. In that case, the court concluded that "[t]he doctrine of comity [did] not require New York to recognize [decedent's civil union partner] as [his] surviving spouse for death benefits purposes." *Id.* at *2. The court reasoned:

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

Id. This reasoning and analysis is fully applicable and persuasive here.

Nevertheless Defendants and Proposed Defendants-Intervenors attempt to distinguish this line of cases on the mere basis that the foreign jurisdiction chose to label its same-sex unions as "marriages" rather than, for example, civil unions or domestic partnerships. This sort of reasoning creates the anomalous result that those same-sex couples joined in Vermont (i.e., a jurisdiction that denominates its same-sex unions as "civil unions") are not entitled to recognition in (or spousal benefits from) New York, while same-sex couples joined in Canada

(i.e., a jurisdiction that denominates its same-sex unions as "marriages") are entitled to recognition in (and spousal benefits from) New York. Surely the issuance of spousal benefits, in particular, and the doctrine of comity, in general, were never meant to hinge on such an arbitrary factor as the label selected by a foreign jurisdiction for the unions of same-sex couples. This Court should thus find that the line of cases declaring that same-sex partners do not qualify as "spouses" under New York law are controlling in the present context, and resist Defendants' and Proposed Defendants-Intervenors' simplistic distinction of these cases because, as demonstrated above, this sort of reasoning leads to bizarre results unsupported by legal authority.

Defendants and Proposed Defendants-Intervenors hold fast to their position that the marriage-recognition rule applies here, and that argument is particularly pressed in Proposed Defendant-Intervenors' rhetoric-filled, openly combative brief. Proposed Defendant-Intervenors assume it is a foregone conclusion that the marriage-recognition rule applies to all same-sex "marriages" performed outside New York. *See* Proposed Defendants-Intervenors' Mem. in Opp. to Plaintiffs' Cross-Motion at 9. But that is far from true. On the contrary, it is undisputed that no New York appellate court has ever applied the marriage-recognition rule to a same-sex union. And the few trial courts that have applied the rule to same-sex unions have done so without thoroughly analyzing whether the rule should apply in that context.

In their memorandum in response to Plaintiffs' cross-motion, Proposed Defendants-Intervenors admit that common law principles, such as the marriage-recognition rule, must "respond, albeit cautiously and intelligently, to the demands of commonsense justice in an evolving society." *Id.* at 18 (quoting *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 291 (2007)). Thus, by Proposed Defendants-Intervenors own admission, this Court has a duty to

consider whether it should take the unprecedented leap of applying the marriage-recognition rule to an out-of-state same-sex "marriage."

Proposed Defendants-Intervenors dismissively assert that Plaintiffs "cobbled together" reasons why the marriage-recognition rule does not apply to same-sex unions. *Id.* at 2. But, far from putting forth some mix-and-match analytical hodgepodge, what Plaintiffs have presented is a logical and rational argument to aid the Court in discharging its analytical duty to carefully consider a request to expand a common law principle into unchartered legal waters. And, despite repeated attempts to do so, Proposed Defendants-Intervenors have been unable to undermine Plaintiffs' four reasons why the marriage-recognition rule does not apply to same-sex unions.

For instance, Proposed Defendants-Intervenors challenge Plaintiffs' assertion that the marriage-recognition rule was never intended as a "conduit for far-reaching social change," characterizing Plaintiffs' argument as "yet another red herring." *Id.* at 18 (quotations omitted).[3] While boldly making this assertion, Proposed Defendants-Intervenors have failed to support it. First, Proposed Defendants-Intervenors do not dispute that the marriage-recognition rule was not intended to foster fundamental social change. In fact, it is clear, as demonstrated in Plaintiffs' memorandum in support of their cross-motion, that the rule does not have any such purpose. Second, Proposed Defendants-Intervenors do not contest that the application of this rule to same-sex unions will result in far-reaching societal change. Indeed, as demonstrated in Plaintiffs' memorandum in support of their cross-motion, such an unprecedented application of the

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[3] Proposed Defendants-Intervenors also state that Plaintiffs present "belittling claims" implying that Ms. Rainbow and Ms. Sloan are akin to giraffes and zebras. *See* Proposed Defendants-Intervenors Mem. in Opp. to Plaintiffs' Cross-Motion at 13. Such a ridiculous assertion raises concerns about whether Proposed Defendants-Intevernors actually read Plaintiffs' memorandum. Plaintiffs did not in any way personally demean or belittle the Proposed Defendants-Intervenors, or imply that they are animals; Plaintiffs simply presented an analogy to further their argument regarding the innate definition of marriage. To suggest that Plaintiffs did otherwise is truly a ridiculous assertion.

marriage-recognition rule *will* drastically alter the complexion of New York society.[4] In short, this solitary example of Proposed Defendants-Intervenors' unpersuasive arguments is illustrious of all the rest; thus Plaintiffs assert that Proposed Defendants-Intervenors have failed to undermine Plaintiffs' well-reasoned position that the marriage-recognition rule does not apply to same-sex unions.[5]

Because the marriage-recognition rule does not apply to same-sex unions, the general principles of comity jurisprudence apply to this Court's evaluation of whether DCS may recognize out-of-state same-sex "marriages" for purposes of administering the state health benefits system. Proposed Defendants-Intervenors, however, grossly misapprehend Plaintiffs' argument on this point. According to Proposed Defendants-Intervenors, Plaintiffs argue that "the Court of Appeals has abandoned the [marriage-recognition] rule altogether in favor of a general comity test." *Id.* at 20. But this characterization of Plaintiffs' argument is wholly unfounded. Plaintiffs do not assert that the Court of Appeals has explicitly displaced the marriage-recognition rule; instead, Plaintiffs clearly contend that because the marriage-recognition rule does not apply to same-sex unions, this Court must default to the general principles of comity

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[4] Proposed Defendants-Intervenors presumably know that this unprecedented expansion of the marriage-recognition rule will alter the composition of marriage in New York, and probably hope for such a change to occur.

[5] Proposed Defendants-Intervenors vainly assert, as they did in their motion to dismiss, that the refusal to extend "spousal" benefits to same-sex couples who were married in other jurisdictions violates SONDA and the constitutional guarantee of equal protection. Perhaps the mere fact that Proposed Defendants-Intervenors continually present this argument in one page or less at the end of their memorandums demonstrates the futility of these arguments. But if the Court were to find any merit in these contentions, it would severely curtail the legislature's autonomy to determine how benefits will be apportioned to the State's employees. Such a ruling would be unprecedented and would gravely jeopardize most, if not all, of the State's benefit programs. Moreover, case law from the Court of Appeals shows that the equal protection argument is wholly without merit. The Court has held that defining marriage to exclude same-sex couples does not violate the equal protection clause of the State Constitution, *see Hernandez*, 7 N.Y.3d at 365, and, by logically extension, neither does the refusal to recognize out-of-state same-sex "marriages."

jurisprudence outlined by the Court of Appeals.[6] *See Langan*, 2007 WL 4530994, at *2 (applying general comity principles to determine whether New York should recognize a same-sex union validly entered into in another jurisdiction). And, as demonstrated in Plaintiffs' memorandum in support of their cross-motion, New York comity jurisprudence indicates that Defendants have acted unlawfully in recognizing same-sex "marriages" performed in other jurisdictions. *See id.* (declaring that under the general principles of comity jurisprudence, "New York is not required to extend to [couples who have entered into Vermont civil unions] all of the benefits extended to marital spouses").

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

Defendants have violated Article VII, Section 8 of the State Constitution by using public funds to aid Governor Spitzer's personal goals of creating "civil marriage equality" in New York. *See* Pl. Am. Compl. Exhibit B. In their memorandum in opposition to Plaintiffs' cross-motion, Defendants contend that Plaintiffs "cannot identify a single politically favored individual who is being benefitted" by the issuance of the Policy Memorandum. Defendants' Mem. in Opp. to Plaintiffs' Cross-Motion at 12. But surely Plaintiffs have identified at least one politically favored individual benefiting from Defendants' actions, namely, Governor Spitzer himself.[7] Governor Spitzer has many times stated his support for same-sex "marriage" and voiced his efforts to champion so-called "marriage equality" in New York. *See* Pl. Am. Compl. Exhibit B; *see also* Danny Hakim, *Spitzer Vows to Push for Gay Marriage*, N.Y. TIMES, Oct. 7, 2006,

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[6] Proposed Defendants-Intervenors' gross misreading of Plaintiffs' clearly stated arguments is puzzling and somewhat troublesome.

[7] Plaintiffs note that other executive officials who favor same-sex "marriage" in Spitzer's administration — including, among other people, Defendant Groenwegen — also benefit from the issuance of Defendants' Policy Memorandum.

available at http://www.nytimes.com/2006/10/07/nyregion/07gays.html (last visited January 3, 2008) (reporting Spitzer's public statements that he would "push to legalize gay marriage"). And Defendants, by issuing their policy memorandum, have directly furthered Governor Spitzer's particular interest in what his administration refers to as "civil marriage equality."

Defendants next argue that Plaintiffs have presented only conclusory assertions and, thus, have failed to state a cause of action for a violation of Article VII, Section 8. Defendants' Mem. in Opp. to Plaintiffs' Cross-Motion at 12. But, in contrast from *Schulz v. McCall*, 632 N.Y.S.2d 883 (3rd Dept. 1995) (per curium), a case relied upon by Defendants, Plaintiffs have presented much more than conclusory allegations. In *McCall*, the petitioner merely stated that the respondents acted for their own political gain "at taxpayer expense." *See id.* at 884 ("The wholly conclusory allegation that the act was done 'at taxpayer expense' will not suffice."). Here, however, Plaintiffs have identified two specific sources of funds that were improperly expended — i.e., (1) public funds given to same-sex couples in the form of health benefits and (2) public funds expended by the executive branch, particularly DCS, in the form of wages, overhead, and supplies — and Plaintiffs have identified the precise impetus behind Defendants' unlawful spending — i.e., Governor Spitzer's and DCS President Groenwegen's desire for "civil marriage equality." *See* Pl. Am. Compl. Exhibit B.[8] This level of specificity sufficiently distinguishes the case at bar from *McCall*.

In a further attempt to defend this claim, Defendants posit a blanket rule unsupported by legal authority, contending that in order to state a cause of action under Article VII, Section 8, a plaintiff must allege that the defendant was "using state funds to finance some sort of political campaign." Defendants' Mem. in Opp. to Plaintiffs' Cross-Motion at 13. While it is true that

[8] Regardless of whether Plaintiffs are entitled to summary judgment on this claim, they have at the very least presented sufficient allegations to deny Defendants' and Proposed Defendants-Intervenors' requests to dismiss this claim.

many of the cases brought pursuant to Article VII, Section 8 involve the improper use of funds in furtherance of some political campaign, the case law does not demonstrate that the involvement of a political campaign is a requirement of an Article VII, Section 8 cause of action. *See* N.Y. CONST. art VII, § 8 ("The money of the state shall not be given . . . in aid of *any* private corporation or association, or private undertaking[.]") (emphasis added). For example, in *State v. Upstate Storage, Inc.*, 535 N.Y.S.2d 246, 248 (3rd Dept. 1988), the court acknowledged, in a context unrelated to a political campaign, that the government's actions in "releasing a contractual obligation without due consideration" amounted to "a gift of public funds" prohibited by Article VII, Section 8. Because Defendants' purported rule is not supported by the case law, this Court should declare that the involvement of a political campaign is not a requirement of an Article VII, Section 8 cause of action. Thus, for all the reasons set forth in the memorandum in support of their cross-motion, Plaintiffs are entitled to summary judgment on this cause of action.

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

Defendants have violated the rulemaking requirements of Article IV, Section 8 of the State Constitution and the State APA. In their memorandum in opposition to Plaintiffs' cross-motion, Defendants apparently concede that their Policy Memorandum satisfies the basic definition of an agency rule or regulation, i.e., "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers . . . ." *See Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951 (1985); *Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301 (1994). Defendants argue only that the interpretive-statement and internal-management

exceptions apply here; they do not argue that their Policy Memorandum does not satisfy the basic definition of an agency rule.

Defendants first argue that the interpretive-statement exception applies, asserting that DCS President Groenwegen's decision to issue the Policy Memorandum rested upon Spitzer's March 2004 legal opinion. Defendants' Mem. in Opp. to Plaintiffs' Cross-Motion at 15. But, as demonstrated in Plaintiffs' memorandum in support of their cross-motion, this sort of argument is little more than a post hoc justification for DCS's politically motivated decision to alter its policy concerning the "spousal" benefits of same-sex partners. Neither Defendant Groenwegen, nor any other DCS official, indicated that the decision to issue the policy memorandum rested on Spitzer's previously authored opinion. And Defendants' argument that they did in fact rely on the legal analysis in Spitzer's 2004 opinion is unfounded.[9]

Defendants next allege that the internal-management exception applies. That exception applies where (1) the agency's proclamation "concern[s] the internal management of the agency" and (2) the agency's proclamation does "not directly and significantly affect the rights of or procedures or practices available to the public." *See* N.Y. A.P.A. LAW § 102(2)(b)(i). Defendants do not specifically contend that both of these requirements are satisfied; Defendants instead incorrectly allege that "[P]laintiffs ignore[d] the Appellate Division's decision in *Krauskopf v. Perales*, [530 N.Y.S.2d 667, 669 (3rd Dept. 1988)]." Defendants' Mem. in Opp. to

[9] Defendants unconvincingly assert that the Second Department's decision in *UCP-Bayview Nursing Home v. Novello*, 769 N.Y.S.2d 285 (2nd Dept. 2003) is relevant here. In *Bayview*, the court held that the interpretive-statement exception applied. But that case is readily distinguishable from the facts before this Court. The plaintiff in *Bayview* challenged the Health Department's new standard for distinguishing between diagnosis codes for each patient's medical condition. The Department's new standard merely "clarified" how medical providers should classify the patient's medical condition, and the Department included this new standard in a "clarification sheet" issued to medical providers. In contrast, DCS did not insert its new policy in a "clarification sheet" but, rather, issued a memorandum to the general public that drastically altered its former policy of refusing to recognize same-sex "marriages" performed out of state. This Policy Memorandum, unlike the clarifying standard in *Bayview*, has a drastic legal effect; thus this Court should find that *Bayview* is unpersuasive and irrelevant here.

Plaintiffs' Cross-Motion at 16. Defendants' argument is misplaced, however. Plaintiffs explicitly addressed the *Krauskopf* case on page 36 of the memorandum in support of their cross-motion, and in that memorandum, Plaintiffs distinguished *Krauskopf* from the facts before this Court. In that case, the Court found that the internal-management exception applied because the agency's action did not directly affect the segment of the general public over which the agency exercised authority. Here, however, Defendants' Policy Memorandum directly and significantly affects the rights and interests of the very "segment of the 'general public' over which [DCS] exercises direct authority," i.e., state employees eligible to participate in the health benefits program. *See Connell v. Regan*, 498 N.Y.S.2d 929, 930 (3rd Dept. 1986). This Court should thus find that *Krauskopf* is not controlling and the internal-management exception is not applicable here.

In short, because none of the exceptions apply, the Court should find that Defendants violated the rulemaking requirements of the State APA and Article IV, Section 8 of the State Constitution.

CONCLUSION

Plaintiffs have conclusively established that Defendants violated the law and request, pursuant to CPLR 3211(c), that this Court grant summary judgment in favor of Plaintiffs on all claims presented. Alternatively, Plaintiffs ask this Court to recognize that they have stated four cognizable causes of action and, thus, deny Defendants' and Proposed Defendants-Intervenors' motions to dismiss.

Dated: January 3, 2008

Respectfully submitted,

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* Not admitted in this jurisdiction

EXHIBIT A

Langan v. StateFarm Fire & Cas.
N.Y.A.D. 3 Dept.,2007.

Supreme Court, Appellate Division, Third Department, New York.
In the Matter of the Claim of John R. LANGAN, Appellant,
v.
STATE FARM FIRE & CASUALTY, Respondent.
Workers' Compensation Board, Respondent.
Dec. 27, 2007.

Gibson, Dunn & Crutcher, L.L.P., New York City (Jennifer H. Rearden of counsel), for appellant.
Stewart, Greenblatt, Manning & Baez, Syosset (David J. Goldsmith of counsel), for State Farm Fire & Casualty, respondent.
David S. Buckel, Lambda Legal Defense & Education Fund, Inc., New York City, for Lambda Legal Defense & Education Fund, Inc., amicus curiae.

Before: CREW III, J.P., MUGGLIN, ROSE, LAHTINEN and KANE, JJ.
KANE, J.
***1** Appeal from a decision of the Workers' Compensation Board, filed September 7, 2006, which ruled that claimant is not the surviving spouse of decedent and denied his claim for workers' compensation death benefits.

Claimant and Neal Conrad Spicehandler (hereinafter decedent) were committed domestic partners from 1986 until decedent's death in 2002. In November 2000, claimant and decedent entered into a civil union in Vermont (*see*Vt Stat Ann, tit 15, §§ 1201). In February 2002, decedent was struck by a car while he was working for claimant's insurance business, resulting in a serious leg injury. After undergoing surgery on his leg, decedent died. Claimant filed workers' compensation claims for decedent's leg injury, and for death benefits as decedent's surviving spouse pursuant to Workers' Compensation Law §§ 16(1-a).[FN1] The workers' compensation carrier accepted the claims as work-related injuries, but questioned whether claimant was decedent's spouse for death benefits purposes. A Workers' Compensation Law Judge found that claimant did not have standing to assert the death benefits claim and the Workers' Compensation Board affirmed.

FN1. Claimant also commenced a wrongful death action against the hospital where decedent's surgery was performed. The Second Department dismissed that action, finding that claimant did not have standing because he does not qualify as a surviving spouse under the EPTL (*Langan v. St. Vincent's Hosp. of N.Y.,* 25 AD3d 90 [2005],*appeal dismissed*6 NY3d 890 [2006]).

On claimant's appeal, he makes three arguments: Workers' Compensation Law §§ 16(1-a) includes a partner to a civil union as a surviving spouse, the doctrine of comity requires New York to recognize claimant as decedent's surviving spouse for death benefits purposes and, if those arguments are not successful, the deprivation of death benefits to same-sex partners of a civil union violates the Equal Protection Clause of the U.S. Constitution. We address each argument in turn.

For purposes of the workers' compensation death benefits provision, which gives first priority to surviving spouses, "the term surviving spouse shall be deemed to mean the legal spouse" of the deceased employee (Workers' Compensation Law §§ 16[1-a]).Workers' Compensation Law §§ 16 does not further define the term "legal spouse" (*see Matter of Valentine v. American Airlines,* 17 AD3d 38, 40 [2005]). In previously reviewing Workers' Compensation Law §§ 16(1-a) in the context of a claim for death benefits by a registered domestic partner, we examined the statute's plain language and legislative history and determined that a " 'legal spouse' is a husband or wife of a lawful marriage"(*id.*). This interpretation is further supported by language in other subdivisions of the same statute, which provide a certain percentage of the deceased employee's average wages to the surviving spouse during widowhood or widowerhood, with a lump sum payment "upon remarriage" (Workers' Compensation Law §§ 16[1-b], [1-c], [2], [2-a]). Clearly, the term "remarriage" assumes that the surviving spouse was previously a party to a marriage. Claimant acknowledges that a civil union is not a marriage (*compare*Vt Stat Ann, tit 15, §§ 1201[2], *with*§§ 1201[4]), and he was not married to decedent. If a

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party to a Vermont civil union was considered a legal spouse for workers' compensation purposes, the statute would have the anomalous result of allowing a surviving civil union partner to continue collecting surviving spouse benefits even after entering into another civil union, because that new civil union is not considered a "remarriage" that would terminate death benefits. As parties to civil unions are not legal spouses under Workers' Compensation Law §§ 16, claimant was not statutorily entitled to assert the death benefits claim.

***2** The doctrine of comity does not require New York to recognize claimant as decedent's surviving spouse for death benefits purposes. This doctrine is not a mandate to adhere to another state's laws, but an expression of one state's voluntary choice to defer to another state's policy (*see Ehrlich-Bober & Co. v. University of Houston,* 49 N.Y.2d 574, 580 [1980]). Although we may recognize the civil union status of claimant and decedent as a matter of comity, we are not thereby bound to confer upon them all of the legal incidents of that status recognized in the foreign jurisdiction that created the relationship (*see Langan v. St. Vincent's Hosp. of N.Y .,* 25 AD3d 90, 102 [Fisher, J., dissenting] [2005], *appeal dismissed*6 NY3d 890 [2006]). Vermont considers parties to a civil union to be "spouses" under that state's law and provides them with all of the benefits, responsibilities and protections of spouses to a marriage, including workers' compensation benefits (*see*Vt Stat Ann, tit 15, §§ 1204[a], [b], [e][9]). But even under Vermont law, such parties are not part of a marriage (*see*Vt Stat Ann, tit 15, §§ 1201[2], [4]). While parties to a civil union may be spouses, and even legal spouses, in Vermont, New York is not required to extend to such parties all of the benefits extended to marital spouses. The extension of benefits entails a consideration of social and fiscal policy more appropriately left to the Legislature (*see Langan v. St. Vincent's Hosp. of N.Y.,* 25 AD3d at 95). We therefore decline to recognize, as a matter of comity, all of the legal incidents of a civil union that Vermont law provides to such parties in that state.

Having reached the conclusions that Workers' Compensation Law §§ 16 does not include parties to civil unions as spouses and that we should not extend death benefits to such parties as a matter of comity, we now determine that the deprivation of death benefits to the surviving party of a civil union does not violate the Equal Protection Clause of the U.S. Constitution (*see*U.S. Const, 14th Amend, §§ 1). Using the rational basis test to review this allegation of sexual orientation discrimination, the "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest" (*City of Cleburne, Texas v. Cleburne Living Ctr.,* 473 U.S. 432, 440 [1985];*see Romer v. Evans,* 517 U.S. 620, 631-633 [1996];*Matter of Valentine v. American Airlines,* 17 AD3d at 42). Claimant bears the burden of rebutting this presumption of constitutionality by demonstrating that the denial of death benefits to parties to a civil union serves no legitimate governmental purpose (*see Matter of Langan v. St. Vincent's Hosp. of N.Y.,* 25 AD3d at 92-93;*Matter of Valentine v. American Airlines,* 17 AD3d at 41). Prior case law "established that confining marriage and all laws pertaining either directly or indirectly to the marital relationship to different sex couples is not offensive to the Equal Protection Clause" (*Matter of Langan v. St. Vincent's Hosp. of N.Y.,* 25 AD3d at 93;*see Baker v. Nelson,* 291 Minn 310, 313-314 [1971],*appeal dismissed*409 U.S. 810 [1972];*Matter of Cooper,* 187 A.D.2d 128, 133-134 [1993],*appeal dismissed*82 N.Y.2d 801 [1993];*see also Hernandez v. Robles,* 7 NY3d 338, 363-365 [2006]).

***3** Claimant has not set forth any basis for us to depart from precedent. We previously held that Workers' Compensation Law §§ 16 does not differentiate on the basis of sexual orientation, but on the basis of legal status, and that this classification was rationally related to the state's interest in "swift and orderly processing of death benefits claims" (*Matter of Valentine v. American Airlines,* 17 AD3d at 42). While that rationale of administrative efficiency was persuasive in the context of domestic partners, a relationship that could be difficult to define in terms of rights and responsibilities and thus delay the payment of benefits (*see id.*), existence of a Vermont civil union is easily evidenced by a Vermont Department of Health license and certificate of civil union, similar to proof of a marriage in New York, and the rights of such partners are extensively defined under Vermont law. Even so, there may be other legitimate state interests served by limiting death benefits to marital spouses.

Workers' compensation provides a safety net to a surviving spouse (*see Matter of Landon v. Motorola, Inc.,* 38 A.D.2d 18, 20 [1971], citing *Matter of Post v. Burger & Gohlke,* 216 N.Y. 544, 553 [1916]). It would not be unreasonable to conclude that the Worker's Compensation Law was enacted, in part, to

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encourage and protect the traditional family constellation of husband, wife and children. Survivor benefits to the homemaker/child-rearing spouse, who was traditionally not employed or was employed part time, protects that spouse from destitution upon the death of the family breadwinner. It also compensates that spouse for sacrificing his or her own career by remaining at home to raise children. Although some may argue that same-sex couples are as capable of creating a family unit and raising children as opposite-sex couples, the Court of Appeals has already determined that the Legislature's decision to limit marriage to opposite-sex couples is rationally related to this legitimate interest and withstands rational basis scrutiny (*see Hernandez v. Robles,* 7 NY3d at 365). The decision to extend workers' compensation death benefits to a whole new class of beneficiaries, i.e., survivors of same-sex unions, is a decision to be made by the Legislature after appropriate inquiry into the societal obligation to provide such benefits and the financial impact of such a decision. As the statute is rationally related to a legitimate state interest, claimant has not met his burden.

CREW III, J.P., MUGGLIN and LAHTINEN, JJ., concur.
ROSE, J. (dissenting).
I respectfully dissent as to the majority's conclusion that the doctrine of comity does not require New York to recognize claimant as decedent's surviving spouse for purposes of the death benefits afforded by Workers' Compensation Law §§ 16(1-a).

While I certainly agree that the valid Vermont civil union entered into by claimant and decedent does not bind us to confer upon them "all of the incidents which the other jurisdiction attaches to such status" (*Matter of Chase,* 127 A.D.2d 415, 417 [1987]), claimant is not seeking such an incident here. He does not ask us to confer workers' compensation death benefits simply because Vermont would confer them. Rather, claimant asks us only to recognize the legal status of spouse afforded to him by Vermont, as a matter of comity. Once that status is recognized, New York law provides the legal incidents to which claimant would be entitled, including workers' compensation death benefits.

*4 There appears to be no real disagreement that Vermont has defined its civil union as a spousal relationship and conferred upon claimant the legal status of spouse (*see*Vt Stat Ann, tit 15, §§ 1204[b]), or that the doctrine of comity requires our recognition of a legal status acquired under the laws of another state (*see Matter of Chase,* 127 A.D.2d at 417). Nor is there any disagreement that Workers' Compensation Law §§ 16 affords a death benefit to a spouse. Where we diverge appears to be over the question of whether claimant can be a qualifying "legal spouse" in New York in view of our prior holding in *Matter of Valentine v. American Airlines* (17 AD3d 38, 40 [2005]), and the use of the term "remarriage" in Workers' Compensation Law §§ 16(1-b).

In *Matter of Valentine v. American Airlines* (17 AD3d at 40), we dealt only with domestic partnerships, holding that a domestic partner does not fall within the definition of "legal spouse" for purposes of Workers' Compensation Law §§ 16(1-a). There, unlike here, we were required to determine the legal status of domestic partners because no authority in New York had considered it. Due to the absence of a statutory definition of "legal spouse," we turned to dictionary definitions to find its meaning and concluded that it excluded domestic partners (*id.* at 40). We did not consider the legal status of Vermont civil union spouses. While Vermont civil unions are not marriages, they are formal spousal relationships between same-sex couples which are sanctioned and recognized by that state (*see*Vt Stat Ann, tit 15, §§ 1201), require a court proceeding to dissolve (*see*Vt Stat Ann, tit 15, §§ 1206) and obligate each party to provide for the support of the other (*see*Vt Stat Ann, tit 15, §§ 1204[c]). Thus, here, we need not construe the term "legal spouse" because a state legislature clearly has conferred that status on claimant, and we need only apply our doctrine of comity to give it effect.

As for the implications of the term "remarriage," it is significant that marriage was the only legally recognized spousal relationship in the United States when Worker's Compensation Law §§ 16 was first drafted (*see* L 1913, ch 816) and, thus, the term "remarriage" covered the only conceivable event that could replace the support obligation lost upon a first spouse's death. Since a civil union is now an alternate way to become a legal spouse and replace that obligation, an anomalous result could occur under the majority's strict reading of the statute even if civil union spouses were excluded from workers' compensation death benefits. Under the majority's construction, the term "remarriage" would mean that, upon later entry into a civil union, the surviving spouse of a marriage would not face termination of death benefits because it would not be a remarriage.

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That result can be avoided by reading the term "remarriage" to mean entry into a subsequent marriage or civil union, thereby treating all spouses the same. The term "remarriage" would then no longer imply that a surviving spouse could only have been previously married rather than having entered a civil union. Such an interpretation of "remarriage," while expansive, would avoid the anomaly, not be unreasonable and, in my view, be preferable "[s]ince the Workers' Compensation Law must be liberally construed in favor of employees in order to achieve its humanitarian purpose" (*Matter of Lashlee v. Pepsi-Cola Newburgh Bottling,* 301 A.D.2d 879, 881 [2003]).

***5** For these reasons, I would recognize claimant's status as a surviving spouse and, if the constitutional issue were not thereby rendered moot, find a violation of the Equal Protection Clause of the U.S. Constitution, requiring annulment and remittal of the Workers' Compensation Board's decision.

ORDERED that the decision is affirmed, without costs.

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AFFIDAVIT OF SERVICE

I, Joshua Tijerina, state under penalty of perjury that on January 3, 2008, I served a copy of the attached memorandum of law to all parties by sending a true and correct copy via UPS Overnight Delivery to:

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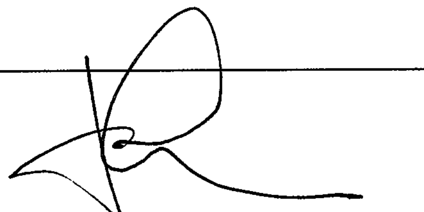
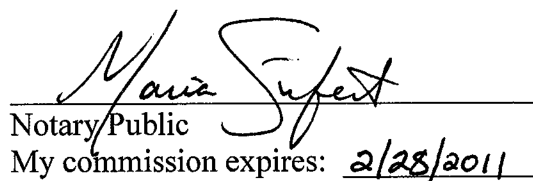
DATED: JANUARY 3, 2008



JOSHUA TIJERINA

Subscribed and sworn to before me
this 3rd day of January 2008.



Notary Public
My commission expires: 2/28/2011

MARIA SIFERT
Notary Public - Arizona
Maricopa County
Expires 02/28/2011