

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

MARGARET GODFREY, ROSEMARIE  
JAROSZ, and JOSEPH ROSSINI,

Plaintiffs,

- against -

ANDREW J SPANO, in his official capacity as  
the Westchester County Executive,

Defendant,

-and-

MICHAEL SABATINO and ROBERT  
VOORHEIS,

Defendants-Intervenors.

Index No. 16894/06

Hon. Joan B. Lefkowitz

Oral Argument Requested

**DEFENDANTS-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS PLAINTIFFS' AMENDED VERIFIED COMPLAINT AND IN  
OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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Defendants-Intervenors, Michael Sabatino and Robert Voorheis, a Westchester same-sex couple who validly married in Canada (“Defendants-Intervenors”), submit this memorandum of law (1) in support of their motion to dismiss the first amended verified complaint for failure to state a cause of action pursuant to CPLR Rule 3211(a)(7), and (2) in opposition to plaintiffs’ motion for a preliminary injunction.<sup>1</sup>

### **INTRODUCTION**

This action is a meritless attack on the rights of same-sex couples in Westchester County and a public official who is simply doing his job in confirming that New York law requires him to uphold these rights. The Alliance Defense Fund, an Arizona-based religious advocacy organization, filed the amended complaint for declaratory and injunctive relief and motion for preliminary injunction on behalf of three purported New York taxpayer plaintiffs (hereinafter collectively referred to as the “ADF”). The ADF seeks to enjoin Defendant Westchester County Executive Andrew J. Spano (the “County Executive”) from complying with controlling New York law requiring that he accord legal respect to valid out-of-state marriages between same-sex couples.

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<sup>1</sup> Defendants-Intervenors filed an unopposed motion to intervene in this action on December 4, 2006. Although the Court has not yet ruled on that motion, Defendants-Intervenors have timely moved to dismiss the action and opposed plaintiffs’ motion for a preliminary injunction so as not to cause delay in the proceeding or prejudice to their ability to be heard. The Defendant and the Defendants-Intervenors previously submitted on December 15, 2006 motions to dismiss plaintiffs’ original complaint and oppositions to the motion for a preliminary injunction. Plaintiffs responded by filing a first amended verified complaint, which Defendants-Intervenors now move to dismiss. This motion, opposition to plaintiffs’ preliminary injunction motion, and supporting papers supersede those filed by Defendants-Intervenors in December 2006. In the event the motion to intervene should be denied, Defendants-Intervenors respectfully request that their memorandum of law and accompanying affirmations, affidavits, and exhibits be accepted as submissions of *amici curiae*.

The lawsuit attempts to cast a cloud over the valid out-of-state marriages of same-sex couples, like that of Defendants-Intervenors, and the legal recognition, benefits, and protections to which these couples are entitled under New York law. The ADF sues the County Executive in his official capacity for doing no more than confirming in an Executive Order that the County will follow longstanding New York common law requiring that a marriage validly entered into in another jurisdiction be accorded legal respect in New York, even if the marriage could not be obtained under New York law. Under this well-settled rule, the County must recognize the out-of-state marriages of same-sex couples like Defendants-Intervenors.

The ADF's amended complaint is facially defective and should be summarily dismissed. The first cause of action, included in the ADF's original complaint as well, alleges that the County Executive's actions are illegal pursuant to New York General Municipal Law Section 51 ("Section 51"). Those allegations, however, even if accepted as true — which they are not — do not state a cause of action, for it is well established that alleged illegality alone is insufficient to maintain a claim under Section 51. That statute provides a cause of action only where the challenged official conduct constitutes fraud, collusion, bad faith, or corruption. The complaint nowhere alleges that the County Executive engaged in such malfeasance by respecting valid out-of-state marriages between same-sex couples, nor could the ADF possibly substantiate such an allegation.

In any event, the first count should be dismissed for the independent reason that the County Executive did not, as a matter of law, act illegally. New York law provides that validly performed out-of-state marriages, such as Defendants-Intervenors', should be respected in New York, even if those marriages cannot be performed in the State.

Indeed, in issuing his Executive Order, the County Executive was specifically following the legal opinion of New York State Attorney General (now Governor) Eliot Spitzer confirming that New York law requires legal respect for valid extra-territorial marriages of same-sex couples. The County Executive did nothing more than affirm that he will comply with controlling New York law. This would not give rise to a cause of action under Section 51 even if the statute were triggered by mere illegality, rather than requiring a showing of fraud or corruption.

The County Executive and Defendants-Intervenors already pointed out in their motions to dismiss the original complaint these fatal defects in the ADF's purported claim under Section 51. Rather than respond to these arguments, in a futile effort to shore up their baseless lawsuit the ADF has added an additional — and equally meritless — claim against the County Executive. The ADF now alleges in a second cause of action that the Executive Order purportedly is “legislation” inconsistent with and preempted by New York Domestic Relations Law (the “DRL”), in purported violation of the restrictions on home rule proscribed in New York Constitution Article IX, Section 2(c) (“Art. IX, Section 2”) and New York Municipal Home Rule Law Section 10(1)(i) (collectively, the “home rule provisions”). With no injury to them to complain of from the Executive Order, the ADF plaintiffs lack standing even to bring this claim. And not only is the Executive Order not “legislation” subject to the home rule provisions, but even if it were, it *follows*, rather than runs afoul of, the controlling State law governing the legal recognition that must be accorded to valid out-of-state marriages. In fact, what is inconsistent with State law is the position the ADF asserts — that local governments

may contravene the governing marriage recognition rule and disrespect valid out-of-state marriages for no reason other than that the spouses are of the same sex.

The amended complaint thus should be dismissed outright. Even were it not, however, the ADF could not meet the stringent requirements for a preliminary injunction. First, the ADF is unlikely ultimately to succeed on the merits, as it fails even to allege a valid cause of action. Second, the ADF cannot establish imminent irreparable harm based on the County Executive's mere confirmation that he will adhere to New York law for the purposes of extending and administering Westchester County rights and benefits belonging to validly married couples. Indeed, the County Executive represents in this litigation that no County benefits have been applied for by or are being provided to a same-sex couple as a result of an out-of-state marriage and that no claims for such County benefits appear to be imminent. Since Westchester County offers domestic partner protections to its employees and residents, many spouses in same-sex married couples likely would be entitled to County benefits in any event — meaning that the County Executive's rightful respect for these couples as married would have no perceptible impact on the public fisc. Thus, there is simply no emergency warranting a preliminary injunction. Finally, a balancing of the equities decidedly favors denying injunctive relief to the ADF. Defendants-Intervenors and other same-sex families continue to be recognized as married by many public agencies and private parties alike. They stand to suffer far greater harm from the confusion that would be created as to the legal respect owed their marriages if an injunction is granted than any alleged impact on the public fisc absent an injunction.

This action should be recognized for what it is — a bald maneuver to impair the rights of lesbian and gay New Yorkers by plaintiffs who cannot countenance that government officials are applying New York law evenhandedly to these residents.<sup>2</sup> The amended complaint should be dismissed with prejudice, a declaration should be entered in favor of the County Executive and the Defendants-Intervenors, and the motion for a preliminary injunction should be denied.

### **FACTUAL BACKGROUND**

#### **A. The Defendants-Intervenors**

Defendants-Intervenors Michael Sabatino and Robert Voorheis were married in Ontario, Canada on October 4, 2003. *See* Affidavit of Michael Sabatino (“Sabatino Aff.”) sworn to Nov. 18, 2006 ¶ 6 (Sommer Aff., Exh. B). They have been in a committed, loving relationship for more than 28 years. *See id.* ¶ 3. Mr. Sabatino is the regional sales manager for LEAP Technologies, which makes and distributes automated instruments for analytical research laboratories. *See id.* ¶ 2. Mr. Voorheis is an interior

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<sup>2</sup> Indeed, this is not the only effort by the ADF and the same plaintiffs to use New York courts to attack application of the marriage recognition rule when it comes to the rights of same-sex couples. At the same time they sued the County Executive, these plaintiffs also sued the New York State Comptroller for confirming that, consistent with New York law, the New York State and Local Retirement System (the “Retirement System”) must respect out-of-state marriages of same-sex couples for purposes of administering pension and retirement benefits to public employees. *See Godfrey v. Hevesi*, No. 5896/06 (Sup. Ct. Albany County filed Sept. 7, 2006). The Comptroller, represented by Attorney General Eliot Spitzer and currently by Attorney General Andrew Cuomo, is vigorously defending the rights of same-sex couples to have their out-of-state marriages respected for Retirement System purposes. Both Attorney Generals have confirmed in that litigation that the marriage recognition rule requires governmental respect for the valid out-of-state marriages of same-sex couples. Copies of the memoranda of law filed by the Comptroller in that case are attached as Exhibits E, F, and U to the accompanying Affirmation of Susan L. Sommer in Supp. of Defs.-Intervenors’ Mot. to Dismiss Pls.’ Am. Ver. Compl. and in Opp. to Pls.’ Mot. for a Prelim. Inj., dated January 26, 2007 (“Sommer Aff.”).

designer for Nelson & Company, a design firm in Manhattan. *See id.* The couple lives in Yonkers, in a house they jointly own. *See id.* ¶ 5.

After they married in Canada, Mr. Sabatino and Mr. Voorheis notified their employers, homeowner and automobile insurance carriers, and financial advisors of their marriage and were recognized as married by these and other third parties. *See id.* ¶ 7. Their marriage was announced by the *New York Times* in the Sunday “weddings” section, which reported that the couple married in Ontario, Canada. *See Sommer Aff., Exh. G.* They receive and expect to continue to receive recognition of and benefits for their marriage. *See Sabatino Aff.* ¶¶ 7-11. For example, they currently receive comprehensive automobile insurance coverage, including uninsured motorist coverage, which is available only to a spouse and would not be available to an additional driver. *See id.* ¶ 7. During a recent medical emergency they saw how important it is for their marriage to be respected, when Mr. Sabatino was able to be at Mr. Voorheis’s side and help make medical decisions as his spouse after Mr. Voorheis was rushed to the hospital with chest pains. *See id.* ¶ 9.

**B. County Executive Spano’s Executive Order  
Confirming That County Agencies Must Respect  
Valid Out-Of-State Marriages Of Same-Sex Couples**

The County Executive’s Order follows and is consistent with the determination by many New York public and private officials and entities that the valid out-of-state marriages of same-sex couples must be given legal respect in New York. Lesbian and gay couples have been legally permitted to wed in Canada since 2003, when Ontario began according same-sex partners the right to marry, followed swiftly by other Canadian provinces and then by nationwide law. *See Sommer Aff.* ¶¶ 15-16. The requirements

and process to enter into marriage in Canada are indistinguishable for same-sex and different-sex couples. *Id.* ¶ 17. Furthermore, Canada has no residency or citizenship requirements to marry there. *Id.* ¶ 18. Thus, U.S. citizens like Defendants-Intervenors may legally marry their same-sex (or different-sex) partners in Canada, and many have. *Id.* ¶¶ 18-19. Same-sex couples also may marry in Massachusetts,<sup>3</sup> Spain, Belgium, the Netherlands, and South Africa. *Id.* ¶ 20.

As discussed in Point I B. below, pursuant to long-standing common law principles, validly performed out-of-state marriages between same-sex couples are respected in New York, even though such couples are not permitted to marry here. Indeed, then Attorney General Spitzer issued an advisory opinion in March 2004 to that effect, confirming that “New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law.” *See Op. Att’y Gen. No. 2004-1* (Mar. 3, 2004) (Sommer Aff., Exh. I).

Many other government officials in New York have reached the same conclusion that New York law requires the jurisdictions over which they preside to respect out-of-state marriages of same-sex couples. Thus the New York State Comptroller announced in October 2004 that the New York State and Local Retirement System would recognize valid out-of-state marriages between same-sex couples. *See Op. of N.Y. State Comptroller Alan G. Hevesi* (Oct. 8, 2004) (Sommer Aff., Exh. I) Many New York municipalities, including New York City, Albany, Buffalo, Nyack, Rochester, and

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<sup>3</sup> Unlike Canada, Massachusetts does place statutory limitations on marriages there by out-of-state residents, so New York same-sex couples have not been free to marry in Massachusetts. *See Cote-Whitacre v. Dep’t of Public Health*, 446 Mass. 350, 844 N.E.2d 623 (2006). However, as explained in Point I, if a validly married Massachusetts same-sex couple moves or travels to New York, their marriage would also be entitled to respect in this State under the marriage recognition rule.

Brighton, have similarly publicly confirmed that, consistent with the marriage recognition rule, these local governments will respect marriages of same-sex couples validly performed outside the State. *See Sommer Aff.* ¶¶ 24-25. Public and private employers across the State are likewise respecting extra-territorial marriages of same-sex couples in New York, as are numerous corporations that conduct business in New York. *See id.* ¶¶ 26-28.

Acknowledging binding law and following the opinion of the Attorney General, the County Executive issued Executive Order No. 3 of 2006 on June 6, 2006, confirming the County's legal obligation to respect marriages of same-sex couples lawfully entered into in other jurisdictions. *See Sommer Aff., Exh. D.* The Executive Order first notes (a) the County's longstanding provision of health benefits to qualifying domestic partners and its support for their families through enactment of Westchester's Domestic Partnership Registry Law; (b) the opinions of the Attorney General and Comptroller, which other local governments publicly confirmed they are following, that New York law requires recognition of valid out-of-state marriages of same-sex couples even if New York does not permit such marriages here; and (c) the County Executive's responsibility under County law to supervise, direct, and control, subject to law, the administrative services and departments of the County. *See id.* The Executive Order then provides "that every department, board, agency, and commission of the County of Westchester" under the jurisdiction of the County Executive must "recognize same sex marriages lawfully entered into outside the State of New York in the same manner as they currently recognize opposite sex marriages for the purposes of extending and administering all rights and benefits belonging to those couples, to the maximum extent allowed by law."

*Id.* The ADF challenges this directive that Westchester County government offices adhere to New York's marriage recognition law.

## ARGUMENT

### I.

#### **THE ADF FAILS TO STATE A CAUSE OF ACTION UNDER THE GENERAL MUNICIPAL LAW**

Settled New York common law requires that the valid out-of-state marriages of couples like Defendants-Intervenors be accorded legal respect in the State. In confirming that the Westchester County government will respect such marriages, the County Executive has done no more than acknowledge what New York law demands and what Defendants-Intervenors and other married same-sex couples deserve. The ADF's allegation that the County Executive is acting illegally by respecting out-of-state marriages is facially insufficient to state a cause of action under Section 51 and simply incorrect as a matter of law. Further, any contention that the marriage recognition rule does not apply when the rights of these families are at stake contravenes longstanding New York principles of common law. Nor did the decision of the Court of Appeals in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), which held that the State Constitution does not require permitting same-sex couples to marry *within* the State, in any way change the distinct requirement that valid out-of-state marriages that could not be obtained here nonetheless be accorded legal respect.

#### **A. The ADF Cannot Demonstrate That The County Executive Engaged In Fraud Or Other Malfeasance As Required To State A Cause Of Action Under Section 51 Of The General Municipal Law**

On its face, the amended complaint fails to state a cause of action under Section 51, justifying dismissal under CPLR Rule 3211(a)(7). *See, e.g., Rosner v. Paley*, 65

N.Y.2d 736, 738 (1985) (motion to dismiss properly granted where complaint fails to state cause of action as matter of law); *Bettors v. Knabel*, 288 A.D.2d 872, 873 (4th Dep't 2001) (motion to dismiss properly granted for failure to state cause of action under Section 51). Specifically, the ADF does not and could not allege that the Executive Order constitutes the fraud, collusion, bad faith, or corruption required to make out a claim under Section 51.

Section 51 creates a cause of action for a taxpayer to challenge an "illegal official act" and "waste and injury" to public property and funds. *See* Section 51. As the Court of Appeals has held, however, a taxpayer may sue a public officer under Section 51 only in very limited circumstances, not present here: when the official conduct complained of is *illegal and involves fraud, collusion, or personal gain*. *See, e.g., Mevista of Forest Hills Inst., Inc. v. City of New York*, 58 N.Y.2d 1014, 1016 (1983); *see also Bernstein v. Feiner*, 13 A.D.3d 519, 521 (2d Dep't 2004) "The decisions under [Section 51] make it entirely clear that redress may be had only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes." *Kaskel v. Impellitteri*, 306 N.Y. 73, 79 (1953). There is no such allegation in the amended complaint, nor would such an allegation be sustainable.

Moreover, a claim under Section 51 "must be read narrowly to avoid inappropriate intervention by the judiciary in public policy issues which must be decided, in the last instance, by duly elected representatives." *Montecalvo v. City of Utica*, 170 Misc. 2d 107, 113 (Sup. Ct. Oneida County), *aff'd*, 233 A.D.2d 960 (4th Dep't 1996); *Montecalvo v. Herbowy*, 171 Misc. 2d 921, 926 (Sup. Ct. Oneida County 1997) ("A

cause of action for official corruption [under Section 51] must contain special, detailed factual allegations of waste tied to corruption.”) *See also* CPLR Rule 3016(b) (“Where a cause of action or defense is based on misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”).

In the absence of illegality, fraud, collusion, corruption, or bad faith, the court “has no power or authority . . . to regulate or superintend the official acts of one holding a civil appointment or to make itself the arbiter of a dispute between some dissatisfied taxpayer and the municipal authorities . . . .” *City of Utica*, 170 Misc. 2d at 114 (quotations omitted). *See also Hanrahan v. Corrou*, 170 Misc. 922, 925 (Sup. Ct. Oneida County 1938) (“The terms ‘waste’ and ‘injury,’ as used in the statute . . . are not intended to subject the action of any administrative official, acting within the limits of his authority and jurisdiction, to the scrutiny and control of a judicial tribunal.”).

Accordingly, the failure to allege such malfeasance by a public official requires dismissal of a Section 51 claim. *See In re Sanitation Garage, Brooklyn Dists. 3 and 3A*, 32 A.D.3d 1031, 1036 (2d Dep’t 2006) (Section 51 claim properly dismissed for failure to allege that government officials “acted corruptly or fraudulently, or engaged in illegal activities”) (citations omitted); *Bernstein*, 13 A.D.3d at 521 (same); *Hill v. Giuliani*, 249 A.D.2d 28, 28 (1st Dep’t 1998) (same).

There is no allegation – and certainly no evidence – that the County Executive’s actions were fraudulent, corrupt, taken in bad faith, or constituted collusion, as required to be actionable under Section 51. The amended complaint alleges only that the County Executive acted beyond his “authority” and “illegally” when issuing the Executive Order

(Am. Compl. ¶¶ 2, 21), but these allegations alone are insufficient to sue a public official under Section 51.<sup>4</sup> *See, e.g., Bernstein*, 13 A.D.2d at 521; *City of Utica*, 170 Misc. 2d at 114. In essence, the ADF alleges only a disagreement with a legal determination the County Executive made while performing his duties and does not even suggest, much less allege, that he has committed any type of fraud on the public or other culpable conduct of the type comprehended by Section 51. In fact, the County Executive followed the opinion of the State's Attorney General in issuing his Executive Order, a far cry from committing the kind of corrupt action Section 51 addresses.

Beyond this, to maintain an action under Section 51 the ADF must be able to “affirm a reasonable relationship between the illegality charged and a detriment to the municipality.” *Hansen v. Ludera*, 67 Misc. 2d 574, 579 (Sup. Ct. Erie County 1971). The ADF has not specified how County funds will be illegally distributed as a result of the Executive Order. “Bald conclusory statements of misrepresentation, conspiracy, collusion and malfeasance lend no substance to a pleading.” *Id.* at 581. Counsel for the County Executive has confirmed that no County funds have been used to provide benefits to same-sex couples as a result of their out-of-state marriages. *See Sommer Aff.* ¶ 39. Therefore, the ADF's contention that the County Executive has acted illegally is false and, even if accepted as true, facially insufficient to maintain this action.<sup>5</sup>

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<sup>4</sup> To the extent the ADF's Section 51 cause of action may be predicated on its faulty allegations regarding violations of the home rule provisions, it fails for the reasons explained not only in this Point but in Point II as well, where the home rule allegations are specifically addressed.

<sup>5</sup> In addition, the ADF had filed its original complaint without making the necessary showing of Section 51 taxpayer standing for each of the original four plaintiffs and without posting the bond required to bring a claim under that provision. After the Defendants-Intervenors and the Defendant moved to dismiss on these grounds, the ADF

**B. As A Matter Of Law, The County Executive Did Not Engage In Illegality By Confirming That Valid Out-Of-State Marriages Between Same-Sex Couples Must Be Respected For County Purposes**

Even if a disagreement with the County Executive’s reading of the law could provide grounds for a Section 51 claim, the complaint would still be subject to dismissal because the County Executive’s understanding of controlling State law was and is completely correct and, indeed, required to avoid unconstitutional discrimination between categories of valid out-of-state marriages.

**1. The Marriage Recognition Rule Requires That Marriages Valid Where Performed Be Respected In New York**

Under well-established New York law, a validly performed out-of-state marriage must be recognized as valid in New York. *See, e.g., Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 293 (1980); *In re Estate of May*, 305 N.Y. 486, 490 (1953) (“[I]n the absence of a statute expressly regulating within the domiciliary State marriages

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dropped one plaintiff from the amended complaint and added allegations relating to the Section 51 taxpayer standing of the remaining three. *See* Am. Compl. ¶ 8.

Significantly, however, the ADF continues to fall short of the bond requirements for maintaining a Section 51 claim. Although the ADF finally has obtained a bond, it has neglected its specific obligation to seek and obtain court approval of the bond and its amount. As Section 51 provides, “upon the commencement of [an] action” the plaintiff “shall furnish a bond to the defendant therein, to be approved by a justice of the supreme court . . . in such penalty as the justice . . . shall direct . . . . Said bond shall be . . . conditioned to pay all costs that may be awarded the defendant in such action if the court shall finally determine the same in favor of the defendant.” (Emphasis added.) The failure to meet this requirement results in dismissal of the claim. *See Zinder v. Bd. of Assessors of County of Nassau*, 38 A.D.2d 836, 836 (2d Dep’t 1972) (Section 51 action could not be maintained without compliance with bond requirement); *Kohilakis v. Harwood*, 29 Misc. 2d 800, 803 (Sup. Ct. Suffolk County 1961). Even after the Defendant and Defendants-Intervenors pointed out in their original motions to dismiss the ADF’s failure to satisfy these specific requirements of Section 51, the ADF has continued to flout them. The first cause of action is subject to dismissal on this ground. Moreover, having neglected this requirement yet again, the ADF deserves no further opportunity to cure the defect and prolong its meritless litigation.

solemnized abroad, the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated.”); *Thorp v Thorp*, 90 N.Y. 602, 605 (1882) (“[T]he validity of a marriage contract is to be determined by the law of the State where it is entered into. If valid there, it is to be recognized as such in the courts of this State”).

Under this rule, *even where the marriage is expressly prohibited or invalid under New York statute*, it is nonetheless entitled to legal respect within New York if valid in the jurisdiction in which it was entered. *See, e.g., Mott*, 51 N.Y.2d at 293 (“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).

Thus, for example, common law marriages, although prohibited by the Legislature since 1933, are respected from other jurisdictions. *Id.*; *Coney v. R.S.R. Corp.*, 167 A.D.2d 582, 583 (3d Dep’t 1990); *Dozack v. Dozack*, 137 A.D.2d 317, 318 (3d Dep’t 1988). New York likewise respects a valid out-of-state marriage between an uncle and a niece, though such a marriage would be invalid, void, and subject to criminal penalty under DRL Section 5(3) if celebrated here. *May*, 305 N.Y. at 492-93. Similarly, although a proxy marriage — one concluded at a ceremony attended by only one of the parties — cannot be contracted in New York pursuant to DRL Section 12, such a marriage will be deemed valid in New York if valid where performed. *See Fernandes v. Fernandes*, 275 A.D. 777, 777 (2d Dep’t 1949); *In re Will of Valente*, 18 Misc. 2d 701, 705 (Sur. Ct. Kings County 1959). Likewise, the out-of-state marriages of countless couples who traveled to other jurisdictions to avoid New York’s (now repealed) statutory

restriction on remarriage after divorce were respected in New York. *See Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44, 55 (1970); *In re Estate of Peart*, 277 A.D. 61, 64, 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) And the out-of-state unions of New Yorkers who married in other jurisdictions because they were too young under DRL Section 7(1) to wed here have likewise been respected under the marriage recognition rule. *See, e.g., Hilliard v. Hilliard*, 24 Misc. 2d 861, 863 (Sup. Ct. Greene County 1960).

Moreover, a marriage validly executed in a foreign nation that could not be obtained here — such as the Canadian marriage of Defendants-Intervenors — is entitled to the same strong presumption of validity in New York as one contracted in another state. *See, e.g., Van Voorhis v. Brintnall*, 86 N.Y. 18, 24 (1881) (“it is a general rule of law that a contract entered into in another State *or country*, if valid according to the law of that place, is valid everywhere”) (emphasis added). *See also Valente*, 18 Misc. 2d at 702 (Italian proxy marriage); *Bronislaw K. v. Tadeusz K.*, 90 Misc. 2d 183, 184 (Fam. Ct Kings County 1977) (determining validity of Polish marriage under laws of Poland). In particular, New York courts have for decades recognized Canadian marriages as valid. *See In re White*, 129 Misc. 835, 836 (Sur. Ct. Erie County 1927) (“validity of the [marriage] ceremonial must be tested, not by . . . the laws of this State, but by the laws of the place where the ceremony took place, which was the Province of Ontario”); *Donohue v. Donohue*, 63 Misc. 111, 112 (Sup. Ct. Erie Trial Term 1909) (“The parties were competent to contract a lawful marriage in the Province of Ontario, Canada; and the marriage was lawful there, and, therefore, is valid in this State.”).

This rule of recognition is stronger than ordinary comity principles, although it shares common roots in respect for other jurisdictions. *See Van Voorhis*, 86 N.Y. at 25 (“By the universal practice of civilized nations the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated.”) (*quoting Cropsey v. Ogden*, 11 N.Y. 228, 236 (1854)). Under a standard comity analysis, New York courts “apply the laws of other States where the application of those laws does not conflict with New York’s public policy.” *Crair v. Brookdale Hosp. Med. Ctr.*, 94 N.Y.2d 524, 528-29 (2000). In assessing New York’s public policy in the general comity inquiry, courts “look to the law as expressed in statute and judicial decision and to the prevailing attitudes of the community.” *Ehrlich-Bober & Co., Inc. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980).

In contrast, the marriage recognition rule — rooted as well in the paramount importance of the marriage contract to individuals and society — permits no such comparative policy analysis. With only two exceptions, the rule *requires* recognition of marriages valid where contracted *regardless* of whether the DRL would permit such marriages or whether New York’s law or public policy otherwise coincides with that of the foreign jurisdiction. *See Mott*, 51 N.Y.2d at 292-93; *May*, 305 N.Y. at 491-93; *Bronislaw K.*, 90 Misc. 2d at 184-85 (contrasting “sophisticated” principles considered in comity or full faith and credit analysis with clear “*lex locis contractus*” rule requiring recognition of marriages valid where contracted).

With marriage comes emotional and financial stability for spouses and any children, which supports a strong presumption of the validity of a marriage to protect these family ties. *See, e.g., Amsellem v. Amsellem*, 189 Misc. 2d 27, 29 (Sup. Ct. Nassau

County 2001) (“[T]he presumption of marriage . . . is one of the strongest presumptions known to the law.”) (citing *In re Estate of Lowney*, 152 A.D.2d 574, 576 (2d Dep’t 1989)) (internal citation omitted). Where, as here, the “party actually challenging the validity of the marriage is a total stranger to the marital relation, the presumption becomes even stronger.” *Seidel v. Crown Indus.*, 132 A.D.2d 729, 730 (3d Dep’t 1987). “[A] stranger to the marital relationship has a heavy burden to establish its invalidity.” *Meltzer v. McAnns Bar & Grill*, 85 A.D.2d 826, 826 (3d Dep’t 1981). The ADF taxpayer plaintiffs, complete strangers to the couples whose marriages are gratuitously attacked, cannot meet this heavy burden.

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 narrow exceptions limit the rule, neither of which applies here.

a. **New York Has Not Enacted Any Positive Law Precluding Recognition Of Out-Of-State Marriages Of Same-Sex Couples**

First, the marriage recognition rule will not apply if a New York statute explicitly declares that a given class of marriages, when concluded in another jurisdiction, will be considered void in New York. *See May*, 305 N.Y. at 492-93; *Van Voorhis*, 86 N.Y. at 26 (“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. While as *Hernandez* confirmed, the DRL does not permit marriages of same-sex couples within New York, 7 N.Y.3d at 357, the DRL notably does not preclude recognition of such marriages validly performed elsewhere. In

the absence of a specific legislative prohibition to the contrary, the common law marriage recognition rule is the governing law that must be applied statewide.

The Court of Appeals made unmistakably clear in *May* that, short of the exceptional situation where a marriage is “abhorrent” (described below), *only* the Legislature through an express statutory enactment — not the courts — may stop operation of the marriage recognition rule and deny respect to a category of extra-territorial marriages. *May* held that the marriage between an uncle and a niece who traveled to Rhode Island to marry must be respected in New York, their home state, even though uncle/niece marriages are *expressly prohibited, deemed void, and subject to criminal penalty* under DRL Section 5(3). 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 grant legal respect to the Rhode Island marriage:

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.

While a number of other states have enacted positive laws prohibiting recognition of out-of-state marriages between same-sex couples, New York, significantly, has not.

The Legislature has not elected to “interdict” out-of-state marriages between same-sex couples; neither the courts — nor a county government — is empowered to do so. *Id.* at 493. See also *Hilliard*, 24 Misc. 2d at 863 (though underage marriage would be void under DRL Section 7(1) if entered into in New York, such marriage entered into in Georgia must be respected here in absence of express statutory prohibition against recognizing out-of-state marriage of underage partners).

This principle is also illustrated by the historical respect accorded in New York to extra-territorial marriages obtained to avoid this State’s one-time restriction on remarriage after divorce. Until its repeal by the New York Legislature in 1966, DRL Section 8 restricted the right of a spouse who had engaged in adultery to remarry following a divorce. See, e.g., *Farber*, 26 N.Y. 2d at 48-49; 1966 N.Y. Sess. Law ch. 254. Many New Yorkers barred under this provision from remarrying in New York traveled to other jurisdictions to avoid DRL Section 8 and enter into a new marriage. A long string of New York 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. The courts concluded that under the marriage recognition rule, because the Legislature had not provided by statute that such marriages when obtained *out-of-state* were prohibited, they were required to be respected here. See, e.g., *Farber*, 26 N.Y. 2d at 55; *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*, 90 N.Y. at 606 (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 avoid 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 the courts to forbid its recognition here); *Peart*, 277 A.D. at 64, 69; *Almodovar v. Almodovar*, 55 Misc.2d 300, 301 (Sup. Ct. Bronx County 1967) (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.”)

The ADF thus gets the law completely backwards when it contends that the County Executive’s recognition of out-of-state marriages between same-sex couples is “legislating” contrary to New York law. *See* Am. Compl. ¶¶ 18-20. Instead, *denying recognition* to out-of-state marriages between same-sex couples would be tantamount to “legislating” in an area reserved to the New York 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.”). In the absence of an express prohibition by positive statutory law, neither the County Executive nor the courts may abrogate the common law rule and deny legal respect to one category of prohibited marriages.

b. **Marriages By Same-Sex Couples Do Not Satisfy The Abhorrence Exception To The Marriage Recognition Rule**

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 patently repugnant to the morality of the community, a criterion so stringent that, throughout the lengthy history of the marriage recognition rule, only polygamous and closely incestuous marriages have been held to meet it. *See id.*; *Van Voorhis*, 86 N.Y. at 26 (exception applies in cases “of incest or polygamy coming within the prohibitions of natural law”); *Earle v. Earle*, 141 A.D. 611, 613 (1st Dep’t 1910) (“the *lex loci contractus* governs as to the validity of the marriage, unless the marriage be odious by common consent of nations, as where it is polygamous or incestuous by the laws of nature”); *Bronislawa K.*, 90 Misc. 2d at 185 (marriage recognition rule gives way to “assert [New York’s] strong public policy of condemnation” of incestuous and polygamous marriages).

This exception too does not remotely govern here. As evidenced by its laws and judicial decisions, New York State increasingly regards same-sex partnerships with respect and tolerance, negating the consensus of abhorrence the ADF would have to demonstrate to invoke this narrow exception to the marriage recognition rule. *See Sommer Aff.* ¶¶ 29-35. The same-sex relationships of lesbian and gay New Yorkers are already respected and accorded protection in a variety of ways throughout the State and in Westchester. This includes, for example, recognition of out-of-state marriages by the

Attorney General, the State Comptroller, other public officials, municipal and County governments, unions, and private entities around the State. *See Sommer Aff.* ¶¶ 21-28. One need only open the marriage announcements section of the *New York Times* for evidence of the widespread social acceptance of marriage between same-sex couples in this State. Indeed, Defendants-Intervenors' marriage was itself announced in the *Times*. *See id.* ¶ 9; *Sommer Aff.*, Exh. G.

Same-sex relationships have long been accorded respect and protections in New York in many other contexts as well. For example, all three branches of State government provide benefits to domestic partners of State employees, as do numerous local governments, including Westchester. *See Sommer Aff.* ¶¶ 29, 32. Westchester County, along with a number of other municipal and county governments, provides an official domestic partner registry for same-sex couples. *See id.* ¶ 32; Laws of Westchester County ch. 550, § 550.01 *et seq.* *See also Levin v. Yeshiva*, 96 N.Y.2d 484 (2001) (same-sex partners entitled to pursue claim under New York City Human Rights Law to receive same student housing as married couples); *Braschi v. Stahl*, 74 N.Y.2d 201, 212-13 (1989) (same-sex life-partners entitled to same protections under rent control laws as spouses and other family members). There is certainly no social consensus in New York that same-sex relationships are abhorrent to public policy.

Ignoring the deeply rooted body of controlling New York common law governing recognition of out-of-state marriages, the ADF places exclusive reliance on *Ehrlich-Bober*, a case having nothing to do with marriage and instead applying general comity principles in the context of “a wholly commercial transaction.” 49 N.Y.2d at 582. *See Attorney Aff. in Supp. of Mot. for Prelim. Inj. and TRO*, submitted by the ADF (“Raum

Aff.”) ¶¶ 21-22. Notably, the ADF makes no mention of the controlling cases applying the marriage recognition rule both before and 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 the years since, the Second Department, along with other Appellate Division Departments, has reiterated and applied the rule numerous times. *See, e.g., In re Estate of Catapano*, 17 A.D.3d 672, 672 (2d Dep’t 2005); *Katebi v. Hooshiari*, 288 A.D.2d 188, 188 (2d Dep’t 2001). *See also, e.g., In re Estate of Yao You-Xin*, 246 A.D.2d 721, 721 (3d Dep’t 1998); *Lancaster v. 46 NYL Partners*, 228 A.D.2d 133, 141 (1st Dep’t 1996); *In re Estate of Gates*, 189 A.D.2d 427, 432 (3d Dep’t 1993); *Coney*, 167 A.D.2d at 583; *Dozack*, 137 A.D.2d at 318.<sup>6</sup>

Thus while general comity principles might call for reference to the “public policy” of New York to resolve a conflict between this State’s and another jurisdiction’s laws, that is not the approach followed under the governing marriage recognition rule.

In any event, even if the ordinary comity principles of *Ehrlich-Bober* rather than those specific to recognition of marriages controlled, out-of-state marriages between same-sex partners would still be required to be respected in New York. Under the comity standard articulated in *Ehrlich-Bober*, a court must compare New York’s public policy

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<sup>6</sup> The ADF attempts to divert the Court’s attention further from the controlling body of New York case law requiring recognition of out-of-state marriages by citing decisions from *other* states addressing *those* jurisdictions’ approaches. *See* Raum Aff. ¶ 25. Many of those cases are cited for propositions consistent with New York’s requirement that out-of-state marriages be recognized here unless repugnant to New York public policy. More to the point, however, is that the only standards for respecting out-of-state marriages that govern here are *New York’s*.

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).

In determining whether recognition of valid foreign marriages would violate New York's public policy, a court still would apply a standard similar to the "abhorrence" exception: whether respect for the foreign law would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 111 (1918). As the Appellate Division explained, "Judge Cardozo's language in the *Loucks* case lay down the proposition that the courts should be righteously indignant and withhold their aid whenever the Plaintiff's right to recover is founded upon proof that Plaintiff has committed acts which are patently violative of public policy, or which constitute an obvious menace to the public welfare." *Barker v. Kallash*, 91 A.D.2d 372, 377-78 (2d Dep't 1983), *aff'd*, 63 N.Y.2d 19 (1984); *see also Greschler v. Greschler*, 51 N.Y.2d 368, 377 (1980) ("[P]ublic policy should be predicated upon 'the prevailing attitudes of the community.'" (citation omitted). In light of New York's long-standing 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 demonstrate

that Westchester County's respect for the marriages of same-sex couples would be contrary to public policy.

**2. The Cases Relied On By The ADF To Support Its Claim That There Is An Exception To The Marriage Recognition Rule For Marriages Of Same-Sex Couples Are Inapposite Or Wrongly Decided**

Contrary to the ADF's argument (*see* Raum Aff. ¶¶ 15, 27), the decision of the Court of Appeals in *Hernandez* does not invalidate the out-of-state marriages of Defendants-Intervenors and other similarly situated same-sex couples. *Hernandez* determined only (1) that the DRL does not on its face allow same-sex couples to marry *within* this State, and (2) that this restriction is not so irrational as to be unconstitutional. *See Hernandez*, 7 N.Y.3d at 357, 360. The decision did not address or apply the entirely separate body of law used to determine whether a marriage that is permitted and valid in another jurisdiction must be recognized in New York.

Further, neither of the holdings in *Hernandez* triggered either the positive law prohibition or abhorrence exceptions to the marriage recognition rule or otherwise altered the County Executive's obligation to apply the rule to accord respect to out-of-state marriages of lesbian and gay public employees. While the plurality and concurring opinions in *Hernandez* concluded that any changes in New York's own marriage rules had to be made by the Legislature, there is nothing in either opinion to suggest that the Court was issuing an immutable "definition" of marriage positively prohibiting respect for a valid *out-of-state marriage* between same-sex partners. *See, e.g., id.* at 366 (plurality op.); *id.* at 379 (Grafteo, J., concurring).

Nor was there anything in either opinion suggesting that marriages of same-sex couples are "abhorrent" to public policy and not accorded respect under the marriage

recognition rule. In fact, all of the judges of the Court of Appeals agreed that the Legislature could or perhaps *should* change the DRL to permit same-sex couples to marry. *See id.* at 358-59 (“The question is not, we emphasize, whether the Legislature must or should continue to limit marriage in this way; of course the Legislature may . . . extend marriage or some or all of its benefits to same-sex couples.”) (plurality op.); *see id.* at 379 (“It may well be that the time has come for the Legislature to address the needs of same-sex couples and their families, and to consider granting these individuals additional benefits through marriage. . . .”) (Grafteo, J., concurring); *see id.* at 396 (Kaye, C.J., dissenting).

The ADF mistakenly claims that a “definitional” aspect of gender difference in marriage is somehow so basic and fundamental that it bars the State from recognizing the marriage of a same-sex couple even if permitted by a respected sister jurisdiction. *See* Raum Aff. ¶¶ 15-18. But as Massachusetts, Canada, Spain, the Netherlands, Belgium, and South Africa demonstrate, same-sex couples *can and do marry*. Simply saying these are not marriages “by definition” does not make it so.

Nor does *Hernandez* say any such thing. The “definition” of marriage upheld in *Hernandez* is no more than the requirement embodied in the DRL for what types of marriages may be solemnized within New York. *See Hernandez*, 7 N.Y.3d at 357. The New York Legislature has not enacted any legislation excluding foreign marriages of same-sex couples from operation of the common law marriage recognition rule. The Court’s deference to the Legislature in “defining” marriages to be performed within the State thus offers no ground to ignore the settled body of law governing recognition of marriages performed out of the State.

The Court of Appeals' decision simply confirms that there is a difference between New York and Canadian law, a situation that New York law addresses through the marriage recognition rule. Indeed, it is necessary to invoke the marriage recognition rule only *because* of a difference between New York's marriage rules and those of other jurisdictions. To conflate the DRL's restriction of marriage to different-sex couples with the separate question of whether an out-of-state marriage of a same-sex couple must be respected would literally eliminate the marriage recognition rule. Under such reasoning any out-of-state marriage not affirmatively *permitted* by the DRL would, by definition, not be *recognized* in New York. That is simply not the law.

The trial court in *Funderburke v. New York State Dep't of Civil Serv.*, 13 Misc. 3d 284 (Sup. Ct. Nassau County), *appeal docketed*, No. 2006-7589 (2d Dep't Aug. 3, 2006), upholding denial of recognition to a Canadian marriage between same-sex partners, made exactly the error the ADF seeks to have repeated here. With virtually no analysis, *Funderburke* conflated *Hernandez's* ruling denying an affirmative constitutional right to marry in New York State with the distinct issue of application of the marriage recognition rule to valid out-of-state marriages. *Id.* at 286. The *Funderburke* decision is on appeal; its faulty conclusion should not be followed here. Indeed, in defending the Comptroller's proper application of the marriage recognition rule to pension and retirement benefits for public employees in yet another ADF litigation, both former Attorney General Spitzer and current Attorney General Cuomo asserted that the *Funderburke* decision "was wrongly decided." See Mem. of Law in Supp. of Def.'s Mot. to Dismiss the Compl. at 23, in *Godfrey v. Hevesi*, No. 5896/06 (Sommer Aff., Exh. E); Reply Mem. in Further Supp. of Def.'s Mot. to Dismiss at 7, in *Godfrey v. Hevesi* (Sommer Aff., Exh. U). They

further explained that the “*Funderburke* court’s reliance on *Hernandez* is entirely misplaced” and that “the *Hernandez* decision simply did not deal with the issue of the recognition of same-sex marriages considered valid in the jurisdiction where executed.” Sommer Aff., Exh. E at 25-26; *see also* Sommer Aff., Exh. U at 7-8.

Finally, *Langan v. St Vincent’s Hospital of New York*, 25 A.D.3d 90 (2d Dep’t 2005), on which the ADF also relies, has no application here. *Langan* concerned a wrongful death claim brought by a party to a Vermont *civil union* — not, as at issue in this case, a marriage — who sought to bring the claim as the spouse of his deceased partner. The Appellate Division declined under choice of law rules to treat parties to a civil union as “married.” The court reasoned that equating a civil union with a marriage would “create a relationship never intended by the State of Vermont in creating civil unions or by the decedent or the plaintiff in entering into their civil union.” *Id.* at 95. In contrast, the ADF is challenging the validity under New York law not of civil unions but of *marriages* entered into in jurisdictions like Canada, where same-sex couples wed on exactly the same terms and enter into exactly the same marital relationship that other married couples do. *See* Sommer Aff. ¶ 17. *Langan* thus did not reject the common law rule governing this case requiring that a marriage valid where entered be accorded legal respect in New York, even if the marriage would have been invalid if performed in this State.

3. **The County Executive Avoided An Unconstitutional And Unjust Result By Following The Marriage Recognition Rule And Confirming That Out-Of-State Marriages Of Same-Sex Couples Must Be Respected For Purposes Of County Benefits**

Far from acting *ultra vires*, as the ADF claims, the County Executive merely confirmed that County agencies would abide by what New York law requires — that the

marriages of couples like Defendants-Intervenors be respected for purposes of County benefits. Defendants-Intervenors and other couples like them are married spouses entitled to have their marriages respected under New York law. It would violate the guarantee of equal protection conferred under New York Constitution Article I, Section 11, to disregard the venerable marriage recognition rule when it comes to respecting the marriages of these lesbian and gay New Yorkers.

Any different interpretation of the statutory and common law would give rise to an unconstitutional result, since there is not even a legitimate and rational reason for Westchester County's government to discriminate between same-sex and different-sex couples who may not marry in New York but have been validly married elsewhere. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632-35 (1996) (desire to impose legal disadvantage on gay and lesbian people is not even legitimate or rational basis for lawmaking); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 549-51 (1985) (town lacked legitimate and rational basis to discriminate on basis of family configuration); *People v Onofre*, 51 N.Y.2d 476, 490-92 (1980) (moral disapproval is illegitimate basis for government intrusion in areas of important personal decision). Under the marriage recognition rule, the County would be required to respect an out-of-state common law marriage, uncle/niece marriage, proxy marriage, or under-age marriage, even though those marriages are prohibited within New York. To single out for unfavorable treatment the out-of-state marriages of lesbian and gay Westchester County residents like Defendants-Intervenors, while simultaneously respecting other out-of-state marriages that likewise

could not be obtained in New York, would violate equal protection, a result the County Executive properly avoided.<sup>7</sup>

In sum, far from engaging in illegality and malfeasance, the County Executive followed governing New York law mandating that the County respect the marriages of couples like Defendants-Intervenors. The ADF thus fails to state a cause of action for violation of Municipal Law Section 51.

## II.

### **THE SECOND CAUSE OF ACTION FAILS BECAUSE THE ADF LACKS STANDING TO ASSERT IT AND IN ANY EVENT DOES NOT STATE A CLAIM FOR VIOLATION OF THE HOME RULE PROVISIONS**

With their original cause of action under Section 51 shown to be an irredeemable failure, the ADF resorts to adding a new — and equally meritless — claim that the Executive Order exceeds the County’s home rule authority in violation of Article IX, Section 2 of the New York Constitution and Municipal Home Rule Law Section 10(1)(i). These parallel home rule provisions allow local governments broad authority to enact local legislation, subject to the restriction against adoption of a “local law” that is “inconsistent” with State law or otherwise preempted by a comprehensive and conflicting

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<sup>7</sup> Given that a straightforward application of the marriage recognition rule supports the County Executive’s determination, these constitutional ramifications need not even be reached. *See People v. Felix*, 58 N.Y.2d 156, 161 (1983) (“It is hornbook law that a court will not pass upon a constitutional question if the case can be disposed of in any other way.”). Should they be taken into account, however, there should be no confusion with the distinct issue addressed in *Hernandez* — whether the State Constitution is violated by prohibiting same-sex couples from marrying *within* New York. *Hernandez* did not at all consider the different constitutional issue here — whether equal protection would be violated by uneven application of the marriage recognition rule to different categories of out-of-state marriages that are prohibited from taking place within New York.

State legislative scheme. *See, e.g., Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96-97 (1987)

As a threshold matter, the ADF plaintiffs lack taxpayer standing even to assert a claim for violation of these home rule provisions, requiring dismissal of this cause of action. Moreover, even if the ADF did have standing to bring this claim, it fails on the merits as a matter of law. The Executive Order is neither a local law nor inconsistent with State law. Instead, the Executive Order simply confirms that the County is *following* the governing State law commanding respect for valid out-of-state marriages of same-sex couples.

**A. The ADF Cannot Establish The Requisite Taxpayer Standing To Assert This Claim**

Standing is a threshold requirement calling for an actual stake in the outcome of the litigation, *i.e.*, an injury-in-fact worthy and capable of judicial resolution. *See Soc’y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772-73 (1991). The plaintiff has the burden to establish standing, which the ADF fails to do here. *See id.* at 769.

A litigant must satisfy a two-pronged test to establish standing in an action against a government official or body. First, the plaintiff must show that he or she will suffer an injury-in-fact distinct from the general public. *See Soc’y of Plastics*, 77 N.Y.2d at 774; *Transactive Corp. v. N.Y. State Dep’t of Soc. Servs.*, 92 N.Y.2d 579, 587 (1998). This requirement is based on the principle that under common law a court is without power to right a wrong where civil, property, or personal rights are not affected. *See id.* “Thus, a private citizen who does not show any special rights or interests in the matter in controversy, other than those common to all taxpayers and citizens, has no standing to sue.” *Meehan v. County of Westchester*, 3 A.D.3d 533, 534 (2d Dep’t 2004). *See also* 3

Carmody-Wait 2d *N.Y. Prac* § 19:12 (New York does not afford taxpayer standing to challenge acts of government official or body unless the taxpayer has special right or interest in matter that is different from those common to all taxpayers and citizens).

Second, a plaintiff is required to demonstrate that the injury claimed falls within the “zone of interests” sought to be protected by the legal authority under which the government acted. *See Transactive*, 92 N.Y.2d at 587; *Soc’y of Plastics*, 77 N.Y.2d at 774. This prerequisite ensures that a group or an individual “whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes.” *Transactive*, 92 N.Y.2d at 587.

Failure to satisfy either prong of the standing requirement results in dismissal of the claim. *See Diederich v. Rockland County Police Chiefs’ Ass’n*, 33 A.D.3d 653, 653-54 (2d Dep’t 2006) (taxpayer complaint dismissed for failure to allege injury-in-fact distinct from general public); *Meehan*, 3 A.D.3d at 534 (2d Dep’t 2004) (same); *Clark v. Town Bd. of Clarkstown*, 28 A.D.3d 553, 553 (2d Dep’t 2006) (taxpayer complaint dismissed for failure to allege injury-in-fact within zone of interests sought to be protected by statute under which government agency acted).

The ADF’s amended complaint fails both prongs. First, the ADF does not and cannot plead any “special right or interest” affected by the Executive Order that differs from any held by the general public. Rather, the ADF simply alleges that “[a]ll Plaintiffs are Westchester County taxpayers who have paid and/or are liable to pay taxes to the County of Westchester” and that the County Executive has spent and will spend County funds to enforce the Executive Order. *See Am. Compl.* at ¶¶ 8, 16. Those allegations,

even accepted as true, do not establish standing to sue. *See, e.g., Colella v. Bd. of Assessors of County of Nassau*, 95 N.Y.2d 401, 407-08 (2000); *Kadish v. Roosevelt Raceway Assocs*, 183 A.D.2d 874, 874-75 (2d Dep't 1992) On this ground alone, the ADF's second cause of action should be dismissed.<sup>8</sup>

Nor does the ADF satisfy the second prong of the standing requirement. It does not and cannot allege any injury falling within the "zone of interests" to be protected by any law conceivably at issue here. The home rule provisions confer broad powers on local governments to adopt local laws relating, for example, to the compensation of their employees (*see* Art. IX, § 2(c)(ii)(1); Mun. Home Rule Law § 10(1)(ii)(a)(1)); the use of their property and local government fees (*see* Art. IX, § 2(c)(ii)(6); Mun. Home Rule Law § 10(1)(ii)(a)(6) & (9-a)); and the safety, health, and well-being of their residents (*see* Art. IX, § 2(c)(ii)(10); Mun. Home Rule Law § 10(1)(ii)(a)(12)). *See, e.g., N.Y. State Club Ass'n, Inc. v. City of New York*, 69 N.Y.2d 211, 217 (1987), *aff'd*, 487 U.S. 1 (1988). The Executive Order confirms that the County will follow the well-established

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<sup>8</sup> A "minuscule even if calculable, adverse" tax impact on the plaintiffs, which is not even alleged in the amended complaint, would be insufficient to establish standing. In *Colella*, taxpayers challenged the decision of the Nassau County Board of Assessors to grant an organization's application for renewal of a tax exemption. *See* 95 N.Y.2d at 407-08. The taxpayers contended that, as real property owners and taxpayers, they incurred some possible measurable financial damage from the challenged tax exemption. *See id.* at 408. The Court dismissed the taxpayers' complaint for failure to allege an injury-in-fact:

It is highly dubious as to whether the minuscule even if calculable, adverse real property tax impact on the individual petitioners here, an injury indistinguishable from that incurred by other Nassau County real property owners, fulfills the first prong of the test for standing, that is suffering "special damage, different in kind and degree from the community generally."

*Id.* at 410.

marriage recognition rule to honor valid marriages of same-sex couples for purposes falling within the scope of the County's legal authority and obligations. While this has potential impact on, for example, gay and lesbian County employees by making certain employment benefits available to their spouses, it has none on these taxpayer plaintiffs. These plaintiffs have neither County benefits nor legal respect for their marriages at stake. Any alleged injury (and there is none) claimed by the ADF falls entirely outside the "zone of interests" protected by the laws involved here. *See Transactive*, 92 N.Y.2d at 587; *Soc'y of Plastics*, 77 N.Y.2d at 774. Their second cause of action should be dismissed on this basis as well.

Finally, while the ADF makes passing reference in the amended complaint to "common-law taxpayer standing" (*see* Am. Compl. ¶ 8), it cannot demonstrate standing on that basis either. Common law taxpayer standing is available only when (1) a plaintiff challenges significant government legislative action, and (2) failure to accord standing would erect an impenetrable barrier to any judicial scrutiny of legislative action. *See Transactive*, 92 N.Y.2d at 589 (contract bidders lacked common law taxpayer standing to challenge contract award for distribution of public benefits because they were not seeking review of legislative action); *Parete v. Maloney*, 20 A.D.3d 712, 713 (3d Dep't 2005) (taxpayer lacked common law taxpayer standing to seek resignation of Ulster County official because "no impenetrable barrier to judicial scrutiny" existed). Common law taxpayer standing "should not be applied . . . to permit challenges to the determinations of local governmental officials having no appreciable public significance beyond the immediately affected parties, by persons having only the remotest legitimate interest in the matter." *Colella*, 95 N.Y.2d at 410-11.

The ADF fails to meet these requirements. First, as explained below, the ADF challenges not “legislative action” but an Executive Order merely confirming that the County will adhere to State law. And while it is of great significance to married Westchester same-sex couples that they will not be discriminated against by their County government, the fact that their marriages are accorded legal respect by Westchester County has little impact on the broader public. Furthermore, this is not a case where denial of standing to the ADF necessarily will insulate the County Executive’s determination from the possibility of judicial review. A party with “special rights or interests in the matter” may seek judicial review under appropriate circumstances. The ADF’s amended complaint is simply an attempt to use the courts to air a disagreement with an administrative determination to comply with State law. There is no common law taxpayer standing to bring such a challenge. *See id.* at 410. Accordingly, the ADF’s second cause of action should be dismissed.

**B. The Executive Order Does Not Trigger The Restrictions On Home Rule And In Any Case Is Fully Consistent With Governing State Law**

Even if the ADF had standing to assert its second cause of action, it would fail on the merits of its claim that the Executive Order violates home rule. This is because the Executive Order is neither a “local law” to which the home rule provisions even speak nor inconsistent with State law.

The broad powers conferred on local governments by the home rule provisions are circumscribed by limitations ensuring that State law remains supreme over conflicting local laws. Thus a local government may not “adopt[] a local law inconsistent with constitutional or general law.” *N.Y. State Club Ass’n*, 69 N.Y.2d at 217. A local law may be found to violate this proscription “when the Legislature has restricted such an exercise

[of power] by preempting the entire area of regulation,” *id.*, and the local law is inconsistent with the State scheme. *Jancyn*, 71 N.Y.2d at 97. While these restrictions limit the authority of a local legislative body to enact legislation inconsistent with State law, they have no application here.

At the outset, the Executive Order cannot properly even be considered a “local law” triggering the restrictions on home rule. A “local law” is defined under Municipal Home Rule Law Section 2(9) as:

A law (a) adopted pursuant to this chapter or to other authorization of a state statute or charter by the legislative body of a local government, or (b) proposed by a charter commission or by petition, and ratified by popular vote . . . ; but shall not mean or include an ordinance, resolution or other similar act of the legislative body or of any other board or body.

The Executive Order was neither enacted by a local legislative body nor proposed by charter commission or petition and ratified by popular vote. Hence it is not a “local law” to which these home rule provisions apply. *See, e.g., Clark v. Cuomo*, 66 N.Y.2d 185, 191 (1985) (“Executive Order . . . is not a law”). Of course, that is not to say that a local government could by Executive Order impose and enforce new measures in conflict with State law. But that is not at all what this Executive Order does.

Instead, rather than “legislate” new local law, the Executive Order simply applies well-established State law to areas squarely within the authority of the County and its Executive. The ADF does not allege that the County lacks authority, for example, to set compensation and provide health benefits to its employees or to enter into agreements with employee organizations regarding the terms of employment. *See, e.g.,* p. 33 above; County Law § 205; Civ. Serv. Law § 204. Moreover, well prior to the Executive Order,

the County covered the domestic partners of its employees under the County health benefit plan and enacted a Domestic Partner Registry Law conferring certain other benefits on County residents in domestic partnerships. *See, e.g.,* Laws of Westchester County ch. 550, § 550.01 *et seq.* As *Slattery v. City of New York*, 266 A.D.2d 24 (1st Dep’t 1999), held, a local government consistent with the home rule provisions may extend benefits to domestic partners of its employees and residents. *Id.* at 25 (“in the absence of any clear conflict between pertinent State legislation and the [local law], the City did not exceed its authority by extending . . . benefits to domestic partners.”).<sup>9</sup>

The County Executive is also authorized under County law “[t]o see that the laws of the state, pertaining to the affairs and government of the County, the acts and resolutions of the County Board and duly enacted local laws are executed and enforced within the County.” Laws of Westchester County ch. 110 § 110.11(6). This may be done using an Executive Order, which can “implement[] the enforcement of . . . standards” already established under law. *Clark v. Cuomo*, 66 N.Y.2d at 191.

Consistent with these powers and responsibilities, the Executive Order confirms that in administering duly enacted County programs, the County will treat married same-sex couples who have legally wed out of State as married. Furthermore, the Executive Order was promulgated subsequent to and to be consistent with opinions issued by the

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<sup>9</sup> *Slattery* also noted that “the City has not, by extending benefits to domestic partners, transformed the domestic partnership into a form of common law marriage . . . impinging upon the State’s exclusive right to regulate the institution of marriage.” *Slattery*, 266 A.D.2d at 25. The Executive Order likewise does not purport to create a “form of common law marriage” or impinge upon the State’s regulation of marriage. The Executive Order does no more than confirm that the County will do what State law compels, which is to respect out-of-state marriages whether they be common law marriages long recognized in New York though barred under the DRL from occurring here, or marriages of same-sex couples.

State Attorney General and Comptroller confirming that *State law requires* governmental respect for valid extra-territorial marriages of same-sex couples. Contrary to the ADF's allegations, the Executive Order thus is not "legislation" creating new legal standards, rights, or prohibitions, but merely confirmation that the County will follow *existing controlling State law* in administering County employee benefits and other County programs. *See* Am. Compl. ¶¶ 25-27. The ADF's invocation of the home rule provisions is thus completely misplaced.

Moreover, even if the Executive Order somehow could be viewed as a "local law," far from being "inconsistent" with or preempted by State law, the Executive Order conforms to State law governing respect for out-of-state marriages. Impermissible "inconsistency has been found where local laws prohibit what would have been permissible under State law or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws." *N.Y. State Club Ass'n*, 69 N.Y.2d at 217 (quotations omitted); *see also Consol. Edison Co. of N.Y., Inc. v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983). The Court of Appeals has further explained that inconsistency will not be found unless "the Legislature has evidenced a desire that its regulations should pre-empt the possibility of varying local regulations . . . or when the State specifically permits the conduct prohibited at the local level." *Jancyn*, 71 N.Y.2d at 96-97. The Executive Order neither "prohibit[s] what would have been permissible" nor "impose[s] . . . additional restrictions on rights under State law." *N.Y. State Club Ass'n*, 69 N.Y.2d at 217. Rather than impose a prohibition not found in the DRL or common law or curtail existing State rights, the Executive Order instead affirms

that the State-conferred rights of same-sex couples will not be abrogated by the County government<sup>10</sup>

Indeed, if anything, a County legislative enactment providing the *opposite* of the Executive Order — that a local government *will not* respect valid out-of-state marriages of same-sex couples (the result the ADF seeks to obtain through this litigation) — very well would run afoul of the home rule restrictions. Such an enactment would be inconsistent with the State marriage recognition rule and would purport to impose limitations on the rights accorded to valid out-of-state marriages beyond any expressed in the statutory or common law. *See, e.g., Lansdown Entm't Corp. v. N.Y. City Dep't of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989) (local law prohibiting what is allowed by State law violates restrictions on home rule). The ADF should not be permitted to pursue this unlawful result through the courts.

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For all the foregoing reasons, the ADF fails to state a claim for relief. The appropriate remedy on the motion to dismiss is for the Court to declare that the County

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<sup>10</sup> That the home rule provisions are not abridged or even at issue here is demonstrated by representative cases applying home rule doctrine to evaluate whether a local government had authority to enact a particular law, such as *Albany Area Builders Ass'n v Town of Guilderland* and *Jancyn*. These cases illustrate the prototypical situation giving rise to home rule analysis in which a local legislative enactment creates new obligations or restrictions that differ from those imposed under State law. *See, e.g., Albany Area Builders Ass'n*, 74 N.Y.2d 372 (1989) (holding that Transportation Impact Fee Law enacted by Town Board requiring payment of transportation impact fee to obtain town building permit was preempted by State Town Law and Highway Law); *Jancyn*, 71 N.Y.2d 91 (Suffolk County local law regulating sale of cesspool additives was not in conflict with or preempted by State statutory scheme regulating sale and use of sewage system cleaning additives). In contrast, nothing in the home rule doctrine speaks to or limits the County Executive's authority to explain that the County will *follow* State law.

Executive's actions are lawful. *See Severson Hotel Assocs , Inc. v. Stranges*, 262 A.D.2d 957, 958 (4th Dep't 1999) (lower court erred in simply dismissing inadequate Section 51 petition "rather than declaring the rights of the parties"); *Vinnie Montes Waste Sys., Inc. v. Town of Oyster Bay*, 150 Misc. 2d 109, 114 (Sup. Ct. Nassau County 1991) ("[i]n a declaratory judgment action, it is appropriate to declare the rights of the parties rather than dismiss the complaint . . . Accordingly this court declares that the Resolution is valid and enforceable . . .") (citation omitted), *aff'd*, 199 A.D.2d 493 (2d Dep't 1993).

### III.

#### **THE ADF CANNOT DEMONSTRATE ENTITLEMENT TO A PRELIMINARY INJUNCTION**

Not only does the ADF fail to state a cause of action, but it certainly cannot satisfy its burden to obtain a preliminary injunction. A petitioner has the "burden in seeking a preliminary injunction to show a likelihood of success on the merits, a danger of irreparable injury if provisional relief is withheld and a balance of equities in their favor." *Schulz v. New York*, 217 A.D.2d 393, 396 (3d Dep't 1995) (denying preliminary injunction motion to movant asserting taxpayer claim under Section 51) (citations omitted). "Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant.'" *Nalitt v. City of New York*, 138 A.D.2d 580, 581 (2d Dep't 1988) (quoting *First Nat'l Bank of Downsville v. Highland Hardwoods, Inc.*, 98 A.D.2d 924, 926 (3d Dep't 1983)). Thus, "[a] movant's burden of proof on a motion for a preliminary injunction is particularly high." *Council of N.Y. City v. Giuliani*, 248 A.D.2d 1, 4 (1st Dep't), *appeal dismissed in part, denied in part*, 92 N.Y.2d 938 (1998). The ADF cannot demonstrate

that it meets *any* of the three requirements for a preliminary injunction; thus it fails to carry its burden to establish a right to this drastic remedy.

First, for the reasons discussed in Points I and II, the ADF cannot demonstrate a likelihood of success on the merits of either of its claims, and a preliminary injunction should be denied on this basis. *See Inc. Vill. of Brookville v. Colby*, 108 A.D.2d 724 (2d Dep't 1985) (motion for preliminary injunction properly denied because taxpayers failed to allege sufficient facts to maintain cause of action under Section 51 and therefore could not meet burden of likelihood of success on merits); *Schulz v. Town of Kingsbury*, 229 A.D.2d 707 (3d Dep't 1996).

Compounding this deficiency, the ADF further fails to show any imminent irreparable harm. To be entitled to a preliminary injunction the ADF must "establish that a real threat of irreparable injury exists by factual demonstration. Mere apprehension or conjectural injury, or injury of an inconsequential nature will not qualify as irreparable injury." *Bisca v. Bisca*, 108 Misc. 2d 227, 231 (Sup. Ct. Nassau County 1981). "To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (internal quotations omitted). This the ADF cannot do.

The County Executive has confirmed that at this time no County benefits have been applied for by or are being provided to a same-sex couple specifically as a result of an out-of-state marriage and that no claims for such County benefits appear to be imminent. *See Sommer Aff.* ¶ 39. Moreover, as more fully outlined in the County

Executive's motion papers, largely similar County benefits already are provided to couples who are financially interdependent and live together (including, for example, registered domestic partners), regardless of whether they are married. Thus, even if a same-sex couple *did* apply for benefits based on their out-of-state marriage, the same benefits would be available to them as domestic partners, and so the County Executive's recognition of the validity of such marriages does not result in any increase in the payment of government benefits. No imminent, irreparable harm has been or can be alleged. For this reason alone, the ADF's request for a preliminary injunction should be denied.

Furthermore, the balance of hardships tips decisively in favor of Defendants-Intervenors and other married same-sex Westchester couples. While recognition of their marriage by Westchester County and throughout New York State is extremely important to Defendants-Intervenors and others like them, there is no imminent detriment to the public that could possibly necessitate the preliminary injunctive relief the ADF seeks. Granting a preliminary injunction would only cast a cloud over the valid marriages of same-sex New York couples and assault their security, dignity, and privacy, without preventing any injury to the public. *See Sommer Aff.* ¶ 41. Indeed, it is apparent that this case has little to do with any alleged concern on the part of the ADF with taxpayer expenditures or the public fisc and far more to do with its mission to prevent lesbian and gay New Yorkers from receiving legal respect for their valid out-of-state marriages. No legitimate purpose is served by the ADF's demand for an injunction.

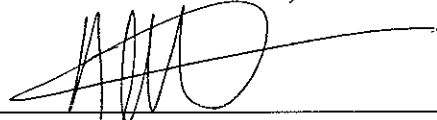
**CONCLUSION**

For the foregoing reasons, Defendants-Intervenors respectfully request that their motion to dismiss the complaint be granted, that the Court issue a declaration on the merits in favor of the County Executive and Defendants-Intervenors, and that the ADF's motion for a preliminary injunction be denied.

Dated: January 26, 2007

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**CERTIFICATION OF SERVICE**

I, Nick Tarasen, hereby certify that on January 26, 2007, I served a copy of the attached DEFENDANTS-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED VERIFIED COMPLAINT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION upon all parties by forwarding the same via Federal Express to:

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Dated: January 26, 2007

  
\_\_\_\_\_  
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