Docket No. 504900

Supreme Court of the State of New York, Appellate Division — Third Department

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

Plaintiffs-Appellants,

v.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND NANCY G. GROENWEGEN, President of the New York State Department of Civil Service,

Defendants-Respondents,

and

PERI RAINBOW AND TAMELA SLOAN,

Defendants-Intervenors-Respondents.

Brief for Amicus Curiae, New York Civil Liberties Union

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INTEREST OF THE AMICUS CURIAE

The New York Civil Liberties Union is a non-profit organization deeply devoted to the protection and enhancement of fundamental rights and liberties. Among those fundamental rights is the equality of valid out-of-state marriages, from which stems both legal recognition of spouses and the protection of families through shared insurance. The NYCLU — through its affiliated law firm, the NYCLU Foundation — served as counsel to the plaintiff in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dep't), *motion for leave dismissed*, 10 N.Y.3d 856 (2008). The validity of the Fourth Department's decision lies at the core of this case.

PRELIMINARY STATEMENT

In *Martinez v. County of Monroe*, the Appellate Division, Fourth Department applied the well-established proposition that marriages valid at the place of celebration will be recognized in New York, holding that spousal benefits must be available to same-sex spouses married in jurisdictions that permit such marriages. This marriage-recognition rule provides legal stability for married families, regardless of whether their marriage could have been performed in this State.

The common law marriage-recognition rule and the antidiscrimination guarantee of Section 296 of the Executive Law mandate the holding

concisely articulated in *Martinez*. Therefore, this Court should uphold the principle recognized by the Fourth Department of the Appellate Division as well as the court below: The law requires recognition of a valid out-of-state marriage, regardless of the sexes or sexual orientation of the spouses.

STATEMENT OF THE CASE

Amicus hereby adopts the Statement of Facts and Procedural History contained in the brief of Defendants-Intervenors-Respondents Peri Rainbow and Tamela Sloan.

ARGUMENT

I. *MARTINEZ V. COUNTY OF MONROE* CORRECTLY RECOGNIZED A SAME-SEX COUPLE'S VALID OUT-OF-STATE MARRIAGE.

The Supreme Court's March 3, 2008 grant of summary judgment to the Defendants-Respondents and Defendants-Intervenors-Respondents expressly relied on the Fourth Department's decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dep't), *motion for leave dismissed*, 10 N.Y.3d 856 (2008). *See Lewis v. Dep't of Civil Serv.*, No. 4078-07, 239 N.Y. L.J. 52, 2008 N.Y. Misc. LEXIS 1623, at *4 (Sup. Ct. Albany County Mar. 3, 2008).[1] On appeal, Appellants make four arguments; the first three

[1] The *Martinez* and *Lewis* decisions are just two of a number of decisions holding that out-of-state marriages of same-sex couples must be recognized in New York. *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (Sup. Ct. N.Y. County 2008), notice of

attack the application of the marriage-recognition rule to valid out-of-state marriages of same-sex couples, effectively challenging *Martinez*. App. Br. 6-8.[2] All of these arguments are premised on the notion that same-sex couples' marriages, although valid at the place of celebration, are not "by definition" marriages subject to the marriage-recognition rule, App. Br. 26, a conclusion tacitly rejected by *Martinez*. *See* 850 N.Y.S.2d at 741 (labeling the plaintiff's marriage to her same-sex spouse as a marriage). Rather, the marriage-recognition rule is premised on the notion that "marriage" is defined by the jurisdiction in which it is celebrated. *See, e.g.*, *Matter of May*, 305 N.Y.2d 486, 490 (1953). As the Policy Memorandum expressly applies to "same-sex *marriages* conducted in jurisdictions where they may legally be performed," R. at 31 (emphasis added), the court below correctly followed *Martinez* by applying the marriage-recognition rule in this case.

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appeal filed, No. 350284/07 *1st Dep't Mar. 18, 2008); *Godfrey v. DiNapoli*, Index No. 5896-06 (Sup. Ct. Albany County Sept. 5, 2007); *Godfrey v. Spano*, 836 N.Y.S.2d 813 (Sup. Ct. Westchester County 2007), *appeal docketed*, No. 2007-4303; *see also Funderburke v. N.Y. State Dep't of Civil Serv.*, 854 N.Y.S.2d 466, 477 (2d Dep't 2008) (vacating trial court's order that had held to the contrary).

[2] Specifically, Appellants argue that DCS, by issuing the Policy Memorandum, violated the separation of powers doctrine by contravening legislative policy expressed in the Domestic Relations Law and the Civil Service Law. App. Br. 8-16. Second, Appellants argue that DCS unlawfully dispersed state funds by enrolling same-sex spouses in NYSHIP. *Id.* at 18-36. Third, Appellants argue that DCS violated the State Constitution by using public funds to further the Spitzer administration's political goals. *Id.* at 36-39.

The marriage-recognition rule asks three questions. (1) Was the marriage valid at the place of celebration? (2) Is recognition of the marriage outside any express statutory prohibition? (3) Is recognition of the marriage not abhorrent to public policy? If the answer to all three questions is "yes," then the marriage must be recognized under New York law. *See Matter of May*, 305 N.Y. at 491. Following these steps, *Martinez* correctly held that a lesbian couple's valid Canadian marriage is entitled to recognition in New York. 850 N.Y.S.2d at 744. This Court should apply the same test to hold that the guidelines advanced by the Policy Memorandum stand firmly within New York law.

A. The Marriage-Recognition Rule Applies Regardless of Whether the Marriage Could Be Performed in This State.

In their brief, Appellants attack the very core of the *Martinez* decision — application of the centuries-old marriage-recognition rule to same-sex couples' valid out-of-state marriages. Appellants insist that "marriage" is only subject to the marriage-recognition rule when it conforms to the laws of New York. *See* App. Br. 26-29.[3] This places the proverbial cart before the

[3] Appellants also urge this Court to reject application of the marriage-recognition rule by appealing to broader trends in comity jurisprudence focusing on public policy considerations. *See* App. Br. 18-21. However, rejection of out-of-state marriages due to their alleged non-conformance with public policy — erroneously defined by Appellants as non-conformance with restrictions on marriages performed *in* New York — would again eliminate the marriage-recognition rule in

horse, imposing the New York definition of a valid marriage on foreign jurisdictions. Rather, the Court of Appeals has long held that "[t]he law to be applied in determining the validity of . . . an out-of-[s]tate marriage is the law of the [s]tate in which the marriage occurred." *Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980); *see also Matter of May*, 305 N.Y. at 490 (1953) ("[S]ubject to two exceptions . . . and in the absence of a statute expressly regulating within the domiciliary [s]tate marriages 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."); *see also Martinez*, 850 N.Y.S.2d at 742; *Matter of Yao You-Xin*, 667 N.Y.S.2d 462, 463 (3d Dep't 1998) (recognizing a common-law marriage that did not conform to New York's laws); N.Y. Op. Att'y Gen 2004-1 at 3-4, R. at 165-66 ("Whether the Domestic Relations Law permits same-sex marriages performed in New York has no bearing on whether New York will recognize as spouses those parties to a same-sex marriage . . . .").[4]

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its entirety. Appellants fail to recognize the crucial public policy furthered by comity to out-of-state marriages: stability in married family relationships.

[4] In *Hernandez v. Robles*, the Court of Appeals expressly limited its holding and did not reach common-law questions such as recognition of foreign marriages. 7 N.Y.3d 338, 366 (2006) ("We hold, in sum, that the Domestic Relations Law's limitation of marriage to opposite-sex couples is not unconstitutional. We emphasize once again that we are deciding only this constitutional question.").

The Court of Appeals has applied the marriage-recognition rule to a range of marriages that New York law would not permit to be celebrated in this state, ranging from the merely voidable to the criminally punishable. In the leading case, *Matter of May*, the Court recognized marriage between an uncle and niece, despite the fact that the couple could have been prosecuted for incest had they attempted to marry in New York. *See* 305 N.Y. at 491. Similarly, in a trilogy of cases in the 1880s, the Court recognized marriages between divorced adulterers and new spouses, despite New York law barring such re-marriages. *See Moore v. Hegeman*, 92 N.Y. 521 (1883); *Thorp v. Thorp*, 90 N.Y. 602 (1882); *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881). Most recently, the Court has recognized out-of-state common-law marriages, despite abolition of such marriages under New York law. *See Mott*, 51 N.Y.2d at 289; *Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44, 54-56 (1970).[5] The lower courts have also applied the rule to "proxy marriages," *Fernandes v. Fernandes*, 87 N.Y.S.2d 707 (2d Dep't 1949); *Matter of Valente's Will*, 188 N.Y.S.2d 732 (Surr. Ct. Kings County 1959); and marriages where one spouse was under age according to New York law. *Hilliard v. Hilliard*, 209 N.Y.S.2d 132 (Sup. Ct. Greene County 1960); *Donahue v. Donahue*, 116 N.Y.S. 241 (Sup. Ct. Erie County 1909).

[5] *See also, e.g.*, *Matter of Yao You-Xin*, 667 N.Y.S.2d at 463 (same).

Thus application of the marriage-recognition rule in *Martinez* — and the application of the *Martinez* decision by the court below — followed centuries of established precedent in applying the marriage-recognition rule to a union deemed a "marriage" by a foreign jurisdiction. *Martinez*, 850 N.Y.S.2d at 742-43; *Lewis*, 2008 N.Y. Misc. LEXIS 1623, at *4; *see also* N.Y. Op. Att'y Gen 2004-1, R. at 163 (applying the same analysis).[6] As mandated by New York's highest court, this Court must therefore apply the marriage-recognition rule to assess the legality of the Policy Memorandum. Appellants do not contest that the Policy Memorandum — by its own terms — concerns the recognition of only legally valid out-of-state marriages of same-sex couples. *See* App. Br. 5; *see also* Policy Memorandum, R. at 47

[6] Appellants and their supporting amicus attempt to draw a dichotomy between marriages of different-sex couples that are valid at the place of celebration but would have been invalid under New York law, on the one hand, and the marriages of same-sex couples that are valid at the place of celebration but would have been invalid under New York law, on the other hand. App. Br. 26-29; Nat'l Legal Found. ("NLF") Br. 7. These arguments rely on outdated or incomplete dictionary definitions, *see* App. Br. 26 (citing dictionaries published in 1740 and 1830), and case-law predating the emergence of legally valid marriage for same-sex couples. *See* App. Br. 26 (quoting *Murphy v. Ramsley*, 114 U.S. 15 (1885)); NLF Br. 7 (quoting *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995)). These arguments wholly ignore that marriage is an evolving social relationship; what was once unimaginable to many is now an unassailable right. *See Loving v. Virginia*, 388 U.S. 1 (1967); *see also* Merriam-Webster Online Dictionary, *Marriage*, § 1(a)(2), http://www.merriam-webster.com/dictionary/marriage (last visited Aug. 1, 2008) (defining marriage as "the state of being united to a person of the same sex in a relationship like that of a traditional marriage"). The existence of marriage for same-sex couples in jurisdictions outside of New York is now an unassailable fact.

(recognizing "as spouses partners in same sex marriages legally performed in other jurisdictions"). Therefore this Court need only look to the second and third factors of the marriage-recognition rule, i.e., whether the Policy Memorandum violates express legislation or is abhorrent to public policy.

B. The Legislature Has Not Prohibited Recognition of Same-Sex Couples' Valid Out-of-State Marriages.

The first exception to the recognition of a marriage valid at the place of celebration is when recognition has been affirmatively banned by the Legislature. *See Matter of May*, 305 N.Y. at 490-91. Although the Legislature has not yet amended the Domestic Relations Law to permit same-sex couples to enter marriages in New York, *see Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006), it has never enacted a prohibition against the recognition of out-of-state marriages of same-sex couples.

In fact, New York stands in stark contrast to the more than forty other states that have enacted or adopted such state-level "Defense of Marriage Acts" or constitutional amendments.[7] Marriage for same-sex couples is now

[7] Ala. Code § 30-1-19; Ala. Const. art. I, § 36.03; Alaska Const. art. I, § 25; Ariz. Rev. Stat. Ann. §§ 25-101, 25-112; Ark. Code Ann. § 9-11-208; Colo. Rev. Stat. § 14-2-104; Colo. Const. art. II, § 31; Del. Code Ann. tit. 13, § 101; Fla. Stat. Ann. §§ 741.04, 741.212; Ga. Code Ann. § 19-3-3.1; Ga. Const. art. I, § IV; Haw. Rev. Stat. §§ 572-1, 572-1.6, 572C-1-7; Haw. Const. art. I, § 23; Idaho Code Ann. § 32-209; Idaho Const. art. III, § 28; 750 Ill. Comp. Stat. 5/201, 5/212, 5/213, 5/213.1; Ind. Code § 31-11-1-1; Iowa Code § 595.2; Kan. Stat. Ann. §§ 23-101(a), 23-115; Kan. Const. art. 15, § 16; Ky. Rev. Stat. Ann. § 402.045; Ky. Const. § 233A; La. Civ. Code Ann. art. 86, 89; La. Const. art 12, § 15; Me. Rev. Stat. Ann. tit. 19-A, §

available in neighboring Canada, Civil Marriage Act, S.C. 2005, ch. 33 (Can.); as well as the fellow states of Massachusetts and California, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); and other foreign jurisdictions such as the Netherlands, Belgium, Spain, and South Africa. R. at 150-51.

Nor has the inevitable presence in this State of same-sex couples married in a ceremony valid at the place of celebration gone unnoticed by New York legislators. Although a statutory prohibition on the recognition of marriages of same-sex couples has been introduced in the Legislature every year since 1996, none has ever been reported out of committee. *See, e.g.*, A.4978/S.2800, 230th Sess., Reg. Sess. (introduced Feb. 12, 2007). In fact, in the last three legislative sessions — since Canada and Massachusetts

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701(5); Md. Code Ann., Fam. Law § 2-201; Mich. Comp. Laws §§ 551.1, 551.271; Minn. Stat. §§ 517.03(4), 518.01; Miss. Code Ann. §§ 93-1-1(2), 93-1-3; Miss. Const. art. 14, § 263A; Mo. Rev. Stat. § 451.022; Mo. Const. art. I, § 33; Mont. Code Ann. §§ 40-1-103, 40-1-401; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.H. Rev. Stat. Ann. §§ 457:1-457:3; N.C. Gen. Stat. § 51-1.2; N.D. Cent. Code §§ 14-03-01, 14-03-08; Ohio Rev. Code Ann. § 3101.01; Okla. Stat. tit. 43, § 3.1; Okla. Const. art. II, § 35; Or. Const. art. XV, § 23; Pa. Cons. Stat. § 1704; S.C. Code Ann. § 20-1-15; S.C. Const. art. XVII, § 15; S.D. Codified Laws § 25-1-38; S.D. Const. art. XXI, § 9; Tenn. Code Ann. § 36-3-113; Tenn. Const. art. XI, § 18; Tex. Fam. Code Ann. § 6.204; Tex. Const. art. I, § 32; Utah Code Ann. § 30-1-4.1; Utah Const. art. I, § 29; Va. Code Ann. § 20-45.2; Va. Const. art. I, § 15-A; Wash. Rev. Code § 26.04.020; W. Va. Code § 48-2-603; Wis. Stat. § 765.04; Wis. Const. art. XIII, § 13. *See generally Andersen v. King County*, 138 P.3d 963, 969-70 (Wash. 2006) (describing the passage of federal and state Defense of Marriage Acts after same-sex marriage litigation began in earnest in the 1990s).

began legally marrying same-sex couples — the proposed Defense of Marriage Act in New York has seen dwindling support in the Legislature.[8] Support reached its lowest point during the last session, the same session during which the Fourth Department decided *Martinez* and a much-discussed memorandum instructed state agencies to review policies and regulations to ensure that same-sex couples validly married outside of New York receive the same treatment as other legally married couples.[9] Indeed, the New York State Assembly even recently passed a bill that would allow same-sex couples to marry. A.8590, 230th Sess., Reg. Sess. (2007).

Because New York's Legislature has consistently rejected a statutory prohibition against the recognition of out-of-state marriages of same-sex

[8] In the 2003-2004 session, the bill had thirty-eight total sponsors (including main sponsors, co-sponsors and multi-sponsors from both the Assembly and the Senate), thirty in the 2005-2006 session, and a mere thirteen in the 2007-2008 session. *See* New York Legislative Bill Drafting Commission, *available at:* http://nyslrs.state.ny.us (last visited July 30, 2008), information for bills A.2998/S.2220, 226th Sess., Reg. Sess. (introduced Feb. 3 & 21, 2003); A.4097/S.2056, 228th Sess., Reg. Sess. (introduced Feb. 8, 2005); and A.4978/S.2800, 229th Sess., Reg. Sess. (introduced Feb. 12, 2007).

[9] *See* Memorandum from David Nocenti, to Agency Counsel (May 14, 2008), *available at* http://www.nyclu.org/files/Nocenti_Order_05.14.08.pdf. Other taxpayers represented by counsel for the Appellants are challenging the Governor's Memorandum in an action filed in State Supreme Court, Bronx County. *See Golden v. Paterson*, Index No. 260148/08 (Sup. Ct. Bronx County); *see also* Jeremy W. Peters, *New York to Back Same-Sex union from Elsewhere*, N.Y. Times, May 29, 2008.

couples, it is clear that the first exception under the marriage-recognition rule does not apply in this case. *See Martinez*, 850 N.Y.S. at 743.

C. Recognition of Same-Sex Couples' Marriages Is Not Abhorrent to New York Public Policy.

The second exception to recognition of a valid out-of-state marriage is limited to cases offensive to the public sense of morality to a degree evoking "abhorrence." *Matter of May*, 305 N.Y. at 491, 493; *see also Martinez*, 850 N.Y.S.2d at 743 (same).[10] Perhaps in light of this deferential standard, Appellants do not openly assert that this second exception applies to same-sex couples' valid out-of-state marriages.

Rather, as discussed above, Appellants assert public policy claims against application of the marriage-recognition rule, failing to grapple with the distinction between public policy against celebration of a class of marriages in New York and public policy against recognition of out-of-state marriages. *See* App. Br. 18-21, 26-29. As *Martinez* aptly recognized, there is an important difference between these two concepts. 850 N.Y.S.2d at 743 (citing *Hernandez*, 7 N.Y.3d at 356). Thus no conflict exists between ongoing recognition of out-of-state common law marriages by the New York

[10] In general, New York courts have been loathe to invoke "public policy" as a means of rejecting enforcement of foreign law. *See Welsbach Elec. Corp. v. MasTec North Am., Inc.*, 7 N.Y.3d 624, 628-29 (2006) ("[W]e have reserved the public policy exception 'for those foreign laws that are truly obnoxious.'") (citing *Cooney v. Osgood Machinery, Inc.*, 81 N.Y.2d 66, 79 (1993)).

Courts, *see, e.g.*, *Mott*, 51 N.Y.2d at 294 (1980), and the ongoing legislative prohibition on common-law marriage in New York State. *See* Dom. Rel. Law § 11. Similarly, courts found no conflict between recognition of out-of-state remarriages by adulterers, *see Moore*, 92 N.Y. at 528; and New York's pre-1967 restrictions on divorce and remarriage — twin policies whereby adultery was the sole recognized ground for divorce, *see, e.g.*, *Cohen v. Cohen*, 103 N.Y.S.2d 426, 427 (Sup. Ct. N.Y. County 1951), yet adulterers could not remarry, *see, e.g.*, *Cropsey v. Ogden*, 11 N.Y. 228, 228 (1854) — which otherwise had effectively prevented deliberate divorce and remarriage.

As the release of the Policy Memorandum indicates, recognition of same-sex couples' valid out-of-state marriages *is* the public policy of New York. In addition, on October 8, 2004, the State Comptroller declared that the State and Local Retirement System, which covers more than one million individuals, "will recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage[.]" R. at 170.[11] Most recently, a memorandum by the Counsel to the Governor definitively declared, "[E]xtension of such recognition is consistent with State policy."

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[11] *See also Godfrey v. DiNapoli*, Index No. 5896-06 (Sup. Ct. Albany County 2007), R. 79-83 (upholding the Comptroller's policy in light of the marriage-recognition rule).

Memorandum from David Nocenti, to Agency Counsel (May 14, 2008), *available at* http://www.nyclu.org/files/Nocenti_Order_05.14.08.pdf. At a local level, at least eight geographically and demographically diverse jurisdictions have also announced policies recognizing valid, out-of-state same-sex marriages: Albany, Buffalo, Brighton, Ithaca, New York City, Nyack, Rochester, and Westchester County. R. at 115, 117, 119-200, 123, 125, 127.[12]

Accordingly same-sex couples' valid out-of-state marriages are not abhorrent to public policy and therefore survive the second exception to the marriage-recognition rule. Having passed all three elements of the marriage-

[12] Numerous state laws also protect individuals from discrimination and animus based on sexual orientation, evincing public policy in favor of equal treatment of all persons regardless of their sexual orientation. *See, e.g.*, Civil Rights Law § 40-c(2) (protecting the general right against discrimination on the basis of sexual orientation); Educ. Law § 313(1)(a) (ensuring equality of opportunity to access educational institutions); Exec. Law §§ 296 to 296-a (prohibiting discrimination in employment, housing, credit, places of public accommodations, volunteer firefighting, and educational institutions on the basis of sexual orientation); Exec. Law § 354-b (allowing payment for burial expenses to domestic partners of military members killed in combat); Penal Law §§ 240.30(3), 240.31 (criminalizing offenses involving animus on the basis of sexual orientation); Penal Law § 485.05(1) (providing for Comp. Law § 4 (allowing for the payment of death benefits to domestic partners); 18 N.Y.C.R.R. § 421.16(h)(2) (prohibiting adoption agencies from rejecting applicants "solely on the basis of homosexuality"); Pub. Health Law § 4201 (allowing domestic partners to be responsible for disposition of a decedent's remains); Pub. Hous. Law § 14.4(c) (allowing a broad definition of family members, which can include same-sex spouses); Pub. Serv. Law § 92.3-a (allowing bulk rates of telephone service to New York residents in the military services and specific family members, including domestic partners).

recognition rule, the statements of the Policy Memorandum are in harmony with the law of the State of New York, as articulated in *Martinez*.

II. *MARTINEZ* CORRECTLY HOLDS THAT DENIAL OF SPOUSAL BENEFITS TO AN EMPLOYEE'S SAME-SEX SPOUSE CONSTITUTES UNLAWFUL DISCRIMINATION.

Once *Martinez* determined that the valid out-of-state marriage of a same-sex couple was entitled to recognition, it concluded that the refusal to recognize such a marriage in the employment context violates New York antidiscrimination law. 850 N.Y.S.2d at 743 (citing Exec. Law § 296(1)(a)). Provisions of the Executive Law known as the Human Rights Law state, "It shall be an unlawful discriminatory practice . . . [f]or an employer . . . because of the sexual orientation . . . of any individual, to . . . discriminate against such individual in compensation or in terms, conditions or privileges of employment." Exec. Law § 296(1)(a).[13] *Martinez* rightly held that where

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[13] *See also* Exec. Law § 290(3) ("The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life."); *id.* § 300 (requiring that the antidiscrimination provisions of the Executive Law "shall be construed liberally for the accomplishment of the purpose thereof"); *Binghamton GHS Employees Fed. Credit Union v. State Div. of Human Rights*, 77 N.Y.2d 12, 18 (1990) (construing a provision similar to Section 296(1)(a) "liberally to encompass optional as well as mandatory benefits of insurance coverage to effectuate the purposes of this remedial statute prohibiting discrimination"); *Delano Vill. Cos. v. Orridge*, 553 N.Y.S.2d 938, 941 (Sup. Ct. N.Y. County 1990) ("The predominant purpose of the Human Rights [Law] is the elimination of discrimination and the court's duty is to reasonably interpret it to achieve that purpose.").

an employer's "sole reason" for denying full spousal benefits is the fact that the employee's spouse, under a recognized marriage, is of the same sex as the employee, the employer has plainly violated Section 296(a)(1). 850 N.Y.S.2d at 743.

Rather than address the plain language of this antidiscrimination provision, Appellants argue that the legislative findings of the Sexual Orientation Non-Discrimination Act ("SONDA"), 2002 N.Y. Laws ch. 2, which *expanded* the protections of the Human Rights Law to include sexual orientation as a prohibited basis for discrimination – disavowed any prohibition on discrimination on the basis of sexual orientation when that discrimination related to marriage. App. Br. 24-25. Appellants fail to quote the exact language on which they rely, for good reason.

In fact, SONDA's legislative findings do not relate to recognition of out-of-state marriages of same-sex couples. The relevant provision states in full, "Nothing in this legislation should be construed to create, add, alter, or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state." 2002 N.Y. Laws ch. 2, § 1, 2002 N.Y. Laws 46. It is plain that this provision relates solely to the right to enter into a marriage in this State, rather than the right to have a valid out-of-state marriage recognized under the common law of this State. Moreover,

to the extent that the marriage-recognition rule calls for acknowledgment of valid out-of-state marriages of same-sex couples, SONDA neither alters nor abolishes that centuries-old imperative.[14]

Appellants' supporting amicus the National Legal Foundation ("NLF") goes even further to distort the law, asserting that *Martinez* was wrongly decided because the Executive Law permits sexual orientation discrimination if a rational basis can be found to justify the discrimination. NLF Br. 8 (citing *Hernandez*, 7 N.Y.3d at 358-59). NLF also asserts that the Executive Law never requires disparate impact analysis with regard to discrimination against individuals on the basis of sexual orientation. *Id.* at 8-13. These claims are patently erroneous.

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[14] Appellants' reliance on a secondary source to advance their interpretation of SONDA is similarly deceptive. App. Br. 25 ("SONDA's legislative history specifically disclaimed any intent to affect the issue of marriage.") (citing Jay Weiser, *Foreward: The Next Normal – Developments Since Marriage Rights For Same-Sex Couples In New York*, 13 Colum. J. Gender & L. 48, 53 (2004)). In fact, the article actually states, "SONDA's legislative history, however, specifically disclaimed any intent to affect *the right to marry*." Weiser, *supra*, at 53 (emphasis added). More importantly, the statement comes from a foreword to a lengthy report by the Association of the Bar of the City of New York that squarely addresses recognition. It states, "For over one hundred years, New York courts have held that out-of-state and out-of-state marriages must be recognized in New York so long as they are valid where consummated. . . . This *lex loci contractus* principle has been enforced even where a New York couple purposefully left the state solely to avoid New York's marriage law and substitute that of another state." Ass'n of the Bar of the City of N.Y., Comms. on Lesbian & Gay Rights, Sex & Law, & Civil Rights, *Report on Marriage Rights for Same-Sex Couples in New York*, 13 Colum. J. Gender & L. 70, 94 (2004).

NLF asserts without citation that "because the category at issue is the same, the constitutional claim and the statutory claim stand or fall together." *Id.* at 8. Here NLF demonstrates a fundamental misunderstanding of antidiscrimination law: Constitutional discrimination claims are in fact analyzed differently than statutory ones. *See Bd. of Educ. of Union Free Sch. Dist. No. 2 v. State Div. of Human Rights*, 345 N.Y.S.2d 93, 97-98 (2d Dep't 1973) ("[T]he test to be applied here is not the constitutional standard under the equal protection clause, but the statutory standard of the Human Rights Law."); *State Div. of Human Rights ex rel Schwabenbauer v. Bd. of Educ.*, 363 N.Y.S.2d 370, 374 (4th Dep't 1975) (distinguishing between constitutional and statutory antidiscrimination analysis). *Hernandez* challenged the constitutionality of a state statute under the state Equal Protection Clause; it therefore was adjudicated under the three-tiered standard applied in such cases. 7 N.Y.3d at 364. This method of review applies varying requirements — based on the nature of the plaintiff class — to both the importance of the state interest asserted and the strength of the link between the interest and the scope of the discriminatory rule. *See, e.g.*, *Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 332-34 (1976).

In contrast, *Martinez* assessed the legality of employment discrimination against a statutorily protected class, 850 N.Y.S.2d at 743,

which is subject to strict prohibition under New York law. Exec. Law § 296(1)(a). Unlike equal protection analysis, even "rational" employment discrimination is forbidden unless it falls under a discrete exception enumerated by statute. *See, e.g.*, *Timashpolsky v. State Univ. of N.Y. Health Sci. Ctr.*, 761 N.Y.S.2d 94, 96 (2d Dep't 2003). Section 296(1)(a)'s prohibition is absolute and contains no such exception. *Cf.* Exec. Law § 296(1)(d) (prohibiting discrimination in job advertising "unless based upon a bona fide occupational qualification").[15] Appellants have not claimed — nor could they claim — that the discriminatory provision of spousal benefits to particular employees and not others on the basis of the employees' sexual orientation falls into an exception. *See* Exec. Law § 296.

Nor is the Legislature powerless to extend stringent statutory protections on the basis of categories that the Court of Appeals has not recognized as suspect classifications under the State Constitution. *See, e.g.*, *Hernandez*, 7 N.Y.3d at 358-59 ("[O]f course the Legislature may . . . extend marriage or some or all of its benefits to same-sex couples."). *Compare Delta Air Lines v. N.Y. State Div. of Human Rights*, 91 N.Y.2d 65, 74 (1997) (applying disparate impact analysis to gender-based discrimination under the

[15] The absolute prohibition found in Section 296(a)(1) is analogous to federal antidiscrimination law under Title VII. *See Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 685 n.26 (1983) ("[N]o such justification is recognized under Title VII once discrimination has been shown.").

Executive Law), *with People v. Whidden*, 423 N.Y.S.2d 512, 513 (3d Dep't 1979) (applying only intermediate scrutiny under the Equal Protection Clause of the New York Constitution to gender-based discrimination).[16] The New York State Legislature provided an absolute prohibition on sexual orientation-based employment discrimination regardless of how the State Constitution treats such discrimination. *See* Exec. Law § 296(1)(a).

Thus, in *Martinez*, the court correctly held that the employer's policy depriving a lesbian employee of equal spousal benefits due to the employee's sexual orientation constituted unlawful disparate treatment under the Executive Law. 850 N.Y.S.2d at 743 (citing Exec. Law § 296(1)(a)). Given the straightforward analysis under the Executive Law, *Martinez* correctly found no need to engage in constitutional disparate impact analysis. *Id.*[17] Accordingly, the court below rightly relied on *Martinez* to support the legality of the Policy Memorandum.

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[16] At the federal level, this distinction has been made even clearer by the passage of legislation meant to provide greater protection to a recognized class than was afforded by the Supreme Court under the Equal Protection clause. *See* Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (barring discrimination on the basis of pregnancy in light of the Supreme Court's use of rational basis review in *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

[17] Even if this Court were to deem discriminatory provision of spousal benefits not to constitute disparate treatment on the basis of sexual orientation, such discrimination would still run afoul of the disparate impact analysis required by the Court of Appeals. The Court has unambiguously held that "an employment practice neutral on its face and in terms of intent which has a disparate impact

III. *MARTINEZ* DOES NOT CONFLICT WITH OTHER NEW YORK PRECEDENT.

Appellants also argue that *Martinez* conflicts with three preexisting precedents of the Appellate Division: *Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105 (3d Dep't 2007) ("*Langan II*"); *Langan v. St. Vincent's Hosp. of N.Y.*, 802 N.Y.S.2d 476 (2d Dep't 2005) ("*Langan I*"); and *Matter of Cooper*, 592 N.Y.S.2d 797 (2d Dep't 1993). App. Br. 21-24. Each of these cases is plainly distinguishable, as none concern an out-of-state marriage. Appellants' attempt to conflate recognition of a foreign civil union or an in-state common-law marriage with the recognition of a valid out-of-state marriage is without merit.

Appellants attempt to create a conflict between *Langan I*, *Langan II*, and *Martinez* by erroneously conflating a civil union with a marriage. *See* App. Br. 23. The plaintiff in *Martinez*, before marrying in Canada, had entered a Vermont civil union with her partner, but she did not seek

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upon a protected class of persons violates the Human Rights Law unless the employer can show justification for the practice in terms of employee performance." *People v. N.Y. City Transit Auth.*, 59 N.Y.2d 343, 348-49 (1983); *see also id.* at 349 ("A standard or practice 'fair in form but discriminatory in operation' as to employment or promotional opportunity is within the reach of the Human Rights Law.") (citations omitted). The addition of sexual orientation as a protected class in SONDA made no mention of a reduced standard of review for this particular category of claims; nor is it reasonable to infer one in the absence of supporting evidence. *See Newport News*, 462 U.S. at 682-83 (applying preexisting standards of review to a discrimination claim based on a newly added protected category).

marriage recognition on the basis of that civil union. *Martinez v. County of Monroe*, No. 05/00433, slip op. at 4 (Sup. Ct. Monroe County 2006), R. at 135. Rather she sought spousal health care coverage "[o]n the basis of her marriage" to her spouse. *Martinez*, 850 N.Y.S.2d at 741-42. On the other hand, *Langan I* and *Langan II* each concerned the recognition of a Vermont civil union for purposes of spousal recognition. In *Langan II*, this Court expressly noted that the "[c]laimant acknowledge[d] that a civil union is not a marriage[.]" 849 N.Y.S.2d at 107. Since a civil union is not a marriage under Vermont law, *see id.* at 108, this Court did not apply the marriage-recognition rule and its broadly deferential notion of comity.

Similarly in *Langan I*, the Second Department noted that creation of the right to marry in Massachusetts did not impact the civil union before the court because "plaintiff and the decedent were not married in that jurisdiction." 802 N.Y.S.2d at 94. The Second Department expressly noted that neither the plaintiff nor his deceased partner had indicated on various legal documents that they were married. *Id.* at 95.

In *Matter of Cooper*, the Plaintiff sought to exercise a right of election against the deceased partner's will, a right reserved by statute to surviving spouses. 592 N.Y.S.2d at 797-98. Although he alleged a spousal relationship had existed, he expressly conceded that he and his partner were

not married; while the couple had lived in New York in a marriage-like relationship for years, they had not been able to marry in any jurisdiction. *See id.* at 797. In essence, the question was whether a same-sex couple's common-law-type marriage should be afforded recognition in New York, since they did not have the opportunity to marry. The Second Department answered, unsurprisingly, in the negative. *Id.* at 801. The question would have been different, perhaps, if the couple met the requirements for a common law marriage in a state that allowed them, but the couple had solely co-habited in New York, but those were not the facts. *See id.* at 797.

In contrast, the marriage at issue in *Martinez* and the range of marriages affected by the Policy Memorandum are all indisputably valid marriages. 850 N.Y.S.2d 741-42; R. at 47. Moreover, the Second Department recently vacated a trial court decision that it found inconsistent with *Martinez*, demonstrating that no disharmony exists between *Martinez* and the court's decisions in *Matter of Cooper* or *Langan I*. *See Funderburke v. State Dep't of Civil Serv.*, 854 N.Y.S.2d 466, 477 (2d Dep't 2008).

This Court should find that *Martinez* is persuasive authority in the area of recognition of same-sex couples' valid out-of-state marriages. Nor do any conflicts exist between the concise and convincing decision in *Martinez* and other decisions of the Appellate Divisions of the Supreme

Court of New York. Therefore — as the court below found — promulgation of the Policy Memorandum was in harmony with the laws of this State.

CONCLUSION

For all the foregoing reasons, the decision of the New York Supreme Court for Albany County should be affirmed.

Respectfully submitted,

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