

*The Court of Appeals
State of New York*

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

Plaintiffs-Appellants

-against-

**THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND NANCY G. GROENWEGEN, IN
HER OFFICIAL CAPACITY AS PRESIDENT OF THE NEW YORK STATE DEPARTMENT OF CIVIL
SERVICE,**

Defendants-Respondents

-and-

PERI RAINBOW AND TAMELA SLOAN,

Defendants-Intervenors-Respondents

**BRIEF OF AMICUS CURIAE FAMILY WATCH INTERNATIONAL
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Robert W. Dapelo
THE LAW OFFICES OF ROBERT W. DAPELO,
ESQ. PC
Counsel of Record
110 North Ocean Avenue, Suite A
Patchogue, NY 11772
Telephone: 631-654-9500

William C. Duncan*
MARRIAGE LAW FOUNDATION
1868 N 800 E
Lehi, UT 84043
Telephone: 801-367-4570

*Not admitted in this jurisdiction

Brief Completed on **, 2009

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
ARGUMENT	2
I. For purposes of marriage recognition, as in all other aspects of New York law, marriage is the union of a man and a woman.	2
II. The Department of Civil Service does not have authority to redefine marriage for any purpose.....	7
III. The Department of Civil Service Memorandum redefining marriage for purposes of interstate recognition threatens important public policies.....	9
A. The Memorandum undercuts the purposes of marriage recognized by this Court.	9
B. The Memorandum undercuts the constitutional principle of separation of powers and the interests that principle protects.	11
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	14

TABLE OF AUTHORITIES

Constitutional Provisions

N.Y. CONST. art. III, sec. 1	11
N.Y. CONST. art. IV, sec. 1	11
N.Y. CONST. art. VI	11

Cases

<i>Bourquin v. Cuomo</i> , 85 NY2d 781, 784 (1995).....	12
<i>Chambers v. Ormiston</i> , 935 A.2d 956 (R.I. 2007)	2-3, 7
<i>Hernandez v. Robles</i> , 7 NY3d 338 (2006).....	4-5, 7, 10
<i>Matter of Campagna v. Shaffer</i> , 73 NY2d 237, 242-243 (1989).....	8
<i>New York State Health Facilities Association v. Axelrod</i> , 77 NY2d 340 (1991)	8
<i>Rapp v. Carey</i> , 44 N.Y.2d 157, 162 (1978)	12-13
<i>Saratoga County Chamber of Commerce, Inc. v. Pataki</i> , 100 N.Y.2d 801(2003)	8, 12

Other Sources

DAVID BLANKENHORN, <i>THE FUTURE OF MARRIAGE</i> (2007).....	9
PETER J. GALIE, <i>THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE</i> (1991)	13
JAMES MCLELLAN, <i>LIBERTY, ORDER, AND JUSTICE</i> (3d ed. 2000).....	12
G. ROBINA QUALE, <i>A HISTORY OF MARRIAGE SYSTEMS</i> (1988).....	9

INTRODUCTION

Plaintiffs-appellants and *amicus curiae* New York State Catholic Conference have clearly articulated legal bases for this Court to conclude that the Department of Civil Service Policy Memorandum redefining marriage for purposes of recognizing same-sex marriages contracted in other jurisdictions is invalid because *ultra vires*.

In this brief, *amicus* Family Watch International will describe the crucial public policy considerations that are threatened by the unlawful memorandum at issue in this case. As this court has recognized, the longstanding definition of marriage in New York promotes legitimate, *amicus* would argue compelling, policy considerations. Recognizing as marriages unions intrinsically precluded from New York's legal understanding of marriage constitutes a redefinition of the institution, not a mere concession to the narrow interests of a group of individuals who contracted same-sex marriages in other jurisdictions. This redefinition of marriage would undercut the interests served by the current marriage law.

This Court also noted that a decision to abandon the goals advanced by New York's current marriage definition is within the province of the legislature. This accords with another compelling policy—the protection of New York's constitutional system of separation of powers. Any incursion on this principle ultimately undercuts the principle advances.

ARGUMENT

I. For purposes of marriage recognition, as in all other aspects of New York law, marriage is the union of a man and a woman.

The legal analysis of the Department of Civil Service is defective in that it misses a crucial interpretive step. DCS has concluded that because another jurisdiction recognizes a same-sex union as a marriage, it can mandate that New York's administrative agencies treat the union in the same way.

The correct analysis, however, first requires a determination that New York law defines marriage in a way that contemplates the union at issue. Only then does the possibility of treating the union as a marriage in New York arise. Since New York law does not understand marriage as anything other than the union of a man and a woman, there was no need for DCS to go to the second step (whether the out-of-state marriage would be recognized) in this instance. Therefore, contrary to DCS's conclusion, same-sex unions contracted in other jurisdictions cannot be recognized as marriages in New York.

This appropriate analysis of the question is exemplified in a recent decision of the Rhode Island Supreme Court. In that case, the court had been asked whether Rhode Island Family Courts had jurisdiction to issue a divorce based on a same-sex marriage contracted in Massachusetts. *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007). At the outset, the court said it must decide, "What is the meaning of the word 'marriage' within the Rhode Island statute that empowers the Family

Court to grant divorces.” *Chambers* at 959. This initial question framed the court’s inquiry because the Family Court could clearly have granted a divorce based on a marriage from another state. So, the question was, is there a “marriage” for purposes of Rhode Island law?

The court conclude that “there is absolutely no reason to believe that, when the act creating the Family Court became law in 1961, the legislators understood the word marriage to refer to any state other than ‘the state of being united to a person of the opposite sex.’” *Chambers* at 962. The understanding of marriage when the relevant statutory law was enacted was “unambiguous” so “the Family Court [was] without jurisdiction to entertain the instant petition for divorce.” *Chambers* at 963.

By answering this initial question, the court did not need to examine further questions, such as comity: “It is our view, however, that considerations of comity (a largely discretionary and somewhat amorphous concept) do not come into play if the court lacks jurisdiction over the case before it.” *Chambers* at 963 note 14.

Applying this analysis to the context of New York law, the Department would have two questions. First, what is marriage for purposes of New York law? Second, assuming the answer to the first question allows an out-of-state union to be considered a marriage, are there other reasons why New York would still not extend recognition?

In regards to this threshold question of what marriage means in New York, this Court has made clear that New York law understands marriage only as the union of a man and a woman. The idea that New York statutes could be construed to recognize a gender-neutral definition of marriage was specifically rejected by this Court when it concluded: “Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only people of different sexes may marry each other, but that was the universal understanding when articles 2 and 3 were adopted in 1909, an understanding reflected in several statutes.” *Hernandez v. Robles*, 7 NY3d 338, 357 (2006). Thus, this Court concluded that “New York’s statutory law clearly limits marriage to opposite-sex couples.” *Hernandez* at 357. The concurrence agreed, saying “the Domestic Relations Law does not authorize marriage between persons of the same sex” *Hernandez* at 368 (Grafano, J., concurring).

This conclusion was not surprising since, as this Court noted, “The idea that same-sex marriage is even possible is a relatively new one.” *Hernandez* at 361. The court thus identifies an important way in which same-sex marriage contrasts with the kinds of marriages that have been accorded recognition in past New York cases involving out-of-state marriages, such as common law marriages or marriages involving persons within prohibited degrees of consanguinity. The marriages recognized in past cases were not new ideas of marriage, but marriages

that would otherwise have been allowed in New York but for positive law preventing recognition. Put more simply, all out-of-state marriages that have been recognized in New York previous to the controversy over same-sex marriage have involved unions of a man and a woman. They were all thus squarely within the definition of marriage identified by this Court in *Hernandez* when it noted that New York law “limits marriage to opposite-sex couples.”

It is abundantly clear that marriage cannot mean two mutually exclusive things at the same time. Marriage cannot be the union of a man and a woman (as this Court noted New York law defines the term) and also the union of any two persons. The former category is exclusive of the latter.

If the Department had employed the correct analysis of the legal question involved in the DCS Memorandum (as exemplified in the Rhode Island decision), the Department would have first asked whether New York law comprehends marriage to mean the union of any two persons. If the law could be so construed, then the Department could have proceeded to the next question—whether something about the out-of-state same-sex unions (such as public policy considerations, specific legislative direction or the natural law) would otherwise disqualify them for recognition as marriages in New York. The Department skipped this first step but it would have been easily addressed since the *Hernandez*

decision makes the answer abundantly clear: in New York, marriage means the legal union of a man and a woman.

Thus, when the Department seeks to compel recognition of a union between two persons of the same-sex as a marriage, it is *de facto* redefining marriage in New York, changing the fundamental legal meaning of the institution. Before the DCS Memorandum, marriage was clearly understood to be the union of a husband and wife and this Court so held. In order to recognize same-sex unions as marriages, DCS had to work a redefinition of marriage so that it now means a union of any two persons. If the redefinition had not taken place, there would be no legal mechanism for recognizing a same-sex union from another state for purposes of New York law. This *sub silentio* redefinition provided the way for the Department to avoid addressing the threshold definitional question that would have been fatal to its desired conclusion.

This administrative redefinition provided the only way for DCS to overcome the analytical problem it was faced with—how to recognize a same-sex union as a marriage when New York law only apprehends legal marriage as the union of a man and a woman. That the Memorandum works such a redefinition raises the inevitable question of whether it had the authority to do so.

II. The Department of Civil Service does not have authority to redefine marriage for any purpose.

In its decision in *Hernandez v. Robles*, this Court specified that marriage could, at some point, be redefined to include same-sex couples. In every instance, where the matter is raised in the opinion, though, this Court makes clear that such a change must come from the Legislature. At the very outset of the opinion, this Court said, “Whether such marriages [involving same-sex couples] should be recognized is a question to be addressed by the Legislature.” *Hernandez v. Robles*, 7 NY3d 338, 356 (2006). This Court further said “the Legislature may (subject to the effect of the federal Defense of Marriage Act) extend marriage or some or all of its benefits to same-sex couples.” *Hernandez* at 358-359 (citations omitted). The point was emphasized at least two more times in the opinion:

- “any expansion of the traditional definition of marriage should come from the Legislature.” *Hernandez* at 361.
- “We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature.” *Hernandez* at 366.

Like the Rhode Island Supreme Court, this Court recognized that “it is not our role to supplement or amend a statute.” *Chambers v. Ormiston*, 935 A.2d 956, 965 (R.I. 2007).

It must be emphasized that at no point did this Court say that the *executive* or *another branch of government* can “extend marriage or some or all of its benefits to same-sex couples.” *Hernandez* at 358-359. It seems clear that if the courts of New York must defer to the Legislature as to the definition of marriage in the State, administrative agencies must also do so. This is in keeping with this Court’s precedent holding that “policymaking” is “legislative in character.” *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 822 (2003). As this Court has made clear:

“an administrative officer has no power to declare through administrative fiat that which was never contemplated or delegated by the Legislature. An agency cannot by its regulations effect its vision of societal policy choices . . . and may adopt only rules and regulations which are in harmony with the statutory responsibilities it has been given to administer.” *New York State Health Facilities Association v. Axelrod*, 77 NY2d 340, 346 (1991) quoting *Matter of Campagna v. Shaffer*, 73 NY2d 237, 242-243 (1989).

That this reality is widely understood is evident in the current legislative debate over the definition of marriage in New York. By seeking legislation to define marriage as the union of any two persons, the governor and legislators are implicitly recognizing that current law cannot just be interpreted to include same-sex couples. If the DCS analysis were correct, an administrative order would be adequate to redefine marriage and there would be no need to enact legislation redefining marriage, at least for purposes of administrative agency actions. If such an order would be invalid to justify the extension of employment benefits or other

incidents of marriage, as is implicit in the notion that these cannot be extended without a new marriage statute, there is no reason to believe such an order would be uniquely valid in the context of out-of-state marriage recognition.

III. The Department of Civil Service Memorandum redefining marriage for purposes of interstate recognition threatens important public policies.
A. The Memorandum undercuts the purposes of marriage recognized by this Court.

Marriage between a man and a woman, involving obligations owed by the spouses to one another and especially to the children their union creates, has been a virtually universal social institution. DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 91 (2007); G. ROBINA QUALE, *A HISTORY OF MARRIAGE SYSTEMS* 2 (1988) (“[m]arriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies”). Marriage has long served to channel potentially procreative relationships into a social institution that provided cultural—and sometimes legal—norms, such as responsibility and fidelity that were understood to be beneficial or even essential for children who would be born to the married couple.

As this Court has noted, “Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.” Thus, “the vast majority of children are born as a result of the sexual relationship between a man and a woman” and the Legislature “could find that an important function of marriage is to create more stability and permanence in the relationships that cause

children to be born” and “choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite sex couples who make a solemn, long-term commitment to each other.” *Hernandez v. Robles*, 7 NY3d 338, 359 (2006). In concurrence, Justice Graffeo noted that “marriage was instituted to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth” so “[i]t is not irrational for the Legislature to provide an incentive for opposite-sex couples—for whom children may be conceived from casual, even momentary intimate relationships—to marry, create a family environment and support their children.” *Hernandez* at 378-379 (Graffeo, J., concurring).

This court also held that the Legislature “could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.” *Hernandez* at 359.

Even husbands and wives who do not have children further the societal goals of marriage because they can provide a mother and father to a child deprived of ties to his or her own biological parents and because their fidelity to one another prevent them from creating children in unstable or impermanent couplings likely to result in motherless or fatherless children.

These vital social goods, however, would be threatened by the Department's decision to redefine marriage to include same-sex couples. The institution of marriage creates an aspirational goal channeling the sexual and reproductive behavior of men and women into a union that protects both the adults and the children their sexual relationship produces. New York law holds out the faithful and exclusive union of a husband and wife as an intrinsic part of marriage, by definition, as an ideal to strive for.

When marriage is legally redefined to include same-sex unions, the law displaces this institution with one that no longer promotes the ideal of men and women coming together for the sake of the children they may create. Rather, this new institution endorses a different view of marriage as a tool for bolstering feelings of dignity and self-worth for individuals in same-sex relationships. The new legal construct also endorses the idea that men and women are fungible and that children do not need either a mother or a father.

The social goods promoted by the traditional understanding of marriage are thus lost.

B. The Memorandum undercuts the constitutional principle of separation of powers and the interests that principle protects.

As this Court has explained,

The State Constitution provides for a distribution of powers among the three branches of government (see N.Y. Const., art. III, s. 1; art. IV, s. 1, art. VI). This distribution avoids excessive concentration of

power in any one branch or in any one person. Where power is delegated to one person, the power is always guided and limited by standards. . . . Without such standards there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities. *Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978).

As Professor James McLellan has noted in his treatise on the United States Constitution, “Of all the theories of government that have been propounded to establish limited government, the doctrine of separation of powers has been the most influential and successful. It stands alongside that other great pillar of Western political thought—the concept of representative government—as the major support for constitutional government.” JAMES MCLELLAN, *LIBERTY, ORDER & JUSTICE* 327-328 (3d ed. 2000). The separation of governmental powers among different branches “is a necessary prerequisite to limited constitutional government because a concentration of political power is inherently dangerous and will sooner or later lead to the abuse of power and to oppressive government.” MCLELLAN at 328. Professor McLellan points out that the doctrine “is also closely associated with rule of law, and may be said to be an indispensable means for its attainment.” MCLELLAN at 328.

In the context of the New York Constitution, “the separation of powers ‘requires that the Legislature make the critical policy decisions, while the executive branch’s responsibility is to implement those policies.’” *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 821-822 (2003), quoting

Bourquin v. Cuomo, 85 NY2d 781, 784 (1995). This “legislative power cannot be delegated—not to the people, not to administrative agencies, and not to committees of the legislature itself.” PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE* 77 (1991). Thus, “[w]here it would be practicable for the Legislature itself to set precise standards, the executive’s flexibility is and should be quite limited.” *Rapp* at 163.

In this case the legislature not only can “set precise standards” but, according to this Court, is *the* branch of government to whom the “critical policy decision” of the definition of marriage for purposes of New York law belongs. Allowing the executive branch to create its own definition of marriage threatens to concentrate far more authority over social policy into the hands of a branch not intended to have that authority. If executive officials can decide to unilaterally assume any legislative function, the rule of law is weakened as the constitutional delegation of authority to the legislative branch is subordinated to the will of administrative officials.

CONCLUSION

For the foregoing reasons, amicus curiae, Family Watch International, respectfully requests that this Court reverse the decision of the court below.

Respectfully submitted,

**

PROOF OF SERVICE

I, ***, a person over the age of 18 and not a party to this action, affirm under the penalties of perjury that on ***, 2009, I served three copies of the attached *Brief of Amicus Curiae* on all parties by sending true and accurate copies via United States Postal Service to:

<p>James P. Trainor Cutler, Trainor & Cutler, LLP 2 Hemphill Place, Suite 153 Malta, NY 12020</p> <p>Benjamin Bull Brian W. Raum James A. Campbell Alliance Defense Fund 15100 North 90th Street Scottsdale, AZ 85260</p>	<p><i>Attorneys for Plaintiffs-Appellants</i></p>
<p>Sasha Samberg-Champion State of New York Office of the Attorney General 120 Broadway, 25th Floor New York, NY 10271</p>	<p><i>Attorneys for Defendants-Respondents</i></p>
<p>Susan L. Sommer Lambda Legal Defense & Education Fund 120 Wall Street, Suite 1500 New York, NY 10005-3904</p> <p>Jeffrey S. Trachtman Norman C. Simon Kramer, Levin, Naftalis & Frankel LLP 1177 Avenue of the Americas New York, NY 10036-2714</p>	<p><i>Attorneys for Defendants-Intervenors-Respondents</i></p>

Dated: **