THE COURT OF APPEALS
STATE OF NEW YORK

MARGARET GODFREY, ROSEMARIE JAROSZ,
and JOSEPH ROSSINI,
Plaintiffs-Appellants,

v.

ANDREW J. SPANO,
in his official capacity as the

Westchester County
Index No. 16894/06

Westchester County Executive,
Defendant-Respondent,

v.

NEW YORK STATE COMPTROLLER,
Defendant-Intervenor-Respondent,

v.

MICHAEL SABATINO and ROBERT VOORHEIS,
Defendants-Intervenors-Respondents.

BRIEF *AMICUS CURIAE* OF NEW YORKERS FOR
CONSTITUTIONAL FREEDOMS
In Support of Plaintiffs-Appellants

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, New Yorkers for Constitutional Freedoms, Ltd. (NYCF) is a statewide, issues-oriented, nonprofit lobbying organization under Section 501(c)(4) of the Internal Revenue Code. NYCF represents hundreds of churches and other Christian organizations, as well as thousands of concerned citizens, throughout New York State. Since its founding in 1982, NYCF has been lobbying the New York State Legislature to protect religious freedoms within the state. NYCF believes that same-sex marriage will cause considerable conflict with religious freedom in New York, thus NYCF has an interest, on behalf of its constituents and supporters, in arguing to defend the traditional and historic opposite-sex definition of marriage.

SUMMARY OF THE ARGUMENT

Limiting marriage to one man and one woman *by definition*, as New York traditionally has, is not tautological. A helpful analogy is provided from the world of chemistry. Just as one molecule of sodium and one molecule of chlorine are required to produce the entity that is defined as salt, so one man and one woman are required to produce the entity called marriage.

With this key understanding in place, one can see that New York's current marriage recognition rule is only helpful to resolve questions abut the recognition *vel non* of foreign marriages that involve one man and one woman. Putative

foreign marriages that deviate from this central concept should not be evaluated by New York courts under the current marriage recognition rule. Rather the courts should follow this Court's holding in *Hernandez v. Robles* that the Legislature must speak to the issue in the first instance. Once the Legislature has spoken, such marriages could then be evaluated under the marriage recognition rule.

ARGUMENT

The substantive question before this Court is the recognition *vel non* of foreign same-sex "marriages." The issue is one which was not contemplated by the courts that fashioned what is today known as the Marriage Recognition Rule (MRR). *See Hernandez v. Robles*, 7 N.Y.3d 338, 361 (2006). The MRR was first articulated in its oft-cited form in 1881 in *Van Voorhis v. Brintnall*, 86 N.Y. 18, 26 (1881) (citations omitted) (emphasis in original):

> Indeed the general doctrine is so well settled by the decisions of all courts and the reiteration of text writers as to become a maxim in the law, that one rule in these cases should be followed by all countries; that is, the law of the country where the contract is made. There are no doubt exceptions to this rule; cases, *first* of incest or polygamy coming within the prohibitions of natural law; *second,* of prohibition by positive law.

But not until 2003, in *Langan v. St. Vincent's Hospital of New York*, did the courts of this state have an opportunity to apply the MRR to unions between persons of the same sex. 765 N.Y.S.2d 411 (N.Y. Sup. 2003), *rev'd*, 802 N.Y.S.2d 476 (App. Div. 2005) (refusing recognition of Vermont civil unions for purposes of a

wrongful death action).

Now that the issue of the application of the current MRR has arrived before this Court, it is important to remember that the current MRR arose in a context in which marriage was unthinkable as existing other than between one man and one woman. In other words, for over one hundred and twenty years, the courts had occasion to consider only conflicts that fell within that definition, such as the recognition of common law marriages (*Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289 (1980); *Shea v. Shea*, 295 N.Y. 909 (1945)); the remarriage of guilty parties to an adulterous divorce (*In re Palmer's Estate*, 79 N.Y.S.2d 404 (Sur. Ct. 1948); *Van Voorhis*, 86 N.Y. at 18); the marriage of an uncle and niece by the half-blood (*In re May's Estate*, 305 N.Y. 486 (1953)); marriages by persons under New York's age of consent (*Hilliard v. Hilliard*, 209 N.Y.S.2d 132 (Sup. Ct. 1960)), or proxy marriages (*In re Valente's Will*, 188 N.Y.S.2d 732 (Sur. Ct. 1959)).

The exceptions allowed were exceptions arising *within the broader understanding* that marriage is solely between one man and one woman. On the other hand, the question now before this Court is not that of an exception, but of a fundamental alteration of the institution of marriage in New York. Your *Amicus* will briefly bring to this Court's attention an analogy that has been persuasive to another court as to why the inherent one man-one woman nature of marriage is critical to properly resolving issues such as the one before this Court. Building

upon that understanding, the remainder of this Brief will demonstrate why the current MRR is inadequate to address the recognition *vel non* of putative marriages falling outside this critical framework. Finally, the Brief will suggest how the current MRR should be adapted to continue to be viable in analyzing *all* foreign marriages, both those falling within the one man-one woman opposite-sex frame work and those falling outside.

I. LIMITING MARRIAGE TO NEW YORK'S TRADITIONAL DEFINITION OF ONE MAN AND ONE WOMAN IS NOT TAUTOLOGICAL AS AN ANALOGY TO CHEMISTRY DEMONSTRATES.

Appellants, Margaret Godfrey, Rosemarie Jarosz, and Joseph Rossini (hereinafter "Godfrey") have cogently demonstrated that the "definition of marriage has remained consistent in New York, both in common and statutory law . . . ." (Pls.-Appellants' Br. 35.) Godfrey also notes the distinction between altering the "regulatory requirements" (such as solemnization, age, and consanguinity) and the core "structure" of marriage (such as the gender and number of persons). (*Id.* 35-40.) The core "structure" of any institution or tangible thing provides its definition.

Same-sex unions are not marriages because they are fundamentally different in composition from opposite-sex unions (and, as will be discussed in Part II., from all other unions, such as polygamous unions). Defendants-Intervenors attempt to dismiss this reality as "*ipse dixit*," or as the result of an outmoded "mystic or

religious belief." (Defs.-Intervenors-Resp'ts' Br. 50-53.) If the sole argument were that marriage must remain the union of one man and one woman for no other reason than it has always been that way, then such a dismissal might be in order. The "definition" of marriage, however, is much more than an insignificant semantic distinction. A cogent analogy is found at the molecular level.

For millennia, the layman has known sodium chloride (NaCl) as common table salt, or simply salt. The study of chemistry has established that a molecule of salt is made up of the union of one atom of sodium (Na) and one atom of chlorine (Cl).[1] Two atoms of chlorine may, nonetheless, join together and form Cl_2. Two atoms of sodium may also join together, forming Na_2. However, neither Cl_2 nor Na_2 is NaCl, nor can they ever be. At the very least, each lacks a key component to complete the union required for NaCl. It is a definitional impossibility.

Just as the union of one atom of sodium and one atom of chlorine has a very specific outcome, so the union of one man and one woman has a very specific outcome. One is a chemical formula, with very specific features and dynamics and effects on the world around it. The other is a social or relational formula, with very specific features and dynamics and effects on the world around it. One can certainly *call* Na_2 or Cl_2 "salt," but neither will ever be, nor have the same features, dynamics, and effects as, NaCl. Likewise, one can *call* the union of two men or

[1] Technically, salt is an ionic compound, but it is often referred to as a molecule, and for ease of discussion here, we shall refer to it as a molecule.

two women "marriage," but neither will ever be, nor have the same features, dynamics, and effects as, the union of one man and one woman.

Just as the term "salt" is given to the specific molecular union NaCl, the term "marriage" is given to the specific social union of one man and one woman. Recognizing that the union of two men or two women is not marriage because it is a definitional impossibility is no different than recognizing that Na_2 or Cl_2 is not salt. That is not circular reasoning—simply a recognition that the union of two men or two women is not the same as the union of one man and one woman. The reservation of the term "marriage" for the specific union of one man and one woman, therefore, is not tautological, but rather employment of that timeless, basic system of verbal communication used to convey specific and exclusive meaning.[2]

While it may be argued that there is more similarity between same-sex unions and opposite-sex unions than between either Na_2 or Cl_2 and NaCl, it has been recognized through the ages, and more recently by the United States Congress, that a man and a woman each contribute something unique in the

[2] The NaCl analogy may also be extended to the supposition that "[s]ame sex couples . . . can and do enter into marriages" in foreign jurisdictions, and thus those "marriages" should be recognized in New York. (Defs.-Intervenors-Resp'ts' Br. 51-52.) The insertion of a different substance—whether Na_2 or Cl_2 or something easier to imagine, such as pepper—into the container labeled "salt," does not miraculously alter the chemical composition of the pepper. Nor does the erroneous assertion that the pepper in the container is "salt" alter its very specific features and dynamics and effects on the world around it. Such a misnomer would inflict chaos upon the palate of the diner.

marriage union. *See, generally,* H. Rep. No. 104-664 (1996).

The United States Court of Appeals for the Ninth Circuit used this salt analogy in its consideration of *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2005). In that case, same-sex couples challenged the California statutory prohibition on same-sex marriage and the Federal Defense of Marriage Act, 1 U.S.C. 7 (2006). Although that court ultimately decided the case based on abstention and standing, it considered the definitional issues along the way. *Id*. at 680 n.18, 681. Furthermore, during the oral argument, the judges relied upon a brief filed by The National Legal Foundation to specifically question counsel about the salt analogy. *Id.,* Oral Arg. Trans., 2006 WL 6069099. Relying on the salt analogy, one of the judges repeatedly made the point that prohibiting same-sex marriage does not constitute discrimination (a question at issue in *Smelt*); rather, such prohibition simply implies that definitions matter. *By definition*, same-sex unions cannot be marriages.

"[T]he word 'marriage,' when used to denote a legal status, refers only to the mutual relationship between a man and a woman as husband and wife, and therefore . . . same-sex 'marriages' are legally and factually—*i.e.*, definitionally—impossible." *Dean v. D.C.*, 653 A.2d 307, 308 (D.C. 1995). Thus, recognizing same-sex "marriages" solemnized in other states is very different from recognizing opposite-sex marriages from other states. A court does not have the authority to

"alter or expand the definition of marriage . . . ." *Id.* at 362. As this Court noted in *Hernandez*, 7 N.Y.3d at 366, should altering the definition of marriage ever become necessary, that responsibility lies with the legislature. *Accord, Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Dean*, 653 A.2d at 362; *Shields v. Madigan*, 783 N.Y.S.2d 270, 277 (Sup. Ct. 2004).

With this critical understanding of the nature of marriage in mind, your *Amicus* will now demonstrate why the current MRR rule has been adequate for deciding marriage recognition questions in the past, but why it must be adapted to adequately address the question the courts are currently and soon may be facing.

II. THE MARRIAGE RECOGNITION RULE SHOULD BE ADAPTED BECAUSE A SINGLE SIMPLE ADJUSTMENT WILL ALLOW THE CURRENT RULE TO REMAIN IN PLACE WHEN ONE MAN-ONE WOMAN MARRIAGE IS AT ISSUE AND WILL ALLOW THE LEGISLATURE TO ACT IN THE FIRST INSTANCE WHEN A REDEFINITION OF MARRIAGE IS AT ISSUE.

This Court issued its opinion in *Van Voorhis* in 1881. The Legislature enacted a new Domestic Relations Law in 1909. The Legislature is presumed to enact legislation with knowledge of this Court's decisional law. *Cmty. Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 159 (1994). Thus, the Legislature knew that the *Van Voorhis* Court had declared that there were only two exceptions to this Court's MRR: "*first* [cases involving] incest or polygamy coming within the prohibitions of natural law; *second,* [cases involving] prohibition by positive law." 86 N.Y. at 26. The Legislature also knew that this Court held that the latter exception would

only be found when the Legislature explicitly provided for extraterritorial reach of the pertinent statute.

Thus, neither in 1909 nor subsequently did the Legislature not need to explicitly state that incestuous and polygamous marriages would be void even if performed out-of-state. However, both in 1909 and subsequently, the Legislature did (and does) need to explicitly state that a statute shall be applied extraterritorially when that is what the Legislature desires.

However, the lower courts in the present case, as well as in other cases, have relied upon the erroneously equated *deliberate legislative choices* (including or excluding extraterritorial provisions) *during enactment* with *the lack of enactment*: "New York has not enacted legislation of similar import, although as of 2003, thirty-five states had passed mini-DOMA laws." *Godfrey v. Spano*, 836 N.Y.S.2d 813, 817 (Sup. Ct. 2007); s*ee also Lewis v. New York State Dep't of Civil Serv.*, 872 N.Y.S.2d 578, 583 (App. Div. 2009); *Golden v. Paterson*, 877 N.Y.S.2d 822, 832 (Sup. Ct. 2008).

As noted earlier, this Court realized in *Hernandez* that, until recently, no one in New York contemplated that the definition of marriage extended beyond the concept of one man and one woman. 7 N.Y.3d at 367 ("The historical conception of marriage as a union between a man and a woman is reflected in the civil institution of marriage adopted by the New York Legislature.") This

was true despite polygamy being known throughout history in parts of the world.

Thus, the current MRR rule only works within the confines of marriage as one man and one woman. Indeed, this fact may explain why incestuous marriages and polygamous marriages have been treated differently under the current MRR, despite starting out under the same recognition exception. In other words, incestuous and polygamous marriages *were* the first exception. Nothing has changed for polygamous marriages; no cases indicate any movement on this issue. However, some foreign incestuous marriages are now recognized by New York courts. In *In re May*, 305 N.Y. 486, 491 (N.Y. 1953), this Court construed the original language of *Voorhis*—" incest or polygamy coming within the prohibitions of natural law"—to mean "polygamy or incest in a degree regarded generally as within the prohibition of natural law." If the incest involved in the marriage was not within such a degree, even those marriages would be recognized, absent an extraterritoriality provision.

Thus—until the advent of same-sex marriage—only polygamous "marriages" have been given a complete pass on the extraterritoriality requirement. And this makes sense since it was for generations the only form of "marriage" that deviated from the one man-one woman core concept.

Furthermore, this distinction points the way forward on the need to adapt the current MRR. The current rule should remain in force for those marriages

which have been at issue since the *Van Voorhis* rule was announced. Furthermore, should other one man-one woman marriage issues arise which "through the luck of the draw" have escaped decision by the New York courts, they too should be analyzed under the current MRR.

However, when the issue involves the redefinition of marriage, the current MRR is powerless to help courts properly implement public policy, which is the very purpose of the MRR. *Cunningham v. Cunningham*, 206 N.Y. 341, 344 (1912) ("But marriage contracts have always been considered as involving questions of public policy, and the interests of others than those of the contracting parties, and should, therefore, be construed in accordance with such policy."). As this Court noted in *Hernandez*, the prerogative to redefine marriage lies, in the first instance, with the Legislature. 7 N.Y.3d at 356.

Thus, the current MRR should be adapted. There is only one change required: When the putative marriage at issue is one that deviates from the traditional one man-one woman core, it will not be recognized until the legislature has spoken. In such cases, the Legislature can choose to amend New York's statutory law to allow such marriages, thereby eliminating the need to seek recognition for such marriages solemnized in foreign jurisdictions. Or the Legislature can choose to ban such marriages. If the Legislature chooses the latter course of action, the new statute would become subject to the current

MRR. Knowing this at the time of enactment, the Legislature would be able to choose to include or exclude an extraterritoriality provision and the courts could treat the enactment as be based on such a deliberate choice.

This one modification to the current MRR honors the MRR's historical origin and provides a signal to advocates for and against new models of marriage that they should pursue their agenda at the Legislature, not in the courts.

The adaptation will have far ranging utility. As this Brief has indicated, it can be used in the current debate over same-sex marriage. But it will have equal utility as ever-expanding concepts of marriage are explored. Although polygamous marriages have never been recognized in New York, efforts are underway to redefine marriage to include polygamy. *See, e.g., Bronson v. Swensen*, 500 F.3d 1099 (10th Cir. 2007) (constitutional challenge to Utah's anti-polygamy statutes). As noted, the adaptation will send a clear signal—and one consistent with this Court's wisdom in *Hernandez*—that the proper place to take such advocacy is to the legislature. And the point can be made repeatedly.

For example, there are those who currently—and seriously—advocate "marrying" objects. *See* http://abcnews.go.com/GMA/Story?id=7283494&page=1 (last visited July 31, 2009); *see also* http://www.objectum-sexuality.org/ (last visited July 31, 2009). Object-sexuality (OS) stems from the belief in animism, the concept that all things have a soul. Object-sexuals assert that there is

communicated "love and attraction" between persons and objects, and that each should be allowed to do "what comes so naturally." http://www.objectum-sexuality.org/ (follow "What Is OS?" hyperlink) (last visited July 31, 2009). Some may argue that an object lacks the legal capacity to enter into a "marriage." But the MRR has recognized marriages solemnized in foreign jurisdictions in which a party lacked the legal capacity to marry in New York. *Hilliard*, 209 N.Y.S.2d 132. Moreover, the Legislature has not given the civil contract or age of consent provisions of the DRL extraterritorial force. *See* N.Y. Dom. Rel. Law §§ 7, 10 (McKinney, Westlaw current through June 25, 2009).

The speed at which same-sex "marriage" has emerged suggests that legally solemnized object "marriage," though not currently available, may not be far off. The world's first same-sex unions were made possible only twenty years ago in Denmark and the world's first legally acknowledged same-sex "marriage" took place only eight years ago in Canada. *See* http://www.samesexmarriage.ca/legal/ontario_case/cer300604.htm (last visited July 31, 2009); http://www.cbc.ca/world/story/2009/05/26/f-same-sex-timeline.html (last visited July 31, 2009). Under the Respondents' interpretation of the MRR, an object "marriage" legally solemnized in a foreign jurisdiction should have a valid claim under the MRR. *See* (Defs.-Resp't's Br. at 24-26, 28-29.) In fact, Defendants-Intervenors encourage this Court "to perpetuate the [MRR] and apply it flexibly to evolving marriage standards."

(Defs.-Intervenors-Resp'ts' Br. 56.) Object "marriages" are neither prohibited by positive law, nor incestuous or polygamous. And since the "abhorrence exception sets an exceptionally high bar" such that "only polygamous and closely incestuous marriages have been held to meet it," object "marriages" should satisfy the MRR. (Defs.-Intervenors-Resp'ts' Br. 33.) Certainly the MRR was never intended to recognize object "marriages," but this illustrates the expansive nature of the MRR when not applied within the parameters of marriage defined by the Legislature.

Similarly, there are those who advocate marrying animals. News reports of such marriages are noteworthy for the various countries in which they arise.[3] If a single jurisdiction were to allow such a marriage, New York courts could conceivably be asked to recognize that marriage.

As the examples of new forms of "marriage" multiple and the departures from marriage's one man-one woman core increase, the appropriateness of carrying on this debate in the Legislature becomes increasingly obvious.

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[3] *Your* Amicus does not mention this matter for its salacious effect. *Your* Amicus is also aware of the anger that the discussion of this issue can produce among those who advocate for same-sex marriage (as documented in the first source cited in this footnote). *Your* Amicus discusses this issue merely because it is factually true that there are those who believe that their attraction to animals is an innate orientation and who desire to marry animals and because many jurisdictions are involved. *See* Thomas Francis, *Those Who Practice Bestiality Say They're Part of the Next Sexual Rights Movement*, Broward-Palm Beach (Florida) New Times, Aug. 20, 2009 (available in Lexis All News database); and Human-animal Marriage, http://en.wikipedia.org/wiki/Human-animal_marriage (last visited Sept. 1, 2009) (collecting links to reputable news sources, such as the BBC and MSNBC.com).

CONCLUSION

For the foregoing reasons and for the reasons found in the Plaintiffs-Appellants' Brief, this Court should reverse the judgment of the Appellate Division, Second Judicial Department.

Respectfully Submitted,
this 2nd day of September, 2009

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CERTIFICATE OF SERVICE

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