SUP. CT. MONROE COUNTY
SUPREME COURT INDEX NO: 05-00433
APPELLATE DIVISION DOCKET NO: 06-2591

SUBMITTED WITHOUT REQUEST FOR ORAL ARGUMENT

The State of New York
Court of Appeals

PATRICIA MARTINEZ,

PLAINTIFF-RESPONDENT,

VS.

COUNTY OF MONROE, MONROE COMMUNITY COLLEGE, TRUSTEES OF THE MONROE COMMUNITY COLLEGE, AND MONROE COMMUNITY COLLEGE DIRECTOR OF HUMAN RESOURCES SHERRY RALSTON, IN HER INDIVIDUAL AND OFFICIAL CAPACITY,

DEFENDANTS-APPELLANTS

BRIEF OF COALITION TO SAVE MARRIAGE IN NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT MONROE COUNTY'S MOTION FOR LEAVE TO APPEAL

DATED: March 21, 2008

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DISCLOSURE STATEMENT

Coalition to Save Marriage in New York ("the Coalition") is a statewide coalition headquartered in Albany, New York. To the extent that the Coalition is required to file a Disclosure Statement pursuant to Court of Appeals Rule 500.1(c), the Coalition respectfully submits that it does not have any parent, subsidiary, or affiliate entities.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Coalition to Save Marriage in New York (hereinafter "the Coalition") submits this brief as *amicus curiae* in support of the motion for leave to appeal made by the County of Monroe, the defendant-appellant in this matter. Based in Albany, New York, the Coalition exists to promote New York's current definition of marriage as a relationship between one woman and one man, and to stand against attempts to alter or expand that definition. *See* Attorney Affirmation at ¶ 3. The nonpartisan, statewide Coalition coordinates grassroots lobbying efforts in support of traditional marriage, monitors legal and legislative developments in relation to same-sex marriage, serves as an informational resource for local and national media, and provides elected officials with a pro-family perspective. *See* Attorney Affirmation at ¶¶ 3, 8.

The Coalition's purposes are further defined in its Statement of Position, which reads, in pertinent part, as follows:

> Marriage is the joining together of one woman and one man in a lifelong, exclusive relationship of mutual care, support, and intimacy. The institution of marriage provides the basic family unit within which children are born and nurtured. Marriage is an essential building block of our society, not an archaic, outmoded tradition to be lightly redefined or cast aside. The legalization of same-sex "marriage" or civil unions would be detrimental to New York's families, and would open the door to a host of negative consequences for our legal system and for future generations.

See Attorney Affirmation at ¶ 4. The following organizations have endorsed the Coalition's Statement of Position: The Rt. Rev. William H. Love, Bishop, Episcopal Diocese of Albany; The Conservative Party of New York State; New Yorkers for Constitutional Freedoms; Association of Hispanic Ministers; The American Family Association of New York; Caucus for America; Concerned Women for America of New York; New York Christian Coalition; United Chaplains of New York/Brooklyn Chapter; New York Family Policy Council; Marriage & Family Savers Institute; Nassau County Civic Association, Inc.; National Traditionalist Caucus; and The Association of Politically Active Christians. *See* Attorney Affirmation at ¶ 5. The religious, geographic, and ethnic diversity of the above-listed organizations reflects the broad-based support for traditional marriage that exists here in the Empire State. The Coalition is directed by leaders of several of the above-listed organizations, many of whom have decades of experience advocating for traditional marriage and related causes within the State of New York. *See* Attorney Affirmation at ¶ 6.

The Coalition respectfully submits this brief to offer the Court its knowledge and expertise regarding the legal and public policy implications of same-sex marriage and of the recognition of foreign same-sex marriage licenses.

PRELIMINARY STATEMENT

The defendant-appellant's motion for permission to appeal should be granted because this case satisfies the criteria set forth in Article VI, Section Three of the Constitution of the State of New York. Furthermore, the Appellate Division's decision subverts the sovereignty of New York State.

Plaintiff Patricia Martinez filed suit after her application for spousal benefits for her partner based upon a Canadian same-sex marriage license was denied by her employer, Defendant-Appellant Monroe Community College. *See Martinez v. County of Monroe,* slip op. at 2. The plaintiff-appellee sought a court declaration that the denial of her application violated both Executive Law § 296 and the Equal Protection Clause of the New York State Constitution. *Id*. Each party moved for summary judgment regarding some or all of the claims in this case. *Id.* On July 27, 2006 – shortly after the Court of Appeals upheld the constitutionality of New York's statutory definition of marriage in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006) – the Supreme Court, County of Monroe (Galloway, J.) granted the defendants' motion for summary judgment in the case at bar. *See Martinez v. County of Monroe,* slip op. at 1. The plaintiff appealed, and the Appellate Division, Fourth Department reversed. *See Martinez v. County of Monroe,* slip op. at 4. The Appellate Division (Peradotto, J.) held that the plaintiff's Canadian same-sex marriage license was valid in New York, and that the defendants thus

discriminated against the plaintiff on the basis of sexual orientation in violation of Executive Law § 296. *See Martinez v. County of Monroe*, slip op. at 3-4. The Appellate Division did not reach the constitutional issues raised below. *See Martinez v. County of Monroe*, slip op. at 4.

The defendant-appellant did not move for permission to appeal to this Court at the Appellate Division, but came directly here.

LEGAL ARGUMENT

POINT I: PERMISSION TO APPEAL SHOULD BE GRANTED BECAUSE THIS CASE SATISFIES THE CRITERIA SET FORTH IN ARTICLE VI, SECTION THREE OF THE CONSTITUTION OF THE STATE OF NEW YORK

Article VI, § 3 of the Constitution of the State of New York sets forth the jurisdiction of the Court of Appeals. That article provides, in pertinent part, that the Court of Appeals has jurisdiction to hear civil appeals of judgments or orders that were (as here) entered upon the unanimous decision of an Appellate Division

> where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals . . . . Such an appeal shall be allowed when required in the interest of substantial justice.

A motion for leave to appeal shall "set forth the questions of law presented" and "shall show why such questions merit review by this court, such as that they are novel or of public importance, or involve a conflict with prior decisions of this

court or . . . a conflict among the Appellate Division[s]. *In re Estate of Hart*, 24 N.Y.2d 158, 160 (1969).

This brief will show that the issues presented in this case are of public importance, that there is a conflict between the decision of the Appellate Division, Fourth Department in the case at bar and the Court of Appeals decision in *Hernandez v. Robles*, and that there is a significant likelihood of conflict between the Appellate Divisions and confusion in New York case law regarding this issue. Because there is an unsettled question of law regarding the recognition of foreign marriage licenses in New York, and because substantial justice requires that an appeal be allowed in this case, the Coalition respectfully submits that permission to appeal should be granted.

A. THE ISSUES PRESENTED IN THIS CASE ARE OF PUBLIC IMPORTANCE

The high public importance of the same-sex marriage issue is almost beyond dispute. The importance and weight of the issue are demonstrated by the strenuous, ongoing efforts made on both sides of the marriage debate. *See, e.g.*, http://www.nytimes.com/2006/07/07/nyregion/07marriage.html?_r=1&oref=slogin (last visited on March 12, 2008); http://www.nycf.info/accomp.shtml (last visited on March 12, 2008); http://www.prideagenda.org/AboutUs/PrideAgendaHistory/tabid/56/Default.aspx (last visited on March 12, 2008). Also, the Appellate Division's decision in this

case received national and international media attention (*see* http://www.onenewsnow.com/Legal/Default.aspx?id=66997 [last visited on March 12, 2008]; http://www.canada.com/story.html?id=17aac1d6-345f-4af3-a6b9-dfab09f70a3e&k=32637 [last visited on March 12, 2008]), further underscoring the significance of the issue. In fact, the defendant-appellant's decision to move for permission to appeal resulted in two public demonstrations and a flurry of passionate commentary from voices on both sides of the marriage debate. *See* http://www.13wham.com/content/news/political/story.aspx?content_id=b9e6940b-942e-468a-b1b3-09396ccb2d7f (last visited on March 12, 2008); http://www.13wham.com/content/news/political/story.aspx?content_id=b9e6940b-942e-468a-b1b3-09396ccb2d7f (last visited March 12, 2008). This Court underscored the public importance of the same-sex marriage issue in *Hernandez v. Robles* when it noted that "there are very powerful emotions on both sides of the question." *Hernandez v. Robles*, 7 N.Y.3d 338, 366 (2006).

B. THE DECISION BELOW CONFLICTS WITH THE COURT OF APPEALS DECISION IN *HERNANDEZ V. ROBLES*

The decision of the Appellate Division, Fourth Department awkwardly skirts this Court's decision in *Hernandez v. Robles*. Specifically, the Appellate Division has held that recognition of the plaintiff's same-sex marriage is not contrary to New York public policy. *See Martinez v. County of Monroe*, slip op. at 3. A close analysis of the *Hernandez* decision reveals that the Appellate Division's decision

conflicts with this Court's ruling in *Hernandez*. Because of that conflict, permission to appeal should be granted.

In *Hernandez*, this Court ruled that "the New York Constitution does not compel recognition of marriages between members of the same sex." 7 N.Y. 3d 338, 356. This Court added that "[w]hether such marriages should be recognized is a question to be addressed by the Legislature." *Id.* Further, this Court noted that "until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Id.* at 361.[1] After a brief discussion of New York marriage statutes, this Court also concluded that "New York's statutory law clearly limits marriage to opposite-sex couples." *Id.* at 357.[2]

Here, however, the Appellate Division opined as follows:

> Defendants . . . contend that recognition of plaintiff's [foreign] same-sex marriage is contrary to the public policy of New York, as articulated by the Court of Appeals in *Hernandez v. Robles* . . . and thus falls within an exception to the rule requiring recognition of valid

[1] Significantly, in the Appellate Division decision in *Hernandez*, Judge Catterson of the Appellate Division, First Department mentioned in a concurring opinion that "no court, state or federal, has ever held that marriage, traditionally understood, extends to same-sex couples." *Hernandez v. Robles*, 26 A.D.3d 98, 114 (1st Dept. 2005) (Catterson, J., concurring), *aff'd*, 7 N.Y.3d 338 (2006).

[2] It should be noted that in 2004, the mayor of New Paltz, New York – along with other New Paltz town officials – was permanently enjoined from solemnizing same-sex marriages as long as such marriages are not recognized under New York law. *See* http://www.poughkeepsiejournal.com/projects/gay_weddings/lo060804s2.shtml (last visited on March 10, 2008); http://www.lc.org/attachments/Order_NewPaltz_113004.pdf (last visited on March 10, 2008).

> foreign marriages. We reject that contention. *Hernandez* does not articulate the public policy for which it is cited by defendants . . . . The Court of Appeals [in *Hernandez*] noted that the Legislature *may* enact legislation recognizing same-sex marriages . . . and, in our view, the Court of Appeals thereby indicated that the recognition of plaintiff's marriage is not against the public policy of New York.

Martinez v. County of Monroe, slip op. at 3. The Appellate Division added that the absence of a Defense of Marriage Act in New York added further support to its conclusion that same-sex marriage does not violate New York's public policy. *Id.* at 3.

This reasoning distorts the Court's holding in *Hernandez* and unduly restricts the scope of that ruling. The Appellate Division is correct in stating that this Court recognized the Legislature's authority to enact same-sex marriage legislation if it so chooses. *See Hernandez*, 7 N.Y.3d at 356, 366. However, the fact that the Legislature is at liberty to pass same-sex marriage legislation does not mean that the recognition of same-sex marriages would not violate New York's *current* public policy as demonstrated by current legislation. New York public policy is shaped by the laws that our Legislature enacts, *see Brentmore Estates v. Hotel Barbizon*, 263 A.D. 389, 392 (1st Dept. 1942), not by the laws that it could enact. While the Legislature may, as a valid exercise of its authority, pass a law mandating the recognition of same-sex marriages, the current public policy of the State of New York – as clearly evidenced by our existing statutory law and confirmed by this Court in *Hernandez* – provides that same-sex marriages are not

recognized. *Hernandez*, 7 N.Y.3d at 357 (2006). The passage of same-sex marriage legislation would reverse that public policy. Unless and until New York's marriage statutes are altered by the Legislature or are held to be unconstitutional, the recognition of same-sex marriage licenses will be contrary to New York's public policy.

Because the recognition of same-sex marriages is contrary to New York's public policy, our marriage recognition jurisprudence does not apply to same-sex marriage licenses validly obtained in other states or nations. Rather, comity principles require that the state not recognize foreign same-sex marriage licenses. New York gives effect to the laws and actions of other states and countries only where "the application of those [foreign] laws does not conflict with New York's public policy." *Crair v. Brookdale Hosp. Med. Ctr.*, 94 N.Y.2d 524, 528-29 (2000). Thus, the defendant-appellant must not recognize the plaintiff's foreign marriage license.

Under the Appellate Division's logic, a foreign marriage between a human being and a robot would not violate New York's public policy simply because the Legislature has not passed a law forbidding such unions (even though it could lawfully do so). Because the Appellate Division's incorrect reasoning conflicts with this Court's ruling in *Hernandez*, permission to appeal should be granted.

C. THE APPELLATE DIVISION'S DECISION CONFLICTS WITH DECISIONS ISSUED BY OTHER APPELLATE DIVISIONS AND

PRODUCES CONFUSION IN NEW YORK CASE LAW REGARDING THE RECOGNITION OF FOREIGN SAME-SEX MARRIAGE LICENSES

The Appellate Division's decision in this case conflicts with decisions issued by the other Appellate Divisions and is likely to cause confusion in New York case law.

First, the *Martinez* decision conflicts with existing decisions from other Departments. The Appellate Division, Second Department has declined to recognize foreign same-sex unions. *See Matter of Cooper*, 187 A.D.2d 128 (2d Dept. 1993) (holding that a same-sex union did not confer a right to a spousal elective share of a decedent's estate); *Langan v. St. Vincent's Hospital of New York*, 25 A.D.3d 90 (2nd Dept. 2005) (declining to recognize a party to a same-sex civil union as a spouse for purposes of a wrongful-death claim). Furthermore, in *Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105 (3rd Dept. 2007), the Appellate Division, Third Department concluded that "[t]he doctrine of comity [did] not require New York to recognize [decedent's civil-union partner] as [his] surviving spouse for death benefits purposes." *Id.* at 107. While the same-sex unions at issue in these cases were not called "marriages" by another state or nation, it is nonetheless significant that the Second and Third Departments have declined to recognize foreign same-sex unions.

Second, it should be noted that several cases involving recognition of foreign same-sex marriage licenses and/or attempts by same-sex couples with

foreign marriage licenses to obtain divorces here in New York are currently wending their way through New York state trial and appellate courts. In *Funderburke v. New York*, the plaintiff sought recognition of a foreign same-sex marriage license for spousal benefits purposes. 13 Misc.3d 284 (Sup. Ct. Nassau County 2006). After the trial court rejected the plaintiff's claim, the case was appealed to the Appellate Division, Second Department (2d Dept. Docket No. 2006-07589); the case has been argued and is awaiting decision. *See* http://www.lambdalegal.org/our-work/publications/facts-backgrounds/update-marriage-recognition-ny.html (last visited on March 10, 2008). In *Godfrey et al. v. Spano*, a trial court upheld a Westchester County executive order recognizing foreign same-sex marriages for official county purposes. 15 Misc.3d 809 (Sup. Ct. Westchester County 2007). The *Spano* decision has been appealed to the Appellate Division, Second Department (2d Dept. Docket No. 2007/4303). *See* http://www.lambdalegal.org/our-work/publications/facts-backgrounds/update-marriage-recognition-ny.html (last visited on March 10, 2008).

In *Godfrey et al. v. Hevesi*, Index No. 5896-06 (Sup. Ct. Albany County Sept. 5, 2007), a trial court decision upholding the New York State Comptroller's 2004 recognition of foreign same-sex marriage licenses has been appealed to the Appellate Division, Third Department. *See* Attorney Affirmation, Exhibit B; *see also* http://data.lambdalegal.org/pdf/legal/godfrey/godfrey-v-dinapoli-decision.pdf

(last visited on March 10, 2008); http://www.lambdalegal.org/our-work/publications/facts-backgrounds/update-marriage-recognition-ny.html (last visited on March 10, 2008). Also, in *Lewis v. New York*, Index No. 4078-07 (Sup. Ct. Albany County March 3, 2008), a trial court – relying entirely on the Fourth Department's decision in *Martinez* – upheld the New York State Department of Civil Service's recognition of foreign same-sex marriage licenses; the plaintiffs intend to appeal that decision. *See* http://www.lambdalegal.org/our-work/publications/facts-backgrounds/update-marriage-recognition-ny.html (last visited on March 10, 2008).

Lastly, in *Beth R. v. Donna M.*, Index No. 350284-07 (Sup. Ct. New York County Feb. 25, 2008), a New York City judge – referencing the Fourth Department's decision in *Martinez* – allowed a woman to sue another woman for divorce based upon a marriage license obtained in Canada. *See* Attorney Affirmation, Exhibit C; *see also* http://www.nypost.com/seven/02262008/news/regionalnews/gay_split_makes_ny_herstory_99275.htm (last visited on March 10, 2008). The defendant in that case has reportedly expressed her intent to appeal to the Appellate Division, First Department. *See* http://www.lifesitenews.com/ldn/2008/feb/08022801.html (last visited on March 10, 2008).

If this Court does not find that there is a current split between the Appellate Divisions concerning the recognition of foreign same-sex marriage licenses, it may be only a matter of time before such a split develops. In any event, the varied results reached by courts that have addressed this question make it plain that there is confusion – and will likely be greater confusion – about whether New York recognizes foreign same-sex marriage licenses. The Coalition respectfully requests that this Court grant permission to appeal so that this confusion may be resolved, and so that it will not proliferate in other New York courts.

POINT II: THE DECISION OF THE APPELLATE DIVISION, IF LEFT UNDISTURBED, WOULD SUBVERT THE SOVEREIGNTY OF THE STATE OF NEW YORK AND WOULD HAVE OTHER FAR-REACHING POLICY IMPLICATIONS

The Appellate Division's decision would lead to absurd results. A same-sex couple in Plattsburgh, New York – who could not be granted a marriage license in New York – could simply drive 30 miles across the Canadian border, obtain a marriage license, and use that license to obtain employee or other benefits here in New York. The plaintiff herself has reportedly stated that if she had not already obtained a marriage license, she would "be leaving skid marks on [the] Peace Bridge going to Canada" for that purpose. *See* http://www.democratandchronicle.com/apps/pbcs.dll/article?AID=/20080223/NEWS01/802230319 (last visited on March 12, 2008).

Also, this decision raises huge state sovereignty concerns. It allows other countries – and, potentially, other states – to export same-sex marriage to New York and to compel New York employers to recognize it. Same-sex marriage should not be imposed on the entire state of New York by nearby states or nations whose elected officials have chosen to define marriage differently than our Legislature has.

Applying New York's judge-created marriage-recognition rule to foreign same-sex marriages would also have far-reaching policy implications. "Any change in [the] frequently articulated heterosexual construct [of marriage] would be a revolution in the law." *Hernandez v. Robles*, 26 A.D.3d 98, 114 (Catterson, J., concurring), *aff'd*, 7 N.Y.3d 338 (2006). As this Court clearly stated in *Hernandez*, this type of a sweeping change in the definition of marriage – if it is made at all – should not be judicially mandated. When New York courts recognize foreign same-sex marriage licenses, they exceed the scope of their authority and override the legislative determination made by the people's elected officials.

Considerations of state sovereignty and public policy clearly indicate that permission to appeal should be granted in this case.

CONCLUSION

Because an appeal of the Appellate Division, Fourth Department's decision and order would serve the interest of "substantial justice," the Coalition respectfully joins in the defendant-appellant's request for permission to appeal.

Dated: March 21, 2008

Respectfully submitted,

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