SUP. CT. MONROE COUNTY **WITHOUT ORAL ARGUMENT**
SUPREME COURT INDEX NO: 05-00433
APPELLATE DIVISION DOCKET NO: 06-2591
BRIEF COMPLETED: MARCH 12, 2008

The State of New York
Court of Appeals

PATRICIA MARTINEZ,

Plaintiff-Respondent

-against-

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 THE AMERICAN CENTER FOR LAW & JUSTICE AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT MONROE COUNTY'S MOTION FOR LEAVE TO APPEAL

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Pro Hac Vice Application submitted herewith

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INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is a public interest law firm dedicated to protecting Constitutional freedoms and to preventing the erosion of traditional moral values via judicial fiat. The ACLJ is committed to preserving the traditional institution of marriage as the union of one man and one woman, and therefore opposes efforts to take public debates on moral issues, including the definition of marriage, out of the legislative process through the minting of new rights under federal and state constitutions. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States, as well as lower federal and state courts.

ARGUMENT

The ACLJ urges this Court to grant the County of Monroe's Motion for Leave to Appeal. The lower court held that New York's foreign marriage recognition law required it to recognize same-sex marriages performed in Canada even though New York has not redefined the institution of marriage to include homosexual relationships. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008). The lower court's ruling is flawed for many reasons. First, the

lower court's ruling triggers substantial equal protection concerns because it establishes a two-tiered system in New York: Same-sex couples who are able to travel to another jurisdiction to marry will have their marriages recognized and will be afforded all the benefits of civil marriage under New York law; same-sex couples who "marry" in private religious ceremonies in New York cannot have their marriages recognized nor can they obtain the benefits of civil marriage. The ACLJ opposes all efforts to redefine the centuries-old institution of marriage, and it also opposes a regime in which some same-sex relationships are treated as marriages while others are not.

The lower court's decision also effectuates an end run around *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1 (2006), in which this Court held that it is exclusively the province of the New York Legislature to redefine marriage to include same-sex unions. Interpreting New York's foreign marriage recognition law to define only some same-sex relationships as "marriages" virtually guarantees that the issue of same-sex marriage will be the subject of on-going litigation in the New York courts.

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE LOWER COURT'S DECISION CANNOT BE RECONCILED WITH THE EQUAL PROTECTION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS.

The Equal Protection Clauses of both the federal and New York

constitutions ensure that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); *see also Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631, 814 N.E.2d 410, 418 (2004). The capacity to violate the equal protection clause does not reside only in the legislative and executive branches of government; rather, judicial decisions may also lead to disparate treatment of similarly situated classes of people. *See People v. Utica Daw's Drug Co.*, 225 N.Y.S.2d 128, 132, 16 A.D.2d 12, 17 (N.Y. App. Div. 1962). "The equal protection clause of the Constitution applies to all agencies of government, including the courts." *Id.* (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

Thus, in *Shelley v. Kraemer*, the Supreme Court of the United States held that a state court violated the equal protection clause merely by upholding private restrictive covenants that contained racially restrictive provisions. 334 U.S. at 4-5, 20. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Id.* at 22.

This Court has struck down state actions that result in disparate treatment of New York residents and serve no rational government interest. For example, in *Weissman v. Evans*, 56 N.Y.2d 458, 438 N.E.2d 397 (1982), this Court held that disparate treatment of New York citizens based solely on geographical factors

violated the equal protection clauses of the federal and state constitutions. Where the state discriminates on the basis of a geographical factor, the "state must demonstrate that the classification is neither capricious nor arbitrary but rests upon some reasonable consideration of difference or policy." *Id*. at 465, 438 N.E.2d at 400 (quoting *Levy v. Parker*, 346 F. Supp. 897, 902 (E.D. La. 1972)). In *Evans*, New York paid state court judges differently depending upon the county in which they served. This Court found no rational basis for the state's disparate treatment, and held that the state violated the plaintiff judges' equal protection rights. *Id*. at 466, 438 N.E.2d at 400-01.

In this case, the lower court's opinion confers upon same-sex couples who have obtained a marriage license in Canada, "the right to demand action by the State which results in the denial of equal protection of the laws to other individuals," *Shelley*, 334 U.S. at 22, *i.e.*, same-sex couples who have been privately married in New York but who cannot obtain a New York marriage license. Those married in Canada are treated differently than those married in New York. The disparate treatment is based solely on the geographical origins (and existence) of the marriage license. No conceivable state interest supports such a distinction. Where a judicial ruling resulting in disparate treatment of identically situated persons "cannot pass even the minimum rationality test," equal protection

rights are violated. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985).

If the New York legislature wishes to redefine marriage to include any dyadic relationship irrespective of the sex of the partners, it may do so. But its redefinition of the institution should not hinge on where the license was procured. Such an arbitrary and irrational distinction is exactly the sort which the equal protections clauses condemn.

II. THE LOWER COURT'S DECISION REDEFINING SOME SAME-SEX RELATIONSHIPS AS MARRIAGES, BUT NOT OTHERS, SERVES ONLY TO CIRCUMVENT *HERNANDEZ v. ROBLES*.

In reality, basing the definition of marriage on the geographical location of the ceremony serves only to avoid this Court's holding in *Hernandez v. Robles* which declared several times that "any expansion of the traditional definition of marriage should come from the Legislature." 7 N.Y.3d at 361, 855 N.E.2d at 9.

> We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result--as many undoubtedly will be--will respect it as people in a democratic state should respect choices democratically made.

Id. at 366, 855 N.E.2d at 12. *See also id.* at 367, 855 N.E.2d at 13 (Graffeo, J., concurring) ("[W]e may not . . . substitute [our] policy preference for that of the Legislature."); *id*. at 379, 855 N.E.2d at 22 (stating that the definition of marriage

and its benefits is a decision "that rests with our elected representatives"). *See also Langan v. St. Vincent's Hosp. of N.Y.*, 802 N.Y.S.2d 476, 479-80, 25 A.D.3d 90, 95 (N.Y. App. Div. 2005) (concluding same-sex marriage is an issue not for the courts but for the Legislature). Interpreting marriage to include same-sex unions under New York's foreign marriage recognition law when the New York legislature has not yet redefined the institution to encompass homosexual unions effectively thrusts the issue of same-sex marriage back in the hands of the judiciary. Every time a governmental agency accords marriage benefits to a same-sex couple married abroad, similarly situated same-sex couples who would marry if they could afford to travel have plausible grounds to bring equal protection claims.

Even assuming, however, that every same-sex couple in New York who wishes to marry does so in Canada or another foreign Country that approves same-sex marriage, the ultimate result is the same: The flouting of this Court's proper insistence that the issue be resolved in the democratically accountable branches of government. New York will have adopted same-sex marriage by judicial fiat. Same sex couples can be married in New York, provided they obtain the license elsewhere.

These scenarios can only be averted if this Court grants review in this case and reverses the lower court's erroneous interpretation of New York's foreign marriage recognition law.

CONCLUSION

For the foregoing reasons, Amicus, The American Center for Law and Justice, respectfully requests this Court to grant review in this case.

Respectfully Submitted,

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AFFIDAVIT OF SERVICE

CHARLES KRISS, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms as follows:

1. I am not a party to the action, am over 18 years of age, and reside in New York.

2. On March 13, 2008, I served by *overnight delivery*, via Federal Express, a copy of the **BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT MONROE COUNTY'S MOTION FOR LEAVE TO APPEAL** on the following:

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Dated: March 13, 2008

_____
Charles Kriss, Esq.

STATE OF NEW YORK
COUNTY OF ALBANY

The foregoing instrument was acknowledged before me this 13th day of March, 2007, by **Charles Kriss.**

_____
Notary Public/Commissioner of Superior Court