No. DA 11-0451

SUPREME COURT OF THE STATE OF MONTANA

JAN DONALDSON AND MARY ANNE GUGGENHEIM et al.

Plaintiffs-Appellants,

v.

STATE OF MONTANA,

Defendant-Appellee.

On Appeal from the First Judicial District Court
Lewis and Clark County, No. BDV-2010-702
Before the Honorable Jeffrey M. Sherlock

BRIEF FOR AMICI CURIAE CONSTITUTIONAL LAW PROFESSORS LARRY M. ELISON, WILLIAM N. ESKRIDGE, JR., DANIEL A. FARBER, THOMAS P. HUFF, PAMELA S. KARLAN, AND ROBERT F. WILLIAMS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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November 30, 2011

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INTRODUCTION

Plaintiffs-Appellants ("Plaintiffs") have persuasively argued that the State is violating the Montana Constitution by failing to give them access to the same benefits and obligations that are statutorily available to similarly situated heterosexual couples through marriage. As the Chief Justice of the Vermont Supreme Court explained in a nearly identical case, "[i]t is plaintiffs' claim to the secular benefits and protections of a singularly human relationship that ... characterizes this case. The State's interest in extending official recognition and legal protection to the professed commitment of two individuals to a lasting relationship of mutual affection is predicated on the belief that legal support of a couple's commitment provides stability for the individuals, their family, and the broader community. The essential aspect of [Plaintiffs'] claim is simply and fundamentally for inclusion in the family of state-sanctioned human relations." *Baker v. State*, 170 Vt. 194, 228-229, 744 A.2d 864, 889 (1999).

Accordingly, this amicus brief focuses on remedies for the State's constitutional violations that would be practical, effective, and constitutionally sound. In the decision below, the district court—without addressing the merits—dismissed Plaintiffs' claims because it concluded that Plaintiffs were seeking an order directing the Legislature to enact legislation establishing domestic partnerships or civil unions. In the court's view, such relief would violate the

separation of powers. The court declined to consider any other remedies, such as declaratory relief. If this Court agrees with the merits of Plaintiffs' claims, it will confront the separation of powers question raised by the trial court and will have to decide what remedy to grant. This case thus presents an interesting and delicate balance between deference to the tripartite structure of government and an appropriate, effective, and practical remedy for Plaintiffs.

The Montana Constitution's provision on separation of powers, while reasonably clear, leaves some margin of disputable jurisdictional authority. *See* Mont. Const. art. III, § 1. The legislature has authority to enact and amend laws, and the executive has the responsibility to enforce them. This Court cannot pass or amend legislation, but as explained in Section I, it has the final authority and responsibility to interpret the Montana Constitution and to hear, decide, and provide remedies in cases that come before the Court.

In this case, the constitutional problem is the exclusion of same-sex couples from a multitude of statutory benefits and obligations available to heterosexual couples. The Legislature has the primary prerogative and responsibility to resolve those violations. This Court, however, can frame an appropriate remedy that enables the State to perform that role. As Sections II and III of this brief explain, the Court can choose from a broad range of remedial options. It need not go as far as a direct mandate to the Legislature to enact laws recognizing domestic

partnerships or civil unions (although that would be permissible). Instead, the Court could fully satisfy Plaintiffs' request for relief through a combination of narrowly-tailored declaratory and injunctive measures. Finally, as noted in Section IV, nothing in the State's constitutional amendment banning same-sex marriage precludes the relief that Plaintiffs seek.

ARGUMENT

I. MONTANA COURTS MAY REMEDY THE UNCONSTITUTIONAL ACTS OF THE LEGISLATIVE AND EXECUTIVE BRANCHES

This Court has long recognized that although the legislative and executive branches pass and enforce the laws, the judicial branch is responsible for ensuring that those laws do not infringe constitutional rights. The Montana Constitution "guarantee[s] to all persons, whether in the majority or in a minority, those certain basic freedoms and rights which are set forth in the Declaration of Rights," and this Court "scrupulously support[s], protect[s] and defend[s] those rights and liberties." *Gryczan v. State*, 283 Mont. 433, 454-455, 942 P.2d 112, 125 (1997); *see also, e.g.*, *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445.

But the power to decide that an executive or legislative act is unconstitutional would be incomplete if the judiciary could not *remedy* the constitutional violation. The Montana Constitution confers on courts the power to provide a "speedy remedy afforded for every injury of person, property, or

character." Mont. Const. art. II, § 16. Likewise, this Court has noted that "for every right there is a remedy." *Melton v. Oleson*, 165 Mont. 424, 432, 530 P.2d 466, 470 (1974). Courts in this State "clearly ha[ve] authority to grant whatever relief is necessary to effectuate [their] judgment." *Caplis v. Caplis*, 2004 MT 145, ¶ 39, 321 Mont. 450, ¶ 39, 91 P.3d 1282, ¶ 39. Effective remedial measures are most crucial in cases like this one, where individual constitutional rights are at stake. Such rights "are in a category of their own," and "the courts, as final interpreters of the Constitution, have the final obligation to guard, enforce, and protect" them. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 18, 326 Mont. 304, ¶ 18, 109 P.3d 257, ¶ 18.

Applying these principles in this case, granting the relief that Plaintiffs seek against the State would not—as the trial court suggested—"launch [a] [c]ourt into a roiling maelstrom of policy issues without a constitutional compass." Dist. Ct. Order at 9. Quite the contrary, the Court has recognized that "it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution." *In re License Revocation of Gildersleeve*, 283 Mont. 479, 484, 942 P.2d 705, 708 (1997).

In sum, if Plaintiffs prevail on the merits of their claims, the Court must enforce the decision against the State through appropriate remedial measures. The remainder of this brief will address the specific remedies that would be appropriate. Importantly, none of the remedies we discuss would invade the "legislative power," and the threshold remedy we recommend (a declaratory judgment) is the least intrusive remedy possible.

II. DECLARATORY RELIEF IS APPROPRIATE

Declaratory relief is entirely proper in this case if Plaintiffs prevail on the merits. Although the trial court believed that Plaintiffs were seeking only an order directing the Legislature to establish domestic partnerships or civil unions, Plaintiffs also sought a declaratory judgment. At the very least, the trial court should have granted this relief.

Montana has adopted the Uniform Declaratory Judgment Act, which provides that all courts in the state "shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code § 27-8-201. "The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree." *Id.* The Act is "remedial" in nature, and "it is to be liberally construed and administered." *Id.* § 27-8-102.

This Court has recognized that the Act permits declaratory relief whether or not injunctive relief is also available. The Act "makes clear that th[e] right to have statutes construed is not dependent on whether further relief 'is or could be claimed.'" *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 331, 951 P.2d 987, 990 (1997). Instead, a declaratory judgment is proper as long as "a justiciable controversy exists." *McGillivray v. State*, 1999 MT 3, ¶ 8, 293 Mont. 19, ¶ 8, 972 P.2d 804, ¶ 8. And, as this Court has specifically noted, declaratory relief is appropriate in a case like this one—where there is "a presently existing bona fide, justiciable, legal controversy concerning the authority of the legislative assembly under the constitution and statutes of Montana." *Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 420-421, 481 P.2d 330, 332 (1971).

A declaratory judgment could be a constructive remedy in this case. Plaintiffs seek a declaration that the State's failure to provide same-sex couples with the legal benefits and obligations accorded to different-sex married couples violates a number of individual constitutional rights. Compl. at 20, ¶¶ 1-5. If the Court were to rule in Plaintiffs' favor on the merits, it could easily structure the relief to maximize the State's flexibility to address the constitutional problems in the first instance and demonstrate its respect for the authority and expertise of the other branches. Such relief could be styled in a number of ways: For example, the Court could declare that the current legislative scheme is unconstitutional and

suspend the effective date of the declaratory judgment for a reasonable period of time to allow the State to cure the constitutional violations.[1] The Court could also simply issue the declaratory judgment effective immediately. Or, most effectively, the Court could pair a declaratory judgment with the prospect of injunctive relief. Under that scenario, the Court could issue a declaratory judgment effective immediately, retain jurisdiction of the case, and then allow the State reasonable time to cure the constitutional violations at its own initiative. Simultaneously, the Court could announce possible injunctive remedies (such as the ones discussed in the next section) that it might order if the State fails to remedy the constitutional violations on its own. If the State has not acted by the end of the specified period, the Court could reassert its jurisdiction, order further briefing on remedies, and then—as appropriate—either give the State further time to act or enjoin it to do so. *Cf.* Calabresi, *A Common Law for the Age of Statutes* 148 (1982).

The Vermont Supreme Court granted similar relief in *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999). After declaring that there was a "constitutional

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[1] *See, e.g., Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 59, 769 P.2d 684 (1989) (declaring that legislative scheme for public-school funding was unconstitutional but suspending declaratory judgment for five months "in order to provide the Legislature with the opportunity to search for and present an equitable system of public school financing" (internal quotation marks omitted)); *State v. Lee*, 95 Mont. 1, 11, 635 P.2d 1282, 1287 (1981) (declaring speed-limit legislation unconstitutional but suspending the effective date of the declaratory judgment by two years so that "the legislature may enact and the governor approve" new legislation "complying with our state constitution").

obligation to extend to [same-sex couples] the common benefit, protection, and security that Vermont law provides opposite-sex married couples," *id.* at 224, 744 A.2d at 886, the court noted that "[w]e do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate[.]" *Id.* The court thus suspended its declaratory judgment and ruled that "the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion." *Id.* at 226, 744 A.2d at 887. "In the event that the benefits and protections in question are not statutorily granted, plaintiffs may petition this Court to order the remedy they originally sought." *Id.* In response, the Vermont legislature passed a new civil-union scheme.

At a minimum, the Court should grant Plaintiffs a declaratory judgment, which would be an important step to resolving the infringement of their constitutional rights.

III. INJUNCTIVE RELIEF WOULD ALSO BE APPROPRIATE

If Plaintiffs succeed on the merits, the Court could properly couple a declaratory judgment with injunctive relief. Plaintiffs are not—as the trial court believed—asking for a court order directing the Legislature to enact domestic partnerships or civil unions. Instead, they are asking for an order to the *State* to grant same-sex couples the same benefits and obligations as different-sex married

couples. To meet that mandate, the State could choose from a broad range of options. But even if the complaint were seeking an order to the Legislature to establish domestic partnerships or civil unions, that too would be appropriate.

A. Plaintiffs' Request for Injunctive Relief Is Open-Ended and Can Be Satisfied in a Number of Ways

Plaintiffs' complaint seeks injunctive relief in the form of an "order enjoining the State from continuing to deny Plaintiffs and their families access to a legal status and statutory structure that confers the protections and obligations the State provides to different-sex couples who marry," and an "order requiring the State to offer same-sex couples and their families a legal status and statutory structure that confers the protections and obligations that the State provides to different-sex couples who marry, but not the status or designation of marriage." Compl. at 20, ¶¶ 6-7. Fairly read, these requests for relief are flexible and need not be limited to a court order requiring the Legislature to enact laws recognizing domestic partnerships or civil unions. Instead, the Court could satisfy Plaintiffs' request for injunctive relief with narrower measures.

For example, the Court could require extension, on a statute-by-statute basis, of the statutory benefits for heterosexual married couples to same-sex committed couples. Such relief would not require the Legislature to create a new legal structure for same-sex couples; it would merely require the State to ensure that

same-sex couples have access to the existing statutory arrangement for married couples.

The Court could also advise the executive branch to extend to same-sex committed couples all the benefits and obligations that it currently administers to heterosexual married couples. There is already precedent for such relief. In *Snetsinger v. Montana University System*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445, this Court declared unconstitutional the policy of the Montana University System prohibiting employees from receiving employment benefits for same-sex partners. In light of that decision, the State's Department of Administration has established criteria for domestic partnerships and provides same-sex partner benefits for any state employee who submits a declaration of entitlement to the benefits. Here, the Court could require the State to provide such benefits to any Montana resident who submits such a declaration.[2]

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[2] A similar circumstance arose in New York. In *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (App. Div. 2008), the court held that the State of New York was constitutionally obligated to recognize same-sex marriages performed outside New York. To comply with the court's decision, Governor David Paterson issued an executive order directing all state agencies to review "your agency's policy statements and regulations, and those statutes whose construction is vested in your agency, to ensure that terms such as 'spouse,' 'husband' and 'wife' are construed in a manner that encompasses legal same-sex marriages." The order also noted that "[i]n many instances, comity can be extended to legal same-sex marriages through an internal memorandum or policy statement directing staff on the construction of relevant terms in statute or regulation. In other cases, regulatory changes may be necessary." Governor Paterson's executive order is attached as Exhibit 1 to this brief.

And, of course, these are only a few of the available options. At its own discretion, the Court could formulate other injunctive remedies that would be equally effective without ordering the Legislature to establish domestic partnerships or civil unions. *See Kiely Construction, LLC v. City of Red Lodge*, 2002 MT 241, ¶ 74, 312 Mont. 52, ¶ 74, 57 P.3d 836, ¶ 74 (noting that "[t]he relief to be granted ... must depend on the facts and circumstances of each case," and "[c]orrective machinery, by its nature, must be given flexible limits ... [so] that adequate and proper dispositions of each case may result" (internal quotation marks omitted)).

B. A Direct Mandate for the Legislature to Adopt Domestic Partnerships or Civil Unions Would Be Appropriate

Even if the complaint had sought an order requiring the Legislature to establish civil unions or domestic partnerships, courts have the authority to demand legislative action that is essential to protect constitutional rights. Such a remedy does not violate the separation of powers.

That kind of relief is precisely what the New Jersey Supreme Court ordered in *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (2006). The court ruled that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution," *id.* at 423, 908 A.2d at 200, and that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples," *id.* at 457, 908 A.2d at 221.

Accordingly, the court then ordered that "the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples." *Id.* at 463, 908 A.2d at 224. The court recognized that "[t]he State can fulfill that constitutional requirement in one of two ways. It can either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage." *Id.* It thus decreed that "[t]o bring the State into compliance with [the state's equal protection clause] so that plaintiffs can exercise their full constitutional rights, the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision." *Id.*

This Court can follow the lead of the *Lewis* court and order the Legislature to "bring the State into compliance" with the Montana Constitution by enacting a new legal structure—a domestic partnership or civil union scheme—that would put same-sex couples on equal footing with married couples with respect to statutory benefits. Such relief would not violate the separation of powers. As other courts have noted, "[w]hen the legislature's transgression is a failure to act, [the judiciary's] duty to protect individual rights includes compelling legislative action required by the constitution." *Campbell County Sch. Dist. v. State*, 907 P.2d 1238,

1264 (Wyo. 1995). In this case, the Legislature has "fail[ed] to act" by not providing opposite-sex couples the same benefits and obligations as heterosexual married couples.

As far as amici are aware, this Court has not previously addressed a case in which it was asked to issue a direct mandate for the Legislature to enact legislation that would cure a constitutional violation. But in *Columbia Falls Elementary School District No. 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257, this Court did rule that the Legislature's scheme for funding public education was unconstitutional and advised the Legislature to enact a new funding system satisfying the Constitution. The Montana Constitution states that the Legislature "shall provide a basic system of free quality public elementary and secondary schools." Mont. Const. art. X, § 1. The Court acknowledged that the judiciary is "the final guardian and protector of the [constitutional] right to education" and is thus responsible for "assur[ing] that the system enacted by the Legislature enforces, protects and fulfills the right." *Columbia Falls*, ¶ 19. The Court held that the Legislature's public education funding scheme was "constitutionally deficient" because it was not "correlated with any understanding of what constitutes a 'quality' education" under the Constitution. *Id.* ¶¶ 22, 25; *see also id.* ¶¶ 26-30. The Court thus "defer[red] to the Legislature to provide a threshold definition" of what a quality education constitutes. *Id.* ¶ 31.

While *Columbia Falls* arose in the declaratory-judgment context, it nonetheless suggests that the judiciary does not violate the separation of powers by urging the Legislature to enact a law to cure a constitutional violation.[3] Indeed, this Court has ordered the executive branch to take specific action to remedy constitutional harm. *See Walker v. State*, 2003 MT 134, ¶ 85, 316 Mont. 103, ¶ 85, 68 P.3d 872, ¶ 85 (holding that certain disciplinary procedures used by the Montana State Prison system violated the Montana Constitution and ordering the State "to conform the operations" of its prison system "to the requirements of this Opinion and to report, in writing to [the district] court within 180 days as to the actions taken"). Similarly, in this case, the Court could direct the legislature to conform state law to the constitutional requirement that same-sex domestic partners receive the same legal benefits as married couples.

IV. The Marriage Amendment Does Not Bar The Relief Sought By Plaintiffs

The trial court suggested that the constitutional marriage amendment "play[ed] into the jurisprudential decision that Plaintiffs' requested relief constitutes an impermissible sojourn into the powers of the legislative branch."

[3] It is true that in the school-funding context the Legislature is required to enact legislation providing a "quality" public education, Mont. Const. art. X, § 1, whereas no such direct constitutional requirement is applicable in this case. Nonetheless, as Plaintiffs explain, because the Legislature has already passed laws providing benefits and protections to different-sex married couples, the Equal Protection Clause and other provisions in the Constitution require similar benefits and obligations to be accorded to opposite-sex couples.

Dist. Ct. Order at 10. But by its plain terms, the amendment forbids only same-sex marriage, which Plaintiffs are not seeking here. And the amendment does not present any separation of powers concerns here. Consequently, the amendment cannot be an obstacle to the relief sought by Plaintiffs.

As this Court has explained, interpretation of the Constitution must begin and end with the text when it is unambiguous. "In interpreting a constitutional provision, the intent of the framers of the constitutional provision controls its meaning. The intent of the framers should be determined from the plain meaning of the words used. If that is possible, no other means of interpretation are proper." *Woirhaye v. Montana Fourth Judicial Dist. Court*, 1998 MT 320, ¶ 15, 292 Mont. 185, ¶ 15, 972 P.2d 800, ¶ 15. When the meaning of a constitutional provision is clear on its face, "the courts may not go further." *Keller v. Smith*, 170 Mont. 399, 405, 553 P.2d 1002, 1006 (1976).

In 2004, the voters of Montana approved, by ballot initiative, a constitutional amendment that limits marriage to different-sex couples: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." Mont. Const. art. XIII, § 7. The meaning and scope of the amendment is plain on its face. It preserves the institution of marriage for different-sex couples, and it precludes same-sex couples from being married in—or having their marriages recognized by—the State of Montana. The amendment does no more

and no less. And, most important for purposes of this case, the amendment does not address domestic partnerships, civil unions, or any other legal status for same-sex couples that Plaintiffs are seeking in this case.

Because there is no language in the amendment that purports to prohibit civil unions, domestic partnerships, or any other comparable legal status, that should be the end of the matter. The amendment cannot block the relief sought by Plaintiffs here, for they are not asking for the right to marry. The Court would be re-writing the Constitution—indeed, it would be making rather than declaring the law—if it found the amendment to cover anything other than marriage.

Finally, the marriage amendment does not speak at all to the separation of powers question in this case. While it forbids the courts from granting same-sex couples the right to marry, it does not preclude them from enforcing the other constitutional rights of same-sex couples, including the ones at stake here. This Court would be well within the scope of its powers to grant declaratory and injunctive relief to Plaintiffs. The marriage amendment does nothing to alter that conclusion.

CONCLUSION

If Plaintiffs prevail on the merits of their constitutional claims, the judgment of the district court should be reversed and the case should be remanded with

instructions for the district court to enter declaratory and injunctive relief for Plaintiffs.

Respectfully submitted,

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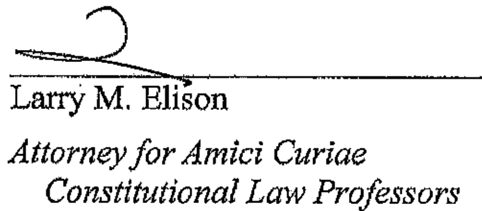
November 30, 2011

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document is double-spaced (except footnotes are single-spaced); has a proportionately-spaced typeface with 14-point Times New Roman text; has left, right, top, and bottom margins of 1 inch; and contains 3,999 words (excluding the table of contents, table of authorities, certificate of compliance, and certificate of service).



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was sent first-class mail to the following on November 30, 2011.

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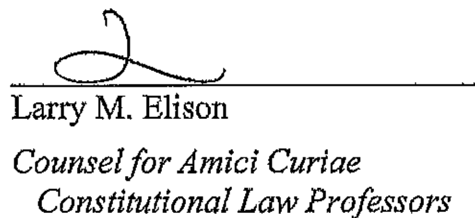

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EXHIBIT 1

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

To: All Agency Counsel

From: David Nocenti

Date: May 14, 2008

Re: *Martinez* decision on same-sex marriages

As you probably are aware, on February 1, 2008, the Fourth Department issued a decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dep't 2008) that has significant implications for the position of state agencies in regard to same-sex marriages performed in other jurisdictions where they are legally recognized. Defendants' motion for leave to appeal was denied by the Court of Appeals on Thursday, May 8, 2008, on the grounds that the order appealed from was not final.

In *Martinez*, the Fourth Department held that legal same-sex marriages performed in other jurisdictions are "entitled to recognition in New York in the absence of express legislation to the contrary." This decision is consistent with the holdings of several lower courts. *See, e.g., Godfrey v. Spano*, 15 Misc.3d 809 (Sup. Ct. Westchester Cty. 2007), *appeal pending* (2d Dep't); *Godfrey v. Hevesi*, *2007 N.Y. Misc. LEXIS 6589* (Sup. Ct. Albany Cty. Sept. 5, 2007). The *Martinez* court also found that the failure to recognize such marriages may violate the New York Human Rights Law.

In light of these decisions, agencies that do not afford comity or full faith and credit to same-sex marriages that are legally performed in other jurisdictions could be subject to liability. In addition, extension of such recognition is consistent with State policy. In April 2007, the Department of Civil Service extended recognition to same-sex spouses in legal marriages from other jurisdictions for purposes of spousal benefits under the New York Health Insurance Program. Moreover, the Third Department recently dismissed an appeal from a decision that had upheld the prior policy of non-recognition as moot, citing *Martinez* in vacating the lower court decision. *Funderburke v. N.Y. State Dep't of Civil Service*, 854 N.Y.S.2d 466 (2d Dep't 2008).

As a result of the above, it is now timely to conduct a review of your agency's policy statements and regulations, and those statutes whose construction is vested in your agency, to ensure that terms such as "spouse," "husband" and "wife" are construed in a manner that encompasses legal same-sex marriages, unless some other provision of law would bar your

ability to do so. A compendium of New York State statutes and regulations that use these terms, prepared by the Association of the Bar of the City of New York and the Empire State Pride Agenda Foundation, may be helpful in performing this review. A copy of this report is available at http://www.nycbar.org/pdf/report/marriage_v7d21.pdf.

In many instances, comity can be extended to legal same-sex marriages through an internal memorandum or policy statement directing staff on the construction of relevant terms in statute or regulation. In other cases, regulatory changes may be necessary.

Currently, same-sex marriages are legal in Canada, South Africa, Spain, Belgium, the Netherlands and Massachusetts. Some decisional law in Massachusetts has called into question whether individuals domiciled in states where same-sex marriage is not legally recognized may marry in Massachusetts. Nonetheless, when a Massachusetts official vested with legal authority, such as a clerk, has recognized such marriage, it should be afforded the same recognition as any other legally performed union.

Please follow up with me, in writing, by June 30, 2008, to indicate what actions you have taken in response to this memo, and any potential legal problems that have come to your attention.

Thank you for your assistance, and please feel free to contact me if you have any questions or would like to discuss this matter further.