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COURT OF APPEALS  
STATE OF NEW YORK

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HUYEN NGUYEN,  
Petitioner,

-against-

No. 146

ERIC HOLDER, JR.,  
Respondent.

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20 Eagle Street  
Albany, New York 12207  
September 9, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Sharona Shapiro  
Official Court Transcriber

1 Counselor, one second.

2 Counselor, would you like any rebuttal  
3 time?

4 MR. MARSZALKOWSKI: Three minutes, Your  
5 Honor.

6 CHIEF JUDGE LIPPMAN: Three minutes, sure.  
7 Go ahead.

8 MR. MARSZALKOWSKI: May it please the  
9 court. Michael Marszalkowski on behalf of the  
10 petitioner/appellant.

11 We have a simple matter before the court on  
12 statutory interpretation. The petitioner's marriage  
13 to her half uncle is valid under New York State  
14 because it is not expressly made void. That is a  
15 matter of statutory construction - - -

16 CHIEF JUDGE LIPPMAN: Counsel, put - - -  
17 let me ask you - - - let's start with the policy  
18 perspective, rather than the analysis of the statute.  
19 What - - - what's the policy reasons that your client  
20 should prevail? What - - - what's the enlightened  
21 policy position here?

22 MR. MARSZALKOWSKI: There's two reasons,  
23 Your Honor. First of all, there's an ongoing  
24 fourteen-year relationship and marriage between these  
25 two, and if this marriage is declared void, she not

1           only will be separated from her husband, she will be  
2           removed from this country, as a matter of final - - -

3                       CHIEF JUDGE LIPPMAN: No, no, I get that.  
4           I meant more on a broader policy perspective.

5                       MR. MARSZALKOWSKI: Certainly.

6                       CHIEF JUDGE LIPPMAN: In the year 2014, is  
7           it a - - - is it a - - - does it make sense to void  
8           this kind of a - - - a marriage? Where should we be  
9           today?

10                      MR. MARSZALKOWSKI: I understand the  
11           question, and the answer is it is acceptable. It is  
12           acceptable as a matter of science and a matter of  
13           fact.

14                      JUDGE PIGOTT: Will this have an effect on  
15           workers' compensation insurance law, estates and  
16           trust, et cetera, the decision that we make here?

17                      MR. MARSZALKOWSKI: I think it would be a  
18           very narrow issue, if you look at the history of how  
19           frequent - - - how infrequently this issue has come  
20           up. The only times this court has raised this issue  
21           was a matter of estates, and frankly, it was a matter  
22           of people fighting over money, people trying to use  
23           this relationship, not because there was something  
24           inherently wrong or abhorrent in it, but solely  
25           because they were trying to get something out of it.

1 CHIEF JUDGE LIPPMAN: Counsel, what about -  
2 - - talk about the policy issues.

3 MR. MARSZALKOWSKI: Yes.

4 CHIEF JUDGE LIPPMAN: What about the  
5 difference in power relationships?

6 MR. MARSZALKOWSKI: In this case - - -

7 CHIEF JUDGE LIPPMAN: Do you know what I  
8 mean? The whole issue of - - - of - - - of different  
9 communities with different practices, and - - - and  
10 is - - - is that an issue here that we should be - -  
11 -

12 MR. MARSZALKOWSKI: I understand that, but  
13 I don't think we're facing that here. I think it's  
14 much more narrow - - -

15 CHIEF JUDGE LIPPMAN: Why not? What aren't  
16 we - - -

17 MR. MARSZALKOWSKI: - - - much more narrow  
18 that that. First of all - - -

19 CHIEF JUDGE LIPPMAN: This would have  
20 implications in that regard, or wouldn't it?

21 MR. MARSZALKOWSKI: It would not have  
22 implications - - -

23 CHIEF JUDGE LIPPMAN: Why?

24 MR. MARSZALKOWSKI: - - - in that regard,  
25 because this is a relationship at the third level of

1 consanguinity. It's a blood relationship that is not  
2 at the first level, which is brother-sister; it is  
3 not at the second level, which would be a full uncle  
4 and a niece; it is at a third level.

5 JUDGE SMITH: Is it the equivalent of first  
6 cousins?

7 MR. MARSZALKOWSKI: It's the exact  
8 equivalent of first cousins.

9 JUDGE SMITH: Who are allowed to marry.

10 MR. MARSZALKOWSKI: In fact, there's an  
11 Attorney General opinion going back seventy years  
12 that says that is acceptable.

13 JUDGE SMITH: Well, I - - - I thought the  
14 Chief's question was more directed at the problem of  
15 - - - of - - - frankly, of old men exploiting young  
16 women and their family. And obviously, that's not  
17 what happened here; these people are five years  
18 apart. But - - - but is there - - - is the  
19 generational difference important?

20 MR. MARSZALKOWSKI: I think it's less so  
21 nowadays, for all of those reasons. But again, it's  
22 a matter specifically of science, and - - - and you  
23 have to have, with this level - - -

24 JUDGE GRAFFEO: Although - - -

25 MR. MARSZALKOWSKI: - - - of protection - -

1 -

2 JUDGE GRAFFEO: Although in common  
3 parlance, how many people talk about their half niece  
4 or half nephew or half aunt or uncle? I mean, most  
5 people just use the terminology, that's my niece,  
6 that's my nephew.

7 MR. MARSZALKOWSKI: Certainly, but that  
8 doesn't limit it - - - the protection - - - again,  
9 what's happening here, this is not an affirmative  
10 application.

11 JUDGE GRAFFEO: If we - - -

12 MR. MARSZALKOWSKI: This is - - -

13 JUDGE GRAFFEO: If we agree with you - - -

14 MR. MARSZALKOWSKI: - - - a law that would  
15 void relationships.

16 JUDGE GRAFFEO: - - - what happens to the  
17 penal statute on incest in the third degree - - -

18 MR. MARSZALKOWSKI: It would not be  
19 affected whatsoever.

20 JUDGE GRAFFEO: - - - which is 255.35, I  
21 think.

22 MR. MARSZALKOWSKI: Yes, I'm familiar with  
23 that. It would not be affected, because again, that  
24 is there to protect the second level of blood  
25 relationship between the uncle and the niece. It is

1 not - - - does not use the same language; it uses  
2 uncle and niece - - -

3 JUDGE GRAFFEO: Well, it says whole or half  
4 - - - it says whole or half blood in the statute.

5 MR. MARSZALKOWSKI: For the brother and  
6 sister - - - I'm sorry, for whole or half for the  
7 brother or sister, not for the aunt or uncle, niece  
8 or nephew that follows afterwards - - -

9 JUDGE PIGOTT: Well, are you arguing that  
10 the statute's un - - -

11 MR. MARSZALKOWSKI: - - - if I'm recalling  
12 it correctly.

13 JUDGE PIGOTT: Are you arguing the  
14 statute's unclear, or that time has changed and now  
15 we ought to reinterpret it, or - - -

16 MR. MARSZALKOWSKI: No, I think the statute  
17 is clear, and I think it's been consistently  
18 interpreted; it does not specify a half uncle and a  
19 niece.

20 JUDGE READ: What about Audley?

21 MR. MARSZALKOWSKI: It does not specify  
22 cousins, first cousins who are both at the same level  
23 - - -

24 JUDGE READ: What about Audley?

25 MR. MARSZALKOWSKI: - - - of protection.

1 JUDGE READ: What about Audley? Didn't - -  
2 - didn't that court - - - well, that was - - - I  
3 guess that wasn't us; that was the Appellate  
4 Division. But didn't they answer exactly that - - -

5 MR. MARSZALKOWSKI: They answered - - -

6 JUDGE READ: - - - the question in front of  
7 us?

8 MR. MARSZALKOWSKI: - - - the exact  
9 opposite that I'm asking you to look over, for the  
10 same reasons that this court analyzed in Simms in  
11 1970 and in May's - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but do you  
13 agree on the statute that the - - - the putting it  
14 in, in Section 2 and not in Section 3, cuts both  
15 ways? Right? In one way you could say, well, if  
16 they said it in 2, they meant to apply it in 3, or  
17 the reverse, that they said it there and they didn't  
18 say it here, you know, they didn't use that term and  
19 therefore, you know, draw that conclusion. It could  
20 be argued both ways, right?

21 MR. MARSZALKOWSKI: I think - - - I think  
22 both arguments are favorable to my position. In the  
23 first inst - - -

24 CHIEF JUDGE LIPPMAN: Both arguments are  
25 favorable to your - - -

1 MR. MARSZALKOWSKI: They are, for this  
2 reason. In the first instance, by not specifically  
3 including it, you're not getting this incredibly - -  
4 -

5 CHIEF JUDGE LIPPMAN: Yeah, but they  
6 specifically included it in the section before,  
7 right?

8 MR. MARSZALKOWSKI: They included - - -

9 CHIEF JUDGE LIPPMAN: In the - - -

10 MR. MARSZALKOWSKI: - - - it with half  
11 brothers.

12 CHIEF JUDGE LIPPMAN: - - - subsection,  
13 yes.

14 MR. MARSZALKOWSKI: Correct.

15 JUDGE PIGOTT: Well, you're suggesting that  
16 when they put this together, way back when, that they  
17 were thinking the way you're thinking today. And - -  
18 -

19 MR. MARSZALKOWSKI: Well, I think they  
20 were, for this reason. Where this all came from, the  
21 whole history of genetics happened with, if you  
22 recall back to your biology, Gregor Mendel, the  
23 Austrian monk and scientist who looked into how do  
24 plants, when they combine together, different  
25 offspring occur. He published those findings in

1 1866. So that was common knowledge. We have Charles  
2 Darwin, in the 1890s, 1900, taking that further. So  
3 I think it was a matter of common knowledge and  
4 availability. I think it might have been a matter of  
5 lazy tongue that when you and I speak, in a  
6 colloquial sense, or in this situation, we may not  
7 use those niceties - - -

8 JUDGE PIGOTT: Well, then it would have  
9 come up soon - - -

10 MR. MARSZALKOWSKI: - - - of half uncle,  
11 half niece.

12 JUDGE PIGOTT: It seems to me it would have  
13 come up sooner. That's why I asked you about all of  
14 these other statutes. I mean, it's never come up in  
15 an insurance law context, where somebody has said,  
16 you know, well, they're - - - they're a niece and a -  
17 - - and an uncle who were married, and therefore  
18 they're - - - they're not spouses for purposes of,  
19 you know, whatever, life insurance or workers'  
20 compensation coverage or disability benefits and  
21 things. Everybody has considered it pretty much the  
22 way it's understood on the street, so to speak,  
23 right?

24 MR. MARSZALKOWSKI: I haven't seen that.  
25 I've seen - - - the few times it's come up in this

1 context, it's been questioned. And this court raised  
2 that issue and questioned the idea of we can't take  
3 this colloquial combination when we have a very  
4 specific scientific basis of - - -

5 JUDGE PIGOTT: Well, if an uncle and an  
6 aunt - - -

7 JUDGE GRAFFEO: Are there many states that  
8 agree with your position?

9 MR. MARSZALKOWSKI: At this point,  
10 approximately five do, but that, by itself, is not  
11 telling, because we have the equivalent parallel of  
12 the legislature changing the most fundamental part of  
13 the basis of marriage to be same sex. And at that  
14 time, again, how many states would have had that kind  
15 of doc - - -

16 JUDGE PIGOTT: But again, even there - - -

17 MR. MARSZALKOWSKI: So I don't think that's  
18 relevant here.

19 JUDGE GRAFFEO: But even - - -

20 JUDGE PIGOTT: Even - - -

21 JUDGE GRAFFEO: - - - some of the states  
22 require genetic testing, don't they, where they - - -

23 MR. MARSZALKOWSKI: Correct, but the - - -

24 JUDGE GRAFFEO: - - - where they permit  
25 this?

1 MR. MARSZALKOWSKI: - - - that's where  
2 science nowadays, I think, has helped us because it  
3 is not just the fact that you're going from a one-  
4 quarter blood relationship to a one-eighth blood  
5 relationship - - -

6 JUDGE GRAFFEO: Right, but we can't order  
7 genetic testing.

8 MR. MARSZALKOWSKI: No, but I'm saying but  
9 the - - - the risk no longer exists, because now that  
10 they know so much about the science of this and the  
11 relationship, it's no longer as big a concern.

12 JUDGE SMITH: You're saying that the  
13 genetic risk is insignificant for a half-blood - - -  
14 half-blood uncle and niece?

15 MR. MARSZALKOWSKI: It - - - yes. Yeah,  
16 the difference is - - -

17 JUDGE SMITH: Did - - - did the authors of  
18 the statute know that in 1893?

19 MR. MARSZALKOWSKI: They might not have  
20 known that, but they knew that there was a blood  
21 difference between the half uncle and niece versus a  
22 full uncle and niece.

23 JUDGE SMITH: And they - - -

24 MR. MARSZALKOWSKI: There is a distinction.

25 JUDGE SMITH: And I guess they didn't - - -

1           whatever they knew, they knew, they knew that they  
2           didn't want to prohibit first cousins from marrying.

3                       MR. MARSZALKOWSKI: That is correct.

4                       CHIEF JUDGE LIPPMAN: Okay, counsel, you'll  
5           get rebuttal. Let's hear from your adversary.

6                       MR. HEYSE: Good afternoon, Your Honors,  
7           and may it please the court. Michael Heyse, on  
8           behalf of the respondent, the Attorney General of the  
9           United States.

10                      CHIEF JUDGE LIPPMAN: Counsel, let me - - -  
11           let me ask you the same question I asked your  
12           adversary. What's the better policy position here?  
13           Why - - - put aside the interpretation of the statute  
14           and everything. Why - - - why is your position  
15           better? Why shouldn't these people have been  
16           together all of these years? Why shouldn't they stay  
17           together? Why, from a policy perspective?

18                      MR. HEYSE: I - - - I have two questions -  
19           - - or two responses to that question, Your Honor.

20                      CHIEF JUDGE LIPPMAN: Go ahead.

21                      MR. HEYSE: First, it actually gets to the  
22           point of this court should not be addressing policy  
23           questions. The - - -

24                      CHIEF JUDGE LIPPMAN: Say we want to know,  
25           for our own - - -

1 MR. HEYSE: I understand.

2 CHIEF JUDGE LIPPMAN: Why is your position  
3 better?

4 MR. HEYSE: In - - - in the light of the  
5 standard that the legislature is best suited to  
6 address issues regarding marriage; that's an  
7 undeniable statement of law from this court, has been  
8 for over a century.

9 JUDGE SMITH: Is there any argument for - -  
10 - any policy argument to be made for deciding the  
11 question the way you want it decided, to prohibit a  
12 half uncle and half niece from marrying?

13 MR. HEYSE: Well, from an immigration  
14 standpoint, which is where I'm coming from - - - I  
15 work for the civil division of the United States  
16 Department of Justice, so it's an unusual position  
17 for me to be here before this court. In terms of  
18 that, why - - - why the government cares about this;  
19 we're looking at a situation where potentially an  
20 individual comes to the United States, obtains  
21 citizenship, has somewhat remote family back home,  
22 cousins and what have you - - -

23 JUDGE SMITH: You're worried - - -

24 MR. HEYSE: - - - and wants to - - -

25 JUDGE SMITH: - - - about green-card

1 marriages.

2 MR. HEYSE: - - - wants to bring them here.

3 And they're - - -

4 JUDGE SMITH: You're worried about  
5 green-card marriages.

6 MR. HEYSE: Exactly, Your Honor.

7 JUDGE SMITH: But we - - - we're  
8 interpreting the law, the State of New York - - - I  
9 mean, this is not primarily directed at green-card  
10 marriages. I think that the Chief's question is, is  
11 there a good reason in 2014 - - - you say that's the  
12 wrong question, and maybe it is. But is there a good  
13 reason, in 2014, for a state to say that a marriage  
14 between a half uncle and a half niece is invalid?

15 MR. HEYSE: My esteemed colleague was  
16 discussing the science of this. That is, notably,  
17 the first time that's - - - that's comes up. I  
18 mentioned it briefly in my brief, inasmuch as it's -  
19 - -

20 JUDGE SMITH: Is he right that  
21 scientifically, it's the same as first cousins?

22 MR. HEYSE: I believe that's accurate.  
23 It's not exactly the same. I'm - - - you know, it's  
24 - - - it is a science experiment, literally, a mixing  
25 of bloods; that's what consanguinity means is mixing

1 of blood. I personally don't know the genetic  
2 science behind it. And again, this is something that  
3 a legislature would be better equipped to address.

4 If - - - if the legislature wanted - - -

5 JUDGE SMITH: Is there anything - - -

6 MR. HEYSE: - - - to make this - - -

7 JUDGE SMITH: Is there anything you could -  
8 - - suppose a legislature were addressing it, is  
9 there - - - and you were retained to make the  
10 argument for this prohibition, half uncle and half  
11 niece, what's the argument?

12 MR. HEYSE: The Court referenced familial  
13 leadership, power struggle issues, also the - - -

14 JUDGE SMITH: Of course we don't - - - in  
15 New York, a stepfather would be allowed to marry his  
16 stepdaughter.

17 MR. HEYSE: I believe that's correct.

18 JUDGE SMITH: And that - - -

19 MR. HEYSE: If - - - yeah - - -

20 JUDGE SMITH: Which would raise - - -

21 MR. HEYSE: - - - there would be no - - -  
22 no blood - - -

23 JUDGE SMITH: - - - obviously, much more  
24 serious power - - - power and exploitation kind of  
25 risk.

1                   MR. HEYSE: Nonetheless, we're dealing with  
2                   - - - questions of genetic mutations have - - - have  
3                   been raised, in terms of the scientific side of  
4                   things. Again, I don't have all of that information.  
5                   That wasn't - - - was not brought up. Again, we're  
6                   not at a trial stage here. This has never been put  
7                   to a trial stage, so we don't know exactly what the  
8                   science of it is.

9                   JUDGE GRAFFEO: There's - - - there's not -  
10                  - -

11                  MR. HEYSE: But in terms of - - -

12                  JUDGE GRAFFEO: There's not much, if we  
13                  look at a strict statutory interpretation, that  
14                  supports your position.

15                  MR. HEYSE: I disagree, Your Honor. Look  
16                  at the - - - the plain meaning, as several of Your  
17                  Honors have mentioned. What does this mean on the  
18                  street? How do people refer to their uncle? How - -  
19                  - how do people refer to their - - - their niece?

20                  JUDGE GRAFFEO: But the legislature - - -

21                  MR. HEYSE: Do they talk about a half  
22                  niece?

23                  JUDGE GRAFFEO: - - - knew to reference  
24                  half blood in the provision immediately prior to this  
25                  provision.

1                   MR. HEYSE: As it was consistent with the  
2 definition of brother. I provided, again, in my  
3 brief, citing the Webster's Dictionary from 1894. I  
4 actually looked at the Webster's Dictionary that is  
5 in the - - - the library down the hall. It has a  
6 very similar definition to that, and actually the  
7 definition remains the same today. A brother - - -

8                   JUDGE READ: I thought you had argued, and  
9 maybe I'm wrong about this, but I thought you had  
10 argued that they wouldn't say half blood, because it  
11 doesn't make any sense in this context, because you'd  
12 have to have the parents be brother and sister.

13                   MR. HEYSE: Correct, Your Honor. What I  
14 was discussing now is the definition of a brother, is  
15 the - - - actually, the definition of uncle and  
16 brother is the same. But in terms of - - - the  
17 brother specifies a male person who has the same  
18 father and mother with another person, or one of the  
19 only, whereas the uncle just defines it as a brother  
20 of one's father or mother. It doesn't make that next  
21 leap.

22                   JUDGE GRAFFEO: Because in - - -

23                   MR. HEYSE: And as Your Honor's pointing  
24 out, for - - -

25                   JUDGE GRAFFEO: - - - in your brief, you're

1           arguing it's more like a quarter than a half, right?

2           I think that's what - - -

3                     MR. HEYSE: In this - - - mathematically in  
4           this situation - - -

5                     JUDGE GRAFFEO: - - - Judge Read is  
6           referencing.

7                     MR. HEYSE: - - - but for the legislature  
8           to have specified the half-blood relationship as to  
9           the uncle and niece would still have been redundant,  
10          because that doesn't exist.

11                    JUDGE RIVERA: But counsel, the State has  
12          done that in other statutes. Under the Trust Law,  
13          it's got a definition, member of a minor's family,  
14          names a bunch of relatives, and then it's uncles and  
15          aunts, whether of whole or half blood. So obviously  
16          the legislature thinks it's of some consequence of  
17          making that - - - of recognizing that consanguinity  
18          in some statutes, so why isn't the - - - the failure  
19          to do that here, in the domestic relations law,  
20          enough to indicate that they're not including these  
21          relatives by the half blood or a quarter blood?

22                    MR. HEYSE: Well, in terms of trust and  
23          estates issues, those have very different and  
24          distinct questions in terms of marital relationships.  
25          Again, we're getting back into the - - - the whole

1 familial relationship - - -

2 JUDGE GRAFFEO: Um-hum.

3 MR. HEYSE: - - - and scientific genetic  
4 concerns, and things of that nature. In terms of the  
5 legislature recognizing it at one time and not at  
6 another, that might be a fair question, but in terms  
7 of when those two statutes were written and - - - and  
8 when these issues have come up, we - - -

9 CHIEF JUDGE LIPPMAN: Counsel, what do you  
10 have in New York case law that - - - that supports  
11 your position?

12 MR. HEYSE: Well, clearly, Audley. Audley  
13 has remained good law since 1921.

14 JUDGE SMITH: But don't we imply in Simms  
15 that we disagreed with Audley? It's admittedly  
16 dictum, but it doesn't sound like we were exactly  
17 blown away by Audley's reasoning.

18 MR. HEYSE: Yes, Your Honor, and in Matter  
19 of Simms, the court definitely discussed the - - -  
20 discussed Audley, in terms of its logic. And it gets  
21 back - - - Audley, in - - - in itself, got back to  
22 the question of how the term is used logically, why  
23 the court - - - or excuse me, why the legislature  
24 would not include the - - - the half-blood language,  
25 because it just wouldn't make sense to do so.

1           But again, ultimately, in Simms, it is  
2           absolutely dicta, and - - - and the court was  
3           essentially offering commentary. But that's not  
4           enough to render Audley - - -

5           JUDGE SMITH: If we decide that we still  
6           think today, as we thought in 1970, we're not bound  
7           by Audley.

8           MR. HEYSE: Not bound by Audley. Again, I  
9           would - - - this - - - it is a lower court in the  
10          State of New York, so no, I'm not sure that that  
11          would necessarily bind this court. But again, this  
12          is a question that the legislature could have  
13          addressed over the last century and has not done so.

14          Your Honors also asked about how - - -  
15          where would this put New York in terms of the  
16          national scheme. There's one state that expressly  
17          authorizes this; Maine currently allows this by law,  
18          and that requires genetic counseling. Rhode Island  
19          permits it, but only as to Jewish marriages. There's  
20          no evidence - - -

21          JUDGE SMITH: But they - - - am I right  
22          that they would permit it - - - that exception would  
23          apply even to a full uncle and full niece?

24          MR. HEYSE: For Rhode Island?

25          JUDGE SMITH: Yeah.

1                   MR. HEYSE: Yeah. Actually, that's - - - I  
2 believe that's true also in Maine. In any event,  
3 there are - - -

4                   JUDGE SMITH: Certainly, I - - - I don't  
5 know any science either, but it does seem to me safe  
6 to say that the genetic problem is exactly half in  
7 the case of a half uncle as to the full uncle. Would  
8 you agree with that?

9                   MR. HEYSE: Again, this - - - it's getting  
10 into sanguinity issues that I am simply not equipped  
11 to - - - to answer. It does - - - it feels like  
12 simple math but - - -

13                  JUDGE SMITH: I'm not either; it just  
14 doesn't stop me.

15                  MR. HEYSE: No, I understand. But what  
16 we're looking at here is in terms of where New York  
17 would fit. There are seventeen states that have  
18 expressly barred this precise relationship by  
19 statute. There were five others that had statutes  
20 similar to New York, three of which that have  
21 subsequently changed their statutes to expressly bar  
22 this as well.

23                  CHIEF JUDGE LIPPMAN: Why should we do it  
24 in New York, though?

25                  MR. HEYSE: One - - -

1 CHIEF JUDGE LIPPMAN: What's the argument?  
2 What's so terrible here? Why should we be doing  
3 this?

4 MR. HEYSE: Why should the court - - -

5 CHIEF JUDGE LIPPMAN: Why should we be  
6 barring it in New York? I mean, put it - - - I  
7 understand you can read the statute in both ways,  
8 plain language could be argued either way, but what -  
9 - - what is it? What's so terrible and why are we  
10 doing this?

11 MR. HEYSE: Again, it's - - - that's a  
12 policy question. That - - - that is one the  
13 legislature should be addressing in the first  
14 instance. Gay marriage - - - again, that was in  
15 Hernandez - - -

16 JUDGE SMITH: Isn't it - - -

17 MR. HEYSE: - - - that there was a policy -  
18 - -

19 JUDGE SMITH: Isn't it highly likely that,  
20 in reality, no legislature ever gave a minute's  
21 thought to this rather esoteric question? I mean,  
22 they - - - and if they had asked, they might well  
23 have said, you know, some judge is going to have to  
24 figure that out some day?

25 MR. HEYSE: I - - - I believe the

1 legislature did give it thought. It's, you know,  
2 logical to - - - the court's first effort to review  
3 this statute, the cardinal rule of statutory  
4 interpretation is to effectuate legislative intent.  
5 And the court should look the plain meaning of the  
6 statute that we have here. And again, if we're  
7 looking at the - - - the on-the-street parlance of  
8 words like brother and uncle, it doesn't make sense  
9 for the legislature to include this half-brother or  
10 half-blood distinction, because it's just un - - -  
11 superfluous language.

12 CHIEF JUDGE LIPPMAN: Okay, counselor.  
13 Thanks.

14 MR. HEYSE: Thank you.

15 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

16 MR. MARSZALKOWSKI: Nothing further, Your  
17 Honor. I'll waive my time.

18 JUDGE PIGOTT: Well, while we've got you,  
19 though, I was thinking about, you know, the people  
20 that issue marriage licenses. It's pretty clear  
21 right now what - - - what you do, you know, when a  
22 marriage license is filled out and you can - - - I  
23 guess they can even do it online now, but you - - -  
24 you know, you do have to line - - - line this up, and  
25 then someone says that you can get married. Aren't

1           you introducing into this kind of a puzzle where  
2           you've got to try to figure out, you know, who's a  
3           half blood and quarter blood, et cetera, rather than  
4           simply saying if you're an aunt and an uncle - - - or  
5           if you're an uncle and a niece you can't get married?  
6           And you can always petition for an exception, I would  
7           assume, but as a - - - as a normal course, if the  
8           legislature wants to change it, why wouldn't they?

9                       MR. MARSZALKOWSKI: I think there's an easy  
10           solution to that, and that's just putting together a  
11           family tree. And by going down the tree, you can see  
12           exactly where the relationship would fit - - -

13                      JUDGE PIGOTT: You want - - -

14                      MR. MARSZALKOWSKI: - - - and see whether -  
15           - -

16                      JUDGE PIGOTT: - - - the town clerk to do  
17           that?

18                      MR. MARSZALKOWSKI: - - - whether it would  
19           work within that or not.

20                      JUDGE PIGOTT: And the other thing that  
21           strikes me is that common law marriage is about as  
22           easy as you can get. I mean, they're not related at  
23           all. We don't recognize it. We never have, and  
24           whether we do or not I think would be up to the  
25           legislature. Wouldn't that be more logical?

1                   MR. HEYSE: I think it is, but the starting  
2 point is the statute does not prohibit it at this  
3 point, and I do think it's a very narrow issue. I  
4 don't think this is going to be an opening of the  
5 floodgates from these sort of relationships if you  
6 decide to just follow the law with - - - as written  
7 since 1909.

8                   CHIEF JUDGE LIPPMAN: Okay, counselor.  
9 Thanks. Thank you both. Appreciate it.

10                   (Court is adjourned)

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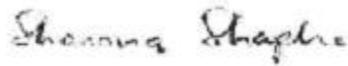
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Nguyen v. Holder, No. 146, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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