98084

Supreme Court of the State of New York
Appellate Division - Third Judicial Department

In the Matter of the Application of:

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER MCDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL, and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs-Appellants,

- against -

THE NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK,

Defendants-Respondents.

BRIEF OF THE EMPIRE STATE PRIDE AGENDA, ET AL. AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE

The Empire State Pride Agenda (hereinafter "the Pride Agenda") respectfully submits this brief as amicus curiae in support of plaintiffs-appellants.

Founded in 1990, the Pride Agenda is New York's statewide civil rights organization committed to winning equality and justice for lesbian, gay, bisexual and transgender ("LGBT") New Yorkers and their families. The Pride Agenda has offices in New York City and Albany and is the largest statewide LGBT organization in the country.

The Pride Agenda is dedicated to ensuring that all New Yorkers are protected from discrimination and bias-motivated harassment and violence, and that all New York families are supported by their government in their roles as parents and caregivers. The organization is a leader in working to achieve equity for LGBT families in such areas as medical decision making, access to Family Court, child custody, bereavement and family leave, insurance, taxation and inheritance. The Pride Agenda has thus continuously tracked the development of the legal protections afforded to LGBT New Yorkers and their families by all three branches of New York State government. The Pride Agenda submits this brief to share with the Court its expertise concerning the evolution of New York State law and policy regarding the treatment of committed same-sex couples.

Amici Bronx Lesbian and Gay Resource Consortium (Bronx), Capital District Gay and Lesbian Community Counsel (Albany), Gay and Lesbian Youth Services of Western New York, Inc. (Buffalo), Gay Alliance of the Genesee Valley (Rochester), Gay Men of African Descent (New York), Gay Men's Health Crisis, Inc. (New York), In Our Own Voices (Albany), The Institute for Human Identity, Inc. (New

York), Lesbian and Gay Family Building Project (Binghamton), The LOFT: the Lesbian and Gay Community Services Center, Inc. (White Plains), Long Island Crisis Center (Bellmore), Long Island Gay and Lesbian Youth, Inc. (Bay Shore), Pride Center of Western New York, Inc. (Buffalo), Rainbow Heights Club (Brooklyn) and SAGE / Upstate (Syracuse) are local community organizations that provide a wide variety of services and resources to LGBT New Yorkers and their families around the State, including in the Third Department. Their work would be substantially affected by the availability of marriage to same-sex couples.

PRELIMINARY STATEMENT

New York State already recognizes, in a variety of important ways, that people of the same sex can and do form committed and loving relationships. New York State has also determined, again and again, that such relationships are worthy of protection. In a wide variety of contexts, all three branches of New York State government have found that treating such devoted and loving couples, and their families, as "strangers" in the eyes of the law—solely because they are of the same sex—is fundamentally unfair. Thus, on issue after issue, from adoption to housing to health care, New York has respected the relationships of, and the families headed by, same-sex couples. Rather than mechanically looking only at whether two people are of the same sex, the State has examined the true nature of a couple's relationship to determine whether there has been sufficient emotional, financial and other types of interdependence to warrant attaching tangible legal consequences to the relationship.

Nevertheless, the court below concluded that the classic and most comprehensive legal avenue for ensuring the basic protections for a relationship—

marriage—does and may remain closed for New York's many same-sex couples.[1] Plaintiffs-appellants and other amici have demonstrated why the lower court's conclusion was wrong as a matter of law. We write to bring to the Court's attention the many ways in which this State has already found—in a variety of legislative, administrative and judicial actions—that same-sex relationships deserve legal protection and recognition. Reversing the lower court is necessary to further this New York State policy and to provide full protections to same-sex couples and their families.

Marriage, like the rest of domestic relations law, is a core area of state, rather than federal, responsibility. As such, subject to minimum federal guarantees, it is New York State law and policy that should control here. This is a New York issue, and it should be decided on the basis of New York policies and precedents. (See Part I below.)

As shown below, New York has already made key choices in favor of honoring same-sex relationships. Over the past decades, New York State's governmental bodies have often been presented with the question of whether certain legal and practical consequences of marriage should attach to the relationship between particular same-sex couples (e.g., may this woman visit her loved one in a hospital emergency room?; may this couple jointly adopt the child they are raising?; should this man receive survivor benefits in connection with the atrocity of September 11, 2001?). And New York has said yes. The courts, the legislature and the executive branch have all found that same-sex couples are capable of entering into relationships meriting many of the consequences

[1] The 2000 U.S. Census reported that households consisting of committed same-sex couples resided in every county in the State and that one in four of them were raising children together. See www.census.gov/prod/cen2000/doc/sf1.pdf; Gary J. Gates & Jason Ost, Gay & Lesbian Atlas (2004).

the law attaches to marriage. Denying plaintiffs the legal status of marriage is contrary to that reality—a relic of the day when committed same-sex couples were deemed to be no more than "strangers". (See Part II.A below.)

Indeed, withholding the "bright-line" status of marriage from same-sex couples would require New York's courts and administrative agencies to continue to delve into the private emotional and financial details of same-sex couples' lives, in a way that would be unnecessary if marriage were available. For example, a woman seeking to avoid eviction from the apartment she shared with her deceased husband does not ordinarily need affidavits from family members attesting to the fact that she and her husband "demonstrated a high level of emotional commitment to one another and took care of each other's day-to-day needs". Why should she be required to produce such affidavits merely because her deceased partner was a woman? See, e.g., East 10th Street Assocs. v. Estate of Goldstein, 154 A.D.2d 142, 143, 552 N.Y.S.2d 257 (1st Dep't 1990). Indeed, most opposite-sex couples tuck their marriage licenses away after they get married and rarely, if ever, see them again. By contrast, same-sex couples are called on again and again to come up with legal documentation to "prove" their relationship—often at stressful times, such as when one of them or their children is ill or in an emergency situation. Recognizing the ability of same-sex couples to marry would not only further New York's policy of according equality to LGBT New Yorkers and their families, but it would also have the practical effect of bringing needed rationality and predictability to the legal treatment of same-sex relationships. (See Part II.B below.)

ARGUMENT

I. WHETHER NEW YORK STATE'S SAME-SEX COUPLES MAY MARRY IS IN THE FIRST INSTANCE A QUESTION OF NEW YORK STATE LAW.

The U.S. Supreme Court has repeatedly recognized that domestic relations law is a core area of state, rather than federal, competency. Mansell v. Mansell, 490 U.S. 581, 587 (1989) ("domestic relations are preeminently matters of state law"); Moore v. Sims, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); In re Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations . . . belongs to the laws of the states and not to the laws of the United States."). "[F]ederal courts consistently have shown special solicitude for state interests 'in the field of family and family-property arrangements'". Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502, 511 (1982) (citing United States v. Yazell, 382 U.S. 341, 352 (1966) (finding that "[e]ach State has its complex of family and family-property arrangements", and that there was "no reason for breaching them" despite the Court's "personal" feelings on the state law)).

As such, although federal law provides a floor of protections, it is initially and primarily New York State law—as evidenced by the New York State Constitution and the decisions of New York's legislative, administrative and judicial bodies—to which this Court should turn. Indeed, the meaning of the New York State Constitution is a question for the New York courts alone, independent of federal court interpretations of the U.S. Constitution. See Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."); People v. Harris, 77 N.Y.2d 434, 437-38, 568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991) ("Our federalist system of government necessarily provides a double source

of protection and State courts, when asked to do so, are bound to apply their own Constitutions notwithstanding the holdings of the United States Supreme Court . . . . Sufficient reasons appearing, a State court may adopt a different construction of a similar State provision unconstrained by a contrary Supreme Court interpretation of the Federal counterpart"); People v. Kern, 75 N.Y.2d 638, 555 N.Y.S.2d 647, 554 N.E.2d 1235 (1990); People v. Barber, 289 N.Y. 378, 384, 46 N.E.2d 329 (1943) (state courts, "in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York . . . [are] bound to exercise [their] independent judgment and [are] not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States" (emphasis added)).

For example, in criminal matters, New York courts have often accorded greater rights to the accused than granted by the U.S. Constitution. See, e.g., People v. Scott, 79 N.Y.2d 474, 583 N.Y.S.2d 920, 593 N.E.2d 1328 (1992) (expressly disagreeing with the U.S. Supreme Court's "open fields doctrine", as expressed in Oliver v. United States, 466 U.S. 170 (1984), and granting greater protection against law enforcement searches than the U.S. Constitution's Fourth Amendment). In Scott, the Court of Appeals "decline[d] to adopt any rigid method of analysis which would, except in unusual circumstances, require us to interpret provisions of the State Constitution in 'Lockstep' with the Supreme Court's interpretations of similarly worded provisions of the Federal Constitution". Scott, 79 N.Y.2d at 490.

Similarly, New York has been a leader in recognizing protections for same-sex couples. In 1980, the Court of Appeals recognized the fundamental liberty interest at stake in private adult consensual sexual activity when it invalidated the Penal

Law's criminalization of consensual sodomy between unmarried persons as inconsistent with constitutional guarantees of privacy and equal protection. People v. Onofre, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980). In so ruling, New York was decades ahead of the U.S. Supreme Court. Indeed, six years later, the U.S. Supreme Court upheld a similar statute from Georgia, specifically finding there to be no federal constitutional right "to engage in acts of sodomy". See Bowers v. Hardwick, 478 U.S. 186, 190 (1986). It was not until 2003 that the U.S. Supreme Court overruled Bowers and joined New York, finding that a prohibition on private adult consensual sexual relations between people of the same sex violates the U.S. Constitution's guarantee of liberty under the Due Process Clause. See Lawrence v. Texas, 539 U.S. 558 (2003).

To borrow Justice Brandeis's famous dictum about "one of the happy incidents of the federal system", New York has "serve[d] as a laboratory". New State Ice Co. v. Liebmann, 285 U.S. 262, 287 (1932) (Brandeis, J. dissenting). On the issue of equality and justice for LGBT families—as on many other issues—New York has "tr[ied] novel social and economic experiments without risk to the rest of the country". Id. As set forth in more detail below, New York continues to do so today.

II. NEW YORK STATE HAS IN MANY CONTEXTS RESPECTED RELATIONSHIPS BETWEEN COMMITTED SAME-SEX COUPLES.

For New York's many same-sex couples, the availability of marriage will have an immediate practical impact on countless aspects of their day-to-day lives. The Court's decision will profoundly affect the ability of same-sex couples to strengthen and protect their relationships and their families. For example, the decision will affect couples' ability to adopt a child together; their ability to provide for children when the family breadwinner dies; their ability to make critical health care decisions for each other

and have access to each other in hospitals; their ability to inherit from each other—and the list goes on and on.

When the New York judicial, legislative and executive branches have confronted such issues in the past, they have repeatedly recognized that two people of the same sex can and do form committed relationships that deserve the protection of the State. Denying same-sex couples the legal status of marriage would be contrary to the real facts of these couples' lives and relationships as well as the State's prior decisions finding that their relationships warrant protection and respect. (See Part II.A below.)

Indeed, closing off marriage to same-sex couples would consign them to a legal limbo, where their relationships may—or may not—be protected, depending on such vagaries as the particular benefit or obligation at stake, the quality of their counsel or a decisionmaker's evidentiary assessment of the nature of their relationship. Marriage provides much-needed certainty to opposite-sex couples in arranging their lives and ordering their affairs. Opposite-sex couples who marry know that they take the good with the bad and commit themselves to the legal (and other) benefits and obligations of life together. Same-sex couples who tie their fates and fortunes together, and their families, should have the same clarity and predictability. New York has in many cases already decided the "difficult" issue—same-sex relationships in this State are worthy of legal protection and recognition. But the State has reached this conclusion on a case-by-case, issue-by-issue basis, leaving same-sex couples to wonder whether, if it becomes necessary, their relationship will be deemed worthy of protection or recognition; or whether they will instead be deemed no more than "strangers". According the legal status of marriage to same-sex relationships would put an end to the inefficiencies and inequalities in this ad hoc approach. (See Part II.B below.)

A. New York has repeatedly recognized that two people of the same sex can and do form committed relationships that deserve the protection of the State.

New York's judicial, legislative and executive branches have in many contexts found that many of the legal consequences of marriage should attach to committed relationships between same-sex couples. Set forth below are examples of such determinations by the State and its governmental bodies.

1. New York has recognized that same-sex couples can be committed, nurturing and responsible parents, entitled to be treated the same as opposite-sex couples for purposes of adoption. Twenty four years ago, in 1981, New York's Department of Social Services issued a regulation stating that "[a]pplicants [for adoption] shall not be rejected solely on the basis of homosexuality". 18 NYCRR § 421.16(h)(2).[2] Subsequently, the Court of Appeals has ruled that the unmarried partner of a child's biological parent may become the child's second parent by means of adoption. In re Jacob, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995). In so ruling, the court found such adoptions to be in the child's best interests because, in addition to the emotional security of having both people actually raising the child legally recognized as parents, allowing such adoptions would provide (1) the ability to collect Social Security and life insurance benefits in the event of either parent's death or disability; (2) the right to sue for the wrongful death of either parent; (3) the right to inherit under rules of intestacy; (4) eligibility for coverage under both parents' health insurance policies; (5) the right of either parent to make medical decisions for the child in case of emergency; and

[2] The basic premise that an individual's sexual orientation does not render him or her an unfit parent was recognized by New York courts even earlier. See, e.g., Di Stefano v. Di Stefano, 60 A.D.2d 976, 401 N.Y.S.2d 636 (4th Dep't 1978).

(6) the right to require each parent to provide for the child's economic support. In re Jacob, 86 N.Y.2d at 658-59. In In re Adoption of Carolyn B, 6 A.D.3d 67, 774 N.Y.S.2d 227 (4th Dep't 2004), the Fourth Department went one step further, ruling that two unmarried same-sex adults, neither of whom is biologically related to a child, may jointly adopt, as a married couple may.

2. New York has recognized that committed same-sex couples are entitled to the same protection of the housing laws as opposite-sex couples. Under New York's Rent and Eviction Regulations, 9 NYCRR § 2204.6(d), upon the death of a rent-controlled tenant, the landlord may not dispossess either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant. In Braschi v. Stahl Assocs., 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989), the Court of Appeals found the surviving member of a committed gay relationship to be a "member of the deceased tenant's family". The court did not focus on whether, at the time of drafting, the drafters intended to include same-sex couples in the definition of family. Rather, the court noted that:

> [T]he term family, as used in 9 NYCRR § 2204.6(d), should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units.

Braschi, 74 N.Y.2d at 211 (emphasis added). Since that time, the holding of Braschi has been extended to protect same-sex partners in rent stabilized apartments. See East 10th Street Assocs., 154 A.D.2d at 145. Moreover, in Levin v. Yeshiva University, 96 N.Y.2d

484, 730 N.Y.S.2d 15, 754 N.E.2d 1099 (2001), the Court of Appeals upheld a same-sex couple's right to challenge a university housing policy that excluded them from certain apartments reserved for married opposite-sex couples.

3. New York also has recognized committed same-sex relationships in the contexts of health and financial benefits, allowing couples to pool their energies and resources to support each other and their families. All three branches of New York State government provide health benefits and other employment benefits to the same-sex domestic partners of their employees. See, e.g., Perez-Pena, Richard, Bruno Agrees on Domestic Partner Benefits, N.Y. Times, Jan. 20, 2001, at B1. In addition, numerous localities across the State offer such benefits to the same-sex partners of their employees.[3] Moreover, the cities of Albany, Ithaca, New York and Rochester, the towns of East Hampton and South Hampton and the County of Westchester have all established domestic partnership registries. See, e.g., New York City's Domestic Partnership Law, NYC Admin. Code § 3-240 et seq. In rejecting a challenge to New York City's registry, the court in Slattery v. City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603 (1st Dep't 1999), found the assertion that the registry was against State law and/or public policy to be "untenable". 266 A.D.2d at 25. Moreover, New York State has enacted legislation enabling domestic partners of credit union members to become members and thereby have full access to banking services. 2003 N.Y. Laws ch. 679, S5590. Similarly, in 2004, the New York State Department of Labor instituted a policy providing

[3] As of 2000, the localities offering such benefits included the Counties of Albany, Nassau, Rockland, Suffolk and Tompkins, and the cities, towns and villages of Albany, Brighton, Eastchester, Greenburgh, Ithaca, New York, Port Jefferson, Rochester and Summit. See Policy Institute of the Gay and Lesbian Task Force, Legislating Equality, 65-68 (2000). Many more localities offer such benefits today.

unemployment benefits to same-sex partners in committed relationships who voluntarily leave a job to follow a partner to another locality—thereby treating same-sex partners the same as married spouses in similar circumstances, see New York State Department of Labor, Unemployment Insurance Division, Adjudication Services Office, Interpretation Service - Benefit Claims, Voluntary Quit, A-750-2119 (March 2004).[4]

4. New York has protected and recognized committed same-sex relationships when it comes to issues involving the illness and death of one member of the couple. For example, New York's insurance laws were amended in 2002 to enable individuals to take out life insurance on their domestic partners, see 2002 N.Y. Laws ch. 542, A8567-A, and New York has enacted legislation guaranteeing domestic partners the same visitation rights as spouses and next-of-kin when taking care of loved ones in hospitals, nursing homes and health-care facilities, see N.Y. Pub. Health § 2805-q. Moreover, the court in Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc., 159 Misc.2d 884, 606 N.Y.S.2d 965 (Sup. Ct. Queens Cty. 1993), held that a same-sex partner was entitled to determine the disposition of his partner's remains. Acknowledging the general rule that only the surviving spouse or next of kin may determine disposition of remains absent testamentary directives to the contrary, the court nevertheless looked to the nature of the relationship between the plaintiff and the decedent. Id. at 888. The court characterized the couple as having had a "close, spousal-like relationship" and held that to deny the partner standing as a surviving spouse would "illustrate a callous disregard of [their] relationship" and would effectively ignore the

[4] Indeed, the legislature has even added same-sex domestic partners to the list of family members of horse owners, trainers and jockeys who are entitled to receive free racetrack passes, cards and badges. See New York Rac. Pari-Mut. Wag. & Breed. § 236.

decedent's wishes "merely because the Plaintiff does not fit neatly into the legal definition of a spouse or next of kin". Id.[5]

5. Moreover, in the aftermath of the September 11 tragedy, New York issued multiple measures treating victims' surviving same-sex partners as spouses. For example, after September 11, the Governor promulgated an Executive Order stating that surviving same-sex partners are entitled to the same benefits as spouses from the state's Crime Victims Board, see Executive Order No. 113.30, 9 NYCRR § 5.113.30 (Oct. 10, 2001), and in 2004, equal eligibility to Crime Victims Board benefits was extended to domestic partners of all crime victims, not just September 11 victims, see 9 NYCRR §§ 525.1, 525.2 (2004). Similarly, the legislature passed the September 11th Victims and Families Relief Act, which was expressly intended to make domestic partners eligible for September 11 Federal Fund awards. See 2002 N.Y. Laws, ch. 73, S7356. The legislature also amended New York's workers' compensation laws to provide same-sex partners of September 11 victims with the same death benefits that were to be provided to spouses, see 2002 N.Y. Laws, ch. 467, S7685, and passed legislation making same-sex partners (and their children) eligible for the State's World Trade Center memorial scholarship. Additionally, New York State's World Trade Center

[5] Recently, a lower court in New York has held that a surviving member of a same-sex couple who entered into a civil union in Vermont should be considered a "spouse" under New York's wrongful death statute. See Langan v. St. Vincent's Hospital, 196 Misc. 2d 440, 442, 765 N.Y.2d 411 (Sup. Ct. Nassau Cty. 2003) (noting that the couple "lived together as spouses from shortly after they met in 1985 until the year 2000, when they took the first opportunity to secure legal recognition of their union in the State of Vermont" (emphasis added)).

Relief Fund treated same-sex domestic partners as surviving spouses.[6] Indeed, every piece of September 11-specific relief created by the State specifically included same-sex partners as eligible beneficiaries.

6. State government entities and many New York localities have also stated that they will respect the marriages and other unions lawfully entered into by same-sex couples in other jurisdictions. For example, the Attorney General has rendered an opinion stating that, with respect to marriages of same-sex couples performed in other jurisdictions, "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law". See Opinion of the Attorney General, dated Mar. 3, 2004, at 28. Similarly, in October of 2004, the New York State Comptroller announced that the New York State and Local Retirement System "will treat Canadian marriages of same-sex couples the same as any other marriage for purposes of retirement benefits and obligations". See Letter from Comptroller Alan G. Hevesi to Mark E. Daigneault, dated Oct. 8, 2004. Further, cities, towns and villages across the State, including Brighton, Buffalo, Ithaca, Nyack, New York and Rochester have proactively recognized the marriages of same-sex couples lawfully entered into elsewhere and accorded married same-sex couples the same rights as all other married couples within their local jurisdictions. See, e.g., Statement of John Shields, Mayor of Nyack, dated Feb. 27, 2004 ("[I]n the Village of Nyack, we accord full legal rights and responsibilities to the marriages of committed same sex couples and their families."); Statement of Carolyn K. Peterson, Mayor of Ithaca, dated Mar. 1, 2004 ("The City of

[6] See New York State World Trade Center Relief Fund Surviving Spouse Application, available at www.nysegov.com/news/WTC_Relief_Dist.htm (visited May 30, 2002) ("A surviving spouse includes a domestic partner.").

Ithaca will, in accordance with New York law and the U.S. Constitution, fully recognize all same sex marriages that were validly performed elsewhere.").[7]

Thus, time and time again, and on a case-by-case basis, New York's judicial, legislative and executive branches have found that committed relationships between same-sex couples deserve the legal protection afforded to married couples. Those legal protections were found to be necessary and appropriate because the State has recognized that as a practical matter, committed same-sex couples live their lives the same way that committed opposite-sex couples do—with the same interdependence and the same need for State protection and recognition. This Court should adhere to this tradition, which acknowledges and respects the practical realities of same-sex couples' lives.

B. Recognizing the ability of same-sex couples to marry would bring needed rationality and predictability to the legal treatment of same-sex relationships.

In areas such as parenting, housing, personal finance and survivorship, New York has determined that same-sex couples are entitled, under the law and under basic notions of fairness, to the same protections and privileges that opposite-sex couples receive. However, as demonstrated above, New York's approach in this area has been piecemeal—a case-by-case or law-by-law analysis, depending solely on the particular issue put before the court, legislature or administrative body. That piecemeal approach has resulted in both inequality and inefficiencies.

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[7] Further, a New York court has held that a member of a same-sex couple who lawfully entered into a "civil union" in Vermont should be treated as a "spouse" under New York's wrongful death statute. See Langan, 196 Misc.2d at 442-43.

As a matter of practice, a member of a same-sex couple who has to turn to the State to protect a benefit (or enforce an obligation) arising from the couple's committed relationship faces a daunting task: (1) determining whether the particular benefit (or obligation) has been explicitly addressed by the State in the context of same-sex relationships; (2) if not, determining whether it has been implicitly addressed and arguing to a court or administrative body that that is so; and (3) in either case, proving that his or her particular relationship is sufficiently committed and interdependent to warrant protection and recognition. Tragically, many same-sex couples are forced to face this uncertainty when they are least equipped to deal with it, such as when death or illness strikes. By contrast, opposite-sex couples wishing to receive the benefits (and shoulder the obligations) arising from their relationship have been able to get married, after which their rights (and obligations) have been clear. Same-sex couples are forced to live without that predictability or certainty.

For example, although New York courts have regularly accorded same-sex relationships legal recognition of one sort or another, they have first had to scrutinize the details of the litigants' lives to determine whether their mutual commitment rose to the level that should be recognized by the State. See, e.g., Braschi, 74 N.Y.2d at 213 (noting that appellant and deceased partner lived together, visited each other's families, shared financial obligations and were beneficiaries of each other's life insurance policies such that the Court "could reasonably conclude that these men were much more than mere roommates"); East 10th Street Assocs., 154 A.D.2d at 143 (citing affidavits of family members that surviving partner of the tenant in a rent-stabilized apartment was considered a "spouse" and therefore entitled to protections afforded to family members). Same-sex couples are in a legal limbo, unable to know, and at the mercy of a court or

agency to decide, whether their relationship will be deemed sufficiently committed or whether they will instead be deemed no more than "roommates" or "strangers".

This uncertainty has also imposed unnecessary burdens on courts and administrative agencies. In deciding matters involving married opposite-sex couples, the legal significance of their relationship is ordinarily clear, with no need for any inquiry into the extent of their interdependence or the strength of their commitment to one another. Because same-sex couples have not received the same automatic presumptions, courts and administrative agencies have had to conduct unnecessarily detailed and complicated inquiries into the personal lives of the same-sex couples appearing before them. Further, in the absence of marriage, the legislature, courts and administrative agencies have had to craft particularized and fact-specific theories or remedies to provide same-sex couples with the protection and respect that the State deems them to deserve.

Marriage, which is a legal way of classifying a relationship based solely on the stated commitment of the participants, provides legal certainty to couples as they plan and live their lives together. The lower court's finding that only opposite-sex couples are entitled to that classification was both legally wrong and inconsistent with the progression of New York State policy. New York has recognized the legal significance of committed same-sex relationships and accorded same-sex couples many of the incidents of marriage. The three branches of New York government have done so on the understanding that same-sex couples can and do form loving, committed and interdependent relationships. New York has also recognized that individuals in such relationships are in no different a position than, and have the same needs as, committed opposite-sex couples. Affording them the legal status of marriage would eliminate an

anachronistic inequality that serves no legitimate New York State policy interest and would bring needed predictability to the lives of New York's same-sex couples.

CONCLUSION

For the foregoing reasons, amici the Pride Agenda, et al. respectfully submit that the decision below is inconsistent with New York's jurisprudence, legislation and policy regarding relationships between same-sex couples and should be reversed.

May 17, 2005

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Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs,

v.

THE NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK,

Defendants.

Index No. 1967-04
Hon. Joseph C. Teresi

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the above named Plaintiffs, pursuant to CPLR 5601(b)(2), appeal to the Court of Appeals of the State of New York from a Judgment of Supreme Court entered on January 18, 2005 in the Office of the Clerk of Albany County, and the Decision and Order of the Supreme Court entered in the office of the Clerk of Albany County on December 7, 2005, which finally determines this action, wherein it is adjudged that the Domestic Relations Law is constitutionally valid; wherein there is directly involved a constitutional question under Article 1, Sections 6, 8 and 11,

of the Constitution of the State of New York; and wherein no other questions are adjudged.

PLEASE TAKE FURTHER NOTICE that the Plaintiffs appeal from each and every part of that Decision and Order of the Supreme Court, as well as from the whole Decision and Order.

Dated: New York, New York
January 18, 2005

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

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Exhibit D

STATE OF NEW YORK
SUPREME COURT — COUNTY OF ALBANY

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 1967-04
RJI NO. 0104077742

THE NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK

Defendants.

Supreme Court Albany County All Purpose Term, September 21, 2004
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiffs, thirteen gay and lesbian couples seek an order pursuant to CPLR §§3212 and the New York Constitution, Article 1, §§6, 8 and 11, for summary judgment in plaintiffs' favor on all claims and causes of action in the complaint. Defendants cross-move for an order pursuant to CPLR §2215 and §3212 for summary judgment dismissing the complaint in its entirety and a declaratory judgment stating that the Domestic Relations Law as applied to same-sex marriages is constitutional.

Plaintiffs' complaint alleges four seperate claims in support of their position that prohibiting same sex marriages under the Domestic Relations Law violates the Constitution of this State. They allege that denying same-sex couples the ability to marry deprives them of the equal protection of the laws based upon their sexual orientation. Next, they allege that denying same-sex couples the ability to marry deprives them of the equal protection of the laws based on their gender. They also allege that this denial violates the due process clause of the New York State Constitution, Article I §6. Lastly, plaintiffs allege that the denial of the ability to marry based on their gender and sexual orientation violates freedom of speech protection under Article 1, §8 of the New York Constitution.

Initially, the Court finds that the Domestic Relations Law does not contain a gender-based classification; both men and women may obtain a license to marry someone of the other gender, and neither a man nor a woman may obtain a license to marry a person of the same gender. Neither of these scenarios discriminates on the basis of gender as both genders are equally free to marry and equally restricted. Therefore, this Court finds that the classification at issue is not one

of gender per se, but rather of sexual orientation..

First, the Court will address the plaintiffs' equal protection claims. The guarantee of equal protection in the 14th Amendment is limited by the practical reality that "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or person." Romer v. Evans, 517 U.S. 620, 632 (1996) A challenged classification will be upheld as long as it does not burden a fundamental right or a suspect class, and provided "it bears a rational relationship to some legitimate end." *Id.* This is so "even if the law seems unwise or works to the disadvantage of a particular group, or if the rational for it seems tenuous." *Id.*

The equal protection clause of the New York State Constitution provides:

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." (N.Y. Const., art. 1 §11).

The Court of Appeals has "equat[ed]" the Federal and State equal protection clauses and has held repeatedly that the State provision "is no broader in coverage than the Federal provision." Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y. 2d 344, 360 n.6 (1985) (citing authorities).

Neither the Court of Appeals nor this State's Third Department has yet addressed what level of scrutiny should be applied to a sexual orientation classification. The Second Department has held that the standard of review is the rational basis test (see, Matter of Cooper, 187 AD2d 128, 133 [2nd Dept.], Appeal dismissed, 82 NY2d 801 [1993]).

In Cooper, the court was presented with two issues, one of which has not been brought

forth by Petitioners in the instant case and will not be addressed here[1]. The pertinent issue before the Court in Conner was the claim that the provisions of the Domestic Relations Law that prohibited "members of the same sex from obtaining marriage licenses" was a violation of the Equal Protection Clause of the State Constitution. The Second Department, affirming the Surrogate Court's decision, held that rational basis is the appropriate standard for review for classifications based on sexual orientation.

Sound judicial practice dictates that this Court follow the well-established New York legal precedent that it is "the duty of a judge at special term to follow a decision made by the Appellate Division of another department until his own Appellate Division or the Court of Appeals pronounces a contrary rule." Hamlin v. Bender, 92 Misc 16 (Sup. Ct. Oneida County (1915) (citations omitted).

Other case law from New York, while not binding, is consistent with this. In Lenzen v. St. Vincent's Hospital of New York, 196 Misc 2d 440 (2003), the court held that "a heightened level of scrutiny for classifications based on 'sexual orientation' has not been applied" in New York. It applied a rational basis standard to the question of whether a Vermont civil union would be recognized in New York for purposes of the wrongful death statute. In further support of that decision, the Supreme Court cited Romer v. Evans, 517 U.S. 620 (1996), a U.S. Supreme Court case that addressed the constitutionality of an Amendment to the Colorado Constitution that expressly discriminated against homosexuals. The Romer majority found the amendment unconstitutional when it failed to satisfy "even this [rational basis] conventional inquiry." Romer

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[1]The first issue addressed by the Second Department was whether the term "surviving spouse" in NY EPTL §5-1.1 could be interpreted to include homosexual partners.

v. Evans, 517 U.S./ 620, 632 (1996).

In light of the above, this Court finds that an equal protection challenge based on a sexual orientation classification is subject to a rational basis standard of review.

The rational basis standard, as stated in Romer v. Evans, 517 U.S. 620, 632 (1996) is that a challenged classification will be upheld as long as it does not burden a fundamental right or a suspect class, and provided "it bears a rational relationship to some legitimate end" *Id.* "This is so even if the law seems unwise or works to the disadvantage of a particular group, or if the rational for it seems tenuous". *Id.*

This Court finds that, there is a legitimate State interest in granting marriage licenses only to opposite sex couples. The record here fails to convince this Court that the plaintiffs have met their burden on that issue. As stated in Affronti v. Crosson, 95 NY2d 713, 719 (2001), the Court of Appeals established the rule for rational basis standard of review.

> "Where a governmental classification is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional (see, Nordlinger v. Hahn, 505 U.S. 1, 10). Undisputably, the disparate judicial salary schedules in Judiciary Law §§221-d and 221-e do not involve suspect classes or fundamental rights and are therefore subject to rational basis review (see, e.g., D'Amico v. Crosson, 93 NY2d, at 32, *supra*; Henry v. Milonas, 91 NY2d, at 268, *supra*).
>
> The Rational basis standard of review is "'a paradigm of judicial restraint'" (Port Jefferson Health Care Facility v. Wing, 94 NY2d 284, 290 [quoting Federal Communications Commn. v. Beach Communications, 508 U.S. 307, 314, *cert denied* 530 U.S. 1276). On rational basis review, a statute will be upheld unless the disparate treatment is "so unrelated to the achievement of any combination of legitimate purposes that * * * [it is] irrational" (Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 [quoted case and

internal quotation marks omitted]). Since the challenged statute is presumed to be valid, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it * * * *whether or not the basis has a foundation in the record*" (Heller v. Doe, 509 U.S. 312, 320-321 [quoted case and internal quotation marks omitted] [emphasis supplied]). Thus, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker '" (Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 [quoting] Vance v. Bradley, 440 U.S. 93, 111).

Indeed, courts may even hypothesize the Legislature's motivation or possible legitimate purpose (see, Port Jefferson Health Care Facility v. Wing, 94 NY2d, at 291, *supra*). Thus, "the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to *courtroom factfinding* and may be based on *rational speculation* unsupported by evidence or empirical data" *(id. [*quoted case and internal quotation marks omitted])."

The reasons advanced by defendants: ensuring consistency among Federal law and the laws of other States; and preserving the historic, legal, and cultural understanding of marriage - are sufficient to satisfy a rational basis review. The Court also notes that in the concurring opinion in Lawrence v. Texas, 539 US 558 at 584 (2003), Justice O'Connor states that preserving the traditional institution of marriage is a legitimate State interest.

Next, the Court will address the due process claims.

With regard to the question of whether there is a fundamental right to marriage for same-sex couples, this Court is bound by the Second Department's ruling in the Cooper decision until the Third Department finds contrary. In Cooper, the Second Department has held that same-sex couples do not have a fundamental right to marry, relying on the dismissal by United States

Supreme Court of a Minnesota Supreme Court case concerning whether same-sex couples had a fundamental right to marry. See, Baker v. Nelson, 409 U.S. 810 (1972). That dismissal was based upon the lack of a federal question after the Supreme Court found that the constitutional challenge had been considered and rejected. Cooper, at 134 (citation omitted). Therefore, this Court rules that same-sex couples do not have a fundamental Constitutional right to marry under both the United States and New York State Constitutions.

Therefore, as the appropriate standard as established by the Court of Appeals is to determine if the statutory scheme has a rational relationship to the governmental interest to be obtained. See, Hope v. Perales, 83 NY2d at 577 (1995). As this court has already found a rational basis, the due process claim must also fail.

Lastly, the Court finds on this record no merit to the plaintiff's claim that issuing marriage licenses only to opposite sex couples offends the State Constitution's Free Speech Clause. (See, Article I, §8, New York Constitution) Assuming, while not finding, that marriage is somehow expressive conduct, the governmental interest in this case is unrelated to the suppression of free expression and any incidental restriction on plaintiffs' free speech rights is no greater than is essential to the furtherance of that interest. People v. Hoffman, 68 NY2d 202, 207 (1986).

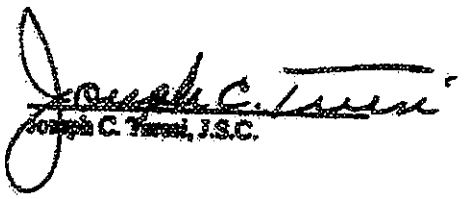
Therefore, the plaintiffs' motion for summary judgment is denied and the defendants' cross-motion for summary judgment dismissing the complaint is granted. The Domestic Relations Law as applied to deny marriage licenses to same sex couples, is declared constitutional.

All papers, including this Decision and Order are being returned to the attorneys for the

defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 7, 2004
Albany, New York



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated June 30, 2004 with Affirmation of Roberta A. Kaplan, Esq. dated June 29, 2004 with Attached Exhibits A and B.
2. Affidavits in Support of Plaintiffs' Motion for Summary Judgment.
3. Notice of Cross Motion dated July 23, 2004 with Affirmation of James B. McGowan, Esq. dated July 15, 2004 with Attached Exhibits A and B.
4. Affirmation of Roberta A. Kaplan, Esq. dated August 16, 2004 with Attached Exhibits A - C and Affirmation of Audra J. Soloway, Esq. dated September 3, 2004.

Exhibit E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs,

v.

THE NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK,

Defendants.

Index No. 1967-04
Hon. Joseph C. Teresi

JUDGMENT

The above named Plaintiffs, having moved this Court pursuant to CPLR 3212 for summary judgment against defendants the New York State Department of Health and the State of New York on all claims and causes of action set forth in the Complaint;

Defendants having opposed Plaintiffs' motion and having cross-moved for summary judgment pursuant to CPLR 2215 and 3212 to dismiss the complaint in its

entirety, and for a declaratory judgment declaring that the Domestic Relations Law is constitutional;

This Court having rendered a written Decision and Order dated December 7, 2004 and entered December 7, 2004, denying plaintiffs' motion for summary judgment, granting defendants' cross-motion for summary judgment, dismissing the complaint in its entirety and declaring the Domestic Relations Law constitutional;

NOW, therefore, upon the motion of plaintiffs, it is hereby

ADJUDGED that the complaint is hereby dismissed in its entirety and the Domestic Relations Law is declared constitutional.

Judgment signed and entered this 11th day of January, 2005.

Hon. Joseph C. Teresi

Exhibit F

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty-first *day of* March 2005

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 224 SSD 10

Sylvia Samuels et al.,
Appellants,
v.
The New York State Department of Health and the State of New York,
Respondents.

The appellants having filed notices of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeals from the order and the judgment of Supreme Court be and the same hereby are transferred without costs, by the Court sua sponte, to the Appellate Division, Third Department, upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (NY Const, art VI, §§ 3[b][2], 5[b]; CPLR 5601[b][2]).

Judge R.S. Smith took no part.

Stuart M. Cohen
Clerk of the Court