To be argued by:
Peter H. Schiff

Time Requested: 30 minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

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

Appellate Division
Docket No. 98084

Albany Co. Index
No. 1967-04

BRIEF FOR RESPONDENTS STATE OF NEW YORK AND DEPARTMENT OF HEALTH

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PRELIMINARY STATEMENT

Plaintiffs-appellants are members of same-sex couples who seek to be civilly married in the New York. In this action, they seek a judgment declaring that the marriage licensing provisions in New York's Domestic Relations Law (the "D.R.L."), insofar as they are applied to deny marriage licenses to same-sex couples, violate the State Constitution's equal protection, due process and free speech clauses. They do not dispute that the current D.R.L. marriage provisions do not permit marriage licenses to be issued to same-sex couples.

The court below rejected plaintiffs' claims and, as demonstrated below, its decision is correct in all respects and should be affirmed. The provisions of the D.R.L. at issue here are subject to rational basis review. Same-sex marriage is not a fundamental right, and thus the D.R.L.'s marriage provisions are not subject to strict scrutiny under the due process clause. And pursuant to this Court's decision in Matter of Valentine v. American Airlines, 17 A.D.2d 38 (2005), rational basis review governs the equal protection claim here. Moreover, the marriage provisions in the D.R.L. easily pass the rational basis test. They reflect and preserve the well-recognized historical tradition of opposite-sex marriage in our culture. They also are consistent with the legal and factual reality that only one state licenses same-sex marriages, and the federal government does not recognize such marriages at all. Furthermore, issuing marriage

licenses only to opposite-sex couples does not offend the free speech clause, because such a restriction furthers important governmental interests that are entirely unrelated to the suppression of free expression.

Perhaps most fundamentally, however, the Legislature should be able to determine the legal requirements for civil marriage in the State of New York. The formulation of social policy regarding same-sex marriage should be preceded by the kind of debate that is the very hallmark of the legislative process.

New York's Legislature and Executive have already recognized and taken extensive action to protect persons who face discrimination on the basis of their sexual orientation in employment, public accommodations, the provision of state services, housing, education, and credit. The Legislature has specifically repealed New York's law against consensual sodomy and expanded the definition of hate crimes and aggravated harassment to include crimes based on sexual orientation. On the state and local levels, same-sex domestic partners and their families are increasingly eligible to receive a variety of benefits and recognition, ranging from health care coverage to hospital visitation rights. In the end, the questions whether to extend any or all of the remaining rights and benefits of married couples to same-sex couples, and whether to do so by issuing a marriage license, by offering some other form of legal

recognition such as a civil union, or by offering specific rights and benefits on an individualized basis, are important decisions best left to the State Legislature.

QUESTIONS PRESENTED

1. Whether civil marriage of same-sex couples is a fundamental right protected by the due process clause of the State Constitution.

2. Whether the D.R.L. marriage provisions are properly analyzed for equal protection purposes by rational basis review, because sexual orientation is not a suspect classification triggering heightened scrutiny and the subject provisions do not contain a discriminatory gender-based classification.

3. Whether the Legislature's decision to permit only opposite-sex couples to obtain marriage licenses is rationally related to the State's legitimate interest in preserving the historic legal and cultural understanding of marriage.

4. Whether issuing marriage licenses only to opposite-sex couples offends the free speech clause of the State Constitution.

STATEMENT OF FACTS

A. Statutory Background

The Legislature comprehensively governs civil marriage in New York by setting forth in the D.R.L. who may marry, how marriage licenses are issued, and how such marriages are solemnized and recorded. All persons who intend to have their civil marriage solemnized in this State must obtain a valid marriage license, issued by a city or town clerk. Before solemnization of civil marriage, that license must be presented to a person authorized to solemnize the marriage. D.R.L. § 13. When issuing a marriage license, it is the duty of the town and city clerk to determine whether the applicants are legally competent to marry. D.R.L. §§ 15(2), 23.

Article 3 of the D.R.L. governs "solemnization, proof and effect" of civil marriages and accords the New York State Department of Health (the "Department") a central role in these matters. By express statutory grant set forth in D.R.L. § 23, general supervisory power over the registration and recording of all marriages in the State outside the City of New York is vested in the Department. In addition, the Department has the authority, at any time, to inspect the record and index of marriage licenses issued by town and city clerks, and to promulgate rules and regulations to insure complete registration. D.R.L. § 23. Under the Commissioner of Health's supervision,

town and city clerks are charged with appropriately issuing marriage licenses. D.R.L. §§ 15, 23. The Department, in turn, can refer violations of any provisions of article 3 of the D.R.L., including violations by town and city clerks, to the local district attorney for prosecution. D.R.L. § 23. Pursuant to D.R.L. § 20, the Department keeps and indexes the original affidavits, statements, consents, licenses with certificates of solemnization, and written contracts of marriage. The Commissioner of Health is authorized to issue certifications of marriage records registered under article 3 of the D.R.L. See D.R.L. §§ 20-a, 20-b. Moreover, the Department must "carefully examin[e]" marriage records, and shall require such further information to be supplied as may be necessary to "make the record complete and satisfactory." Id.

B. Procedural History of This Action

Plaintiffs commenced this action on or about April 7, 2004, seeking a judgment declaring that the D.R.L., insofar as it is applied to prohibit the issuance of marriage licenses to same-sex couples, violates the due process, equal protection and free speech clauses of the New York State Constitution (R78-108).[1]

[1] References in parentheses to "R" followed by a number are to pages in the Record on Appeal.

Defendants timely answered (R112-116), and the parties moved for summary judgment (R117-20, 394-96).

By decision and order entered December 7, 2004, Supreme Court, Albany County (Teresi, J.), denied plaintiffs' motion, granted defendants' cross-motion, and declared the D.R.L. as applied to deny marriage licenses to same-sex couples to be constitutional (R10-20). Critically, the court held that the provisions were subject to rational basis review. Relying on the Second Department's decision in Matter of Cooper v. Kelly, 187 A.D.2d 128 (2d Dep't), appeal dismissed, 82 N.Y.2d 801 (1993), the court held that same-sex couples do not have a fundamental right to marry, and thus plaintiffs' due process claim did not warrant heightened scrutiny. Further, plaintiffs' equal protection claim was subject to rational basis review because the D.R.L. does not contain a gender-based classification, given that both genders are equally free to marry and equally restricted, and statutory classifications based on sexual orientation do not trigger heightened scrutiny.

Applying rational basis review, the court concluded that 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 rational basis review. Finally, the court rejected plaintiffs' free speech claim, holding that even assuming that marriage constitutes 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 not greater than is essential to the furtherance of that interest" (R17).

After entry of judgment on January 18, 2005 (R25-26), plaintiffs sought a direct appeal pursuant to C.P.L.R. § 5601(b)(2) to the Court of Appeals (R6-9). However, in an order entered March 31, 2005, the Court of Appeals transferred the appeal to this Court upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (R5).

ARGUMENT

POINT I

PLAINTIFFS HAVE NOT ESTABLISHED BEYOND A REASONABLE DOUBT THAT GRANTING MARRIAGE LICENSES ONLY TO OPPOSITE-SEX COUPLES VIOLATES THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE NEW YORK STATE CONSTITUTION

The court below correctly held that plaintiffs did not meet their burden of demonstrating that the marriage licensing provisions in the D.R.L. are unconstitutional. Statutory provisions enjoy a strong presumption of constitutionality, Klein v. Hartnett, 78 N.Y.2d 662, 666 (1991), cert. denied, 504 U.S. 912 (1992), grounded in part on "an awareness of the respect due the legislative branch." Dunlea v. Anderson, 66 N.Y.2d 265, 267 (1985); see also Montgomery v. Daniels, 38 N.Y.2d 41, 54-56

(1975). Thus, plaintiffs can prevail only by establishing the statute's unconstitutionality "beyond a reasonable doubt." Schulz v. State, 84 N.Y.2d 231, 241 (1994), cert. denied, 513 U.S. 1127 (1995); Hope v. Perales, 83 N.Y.2d 563, 574-75 (1994).

Plaintiffs have not shown beyond a reasonable doubt that New York's statutory marriage scheme, as applied to them, violates the due process or equal protection clauses of the New York Constitution. Indeed, they fail to establish that the State's licensing scheme is in any way invidiously discriminatory. Instead, although the word "marriage" has been understood to mean a marriage between a husband and a wife, plaintiffs seek to redefine the word under New York law to encompass same-sex couples. This Court should decline plaintiffs' invitation and should instead defer to the Legislature's determination to allow marriage licenses to issue only to opposite-sex couples. Limiting the issuance of marriage licenses to opposite-sex couples is rationally related to the State's legitimate interests in preserving the traditional concept of civil marriage and in maintaining reasonable consistency among state and federal governments in the legal definition of marriage.

A. The Civil Marriage of Same-Sex Couples Does Not Implicate a Fundamental Right, and the State's Marriage Licensing Scheme Does Not Offend the State Constitution's Due Process Clause.

The courts below correctly rejected plaintiffs' assertion that the D.R.L.'s failure to authorize civil marriage of same-sex couples implicates a fundamental right and is therefore subject to heightened scrutiny under the due process clause of the State Constitution. To the contrary, no fundamental right is implicated here, and the State's marriage licensing provisions comport with New York's due process clause because they are rationally related to legitimate governmental interests.

The due process clause provides "that no person shall be deprived of life, liberty or property without due process of law." N.Y. Const., art. 1, § 6. If the statutory scheme under review burdens a fundamental right, then strict scrutiny will apply and the statutory scheme will be found unconstitutional unless the government establishes that it is necessary to promote a compelling state interest and the statute is narrowly tailored to achieve its purpose. If a fundamental right is not at issue, the statutory scheme will survive as long as it has a rational relationship to the governmental interest to be obtained. See Hope v. Perales, 83 N.Y.2d at 577 (citing Golden v. Clark, 76 N.Y.2d 618, 624 (1990)).

Thus, the threshold inquiry in any substantive due process analysis is determining whether the statute at issue burdens a

"fundamental right." The Supreme Court has urged extreme caution in attaching the "fundamental right" label to an asserted liberty interest. In doing so, the Court has warned, the judiciary takes the substantive matter at stake completely out of the political arena and arrogates to the courts powers that heretofore had been exercised by the legislature:

> By extending constitutional protection to an asserted right or liberty interest, we to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (internal citations omitted); see also Hope v. Perales, 83 N.Y.2d at 575 ("It is not the role of the courts to pass upon the wisdom of the Legislature's policy choice, even though there may be differences of views about the [Legislature's] decision . . .."). Fundamental rights protected by the due process clause are those "which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. at 720-21 (internal citations omitted).

The court below concluded, consistent with other New York state courts that have considered the issue, that civil marriage

of same-sex couples is not such a right. See Seymour v. Holcomb, 7 Misc. 3d 530, 537 (Sup. Ct. Tompkins Co. 2005); Matter of Kane v. Marsolais, Index No. 3473-04, slip op. at 8 (Sup. Ct. Albany Co., Kavanagh, J., January 31, 2005); Matter of Shields v. Madigan, 5 Misc. 3d 901, 907 (Sup. Ct. Rockland Co. 2004); see also Matter of Cooper v. Kelly, 187 A.D.2d at 134 (noting, without ruling on the issue, the determination of the Minnesota Supreme Court in Baker v. Nelson, 291 Minn. 310, 312-13, 191 N.W.2d 185, 186 (Minn. Sup. Ct. 1971), appeal dismissed, 409 U.S. 810 (1972), that same-sex marriage is not a fundamental right). But see Hernandez v. Robles, 7 Misc. 3d 459, 479-80, 486 (Sup. Ct. New York Co. 2005) (agreeing that same-sex marriage is not a fundamental right, but concluding that the challenged provisions implicate the fundamental right to choose one's spouse).

The courts of many other states have similarly found that no such fundamental right exists. See, e.g., Morrison v. Sadler, 821 N.E.2d 15, 32-34 (Ct. App. Ind. 2005); Lewis v. Harris, 875 A.2d 259, 268-271 (Super. Ct. N.J. App. Div. 2005); Standhardt v. Superior Court, 206 Ariz. 276, 281-285, 77 P.3d 451 (Ariz. Ct. App. 2003), pet. for review denied, 2004 Ariz. LEXIS 62 (2004) (prohibition against same-sex marriage does not violate a fundamental liberty interest protected by due process); Matter of the Application for a Marriage License for Nash, 2003 Ohio 7221, 2003 Ohio App. LEXIS 6513 (Ohio Ct. App. 2003) (no violation of

equal protection to deny post-operative former female a marriage license for a marriage with a female); Dean v. District of Columbia, 653 A.2d 307, 361-64 (D.C. Ct. App. 1995) (finding no constitutional impediment to prohibiting same-sex marriage) (opinions of Terry and Steadman, Assoc. J.J., concurring); Jones v. Hallahan, 501 S.W.2d 588, 590 (Kentucky Ct. App. 1973) ("We find no constitutional sanction or protection of the right of marriage between persons of the same sex."); Baker v. Nelson, 291 Minn. at 312-314, 191 N.W.2d at 186-87 (finding no due process or equal protection violation).

In the face of these judicial precedents, plaintiffs argue that the court below and respondents have too narrowly defined the fundamental right at issue here. They claim that the fundamental right implicated here is the broad "right to marry," which includes the right to choose whom to marry (Plaintiffs' Brief, pp. 17-18). But what plaintiffs seek from this Court is not simply recognition of an already existing fundamental right, but an expansion of a fundamental right into new territory. As the courts have repeatedly recognized, same-sex couples challenging marriage statutes seek not to exercise an existing fundamental right, but to re-define civil marriage to encompass something it has not heretofore included. What plaintiffs really seek is not to enforce the right to marry, but rather to acquire

the right to marry a person of the same sex, something they have never had before.

Thus, for example, the Court of Appeals of Kentucky found "no constitutional sanction or protection of the right of marriage between persons of the same sex" and declined to require the issuance of marriage licenses to same-sex couples "because what they propose is not a marriage." Jones v. Hallahan, 501 S.W.2d 588 at 590. Similarly, the Court of Appeals of Washington noted that same-sex couples were not denied a fundamental right to marry because it could not be said that legal recognition of same-sex couples was "fundamental." Singer v. Hara, 11 Wn. App. 247, 522 P.2d 1187 (Wash. Ct. App. 1974)

Loving v. Virginia, 388 U.S. 1 (1967), does not compel a contrary result. Rather, Loving involved opposite-sex marriage and held that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." 388 U.S. at 12. Loving thus involved a fundamental right to opposite-sex marriage that already existed and was infringed by a state. Here, by contrast, plaintiffs seek to broaden civil marriage to include relationships between same-sex couples. And because such an extension would amount to the creation of a new right, it cannot be deemed fundamental.

Moreover, where, as here, a statutory scheme under review does not burden a fundamental right, the statutory scheme must be found constitutional if it has a rational relationship to the legitimate governmental interest being asserted. See Hope v. Perales, 83 N.Y.2d at 577 (citing Golden v. Clark, 76 N.Y.2d at 624). As demonstrated below in Point I(B)(3), New York's statutory marriage scheme, insofar as it limits the issuance of marriage licenses only to opposite-sex couples, is rationally related to the State's legitimate interests in preserving the traditional legal and cultural concept of marriage and maintaining reasonable consistency among federal law and the laws of other states. That is enough to render it constitutional under New York's due process clause, and thus plaintiffs' substantive due process challenge must fail.

B. Granting Marriage Licenses Only to Opposite-Sex Couples Does Not Offend the State Constitution's Equal Protection Clause.

The court below also correctly held that the Legislature's restriction of marriage licenses to opposite-sex couples comports with the equal protection clause of the State Constitution. That clause 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 State provision "'embodies in our Constitution the provisions of the [equal protection clause of the] Federal Constitution which are already binding upon our State and its agencies.'" Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530-32 (1949) (quoting 2 Rev. Record of N.Y. State Constitutional Convention, 1938, at 1065), cert. denied, 339 U.S. 981 (1950). Accordingly, and contrary to plaintiffs' contentions (Plaintiffs' Brief, p. 42), the Court of Appeals "equat[es]" 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).

Under both the state and federal constitutions, courts apply one of three levels of scrutiny to analyze equal protection challenges to statutory classifications. Strict scrutiny applies only when reviewing legislative classifications based on race, alienage, or national origin ("suspect classifications"), and requires the government to establish that the classification is narrowly tailored to serve a compelling state interest. An intermediate level of scrutiny, so-called "heightened scrutiny," applies when reviewing classifications based on gender or

illegitimacy (sometimes referred to as "quasi-suspect classifications"), and requires the government to prove that the classification is substantially related to an important governmental interest. See People v. Santorelli, 80 N.Y.2d 875, 876 (1992); People v. Liberta, 64 N.Y.2d 152 (1984), cert. denied, 471 U.S. 1020 (1985). Finally, rational basis review applies to all other classifications and requires the challenger to prove that the classification is not rationally related to any legitimate state interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985).

Plaintiffs urge this Court to apply a high level of scrutiny to New York's statutory marriage scheme. They claim either (i) the Court should create, for the first time in New York, a new suspect class consisting of homosexuals, that is entitled to heightened scrutiny, or (ii) heightened scrutiny is justified because the relevant statutes classify on the basis of gender. Furthermore, they argue that New York's statutory marriage scheme does not pass even rational basis review.

This Court's decision in Matter of Valentine v. American Airlines, 17 A.D.3d 38, however, forecloses any argument that heightened scrutiny applies here. In Valentine, this Court held that the unmarried domestic partner of a decedent was not entitled to death benefits under Workers' Compensation Law

§ 16(1-a), which authorizes death benefit awards to "surviving spouses" and states that the term "surviving spouse" "shall be deemed to mean the legal spouse." The Court considered –- and rejected -- petitioner's equal protection challenge to Workers' Compensation Law § 16. First, the Court held that the statute does not discriminate on the basis of gender because it is facially neutral and applies equally to males and females. Second, the Court squarely held that, to the extent the statute classified based on sexual orientation, it was to be analyzed for equal protection purposes according to the rational basis standard. 17 A.D.3d at 42.

Therefore, on the issue whether rational basis review applies here, Valentine is dispositive. Moreover, the Court's reasoning in that case is sound and should be followed. And as further demonstrated below, New York's marriage provisions readily pass the rational basis standard of review, in large part because of the State's legitimate interest in preserving the age-old understanding of the institution of marriage as a union of a man and a woman.

1. A Classification Based upon Sexual Orientation Is Not "Suspect" for Purposes of Equal Protection Analysis.

As a general matter, courts have been, and should be, extremely hesitant to label a statutory classification as "suspect" for purposes of equal protection analysis. Such a

judicial determination implicates serious separation of powers concerns. Once a class is so labeled, all governmental action based on that classification becomes subject to strict scrutiny, thereby increasing the likelihood of invalidation by the courts. Accordingly, courts have found exceedingly few classes entitled to enhanced protection under the equal protection clause.

Not surprisingly, therefore, numerous New York courts -- in addition to this one -- have consistently and without exception declined to fashion a new suspect classification based on sexual orientation when analyzing equal protection challenges arising under the federal or state constitutions. See Valentine, 17 A.D.3d at 42 ("Courts, including the U.S. Supreme Court, have applied the rational basis standard, rather than strict or heightened scrutiny, when reviewing sexual orientation discrimination allegations."); Matter of Cooper v. Kelly, 187 A.D.2d at 133; Hernandez, 7 Misc. 3d at 491 (applying rational basis test to equal protection challenge); Seymour, 7 Misc. 3d at 535 (relying on Cooper and holding that a classification drawn on the basis of sexual orientation "is subject to the rational basis analysis"); Kane, slip op. at 7 (relying on Cooper and holding that "a standard of strict scrutiny will not be applied to any classification based on an individual's sexual preference"); Shields, 5 Misc. 3d at 906-07 (relying on Cooper and holding that a classification drawn on the basis of sexual orientation "is

subject to the rational basis analysis"); see also Langan v. St. Vincent's Hospital of New York, 196 Misc. 2d 440 (Sup. Ct. Nassau Co. 2003).

The overwhelming majority of federal courts and courts in other states have similarly declined to accord suspect class status to homosexuals. See, e.g., Lewis v. Harris, 2003 WL 23191114 at *21 (N.J. Super. Ct. 2003), aff'd, 875 A.2d 259 (Super. Ct. N.J. App. Div. 2005); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950-51 (7th Cir.), cert. denied, 123 S. Ct. 435 (2002); Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998); Baker v. Vermont, 170 Vt. 194, 213 n.10, 744 A.2d 864, 878 n.10 (Sup. Ct. Vt. 1999) (and cases cited therein). But see Tanner v. Oregon Health Sciences Univ., 157 Ore. App. 502, 524, 971 P.2d 435, 447 (Or. Ct. App. 1998), pet. for review denied, 329 Ore. 528, 994 P.2d 129 (Sup. Ct. Oregon 1999).[2]

[2] Tanner was decided under Oregon's unique privileges and immunities clause of Article I, section 20, of the Oregon Constitution. That clause provides: "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." The Oregon Court's analysis is of little utility in interpreting New York State's equal protection clause, as even the Oregon Court acknowledged that it does "not pretend that the cases construing Article I, section 20, describe a completed, coherent jurisprudence. It is perhaps best to view the cases at this juncture as something of a work in progress." 157 Ore. App. at 520, 971 P.2d at 445.

Moreover, these decisions are sound. The Supreme Court has refused to establish new suspect classifications where a group "is not . . . relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); City of Cleburne v. Cleburne Living Ctr, 473 U.S. at 443 (class not suspect where "legislative response . . . demonstrates . . . that lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary"); see also Laurence H. Tribe, American Constitutional Law 1616-1617 (2d ed. 1988) (heightened scrutiny particularly justifiable where a class lacks ability to make its voice heard, attract attention of lawmakers, or to effectuate changes in the law to reflect changing social norms).

Homosexuals as a class cannot be viewed as politically powerless in New York. Significantly, this class clearly has access to the legislative and political process in New York. In the approximately 35 years since the birth of the modern gay rights movement, a wide variety of advocacy groups and coalitions have represented the interests of homosexuals in numerous state and national campaigns and lawsuits designed to increase awareness of gay rights and effectuate legal change. The quality

of the advocacy has been high, and the groups have enjoyed success in New York.

There is an impressive list of legislative achievements creating and recognizing a broad array of rights for gay men and lesbians in New York. These include: Civil Rights Law § 40-c(2) (prohibiting discrimination or harassment based on sexual orientation); Executive Law § 296 (prohibiting discrimination in the workplace, organized labor, housing, education, public accommodations, credit, and trade based on sexual orientation); Education Law § 313 (prohibiting denial of access to educational programs or courses based on sexual orientation); Insurance Law § 2701(a) (extending the protections of the Holocaust Victims Insurance Act of 1998 to persons against whom the Nazi regime discriminated on the basis of sexual orientation); Penal Law § 240.30(3) (criminalizing physical contact "because of a belief or perception regarding [the victim's] sexual orientation"); id. at § 485.05(1) (bringing sexual orientation within the protection of the Hate Crimes Act of 2000).

In addition to these legislative achievements, the Executive has acted to prohibit state agencies and departments from discriminating based on sexual orientation in employment and in the provision of state services and benefits. See Executive Order Nos. 28, 28.1, 32; 9 NYCRR 4.28, 5.32. Moreover, Governor Pataki signed into law a number of September 11-related bills

recognizing the rights of domestic partners, including same-sex domestic partners. See L. 2002, ch. 73, ch. 467, and ch. 468.

At the local level, the City of New York and at least 20 other local jurisdictions include sexual orientation as a protected category in their anti-discrimination policies and laws. In addition, several municipalities, including the cities of Ithaca and Albany, provide for the registration of domestic partnerships, the benefits of which some of the plaintiffs have exercised and enjoy. See, e.g., New York City Administrative Code, § 3-241 et seq.; R86, 87, 96.

This collective response from the State Legislature, the Governor and other elected officials "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary" and "negates any claim that [homosexuals] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." City of Cleburne, 473 U.S. at 443, 445. Thus, a classification based upon sexual orientation does not trigger heightened scrutiny for equal protection purposes.

2. New York's Statutory Marriage Licensing Scheme Does Not Contain a Discriminatory Gender-based Classification Triggering Heightened Scrutiny.

Plaintiffs similarly cannot obtain heightened scrutiny on the ground that the D.R.L.'s marriage-licensing scheme embodies a discriminatory gender-based classification. The applicable

sections of the D.R.L. do not deprive one gender of a right that is given to the other, or confer on one gender a benefit that the other is denied, or restrict one gender's conduct but not the other's. Both men and women have the same right: to obtain a license to marry someone of the other gender. Both men and women are subject to the same restriction: neither a man nor a woman can obtain a license to marry someone of his or her own gender. Accordingly, as the court below held, and as every New York State court to have squarely addressed the issue has held, the D.R.L. marriage licensing provisions do not classify on the basis of gender. See Seymour, 7 Misc. 3d at 534; Kane, slip op. at 7; Shields, 5 Misc. 3d at 906.

Plaintiffs' analogy to the antimiscegenation statute struck down in Loving v. Virginia, 388 U.S. 1, does not withstand analysis. The statute in Loving prohibited and punished interracial marriages between "any white person and colored person."[3] The State of Virginia argued that the statute, despite its facial racial classification, did not work an invidious racial discrimination because it punished equally the white and non-white participants in an interracial marriage. The Supreme

[3] Significantly, in the fifteen years just prior to the Supreme Court's decision in Loving, fourteen states repealed their laws outlawing interracial marriages. At the time Loving was decided, only sixteen states (fifteen of which were in the South) still punished and prohibited interracial marriages. Loving v. Virginia, 388 U.S. at 6 n.5.

Court rejected this "equal application" argument and, applying strict scrutiny, held that restricting the freedom to marry solely because of race violated the Equal Protection Clause.

The fact that the antimiscegenation statute in Loving expressly classified on the basis of race was critical to the Court's analysis. The Fourteenth Amendment specifically prohibits racial discrimination, and its "clear and central purpose . . . was to eliminate all official state sources of invidious racial discrimination in the States." Loving v. Virginia, 388 U.S. at 10. As the Supreme Court explained in Loving, where a statute contains such an express racial classification, "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." 388 U.S. at 8-9. In contrast, this case does not involve a racial classification.

The courts of other states have rejected the Loving analogy and the argument that a marriage statute that restricts marriage to one man and one woman discriminates on the basis of gender. See Lewis v. Harris, 2003 WL 23191114 at *20-21, aff'd, 875 A.2d 259 (rejecting the applicability of Loving and applying rational basis scrutiny to New Jersey marriage statute after noting that state constitution did not outlaw statutory classifications based on sexual orientation); Morrison v. Sadler, 2003 WL 23119998 at

*4-5, aff'd, 821 N.E.2d 15 (rejecting the Loving analogy because "[u]nlike anti-miscegenation laws, restrictions against same-sex marriage reinforce, rather than disrupt, the traditional understanding of marriage as a unique relationship between a woman and a man"); Baker v. Vermont, 170 Vt. at 215 n.13, 744 A.2d at 880 n.13 (holding that Vermont marriage laws did not discriminate on the basis of gender because they prohibited men and women equally from marrying a person of the same gender and therefore were not subject to heightened scrutiny); Dean v. District of Columbia, 653 A.2d at 363 n.2 (rejecting sex discrimination argument because marriage statute applies equally to men and women); Singer v. Hara, 11 Wn. App. at 252-255, 522 P.2d at 1191-92 (holding that Washington statutory prohibition of same-sex marriage does not violate equal rights amendment to state constitution or the federal constitution because appellants were not being denied entry into the marriage relationship because of their gender, but because their relationship did not comport with the definition of marriage as one between members of opposite sexes); Baker v. Nelson, 291 Minn. at 315, 191 N.W.2d at 187 (distinguishing Loving on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex"). But see Baehr v. Lewin, 74 Haw. 530, 572, 852 P.2d 44, 64 (Haw. 1993) (holding that Hawaii marriage statute establishes a gender-based

classification and discriminates against a suspect class and therefore is subject to strict scrutiny). This Court should follow this great weight of authority, reject plaintiffs' Loving analogy, and hold that the D.R.L. does not contain a gender-based classification.

3. Granting Marriage Licenses Only to Opposite-Sex Couples Is Rationally Related to the State's Legitimate Interests.

Finally, the Legislature's decision to allow marriage licenses to issue only to opposite-sex couples readily passes the rational basis test. New York's marriage licensing scheme, insofar as it authorizes the issuance of marriage licenses only to opposite-sex couples, preserves the long-standing cultural and legal definition of marriage as a union between one man and one woman with the potential for procreation. It also reflects the reality that "same-sex marriages" and "opposite-sex marriages" have a very different legal status under federal law and the laws of the vast majority of states. Thus, it avoids, inter alia, issuing licenses that would give the misleading impression that same-sex married couples would uniformly have the same rights as opposite-sex married couples. Because plaintiffs have not negated "every conceivable basis which might support [the Legislature's marriage scheme]," Affronti v. Crosson, 95 N.Y.2d 713, 719 (2001), cert. denied, 534 U.S. 826 (2001) (internal citation omitted), their equal protection challenge should fail.

The rational basis standard of review is "a paradigm of judicial restraint." Affronti, 95 N.Y.2d at 716. Under such 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 (2000) (internal quotation 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, 320-21 (1993) (internal quotation omitted); see also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (challenger must persuade the court that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker" [internal quotation omitted]). Indeed, with respect to an equal protection challenge to a state statute, "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." Affronti, 95 N.Y.2d at 719 (internal quotation omitted). Courts may hypothesize the Legislature's motivation or possible

legitimate purpose. See Port Jefferson Health Care Facility v. Wing, 94 N.Y.2d 284, 291 (1999), cert. denied, 530 U.S. 1276 (2000). The Legislature, in creating a classification, "need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. at 290 (quoting Heller v. Doe, 509 U.S. at 320).

Plaintiffs have not met their burden of negating every conceivable rational basis for a legislative scheme that limits the issuance of marriage licenses only to opposite-sex couples. Indeed, the State continues to have legitimate interests in restricting the issuance of a marriage license to opposite-sex couples, all of which plaintiffs fail to negate in their submissions.

First, New York's marriage licensing scheme comports with the current legal landscape nationwide, under which the federal government and at least 44 states deny legal effect to same-sex marriages. Under the laws of the United States and most states, opposite-sex married couples have a unique legal relationship. Federal law confers a host of rights and benefits on married opposite-sex couples, including income, gift and estate tax benefits, Social Security benefits, immigration rights, and

health care and nursing home benefits. See Report of the United States General Accounting Office, GAO/OGC-97-16, Defense of Marriage Act, January 31, 1997 (http://www.gao.gov/archive/1997/og97016.pdf); Report of United States General Accounting Office, GAO-04-353R, Defense of Marriage Act: Update to Prior Report, February 24, 2004 (http://www.gao.gov/atext/d04353r.txt).

The federal Defense of Marriage Act ("DOMA") (Pub. L. 104-109, 110 Stat. 2419), enacted in 1996, eliminates the possibility that any of these rights would be available to same-sex couples even if they could acquire a marriage license in New York. DOMA states that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. DOMA also provides that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect [under the Full Faith and Credit Clause of the United States Constitution] to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State,

territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C.

Thus, the federal government does not recognize same-sex marriage, and DOMA provides that the states are not obliged to do so by any act of the federal government or any other state. As of today, at least 44 states (though not New York) have enacted legislation in the form of "mini-DOMAs" or have amended their state constitutions either to prohibit same-sex marriages, to deny recognition to marriages between same-sex couples, or both.[4] Consequently, a same-sex couple married in New York probably would not have access to the benefits available to opposite-sex married couples in those states or from the federal government, regardless of what this Court determines.[5] Moreover, that same-sex couple might not have access to a state court to obtain a

[4] Those states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

[5] This is not to suggest that the Legislature cannot confer some or all of the benefits, rights and duties accorded married opposite-sex couples under state law upon same-sex unions. Rather, the Department's position is that it is rational, and therefore constitutional, for the Legislature to determine that those benefits, rights and duties should not be conferred upon same-sex couples based on the issuance of a "marriage license." The decision to extend any or all of the rights and benefits associated with marriage simply is a task for the Legislature, not the courts.

divorce, a separation or related support and custody orders. See Hennefeld v. O'Dell, 22 N.J. Tax 166 (Tax Ct. N.J. 2005); Lane v. Albanese, 2005 Conn. Super. LEXIS 759 (Conn. Super. Ct. 2005); Rosengarten v. Downes, 71 Conn. App. 372, 802 A.2d 170 (Conn. App. Ct. 2002); Burns v. Burns, 253 Ga. App. 600, 560 S.E.2d 47 (Ga. App. 2002).

These substantive differences in legal status make it rational to call the license issued to opposite-sex couples alone a "marriage license." The terminology reflects the reality that the legal status of same-sex couples differs from that of opposite-sex married couples. See Opinions of the Justices of the Supreme Judicial Court of Massachusetts to the Senate, 440 Mass. 1201, 1213-1218, 802 N.E.2d 565, 574-78 (2004) (Opinion of Justice Martha B. Sosman) (addressing the constitutionality of a proposed bill providing for the establishment of "civil unions" for same-sex couples in Massachusetts).

Second, the State has a legitimate interest in preserving the historic legal and cultural understanding of marriage. Plaintiffs have mischaracterized both the Department's position and the realities of opposite-sex marriage in our history, tradition and culture. Opposite-sex marriages have been recognized to provide long-standing societal benefits.

The United States Supreme Court has long recognized the importance of the legal institution of marriage in fostering

significant state interests. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Supreme Court invalidated a law authorizing sterilization of habitual criminals, stating that "marriage and procreation are fundamental to the very existence and survival of the race." Id. at 541. The Court repeated this statement 25 years later, in its landmark right to marry case, Loving v. Virginia, 388 U.S. 1, 12 (1967); see also Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (linking marriage and procreation).

Similarly, New York courts have consistently recognized the significance of the tradition of heterosexual marriage as a social institution in which procreation occurs. See Matter of Cooper v. Kelly, 187 A.D.2d at 133 (referring to "'[t]he institution of marriage as a union of man and woman,'" (quoting Baker v. Nelson, 291 Minn. at 312, 191 N.W.2d at 186)); Kane, slip op. at 8; Seymour, 7 Misc. 3d at 536; Shields, 5 Misc. 3d at 907 (referring to the "historic institution of marriage as a union of man and woman, which, in turn, uniquely fosters procreation"); Storrs v. Holcomb, 168 Misc. 2d at 900 ("The long tradition of marriage, understood as the union of male and female, testifies to a . . . political, cultural, religious and legal consensus" that denying a marriage license to a same-sex couple does not destroy a fundamental right).[6]

[6] The decisions of the Town of New Paltz Town Justices in People v. West, 4 Misc. 3d 605 (Justice Ct. Town of New Paltz 2004), and People v. Greenleaf, 5 Misc. 3d 337 (Justice Ct. Town of

As stated by the lower court in Matter of Cooper, 149 Misc. 2d at 287, "the State has a compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or in nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values." See also Lawrence v. Texas, 539 U.S. at

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New Paltz 2004), addressing the constitutionality of New York State's marriage licensing scheme are not apposite for several reasons. Those cases involved criminal prosecutions of a mayor (West) and two members of the clergy (Greenleaf) charged with violations of D.R.L. § 17 for solemnizing same-sex marriages without marriage licenses. The criminal courts dismissed the proceedings against the defendants on the ground that the marriage licensing provisions of the D.R.L. were unconstitutional as applied because they had the effect of prohibiting the marriage of same-sex couples. None of those couples, however, were before the court. Moreover, the prosecutor in those proceedings urged that there was no need for the courts to address the constitutional issues in light of the plain language of D.R.L. § 17. On appeal, the Ulster County Court reversed the decision and order in West, holding that the mayor had a duty to uphold the current marriage licensing provisions of the D.R.L. and could not ignore them based merely on a personal opinion that they were unconstitutional. People v. West, No. 20-04 (Ulster County Ct. February 2, 2005). The court also held that the mayor did not have standing to assert a constitutional challenge to the D.R.L. on behalf of same-sex couples. The Ulster County District Attorney recently announced that he was dropping the criminal charges against the mayor and the clergy. However, Mayor West and other Village of New Paltz officials are subject to a permanent injunction precluding them from solemnizing marriages without a duly issued marriage license by a city or town clerk. See Hebel v. West, No. 04-0642 (Ulster Co. Sup. Ct., Kavanagh, J., June 7, 2004); Hebel v. Village of New Paltz, et al., No. 04-1915 (Ulster Co. Sup. Ct., November 30, 2004). Both Hebel cases are currently on appeal to the Third Department. Oral argument is scheduled for September 12, 2005.

585 (O'Connor, J., concurring) (describing "preserving the traditional institution of marriage" as a legitimate state interest); Morrison v. Sadler, 821 N.E.2d at 23-27; Standhardt v. Superior Court, 77 P.3d at 461-464; Lewis v. Harris, 2003 WL 23191114 at *26, aff'd, 875 A.2d 259 ("The State's interest in preserving the long-accepted definition of marriage . . . is substantial. . . . The institution of marriage has played a unique role in the formation of our society. Its status as the union of people of different genders has remained unchanged throughout history.").

The State's interest in preserving the traditional definition of marriage cannot be equated with moral disapproval of homosexuality. The morality of homosexual conduct and same-sex relationships is not at issue here. This case is thus very different from Lawrence v. Texas, 539 U.S. 538, in which the State of Texas asserted that moral disapproval, standing alone, was a legitimate state interest justifying a statute that banned homosexual sodomy. The Supreme Court rejected this argument, holding that the statute violated the Due Process Clause because it did not further any "legitimate state interest which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578. The Court, however, clearly limited the reach of its holding by stating that it did not involve the question "whether the government must give formal

recognition to any relationship that homosexual persons seek to enter." Id.. Justice O'Connor, in her concurring opinion, also was careful to point out that the Court's holding did not extend to other laws that distinguished between heterosexuals and homosexuals:

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations--the asserted state interest in this case--other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

539 U.S. at 585 (emphasis supplied). By comparison, as Justice O'Connor's concurrence suggests, a legitimate interest does exist in continuing to restrict use of the traditional label "marriage license" to licenses issued to opposite-sex couples.

Moreover, the mere fact that plaintiffs could derive economic benefits, should the definition of civil marriage in New York be changed to encompass them, does not provide a basis for striking down the statute. Under the rational basis test, a classification "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" Goodwin v. Perales, 88 N.Y.2d 383, 398 (1996), quoting Dandridge v.

Williams, 397 U.S. 471, 485 (1970); see also Heller v. Doe, 509 U.S. at 321 (same). See Standhardt v. Superior Court, 206 Ariz. at 287-288, 77 P.3d at 462-63; Baker v. Vermont, 170 Vt. at 219, 744 A.2d at 882 ("It is, of course, well settled that statutes are not necessarily unconstitutional because they fail to extend legal protection to all who are similarly situated."). Perhaps, with respect to same-sex marriage, the line could be drawn differently. That, however, is for the Legislature to decide, because rational reasons exist for the line as currently drawn, see FCC v. Beach Communications, Inc., 508 U.S. 307, 313-16 (1993), and because the formulation of social policy and its enactment into law are matters for the legislative branch of government, not the courts.

Finally, the statutory marriage scheme in the D.R.L. is not impermissibly underinclusive simply because, as plaintiffs urge, "[p]eople who marry often do not procreate, people who cannot procreate may nevertheless marry, many people (both straight and gay) procreate outside of marriage, and many people in same-sex couples have biological children" (Plaintiffs' Brief, p. 39). That the State's generalization proves to be an inadequate proxy in any individual case is irrelevant. "[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" Massachusetts Bd. of Retirement v. Murgia, 427 U.S.

307, 316 (1976) (quoting Dandridge v. Williams, 397 U.S. at 485); accord Goodwin v. Perales, 88 N.Y.2d at 398.

4. Precedents From Other State Courts Are Unpersuasive in This Case.

As demonstrated above, plaintiffs' equal protection claims fail in light of well-settled precedent established in the courts of this State and other states, and in the Supreme Court of the United States. While a few precedents from sister states have departed from established equal protection doctrine, those cases are distinguishable or wrongly decided. For example, Baker v. Vermont, 170 Vt. 194, 744 A.2d 864 (Vt. 1999), which held that Vermont was constitutionally required to extend to same-sex couples the benefits and protections that flow from marriage under state law, is of no utility here, for several reasons. First, the Vermont court based its decision not on the equal protection or due process clauses, but on the unique "Common Benefits Clause" of the Vermont Constitution. The Common Benefits Clause provides, in pertinent part, "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." Vt. Const., ch. I, art. 7. The Vermont court noted that the Common Benefits Clause was adopted nearly a century

before the federal government adopted the Equal Protection Clause of the Fourteenth Amendment and that the state provision "differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development." Baker, 170 Vt. at 202, 744 A.2d at 870.

Second, the framework for analyzing constitutional challenges under the Common Benefits Clause is very different from the framework for analyzing equal protection challenges in New York. Under the Common Benefits Clause, there is no presumption in favor of the constitutionality of the statute. Rather, there is a core presumption of inclusion of all members of the Vermont community in the provision of protections, benefits and security of a challenged law. Baker, 170 Vt. at 214, 744 A.2d at 879. Moreover, Common Benefits Clause analysis does not follow the traditional three-tiered scrutiny applicable to equal protection claims. 170 Vt. at 212, 744 A.2d at 878. Instead, the court determines what part of the community is disadvantaged by the law and then examines whether the classification is reasonably necessary to accomplish the State's claimed objectives. Id..

Third, in the end, the court did not order Vermont to make marriage licenses available to same-sex couples. Rather, the court left the ultimate remedy to the legislature, which opted

instead to require that same-sex couples be entitled to enter into civil unions. 15 Vt. Stat. Ann. §§ 1201-1207.

Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Haw. 1993) held -- contrary to the great weight of authority -- that the Hawaii marriage statute "establishes a sex-based classification." 74 Haw. at 572, 852 P.2d at 64. The court held that "sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution[,]" and that a strict scrutiny test rather than the rational basis test applied. 74 Haw. at 580, 852 P.2d at 67. (Thus, as a matter of Hawaii law, the court applied a test even more rigorous than the intermediate heightened-scrutiny applied to sex-based classifications pursuant to the federal Equal Protection Clause.) On remand, the trial court applied strict scrutiny and found that the statute violated the Hawaii Constitution's equal protection clause. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. December 3, 1996).

Baehr is inapplicable here because it rests on the false premise that a statute prohibiting same-sex marriage discriminates on the basis of gender. As demonstrated above, the D.R.L. does not discriminate on the basis of gender, and is therefore not subject to heightened scrutiny.

This leaves Goodridge v. Dep't of Public Health, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003) -- the only case to hold a one-man, one-woman marriage statute unconstitutional pursuant to the rational basis test. The Massachusetts court's decision in Goodridge, however, is not persuasive. Goodridge was decided under the due process and equal protection clauses of the Massachusetts Constitution, which the Massachusetts courts long ago held to be broader than the federal Equal Protection Clause. 440 Mass. at 328 & n.18, 798 N.E.2d at 959 & n.18. In New York, by contrast, the Court of Appeals has established an "equation" between the federal Equal Protection Clause and the New York Equal Protection Clause. See, e.g., Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d at 360 n.6.

Furthermore, in Goodridge, the court expressly acknowledged that it applied its own state-law version of the rational basis test. See 440 Mass. at 340, 798 N.E.2d at 967. Indeed, the decision turns the traditional rational basis test on its head. As demonstrated in the dissenting opinions in that case, the bare majority in Goodridge ignored several core principles of the rational basis test -- that the statute is strongly presumed valid, that the burden rests on the party who challenges the statute and that the statute must be upheld where, as here, the evidence offered by the challenging party is debatable. In such

circumstances, the choice to change the law is left to the Legislature.

POINT II

GRANTING MARRIAGE LICENSES ONLY TO OPPOSITE-SEX COUPLES DOES NOT OFFEND THE STATE CONSTITUTION'S FREE SPEECH CLAUSE

The marriage licensing provisions in the D.R.L. do not burden the right to free expression protected by article I, section 8 of the New York Constitution.[7] According to plaintiffs, the D.R.L. implicates free-speech protection by placing "restrictions" on and providing "differential access to the expressive opportunities presented by the institution of civil marriage" (Plaintiffs' Brief, pp. 60, 63). But marriage is not speech. It is a legal status. As provided by the D.R.L., it is "a civil contract." D.R.L. § 10. It requires no particular form of words. See D.R.L. § 12 ("[n]o particular form or ceremony is required when a marriage is solemnized . . . but the parties must solemnly declare . . . that they take each other as husband and wife"). The D.R.L. does not prohibit same-sex couples from speaking or writing whatever they may chose to say

[7] Article I, section 8 provides, in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . . ."

about their relationships. What is denied to plaintiffs is a legal status, not speech, and this denial cannot be recast as a prohibition on speech in order to give them more protection than the Constitution otherwise offers.

Plaintiffs' argument is quite novel. The only court to have addressed such an argument rejected it out of hand. See Goodridge v. Department of Public Health, 14 Mass. L. Rep. 591, 2002 Mass. Super. LEXIS 153 (Sup. Ct. Mass. Suffolk 2002), vacated on other grounds and remanded, 440 Mass. 309, 798 N.E.2d 941 (2003). For the proposition that marriage is entitled to protection as speech, plaintiffs rely on Turner v. Safley, 482 U.S. 78, 95 (1987), in which the Supreme Court, reciting the reasons that prison inmates retain a constitutional "right to marry" subject to due process protections, acknowledged that one "attribut[e] of marriage" is that it is an "express[ion] of emotional support and public commitment." The Court did not, however, scrutinize the marriage prohibition at issue in Turner in terms of its restriction of speech, even though the other prison regulation involved in the case implicated and was discussed in terms of the First Amendment. See Turner, 482 U.S. at 92-93.

Indeed, the Supreme Court has expressly warned against treating conduct as "speech" subject to the enlarged protections of the First Amendment. The Court has rejected the "view that an

apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968). "It is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." City of Dallas v. Stanglin, 490 U.S. 19, 25-26 (1989). Thus, if plaintiffs' argument is correct, it is difficult to conceive of conduct that would fall outside the scope of first amendment protection. Even Professor David Cruz, the author of the law review article on which plaintiffs rely, recognizes this "floodgate problem." Cruz, "Just Don't Call it Marriage: The First Amendment and Marriage as an Expressive Resource," 74 S. Cal. L. Rev. 925, 975-979 (2001).

Even if entry into marriage has an expressive component, New York's prohibition of same-sex marriage does not infringe free-speech protections. Under both the state and federal constitutions, expressive conduct "may be regulated, or even prohibited, 'if [the regulation] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no

greater than is essential to the furtherance of that interest.'" People v. Hollman, 68 N.Y.2d 202, 207 (1986) (quoting United States v. O'Brien, 391 U.S. at 377)).

The prohibition against same-sex marriage readily passes this test. Regulation of marriage is concededly within the Legislature's constitutional powers and, as discussed above, the restriction of marriage to opposite-sex couples furthers important governmental interests. These interests are, moreover, entirely unrelated to the suppression of free expression. The State is concerned with recognizing the reality that, under federal law and the laws of most states, the legal status of same-sex couples differs from that of opposite-sex couples. It also seeks to preserve the historic legal and cultural understanding of marriage. These interests are not immune from –- although, as noted above, they withstand –- constitutional scrutiny. But they have nothing to do with the suppression of speech.

Plaintiffs' reliance on the Supreme Court's "public forum" doctrine in attacking the D.R.L. (Plaintiffs' Brief, pp. 62-64) is also misplaced. A public forum is a place or a means through which speech can occur. It is true, as plaintiffs note, that a forum need not be "spatial or geographic," see Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 830 (1995) (university "student activities fund" used to finance

expressive activities was public forum). But the forum in which speech occurs and the speech itself are different. Thus, marriage cannot be both expressive conduct, as plaintiffs argue it is, as well as the medium through which expression occurs. And if it is not such a medium, then public forum analysis does not apply.

CONCLUSION

The existing D.R.L. marriage provisions are consistent with the State's legitimate interests in promoting consistency in national marriage laws and preserving the historic legal and cultural understanding of marriage. Certainly, New York's Legislature, Executive, and municipalities have taken significant action to address discrimination based on sexual orientation and have accorded many benefits to same-sex couples and their families. However, this demonstrated ability to change the law suggests that the question of same-sex marriage and the needs of committed same-sex couples should be left to the political arena, where all interested parties can have a full and fair opportunity to argue their respective positions. And of course, debate in the Legislature -- as distinct from litigation in a court -- may lead to compromise. The Legislature need not, and often does not, decide controversial matters of social policy in the all-or-nothing way that courts decide cases. See Montgomery v. Daniels,

38 N.Y.2d 41, 62 (1975) (“[I]n enacting reform, the Legislature is entitled to proceed one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”) (internal quotation omitted). It may choose to confer some or all of the benefits associated with marriage on same-sex couples, but it is not compelled to do so. There is therefore every reason for this Court to exercise judicial restraint here and leave the resolution of this important issue to the State Legislature. This Court should thus affirm the order of the court below.

Dated: Albany, New York
August 19, 2005

Respectfully submitted,

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