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February 3, 2005

By Hand

Mr. Stuart M. Cohen, Esq.
Clerk of the Court
New York State Court of Appeals
11 Eagle Street
Albany, New York 12207-1095

Samuels and Gallagher, et al. v. New York State Dep't of Health, et. al.
Albany County Clerk's Index No. 04-1967

Dear Mr. Cohen:

We represent the Plaintiffs-Appellants in the above-referenced matter. In response to your letter dated January 25, 2005 (the "January 25 letter"), we write to confirm that we wish to pursue this direct appeal pursuant to N.Y. Const., Art. VI, § 3(b)(2) and CPLR § 5601(b)(2). We set forth below the reasons why we respectfully submit that the Court of Appeals should retain subject matter jurisdiction over this appeal.

* * *

CPLR § 5601(b)(2) provides that an appeal may be taken to the Court of Appeals as of right "from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the

state or of the United States." As we demonstrate below, this appeal satisfies every one of the elements for direct appeal set forth in CPLR § 5601(b)(2). Accordingly, jurisdiction in the Court of Appeals is proper at this stage in the proceedings.

The Only Questions Involved On This Appeal Are the Validity of New York Statutory Provisions Under the Constitution of the State of New York

Plaintiffs-Appellants in this action are thirteen same-sex couples who seek the protections and obligations provided by civil marriage under the laws of the State of New York. However, the Domestic Relations Law (the "DRL") does not permit them to obtain those benefits because the statute permits civil marriage only between a man and a woman. *See* Opinion of the New York Attorney General, No. 2004-1, dated March 3, 2004, at 4-7; *see also, e.g.,* DRL § 15(1)(a) (requiring the provision of information from the "bride" and "groom"); *id.* § 12 (requiring parties to a marriage to declare that they take one another as "husband" and "wife"). The Defendants-Respondents have admitted as much in their Answer to the Complaint, in which they aver that "the Domestic Relations Law does not permit marriage licenses to be issued to same-sex couples in New York State." (JA 34)[1]

Accordingly, Plaintiffs-Appellants have brought a constitutional challenge—and only a constitutional challenge—to the provisions of the Domestic Relations Law that prohibit them from obtaining the protections and obligations afforded by civil marriage. Specifically, Plaintiffs-Appellants bring claims under Article I, §§ 6, 8, and 11 of the New York State Constitution. (JA 27-29) Plaintiffs-Appellants bring no other claims. In point of fact, the only relief sought by Plaintiffs-Appellants, aside from their costs, is a declaration that "the provisions of the Domestic Relations Law that prohibit same-sex marriage are invalid under the Constitution of this State." (JA 30) There are no questions of statutory construction presented by this case.[2] Nor does this case present any ancillary or procedural issues aside from the merits, which, as noted

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[1] Materials from the record below requested by the January 25 letter are submitted concurrently herewith in a volume entitled "Plaintiffs-Appellants' Jurisdictional Appendix" and are paginated with the prefix "JA".

[2] Because some have expressed the view that the DRL might be read to permit civil marriage between same-sex couples, it might be argued that this case involves a question of statutory construction. The case before this Court involves no such question, however. For one, the Defendants-Respondents have themselves agreed that the DRL does not permit civil marriage of same-sex couples. *See* Opinion of the New York Attorney General, No. 2004-01, dated March 3, 2004, at 4-7. And the trial court did not address the scope of the DRL, either. Moreover, it would be improper to conclude counsel should have asserted arguments that they believe lack merit. Every one of the claims that are *actually* in this case—which are and should be the sole focus of the jurisdictional inquiry—are purely constitutional ones. Accordingly, jurisdiction in the Court of Appeals is proper.

above, are limited to purely questions of constitutional interpretation. *See Merced* v. *Fisher*, 38 N.Y.2d 557, 558 (1976) (per curiam) (rejecting direct appeal because "in addition to the constitutionality of the statute, there is a procedural question.").

Given the claims asserted and the relief sought, the only questions addressed by the Supreme Court, Albany County involved the constitutionality of the DRL. The trial court, in denying Plaintiffs-Appellants' motion for summary judgment, and simultaneously granting Defendants-Respondents' cross-motion for summary judgment, considered the constitutionality of the DRL under the Equal Protection, Due Process and Free Expression Clauses of the State Constitution. (JA 221-29) The lower court did not (and could not have) addressed any other questions, and indeed none were raised by the parties or *amici*. *See Valz* v. *Sheepshead Bay Bungalow Corp.*, 249 N.Y. 122 (1928) (where the court below "did not and could not" resolve the case on non-constitutional grounds, a direct appeal is appropriate.).

This action is thus appropriately appealed to the Court of Appeals pursuant to the right to direct appeal set forth in Article VI, § 3(b)(2) of the New York Constitution, and codified in CPLR § 5601(b)(2), because it "directly and primarily [involves] an issue determinable only by our construction of the Constitution of the state or of the United States." *Board of Educ. of Monroe-Woodbury Central Sch. Dist.* v. *Wieder*, 72 N.Y.2d 174, 182 (1988) (citations omitted); *see also A.E. Nettleton Co.* v. *Diamond*, 27 N.Y.2d 182 (1970) (direct appeal was appropriate where a state statute was challenged under two different provisions of the United States Constitution, and on no other grounds.).

The Constitutional Questions Raised By This Appeal Are Substantial Ones

The constitutionality of the prohibition of same-sex marriage in the DRL are also constitutional questions that are "substantial" under any definition of that term. *See, e.g., Gerzof* v. *Gulota*, 40 N.Y.2d 825 (1976) (transferring appeal to the Appellate Division, Second Department, because the appeal did not present a "substantial" constitutional question). The resolution of this appeal will affect the rights and privileges of many thousands of same-sex couples in committed relationships across this state. Moreover, there are hundreds of statutory provisions in New York law that provide protections based on marital status; the definition of who may be civilly married thus carries with it tremendous consequences for committed same-sex couples, reaching into the realms of survivorship benefits, healthcare benefits, property distribution, and many other areas.

The constitutional issues presented by this appeal are also "substantial" in that they implicate the most fundamental guarantees of the State Constitution, those of due process, equal protection, and free expression. Moreover, there is plainly substantial ground for disagreement as to the merits of the constitutional questions involved. *See* Opinion of the New York Attorney General, No. 2004-1, dated March 3, 2004, at 9

(opining that "[t]he question whether the DRL authorizes or permits same-sex marriage must be analyzed in light of an ongoing and rapidly shifting debate about whether it is constitutional to deny eligibility for marital status to same-sex couples," and noting that the denial of marriage licenses to same-sex couples "raises constitutional concerns."). Indeed, the constitutionality of the DRL's prohibition of same-sex civil marriage has split the lower courts in New York. *Compare, e.g., People* v. *Greenleaf,* 5 Misc. 3d 337 (New Paltz Just. Ct. 2004) (dismissing criminal prosecution for the solemnization of same-sex marriages prohibited by the DRL, because the prohibition of the issuance of marriage licenses to same-sex couples violates the constitutional guarantee of equal protection of the laws) *with Samuels and Gallagher, et al.* v. *New York State Dep't of Health, et al.*, Decision and Order dated December 7, 2004, at 4-7 (JA 226-28) (holding that the prohibition on same-sex marriage does not violate the Equal Protection Clause of the New York Constitution). *See also* Karger, The Powers of the New York Court of Appeals, § 37(c) (3d ed. 1997) (discussing the "substantial question" requirement).

This Appeal Is Taken From A Court of Record of Original Instance From A Judgment That Finally Determined This Action

Finally, there can be no doubt that the Decision and Order below was from the proper court and "finally determined" this action. This action was originally filed in Supreme Court, Albany County; that court is therefore the court of "original instance," as well as a "court of record," as provided by Article II, Section 2 of the New York Judiciary Law.

Moreover, as noted above, the only relief sought by Plaintiffs-Appellants was a declaration that the DRL's prohibition of same-sex civil marriage is unconstitutional. In its Decision and Order, the Supreme Court held that that the DRL "is declared constitutional." *Id.* Accordingly, there remain no issues in the case that have not been finally determined by the court below. *See Gaudette* v. *Gaudette*, 89 N.Y.2d 1023, 1024-25 (1997) (rejecting direct appeal because a portion of the order below did not finally determine the action.).[3]

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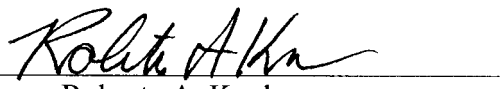
[3] The Supreme Court, Albany County, issued both a Decision and Order awarding summary judgment to the Defendants-Respondents (JA 221-29), as well as a Judgment that recorded the judgment announced in the Decision and Order. (JA 245-46) As we explained to your office in response to a a telephone call from Ms. Susan Dautel on Friday, January 28, 2005, because the Judgment was issued after the thirty-day period for appeal of the Decision and Order had already expired, in an abundance of caution, we also filed a Notice of Appeal from the Judgment (JA 247-61), even though we had already timely filed a Notice of Appeal of the Decision and Order (JA-230-44), in order to be sure that Plaintiffs-Appellants had appealed the proper order. Plainly, either order "finally determined" the action below, and Plaintiffs-Appellants will voluntarily dismiss one or the other appeal, at the Court's instruction.

* * *

Please let us know if we can provide any further assistance with the Court's jurisdictional inquiry in this matter.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: 

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Enclosures