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 HARNG 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

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs respectfully submit this memorandum of law in further support of their motion for summary judgment, and in opposition to the State's cross-motion for summary judgment.

Preliminary Statement

There is no dispute in this case that in many different areas of everyday life same-sex couples in New York are at a very real and severe disadvantage because they cannot receive the practical, financial and emotional benefits of civil marriage. The State's brief in opposition to plaintiffs' motion for summary judgment, however, is perhaps most notable for the fact that it fails to discuss, much less grapple with, the concrete harms that result from the State's discrimination in marriage.

The Attorney General, for example, does not attempt to explain (presumably because he cannot) why preventing plaintiff Sylvia Samuels from marrying her life partner, Diane Gallagher, and thereby precluding them from obtaining health care coverage for Diane through Sylvia's employer, satisfies the Equal Protection or Due Process Clauses of the New York Constitution. Nor does the State offer a word of explanation for why it is constitutional to deprive Sylvia of the right of a spouse to make critical medical decisions on behalf of Diane. The State does not point to a single legitimate governmental interest (much less a compelling one) that is being served by excluding Sylvia and Diane from marriage and the health care rights and privileges that are afforded to married couples in this State.

Similarly, the State does not offer any justification whatsoever for the constitutionality of preventing plaintiffs Regina Cicchetti and Susan Zimmer from marrying and gaining the financial benefits of joint home ownership as a married couple. The Attorney General does not explain what the State's interest is in excluding plaintiffs John Wessel and Billy O'Connor from marriage and thereby requiring them to pay substantially higher

inheritance taxes than a married couple does simply because they are gay. The State does not articulate any compelling reason why plaintiff Paul Muhonen should be precluded from marrying his partner, Michael Hahn, and thereby gaining the right – now denied to him – to take family leave from his job in case he and Michael need to care for Michael's elderly parents in Florida.

In short, the State offers no compelling or even legitimate goal that is achieved by withholding marriage from plaintiffs and thereby depriving them of these very real protections. As we demonstrated in our moving brief, and as the State does not contest here, the definition of marriage in the Domestic Relations Law ("DRL") has far-reaching consequences for hundreds of State statutes that affect rights, privileges and obligations ranging from child rearing and health care to real estate and survivorship. (*See* Affirmation of Roberta A. Kaplan dated August 16, 2004 (hereinafter "Kaplan Aff."), Ex. A) (listing a selection of statutes that apportion rights and privileges based on one's marital status).

Rather than addressing these serious issues, the Attorney General's brief instead boils down to what can be characterized as a single refrain: that near-total deference should be paid to the DRL's marriage provisions and that judicial review of the marriage statute would "usurp" the legislative function. (Def. Br. at 2.) This argument ignores not only the realities of the lives of these plaintiffs and thousands of other gay and lesbian New Yorkers like them, but disregards one of the most fundamental principles of our form of government, our history and our tradition. It has been the law since at least Chief Justice Marshall's statement in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), two centuries ago that it is the primary duty *of the courts,* not the Legislature or the Attorney General, to review legislative enactments for compliance with the Constitution. The State

gives no reason for this Court to abdicate its constitutionally mandated function of judicial review here.

Indeed, far from deference, what is required in this case is the most searching judicial scrutiny possible because the statute at issue involves an unquestionably fundamental right – marriage – and categorizes New Yorkers along lines that are rarely proper reasons for government decision-making – namely, sexual orientation and gender. Indeed, in its zeal to encourage the Court to abandon meaningful judicial review and treat the marriage statute as if it were some form of inconsequential administrative licensing scheme, the State ignores other key arguments set forth in our moving brief as well.

For instance, the State fails to address the three-part test set forth by the United States Supreme Court (and applicable in New York as well), under which we have shown that classifications based on sexual orientation meet all of the criteria for heightened judicial scrutiny. The State does not even attempt to contest that there has been a history of discrimination in New York affecting gays and lesbians, nor does it contest that sexual orientation is not a proper criterion for government decisionmaking in that it infrequently (if ever) is related to individual merit. And the State's half-hearted argument that gays and lesbians have achieved a modicum of political success in this State due to the recent enactment of certain non-discrimination laws neither rebuts the showing we have made about the failure of New York's political institutions to meaningfully include gays and lesbians, nor addresses the relevant criteria identified by the Supreme Court.

Indeed, the exclusion of gays and lesbians from marriage cannot be justified even under the lowest level of judicial scrutiny – rational basis review. Under black letter principles of equal protection analysis, it is quite clear that a classification cannot be maintained merely for its own sake – yet that is precisely what the State attempts to do here

by purporting to justify the exclusion of same-sex couples from marriage on grounds of "history" or "tradition." Nor is it rational to justify discrimination against gays and lesbians on the basis that other states discriminate: if that were the case, discrimination anywhere would be a justification for discrimination everywhere. And New York has no articulable interest in falling in line with other states simply for the sake of consistency, particularly given the undisputed fact that New York does not seek uniformity with other states in any other significant aspect of its marriage laws.

We also demonstrated in our moving brief that plaintiffs' right to marry is a fundamental right under New York's Due Process Clause. The State's rejoinder to that argument is that plaintiffs are attempting to fashion a new fundamental right to "same-sex marriage." But in point of fact, as precedent shows, the State cannot constrict the right that plaintiffs seek to vindicate – the well-established right to marry – by re-defining it in such an artificially narrow fashion. Plaintiffs' due process claim does not ask the Court to devise a new constitutional right. It merely asks this Court to do what the courts often do in deciding due process cases: to recognize that a right identified as a fundamental right cannot be denied to a particular group of citizens unless a compelling state interest – an interest which is altogether lacking here – can justify the denial of the right.

Finally, although the State derides plaintiffs' argument under the Free Expression Clause of the New York Constitution as "novel" (Def. Br. at 30), that claim is based upon a straightforward application of well-accepted principles. Most fundamentally, the State errs in asserting that marriage lacks an expressive component. If it were not obvious enough that the act of holding oneself out as married is expressive, the stories of these plaintiffs make clear that marital status is a unique means of expressing one person's commitment to another. The legitimacy and the dignitary benefits conferred by

communicating that message to the broader community are some of the many reasons why these plaintiffs and countless others like them seek to marry.

For the reasons set forth below, and for the reasons contained in our moving brief, plaintiffs respectfully submit that summary judgment should be entered in plaintiffs' favor.

I.

THE DRL CREATES CLASSIFICATIONS BASED ON SEXUAL ORIENTATION AND GENDER THAT MERIT HEIGHTENED JUDICIAL SCRUTINY

In our moving brief, plaintiffs demonstrated that the DRL's exclusion of gay men and lesbians from marriage required heightened judicial scrutiny for three reasons: (1) because it classifies New Yorkers based on sexual orientation; (2) because it classifies New Yorkers based on gender; and (3) because it gives same-sex couples unequal access to the fundamental right of marriage. Although we address the State's responses to each of these arguments below, it is important to note at the outset that the State's primary argument in support of the DRL's exclusion of same-sex marriages is that this Court should apply a degree of deference to the legislature that is unsupported by either precedent or logic.

Although the Attorney General repeatedly emphasizes the purported "presumption of constitutionality" that attends legislation and cites several Court of Appeals opinions observing that a challenge to a statute on constitutional grounds must be proven "beyond a reasonable doubt" (Def. Br. at 4), the Attorney General improperly expands the presumption beyond all recognition. The Court of Appeals, after all, has not hesitated to fulfill its duty to strike statutes down as unconstitutional when necessary and appropriate, most recently in a case involving the jury charge in death penalty cases. *People* v. *LaValle*, __ N.Y.2d __, 2004 N.Y. LEXIS 1575 (June 24, 2004). In response to an argument about

judicial deference in *LaValle* similar to the argument being made by the State here, the Court explained as follows: "The dissent argues that the majority is ignoring the will of the Legislature. The Court, however, plays a crucial and necessary function in our system of checks and balances. It is the responsibility of the judiciary to safeguard the rights afforded under our State Constitution." *Id.* at * 65. *See also id.* at *74 (Rosenblatt, J. concurring) ("Declaring a statute unconstitutional is not a celebratory event, but from time to time a necessary part of the judicial function and a pillar of our system of checks and balances."); *Campaign for Fiscal Equity Inc.* v. *State of New York,* 100 N.Y.2d 893, 931 (2003) (holding that level of education provided by the State did not meet constitutional standards and that courts are "well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government – not in order to make policy but in order to assure the protection of constitutional rights").

It is, of course, true that *if* the rational basis test applies to the DRL's exclusion of same-sex couples, then it is plaintiffs' burden to show that the statute violates the Constitution. But relying on cases that state this unremarkable principle, *see, e.g., Montgomery* v. *Daniels*, 38 N.Y.2d 41, 54-56 (1975) (*cited in* Def. Br. at 4), the State would have this Court believe that there is some extraordinary degree of deference that should apply to its review of the DRL here. However, no more deference to the Legislature is warranted here than in any other constitutional challenge to a legislative enactment. The question of whether heightened scrutiny applies to classifications based on sexual orientation is a purely legal question that can be answered like any other legal question, and warrants no special deference to the Legislature; it is the answer to this *legal* question that then determines what standard of review that the Court should apply.

Most importantly, if this Court concludes that the DRL classifies New York's citizens on the basis of characteristics like gender and sexual orientation that have dubious connections to government decisionmaking and have often been used as the reason to discriminate, there is, in fact, a presumption that the legislative enactment is *invalid* unless the State can summon a compelling (or at least substantial) interest for it. *See, e.g.*, *Aliessa ex rel. Fayad* v. *Novello*, 96 N.Y.2d 418, 430-36 (2001).

A. The State Fails to Rebut Plaintiffs' Showing That Classifications Based on Sexual Orientation Trigger Heightened Judicial Scrutiny

As noted above, the State has largely dodged the arguments set forth in our moving brief as to why classifications based on sexual orientation require heightened judicial scrutiny. As the Supreme Court has explained, classifications affecting a particular group should receive aggressive judicial review if that group: (1) has "experienced a history of purposeful unequal treatment;" or (2) has been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities;" or (3) has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Bd. of Retirement Sys.* v. *Murgia*, 427 U.S. 307, 313 (1976).

In our moving brief, we recounted in great detail the history of purposeful unequal treatment that has affected gay men and lesbians in New York (Pl. Br. at 18-25), and we explained that sexual orientation is so unrelated to an individual's merit or ability to contribute to society that it cannot be a valid basis for government decision-making (*id.* at 25-27). The State fails to respond to either of these arguments – not surprisingly, given the extensive record of discrimination against gay men and lesbians, and the obvious disconnect between an individual's sexual orientation and his or her ability to contribute to society.

Those uncontested showings alone are sufficient to support the conclusion that sexual orientation meets the Supreme Court's definition of a "suspect class." Significantly, when it explains what constitutes a suspect class, the Supreme Court has consistently identified the three criteria using the conjunctive "or" – never signaling that all three are necessary conditions for concluding that a classification involving a particular group is inherently suspect. *See San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973) ("[T]raditional indicia of suspectness: the class is not saddled with such disabilities, *or* subjected to such a history of purposeful unequal treatment, *or* relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.") (emphases added); *see also Murgia*, 427 U.S. at 313 (same). The New York courts have recognized this same analytical framework. *See, e.g., People* v. *Fox*, 175 Misc. 2d 333, 336-39 (Cty. Ct. 1997).[1]

The sole factor that the State does address – the ability of gay men and lesbians to obtain relief through the political process – it examines in a non-responsive way. In our moving brief, plaintiffs applied the analysis set forth by the United States Supreme Court in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), to show that the institutions of New York State – the legislature, executive and judiciary – are not open to *openly* gay men and lesbians on the same terms as they are to other groups. (Pl. Br. at 27-33.) The State replies by asserting that

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[1] If a careful reading of the Supreme Court and New York case law on this point reveals anything, it is that if any of the factors take on more significance than the others, it is the relationship between the classification itself and an individual's merit or his or her ability to contribute to society. When the Supreme Court has declined to establish a suspect class, it has typically done so not because the group in question has not faced a history of discrimination, but because the characteristic in question is in fact related to the individual's ability. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985) (mental retardation is not a suspect characteristic because the mentally retarded "have a reduced ability to cope with and function in the everyday world"); *Murgia*, 427 U.S. at 313 (age is related to ability to perform certain functions); *Fox*, 669 N.Y.S.2d at 473 (same concerning mental illness). Significantly, as noted

heightened scrutiny cannot apply because certain non-discrimination measures have recently been enacted in New York. (Def. Br. at 12-13). However, those measures, while significant, are beside the point since, as we have pointed out (Pl. Br. at 32), both race and gender were identified by the Supreme Court as suspect classifications *after* federal non-discrimination statutes were passed protecting women and racial minorities. Indeed, if anything, the record preceding the passage of the Sexual Orientation Non-Discrimination Act, 2002 N.Y. Laws ch. 2, highlights the difficulties that gay men and lesbians have had participating in the political process in this State.[2]

The only other response by the State to plaintiffs' arguments in this regard is to cite a number of cases in which courts have declined to review classifications based on sexual orientation with heightened scrutiny. However, all but one of those cases were decided before the Supreme Court's landmark overruling of *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), last year in which the Court concluded that "*Bowers* was not correct when it was decided and it is not correct today. It ought not to remain binding precedent." *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2484 (2003). *See Schroeder* v. *Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir.

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above, the State has not challenged our showing that sexual orientation is wholly unrelated to merit or one's ability to contribute to society.

[2] Although first proposed as early as 1971 and passed by the State Assembly every year since 1993, SONDA did not reach the floor of the Senate until 2002. Empire Pride State Agenda, *Sexual Orientation Non-Discrimination Act Chronology*, *at* http://www.prideagenda.org/sonda/SONDA Chronology.PDF. The history behind the Hate Crimes Act of 2000 – also cited by the Attorney General as evidence of gay men and lesbians' purported political power – similarly demonstrates that the inclusion of sexual orientation in that statute actually significantly slowed its passage due to animus towards gay men and lesbians. As one legislator noted during the Senate debate, "It's no secret that for years we could have passed a hate-crimes bill if we were willing to take out gay people, if [we] were willing to take out sexual orientation." *Hate Crimes Act: N.Y. S. Deb. Transcripts on S. 4691A*, at 4603 (2000) (New York Legislative Service, Inc. Ch. 107) (Statement of Sen. Eric Schneiderman); *id.* at 4542-43 (same) (Statement of Sen. Martin Connor). And indeed, the Hate Crimes law languished in the New York legislature because of its inclusion of sexual orientation as a protected group until public outrage at the brutal murder of Matthew Shepard in Wyoming forced the issue to the floor. *See id.* at 4533 (Statement of Sen. Roy Goodman).

2002); *Equality Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997); *Baker* v. *Vermont*, 744 A.2d 864, 878 n.10 (Vt. 1999).[3] Accordingly, the cases cited by the State (Def. Br. at 11), including the Court of Appeals' observation in 1985 that courts had declined to apply strict scrutiny to classifications based on sexual orientation, *see Under 21* v. *City of New York*, 65 N.Y.2d 344, 364 (1985), provide little, if any, support for its effort to oppose heightened scrutiny for classifications based on sexual orientation here.

B. The DRL Also Discriminates on the Basis of Gender

As discussed in plaintiffs' moving brief, New York's marriage law permits or prohibits individuals from marrying based on their gender. (Pl. Br. at 34-35.) As a result, the Court should, for this reason as well, apply heightened scrutiny in evaluating the constitutionality of New York's marriage law under this Equal Protection challenge.

In its opposition, the State argues that the DRL does not contain a discriminatory gender-based classification because it treats men and women alike and does not give any benefits or burdens to one sex and not to the other. (Def. Br. at 7.) In so arguing, the State seeks to distinguish *Loving* v. *Virginia*, 388 U.S. 1, 8 (1967), in which the Supreme Court explicitly rejected the idea that a race- or sex-based classification is not

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[3] The State also cites *Lewis* v. *Harris*, 2003 WL 2319114, at *21 (N.J. Super. Ct. Nov. 5, 2003) in which the court held that sexual orientation was not a suspect class. However, the *Lewis* court dismissed *Lawrence* in a cursory fashion without even attempting to explain why the logic of the Supreme Court's decision was inapplicable. Indeed, the entirety of the *Lewis* court's discussion of *Lawrence* is two sentences long: "Finally, the recent decision by the United States Supreme Court in *Lawrence* v. *Texas* does not alter the determination of this court. In *Lawrence,* the court held that a same-sex couple's right to liberty under the Due Process Clause gives them a right to engage in consensual sexual activity in the home without government intervention." *Id.* (citations omitted).

discriminatory merely because it applies equally to all races or all sexes.[4] But the State's argument is flawed.

The State attempts to distinguish *Loving* by arguing that the fact that *Loving* involved race rather than gender "was critically important to the Court's analysis" because the Fourteenth Amendment's proscription on state-sponsored racial discrimination meant that the Court would closely scrutinize the statute even though it applied equally to whites and non-whites. (Def. Br. at 8.) But the State misses the point: the significance of *Loving* is not the level of scrutiny that the Court applied to the racial classification in the Virginia statute; its significance is the Court's recognition that the anti-miscegenation statute contained a racial *classification* notwithstanding its "equal application" to multiple races. In *Loving*, Virginia argued that its anti-miscegenation statute was not discriminatory because it punished equally whites and non-whites who sought to enter into an interracial marriage. In rejecting Virginia's "equal application" argument, the Supreme Court relied upon *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), in which the Court held that "[j]udicial inquiry under the Equal Protection Clause...does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *Id.* at 191. And the *Loving* court concluded that "there can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race." *Loving*, 388 U.S. at 11.

Just as the Virginia statute contained a classification on the basis of race, regardless of its "equal application" to multiple races, so too does the DRL contain a

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[4] The State does not address the other Supreme Court cases cited in our moving brief that rejected the very argument that the State advances here – namely, that a race- or sex-based classification is

classification on the basis of gender, regardless of its "equal application" to both sexes. The fact that *Loving* involved a racial classification affects only the level of scrutiny invoked in the Court's equal protection analysis, not the determination of whether the statute creates a classification in the first place. That this case involves a gender classification, not a racial classification, affects only the appropriate level of scrutiny, not the determination of whether or not the DRL creates a gender classification.[5] Plaintiffs ask that the Court simply recognize that New York's marriage laws classify on the basis of gender and apply the heightened level of scrutiny appropriate under the New York Constitution.

The State also attempts to distinguish *Loving* by arguing that the racial classification there was "enacted with clear discriminatory intent" while the plaintiffs here have not shown that the marriage laws were motivated by discriminatory intent. (Def. Br. at 8.) But the State confuses discriminatory "intent" with "animus." The intent required in equal protection analysis does not equate to a showing of animus or evil motive. *See City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 494-95 (1989) (a showing of benign motive does not insulate a racial or sexual classification from equal protection scrutiny). All that is required is an intent to establish the classification. New York's DRL contains a facial gender classification and defines marriage in gender-specific terms. That facial classification alone is an intentional act for purposes of constitutional analysis.

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not discriminatory when it applies equally to all races or sexes. (Pl. Br. at 36-37)

[5] Nor does the fact that this is a gender case rather than a race case affect the rejection of the "equal application" theory. For instance, in *Califano* v. *Westcott*, 443 U.S. 76, 83-84 (1979), the Supreme Court rejected the State's argument that an unemployment benefits law did not contain a gender classification just because the "denial of aid based on the father's unemployment necessarily affects, to an equal degree, one man, one woman, and one or more children." Instead, the Court focused on the law's discriminatory effect upon mothers, holding that the law "is obviously gender biased, for it deprives [mothers] and their families of benefits solely on the basis of their sex." *Westcott*, 443 U.S. at 84.

Furthermore, the burden of justifying the statute rests entirely on the State. *See United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (holding that the burden of justification for gender-based classifications "is demanding and it rests entirely on the state."). To withstand a constitutional challenge under the heightened scrutiny that applies to gender classifications, the State bears the burden of showing that "the classification is substantially related to the achievement of an important governmental objective." *People* v. *Liberta*, 64 N.Y.2d 152, 168 (1984). The State bears the burden of showing "both the existence of an important objective and the substantial relationship between the discrimination in the statute and that objective." *Id.* Thus, it is not necessary for plaintiffs to show any *discriminatory* intent in order to prevail on their equal protection challenge to New York's marriage law.

Finally, in asserting that other state courts have rejected the argument that prohibitions on same-sex marriage constitute discrimination on the basis of gender, the State notes, citing *Morrison* v. *Sadler,* 2003 WL 23119998 (Ind. Super. Ct. May 7, 2003), that "[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 man and a woman."[6] (Def. Br. at 9.) The State's brief therefore suggests that the gender

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[6] The State argues that the "great weight of authority" rejects the *Loving* analogy and does not support a finding that the marriage statute involves gender-based classification. (Def. Br. at 9.) But the other cases the State cites in addition to *Morrison* are inapposite as well. *Lewis* v. *Harris*, 2003 WL 23191114, at *21 (N.J. Super. Ct. Nov. 5 2003), considers *Loving* in the context of sexual orientation, not gender. The Court in *Baker* v. *Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999), did not rule on the issue of sex discrimination, but rather found that sex discrimination did not provide a useful analytic framework under the Common Benefits Clause of the Vermont Constitution. *Dean* v. *District of Columbia*, 653 A.2d 307, 363 n.2 (D.C. Ct. App. 1995), based its equal protection analysis on sexual orientation, not on gender. *Singer* v. *Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974), found that there was no sex classification in the state law because appellants were not denied the right to marry on account of their sex (rather, the Court held, the appellants were denied their right to marry because the Court found that the definition of marriage permitted entry only by two persons of the opposite sex). Finally, *Baker* v. *Nelson*, 191 N.W. 185 (Sup Ct. Minn. 1971), as discussed in more detail below, was decided at a time before sex classifications received heightened scrutiny.

classification in the DRL ought to be viewed with less suspicion because it is based on a "traditional understanding" of how gender shapes familial relationships. This argument is flatly inconsistent with well-established equal protection jurisprudence. That the gender classification is based on traditional notions of the roles of men and women in society renders the law *more suspect* under the Equal Protection Clause, not less so. *See Frontiero* v. *Richardson,* 411 U.S. 677, 684-86 (1973); Pl. Br. at 51-52.

Generalizations based on gender, like those based on race, that are founded on stereotypes and prejudicial social norms are not permissible under the Equal Protection clause no matter how grounded in history such "traditional understanding[s]" may be. *See J.E.B.* v. *Alabama*, 511 U.S. 127, 135 (1994) ("This Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender." (citing *Schlesinger* v. *Ballard*, 419 U.S. 498, 506-507 (1975))); *see also id.* at 138 (courts must "not accept as a defense to gender-based [distinctions] 'the very stereotype the law condemns.'" (citing *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991))). Thus, this Court should reject the State's attempt to defend its gender-based classification by referring to traditional notions of marriage as between a man and a woman.

II.

IN ANY EVENT, THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE DOES NOT SATISFY THE RATIONAL BASIS TEST

Far from being able to pass any form of heightened judicial scrutiny, New York's exclusion of same-sex couples from marriage does not meet even the minimum requirements of equal protection. To pass rational basis analysis, "(1) the challenged action must have a legitimate purpose and (2) it must have been reasonable for the legislators to

believe that the challenged classification would have a fair and substantial relationship to that purpose." *Countryman* v. *Schmitt*, 176 Misc. 2d 736, 747 (N.Y. Sup. Ct. Monroe Cty. 1998). *See also People* v. *Liberta*, 64 N.Y.2d 152, 163 (1984) (classification "must be reasonable and must be based upon some ground of difference that rationally explains the different treatment") (internal quotation omitted); *Abrams* v. *Bronstein*, 33 N.Y.2d 488, 493 (1974).

The State offers two justifications for excluding same-sex couples from marriage in New York: (1) doing so follows a line adopted by other states and the federal government, and (2) doing so preserves the "historic legal and cultural understanding of marriage," which provides "social continuity and economic equity." (Def. Br. at 17.) Plaintiffs' opening brief outlined why these purported objectives either are not legitimate or are not rationally furthered by excluding same-sex couples from marriage. (Pl. Br. at 49-58.) The State utterly fails to respond to most of those arguments, while the responses it does offer fail to withstand scrutiny.[7]

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[7] The Attorney General makes the truly novel suggestion that the decisions of the Town Justices in *People* v. *West*, No. 04030054, 2004 N.Y. Misc. LEXIS 954 (New Paltz Just. Ct. June 10, 2004) and *People* v. *Greenleaf*, No. 04030294, 2004 N.Y. Misc. LEXIS 1121 (New Paltz Just. Ct. July 13, 2004) should not be followed because those cases involved criminal prosecutions, whereas plaintiffs here seek declaratory and injunctive relief. (Def. Br. at 25 n. 7) Those cases held New York State's marriage statute unconstitutional, finding that it denies same-sex couples the right to marry without any rational basis. Constitutional adjudication in the context of criminal prosecutions has formed the backbone of constitutional jurisprudence. Such widely-cited constitutional cases as *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (ordering reversal of aiding-and-abetting convictions of medical and family planning providers for being accessories to contraception-use crime, on Substantive Due Process grounds), *Loving* v. *Virginia*, 388 U.S. 1 (1967) (ordering reversal of criminal convictions for violating Virginia anti-miscegenation statute, on Equal Protection grounds), *Lawrence* v. *Texas*, 123 S. Ct. 2472 (2003) (ordering reversal of conviction under Texas criminal sodomy statute, on Substantive Due Process grounds), and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (ordering reversal of conviction for teaching German to a child who had not completed the eighth grade, on Substantive Due Process grounds) involved the adjudication of the constitutionality of a law in the context of a criminal prosecution. The State also appears to suggest that *West* and *Greenleaf* were decided incorrectly because the defendants in those cases did not have standing to challenge the constitutionality of the DRL scheme as it affects same-sex couples, who were not before the court. However, a party unquestionably has standing to challenge the constitutionality of the law on which his or her own criminal prosecution is based. *See, e.g., Griswold*, 381 U.S. at 481.

A. "Everyone Else Does It"

The State asserts that excluding same-sex couples from marriage is "rational" because it "reflects the reality that the legal status of same-sex couples [in other states] differs from that of opposite-sex married couples." (Def. Br. at 16-17.) However, as plaintiffs pointed out in our moving brief (Pl. Br. at 52-54), unless the State can explain how following the lead of other states advances some legitimate government interest apart from merely adhering to the traditional definition of marriage, following other states' definition is just deferring to the discriminatory laws of others, which is impermissible. And the State's brief offers not a word of explanation about how falling in line with other states serves any legitimate interest in New York.

In fact, simply mimicking other states' definition of marriage is not something New York does (Pl. Br. at 55-58) (*inter alia*, New York follows minority rule by allowing first cousins to marry), so New York cannot credibly assert an interest in maintaining uniformity of its marriage laws with those of other states. The State's total silence about this reality indicates the power of the point – falling in line with other states by banning marriage for same-sex couples does not further any independent or legitimate state interest.

B. "Preserving the Historic Legal and Cultural Understanding of Marriage"

The State's "tradition" rationale cannot justify the exclusion because the classification – excluding same-sex couples from marriage – is the same as, and therefore not independent of, the objective – maintaining the historic exclusion of same-sex couples from marriage. *See Romer* v. *Evans*, 517 U.S. 620, 635 (1996) (state interest that is not independent of the classification is not legitimate); (Pl. Br. at 49-51.). The State's brief fails to grapple with the fact that the tradition it seeks to further through this exclusion is not independent of the classification and therefore cannot be legitimate.

In an attempt to dress up the tradition rationale, the State sets forth two additional bases for the classification by asserting that the traditional exclusion furthers "social continuity and economic equity." (Def. Br. at 17.) "Social continuity" appears to mean the State's interest in ensuring reproduction of the species, but the State fails to address the utter lack of logical connection between keeping same-sex couples from marrying and encouraging other people to procreate. (Pl. Br. at 60-61.) *See also Andersen* v. *King County*, No. 04-2-04964 (SEA), slip op. at 18-19 (Sup. Ct. King County, Wash. Aug. 4, 2004) ("The precise question is whether barring committed same-sex couples from the benefits of the civil marriage laws somehow serves the interest of encouraging procreation. There is no logical way in which it does so.") (Kaplan Aff. Ex. B).

In addition, the State's decision to exclude same-sex couples from marriage is such an ill-fitting means of promoting procreation that this justification is "impossible to credit." *Romer*, 517 U.S. at 632, 635 (where classification is "is so discontinuous with the reasons offered for it," and "so far removed" from them, those reasons are "impossible to credit"). (Pl. Br. at 61-65.) Indeed, the State acknowledges that marriage is an "inadequate proxy" for procreation, since many people procreate outside of marriage and neither the ability nor the intention to procreate is a pre-requisite to marriage. (Def. Br. at 21.). Yet the State would have the Court believe that enacting restrictions on this inadequate proxy — marriage — rationally furthers its interest in promoting procreation. Furthermore, it is simply "impossible to credit" that the State would choose to exclude same-sex couples from the vast range of protections that come with marriage – protections primarily focused on the adult couple – in order to encourage procreation, which it effectively admits is but a secondary aspect of the State's protection of marriage. (Pl. Br. at 61-64.) This level of disconnect between the means the State has chosen and the interest it purportedly seeks to further renders

the law irrational and unconstitutional. *Romer*, 517 U.S. at 632, 635; *Baker* v. *State*, 744 A.2d 864, 881 (Vt. 1999) (restricting the benefits of marriage to different-sex couples is not sufficiently linked to promoting procreation where state gives marriage benefits to many people who have "no logical connection" to the goal of procreation); *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting) (the "encouragement of procreation" does not justify excluding same-sex couples from marriage because "the sterile and the elderly are allowed to marry.").

The State suggests that an "imperfect fit" between the line chosen in the statute and the objective sought raises no constitutional concerns (Def. Br. at 13-14, 21), but that is simply not the case: it is precisely the "search for the link between classification and objective [that] gives substance to the Equal Protection Clause." *Romer,* 517 U.S. at 632. The courts have repeatedly struck down laws on rational basis review because the "fit between means and ends" (Def. Br. at 14) was "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *see also Romer*, 517 U.S. at 633 (striking down law whose terms were "at once too narrow and too broad," belying any "rational relationship to an independent and legitimate legislative end"); *Eisenstadt* v. *Baird*, 405 U.S. 438, 447-52 (1972) (striking down ban on sale of contraceptives to unmarried individuals under rational basis review because "the effect of the ban . . . has at best a marginal relation to the proffered objective"); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 537 (1973) (striking down rule that unrelated individuals sharing a household were ineligible for food stamps because that rule "simply does not operate so as rationally to further the prevention of fraud," the interest purportedly served); *Liberta*, 64

N.Y. 152, 163 (1984) (striking down marital exemption to rape law because distinguishing between marital and non-marital rape did not rationally advance any legitimate purpose).[8]

The State asserts, and plaintiffs agree, that marriage provides economic benefits for committed couples. (Def. Br. at 17.) But the fact that marriage in general furthers a legitimate state interest is immaterial; the question for the Court is whether keeping same-sex couples *out* of marriage furthers a legitimate government interest. The State has not explained, and it is not possible to discern, how excluding same-sex couples from marriage would logically increase economic equity for anyone, straight or gay.

C. The Cases Cited by the State Are No Longer Good Law

Indeed, none of the cases that the State cites to support its position can be considered good law. For example, *Matter of Cooper*, 187 A.D.2d 128 (2d Dep't 1993), relies heavily on *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971), a thirty-plus year old Minnesota Supreme Court case that rejected a constitutional challenge brought by a same-sex couple to Minnesota's marriage law. However, the Attorney General himself admitted five months ago that *Baker* v. *Nelson* "no longer carries any precedential value with respect to the federal Equal Protection Clause." Opinion of the Attorney General, dated March 3, 2004, at 21 (explaining that *Baker* was decided at a time when sex classifications did not get heightened scrutiny, and before the Supreme Court explained that moral disapproval of a group cannot be a legitimate government interest) (Kaplan Aff. Ex. C).

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[8] Furthermore, while the State may have no burden to "produce evidence to sustain the rationality of a statutory classification," *Affronti* v. *Crosson*, 95 N.Y. 2d 713, 719 (2001), the Court must still evaluate whether that classification rationally furthers a legitimate state interest based on facts in the real world, rather than on mere speculation or theory, *see Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County,* 488 U.S. 336, 343 (1989) (rational relationship must exist in reality not just in theory); *Heller* v. *Doe*, 509 U.S. 312, 321 (1993) ("even the standard of rationality as we so often have defined it must find some footing in the realities of the subject matter addressed by the legislation").

The *Cooper* court also cited to *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), the Supreme Court's 1986 decision upholding the constitutionality of sodomy laws. *Cooper*, 187 A.D.2d at 133-134. As discussed above, however, the Supreme Court overruled *Bowers* last year in *Lawrence,* and as a result, the reasoning in *Cooper* is suspect. *Cooper* was also decided three years before the Supreme Court decided *Romer* v. *Evans*, 517 U.S. 620 (1996), in which the Supreme Court clarified that a classification that is disconnected from its purported objective violates equal protection.[9]

Although in *Adams* v. *Howerton*, 673 F.2d 1036 (9th Cir. 1982), a case upon which the State also relies (Def. Br. at 19, 27), the court rejected an equal protection challenge to the INS's refusal to recognize the marriage of two men, that ruling does not help the State either. First, *Howerton* was based on the courts' extraordinary deference to Congress in immigration matters, where "Congress has almost plenary power and may enact statutes which, if applied to citizens, would be unconstitutional." *Id.* at 1042. Of course, no similar level of deference is due here. Second, *Howerton* hypothesized that excluding same-sex couples from marriage might be justified, *inter alia*, based on "traditional and often prevailing societal mores," *id.* at 1043. But again, *Howerton* was decided before the Supreme Court ruled that moral disapproval of a group such as homosexuals cannot provide a rational basis for disadvantaging that group, *see Lawrence*, 123 S. Ct. at 2486 ("Moral disapproval of [a]

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[9] Contrary to the State's argument (Def. Br. at 19 n. 5), the question is not whether the Supreme Court's decisions in *Lawrence* and *Romer* overruled *Cooper.* Rather, *Lawrence* expressly overruled *Bowers,* on which *Cooper* relied, and the logic of both *Lawrence* and *Romer* casts substantial doubt on the ruling in *Cooper.* The State also errs to the extent that it suggests that *Cooper*, a Second Department decision, is somehow binding on this Court. Although the *Cooper* holding is discredited for the reasons set forth above, it in any event merely carries persuasive authority for this Court. *See People* v. *Richburg*, 671 N.Y.S.2d 609, 610 (Sup. Ct. Albany County 1998) (holding that a Second Department decision is not binding on a Third Department trial court).

group . . . is an interest that is insufficient to satisfy rational basis review") (O'Connor, J., concurring); *Romer*, 517 U.S. at 634-35.

III.

THE STATE CANNOT EVADE THE DUE PROCESS CLAUSE BY NARROWLY REDEFINING THE FUNDAMENTAL "RIGHT TO MARRY" AS "THE RIGHT TO SAME-SEX MARRIAGE"

In our moving brief, plaintiffs demonstrated that the right to marry is a fundamental right subject to the most heightened protections of the New York State Constitution.[10] (Pl. Br. at 37-47.) Plaintiffs also demonstrated that, once a fundamental right is recognized, even a long-standing history and tradition of excluding a minority group from participation in that fundamental right cannot justify continued abridgment of that right. (*Id.*) The State in no way disputes either of these arguments.

Rather, the State argues that plaintiffs seek to establish a *new* fundamental right: not the right to marry, but the right *of same-sex couples* to marry. In attempting to make this distinction, however, the State has incorrectly defined the fundamental right at issue.[11] Indeed, pursuant to well-established precedent, the State cannot narrowly redefine the

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[10] The State can hardly quibble with the principle that the right to marry is a fundamental right protected by the Due Process Clause; it has been recognized as such by every American jurisdiction and there is no need for this Court to reconsider this staggering body of case law. *See, e.g.*, *Maynard* v. *Hill*, 125 U.S. 190, 211 (1888) (describing marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress"); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Zablocki* v. *Redhail*, 434 U.S. 374, 386 (1978) ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."); *Turner* v. *Safley*, 482 U.S. 78, 83 (1988) ("[T]he decision to marry is a fundamental right."); *Cooper* v. *Marin*, 49 N.Y.2d 69, 80 (1979) (recognizing a prison inmate's "fundamental right to marriage and family life"); *People* v. *Shepard*, 50 N.Y. 2d 640, 644 (1980) (noting that "the government has been prevented from interfering with an individual's decision about whom to marry").

[11] The state court cases cited by the State – many of which were decided prior to the Supreme Court's acknowledgement in *Lawrence* that *Bowers* had been wrongly decided – similarly define incorrectly the right at issue as the right to same-sex marriage. (Def. Br. at 27.) The State's recognition of the actions taken by some states to amend their constitutions to exclude same-sex couples from participation in the institution of civil marriage lends no support to defendants' argument either. Indeed, it has no bearing at all on whether New York's Constitution, as presently written, protects the right to marriage by same-sex couples. Furthermore, the fact that state

right to marry to exclude plaintiffs in order to prevent them from exercising a pre-existing fundamental right.[12]

The analytical flaw in the State's reasoning is evident in its reading of *Loving*. The State asserts that the Supreme Court in *Loving* merely addressed an already existing right of "opposite sex marriage." (Def. Br. at 29.) The State once again errs in its interpretation of *Loving*. For one, *Loving* does not identify the liberty interest in question as the right to enter into "opposite sex" marriage. Instead, the Supreme Court's holding in *Loving* recognizes the fundamental right in question as the ability of individuals to *choose their partners*. *See Loving*, 338 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Perez* v. *Lippold*, 198 P.2d 17, 27 (Cal. 1948).

Moreover, the State has utterly failed to address plaintiffs' showing that, although the recognition of *what* is protected as a fundamental right is guided by history and tradition, the question of *who* may exercise that right is not limited by either tradition or history. Just as the right to marry in New York does not presently extend to same-sex couples, before *Loving* was decided, the traditional right to marry did not extend to interracial couples. Similarly, before *Turner* v. *Safley*, 482 U.S. 78 (1987), was decided, there was no existing history and tradition of marriage by prison inmates. In these instances and others, the courts have understood the right in question to be a broader right to marry – which *has* historically been protected – and the courts have repeatedly stuck down restrictions on *who*

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governments across the country are acting to amend their constitutions may be seen as an acknowledgment that, as written, these documents may be interpreted to extend rights to marriage to same-sex couples.

[12] It is telling that the State cites *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), in support of its argument that plaintiffs are seeking the establishment of a new fundamental right. That case *did* present a novel liberty interest — the right to die. The right to marry, however, is one of the most well-established and protected of fundamental rights, and thus stands in marked contrast with the right to die.

can access the right, no matter how long-standing the prohibition may have been.[13] (Pl. Br. at 41-46).

This analysis is consistent with Supreme Court precedent cautioning that rights cannot be narrowly defined for the purpose of excluding some from a right exercised by many. For example, in *Lawrence* the Court held that the liberty interest in question was not, as the defendant claimed, a "fundamental right upon homosexuals to engage in sodomy." *Lawrence*, 123 S. Ct at 576 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986)). Rather, the correct inquiry was whether two loving adults had the right to engage in inherently private, consensual conduct. "Persons in a homosexual relationship may seek autonomy [for the reasons] heterosexual persons do." *Id.* at 574. By analogy, the question here is not whether plaintiffs have a right to "same-sex marriage," but rather, whether they may exercise their fundamental right to marry the partner of their choice.

IV.

DENYING SAME-SEX COUPLES THE ABILITY TO MARRY VIOLATES THE FREE EXPRESSION PROVISION OF THE NEW YORK CONSTITUTION

In challenging New York's refusal to recognize same-sex marriage as a violation of the free expression clause (Article I, Section 8) of the New York Constitution, plaintiffs begin with the unexceptional proposition that civil marriage presents a unique, expressive opportunity for a couple to proclaim publicly the integrity and depth of their love and commitment to each other. Indeed, the United States Supreme Court has agreed, recognizing that "an important and significant aspect" of marriage is that it provides the

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[13] In a similar constitutional challenge brought by eight couples in Washington State, a Washington court recently addressed the question of whether it should "focus on the broad right to marry or should it, instead, focus on the more narrowly drawn right to marry someone of the same sex." *Andersen* v. *Kings County,* No. 04-2-04964 (SEA), 2004 WL 1738447, *5 (Super. Ct., King County, Wash., Aug. 4, 2004) (Kaplan Aff. Ex. B). Considering such cases as *Loving, Turner,* and *Zablocki* (discussed at length in Moving Br. at 42, 44, 72), the court concluded that the correct formulation of the operative right was whether the statute had burdened "the right to marry" – not "the right of same-sex couples to marry." *Id.*

opportunity for "*expressions* of emotional support and public commitment." *Turner* v. *Safley*, 482 U.S. 78, 95, 96 (1987) (emphasis added).

Based upon this proposition, plaintiffs assert that civil marriage must be understood as an institution created by the State that provides an important expressive opportunity, and that as such, its regulation by the State is subject to serious constitutional scrutiny because the government is presumptively prohibited from regulating access on the basis of the views that might be expressed or the identity or status of the speakers. *See Police Dep't of the City of Chicago* v. *Mosely*, 408 U.S. 92, 96 (1972). By conferring access to civil marriage on heterosexual couples and by excluding same-sex couples, the State is providing differential access to the expressive opportunities presented by the institution of civil marriage and such differential access runs afoul of the New York Constitution.

The State seeks to avoid the force of this argument in several ways. First, it argues that "marriage is not 'speech.'" (Def. Br. at 30.) Alternatively, it maintains that "[e]ven if entry into marriage has an expressive component, New York's prohibition of same-sex marriage does not infringe free-speech protections." (*Id.* at 31.) In this regard, the State contends that marriage is entitled to no greater protection under the New York Constitution than symbolic speech. The State also asserts that the more rigorous standard that is typically applied to the denial of equal access to a medium of expression is inapplicable here because marriage is not a medium of expression. All of these arguments, however, are without merit.

A. The Institution of Civil Marriage Provides an Important Expressive Opportunity

The State's argument that "marriage is not speech" rests upon a mischaracterization of plaintiffs' position. Plaintiffs do not assert that marriage is nothing more than an expressive arrangement. Clearly, it is much more, including a contractual relationship and a set of obligations and commitments to which the law applies special rules. *See* Kaplan Aff. Ex. A (setting forth an illustrative list of how marital status affects benefits and obligations). But what plaintiffs do assert is that, among its attributes, the institution of

civil marriage provides a unique and important expressive opportunity for individuals to proclaim their commitment and responsibilities toward one another.

Indeed, the State acknowledges that under the DRL "when a marriage is solemnized . . . the parties must solemnly declare . . . that they take each other as husband and wife." DRL § 12 (McKinney 2004) (Def. Br. at 30). Such a declaration is, in and of itself, an expressive event. And, of course, most couples use the institution of marriage to engage in a public expression of commitment and love that extends well beyond that initial declaration.

B. The Denial of Equal Access to the Expressive Opportunities Presented By the Institution of Civil Marriage Violates Free Speech Equality Principles Embraced Within Article I, Section 8 of the New York Constitution

Given the obvious expressive aspects to the marriage ceremony, defendants argue, in the alternative, that "even if . . . marriage has an expressive component, New York's prohibition of same-sex marriage does not infringe free speech protections." (Def. Br. at 31.) And they defend this assertion by arguing that the expression that takes place at a civil marriage ceremony is entitled only to the degree of constitutional protection accorded to symbolic speech.[14]

This argument ignores the fact that declarations of commitment made at a civil marriage ceremony are what are known under free speech jurisprudence as "pure speech" because they explicitly use words to convey publicly the import of the marital commitment. So understood, the declarations are not symbolic speech of the type arguably at issue in *People* v. *Hollman*, 68 N.Y.2d 202 (1986) (nude sunbathing), or *United States* v. *O'Brien*,

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[14] It is no answer to the claim that civil marriage affords expressive opportunity to argue that individuals seeking such expressive opportunity could always participate in a religious marriage. One of the primary reasons that this alternative is unsatisfactory is that a great many individuals may be unaffiliated with a religion and that for such individuals, the choice is a civil marriage ceremony or none at all. Others may be affiliated with a religion that may not approve of same-sex marriage. These individuals would also be denied the opportunity to engage in a public expression of marital commitment at a marriage ceremony.

391 U.S. 367 (1968) (burning a draft card). But, more importantly, unlike cases such as *Hollman*, *O'Brien*, and *Arcara* v. *Cloud Books*, 68 N.Y.2d 553 (1986),[15] this case involves the denial of equal access to a *state-created* institution that provides an opportunity for important and unique expression. Although the State has created the institution of civil marriage, it selectively distributes access to it: heterosexual couples secure access; same-sex couples do not.

The State responds to this argument by claiming that the institution of marriage cannot be regarded as medium of expression. In other words, the State argues that "marriage cannot be both expressive conduct . . . and the medium through which such expression occurs." (Def. Br. at 34.) But that argument is the equivalent of saying that "broadcasting cannot be both expressive conduct and the medium through which the broadcasting occurs." In both situations, it is important to separate the words that are conveyed over the airwaves or at the civil marriage ceremony from the medium itself. In the case of broadcasting, the medium is the electromagnetic spectrum. In the case of civil marriage, the medium is the ceremony of civil marriage at which the parties declare their commitment. As the Supreme Court made clear in *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), free speech equality principles can apply even where the medium to which selective

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[15] The State asserts that plaintiffs' reliance on *Arcara*, 68 N.Y.2d 553 (1986), is misplaced because "*Arcara* does not impose more exacting scrutiny than does *O'Brien*." (Def. Br. at 33.) But plaintiffs do not contend that *Arcara* imposed a more exacting standard than *O'Brien*. Rather, plaintiffs introduced *Arcara* for two purposes. First, plaintiffs cited *Arcara* to demonstrate that the Court of Appeals has held that the State Constitution is more protective of free expression than is the U.S. Constitution. After the Supreme Court held that the First Amendment did not protect the adult bookstore at issue from closure, the case was remanded to the New York Court of Appeals, which concluded that, notwithstanding the Supreme Court's interpretation of the federal Constitution, the Court of Appeals would now hold that the free speech clause of the State Constitution would protect the bookstore from closure. Second, *Arcara*, which was a pure speech case and not a symbolic speech case, was also introduced to demonstrate that under New York's interpretation of the State Constitution, "[t]he crucial factor in determining whether State action

access is granted is not "spatial or geographic" but instead is "metaphysical." *Rosenberger*, 515 U.S. at 830.

In this case, the State confuses the words that are conveyed at the civil marriage ceremony with the ceremony itself. As the State correctly points out, under section 12 of the DRL, "[n]o particular form or ceremony is required when a [civil] marriage is solemnized." N.Y. Dom. Rel. L. § 12 (McKinney 2004) (Def. Br. at 30). Thus, couples may choose to express themselves in a variety of ways and with a variety of statements. Nevertheless, *some kind of declaration* – no matter how perfunctory – is required.[16] Thus, regardless of how minimalist or expansive the declarations at the civil marriage ceremony may be, the fact remains that the State offers expressive opportunities within the institution of marriage to heterosexual couples and denies them to same-sex couples. Such differential treatment cannot be sustained.

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affects freedom of expression is the impact of the action on the protected activity and not the nature of the activity which prompted the government to act." *Arcara*, 68 N.Y.2d at 558.

[16] Under section 12 of the DRL, "the parties must solemnly declare . . . that they take each other as husband and wife." N.Y. Dom. Rel. L. § 12 (McKinney 2004). Under section 11, marriages entered into by written contract must be "signed by both parties and at least two witnesses, all of whom shall subscribe the same within the state . . ." N.Y. Dom. Rel. L. § 11(4) (McKinney 2004). Thus, even civil marriages by contract involve declarations that qualify as expressive statements.

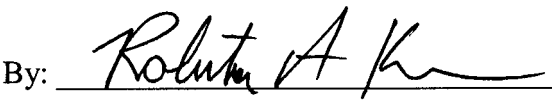
Conclusion

For all of the foregoing reasons, as well as the reasons stated in our moving brief, the Court should grant plaintiffs' motion for summary judgment, deny defendants' cross-motion for summary judgment, and grant such other and further relief as the Court may deem proper.

Dated: New York, New York
August 16, 2004

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: 

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