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

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO MEMORANDUM OF LAW ON BEHALF OF *AMICI*

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 344-3005

Attorneys for Plaintiffs

TABLE OF CONTENTS

Page

Preliminary Statement 1

Argument 2

I. HEIGHTENED SCRUTINY APPLIES TO NEW YORK'S EXCLUSION OF SAME-SEX INDIVIDUALS FROM MARRIAGE 2

A. Heightened Scrutiny Applies to Classifications Based on Sexual Orientation 2

B. Heightened Scrutiny Also Applies to Classifications Based on Gender 7

C. While Conceding That There Exists a Fundamental "Right to Marry", *Amici* Incorrectly Define the Right Here at Issue as the "Right to Same-Sex Marriage" 8

II. EVEN UNDER A RATIONAL BASIS ANALYSIS, EXCLUDING SAME-SEX COUPLES FROM MARRIAGE FURTHERS NO LEGITIMATE STATE INTEREST 10

A. Preservation of a Discriminatory Status Quo Is Not an Independent Justification for Excluding Same-Sex Couples from Marriage. 10

B. Excluding Same-Sex Couples from Marriage Does Not Rationally Promote Procreation 13

C. Far From Promoting the Welfare of Children, the Exclusion of Same-Sex Couples from Marriage Harms Thousands of Children of Gay and Lesbian Parents in New York State. 15

III. DENYING SAME-SEX COUPLES THE ABILITY TO MARRY VIOLATES THE FREE EXPRESSION PROVISION OF THE NEW YORK CONSTITUTION 18

Conclusion 21

TABLE OF AUTHORITIES

Page

Cases

Andersen v. *King County*, No. 04-2-04964 (SEA), slip op. at 18-19 (Sup. Ct. King County, Wash. Aug. 4, 2004) 13

Baehr v. *Lewin*, 852 P.2d 44 (Haw. 1993) 8

Baker v. *Wade*, 106 F.R.D. 526 (N.D. Tex. 1985) 17

Brause v. *Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) 8

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 14

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 4

Gay Student Servs. v. *Texas A&M Univ.*, 737 F.2d 1317 (5th Cir. 1984) 1, 17

Greenberg v. *Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980) 20

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 14

Matter of Jacob/Dana, 86 N.Y.2d 651 (1995) 7, 16, 17

Korematsu v. *United States*, 323 U.S. 214 (1944) 4

Lawrence v. *Texas*, 123 S. Ct. 2472 (2003) 9

Lofton v. *Kearney*, 358 F.3d 804 (11th Cir. 2004) 18, 19

Loving v. *Virginia*, 388 U.S. 1 (1967) 7, 9, 10

Massachusetts Bd. of Retirement Sys. v. *Murgia*, 427 U.S. 307 (1976) 3, 5, 6

Planned Parenthood of Southeastern Pa. v. *Casey*, 505 U.S. 833 (1992) 14

Romer v. *Evans*, 517 U.S. 620 (1996) 1, 2, 10, 14, 15

Singer v. *Hara*, 522 P.2d 1187 (Wash. 1974) 8

United States v. *O'Brien*, 391 U.S. 367 (1976) 19

Miscellaneous

American Academy of Pediatrics, Homosexuality and Adolescence, Policy Statement, (Oct. 1993) available at <http://www.apa.org/pi/sexual.html> (last visited August 25, 2004) 11

See American Psychiatric Association, *APA Position Statement on Therapies Focused on Attempts to Change Sexual Orientation ("Reparative" or "Conversion" Therapy)* (December 1998) available at <http://www.psych.org/public_info/ gaylesbianbisexualissues22701.pdf> (last visited August 25, 2004) 11

M.V. Badgett, *Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia?*, May 20, 2004, available at http://slate.msn.com/id/2100884/ (last visited August 25, 2004) 15

A. Lee Beckstead, *Understanding the Self-Reports of Reparative Therapy "Successes,"* 32 Archives of Sexual Behavior 399, 423 (Oct. 2003) 12

Brief of the State of North Carolina as *Amicus Curiae*, No. 395, 1967 WL 93614 (U.S. Jan. 24, 1967) 9

Kenneth M. Cohen and Ritch C. Savin-Williams, *Are Converts to Be Believed? Assessing Sexual Orientation "Conversions,"* 32 Archives of Sexual Behavior 399, 427 (Oct. 2003) 12

Nancy F. Cott, Public Vows: A History of Marriage and the Nation (2000) 10

Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 ..... 1, 12

Lawrence Hartmann, *Too Flawed: Don't Publish*, 32 Archives of Sexual Behavior 399, 436 (Oct. 2003) 12

Gregory M. Herek, *Evaluating Interventions to Alter Sexual Orientation: Methodological and Ethical Considerations*, 32 Archives of Sexual Behavior 399, 438 (Oct. 2003) 12

Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sexuality 133, 152 (1991) 17

Craig A. Hill and Jeannie D. DiClementi, *Methodological Limitations Do No Justify the Claim That Same-Sex Attraction Changed Through "Reparative Therapy,"* 32 Archives of Sexual Behavior 399, 441 (Oct. 2003) 12

National Association of Social Workers (NASW), *Policy Statement on Lesbian, Gay and Bisexual Issues* (Aug. 1996), *reprinted in* NASW, *Social Work Speaks: NASW Policy Statements* 230 (6th ed. 2003) 12

Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 Am. Sociological Review 159, 161 (2001) 17, 18

Milton L. Wainberg, et al., *Science and the Nuremberg Code: A Question of Ethics and Harm*, 32 Archives of Sexual Behavior 399, 455 (Oct. 2003) 12

Plaintiffs respectfully submit this memorandum of law in response to the Memorandum of Law on Behalf of *Amici* in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment, dated August 20, 2004 (hereinafter, "*Amici* Br.").

Preliminary Statement

This case is about access not simply to a marriage license or the "institution of marriage," but to the hundreds of practical benefits that come with a marriage license and that are denied to same sex-couples, including plaintiffs in this case, every day. In their brief, *amici* Ruben Diaz, Sr., Daniel Hooker, Michael Long, Raymond Meier, and the New York Family Policy Council (collectively, *"amici"*) do not contest or even acknowledge the existence of these myriad advantages that inure to married couples. Nor do *amici* offer any explanation of how the deprivation of these marital benefits to same-sex couples throughout this State passes muster under the New York Constitution.

Instead, *amici* repeatedly press the argument that "marriage," by definition, is a union between a man and a woman. Therefore, *amici* argue, the constitutional protections afforded under the Due Process and Equal Protection Clauses of the New York Constitution cannot possibly be interpreted to extend to same-sex couples. But, as the United States Supreme Court held in *Romer* v. *Evans*, 517 U.S. 620, 635 (1996), a "classification . . . for its own sake"—or a desire to disadvantage a group that is in fact already disadvantaged—does not provide a legitimate justification for the discrimination. And, as we showed in our moving papers, this Court should declare that discrimination against lesbians and gay men is unconstitutional for reasons similar to those that led the courts of this great nation to declare discrimination against African-Americans in marriage unconstitutional: government distinctions based on criteria like race or sexual orientation—which have historically been

used invidiously, are not related to ability to participate in society, and are unlikely to be remedied by the normal political process—should be viewed with suspicion.

Furthermore, the brief of the *amici* seeks to bolster its flawed legal analysis with equally dubious scientific evidence. Even while challenging the sufficiency of plaintiffs' undisputable showing that gay men and lesbians have experienced a history of discrimination, *amici* cite to wholly discredited studies suggesting that same-sex marriage will cause the breakdown of the family unit and attesting to the benefits of so-called "conversion therapy," a treatment for "converting" gay men and lesbians into heterosexuals. (*Amici* Br. at 19 n.10; *id.* at 24-26 & accompanying notes) (discussing "risk" of African-American fathers abandoning their children and breakdown of the family in Scandinavia). These arguments, however, only serve to reveal *amici*'s true agenda: that gay men and lesbians should not be treated as equal participants in our society. For these reasons and those discussed below, this Court should soundly reject *amici*'s analysis.

I.
HEIGHTENED SCRUTINY APPLIES TO NEW YORK'S EXCLUSION OF SAME-SEX INDIVIDUALS FROM MARRIAGE

Plaintiffs have argued in our moving and reply briefs that New York's marriage laws must be subjected to heightened scrutiny because those laws classify on the basis of sexual orientation and gender, and because the right to marry is a fundamental right. For the reasons discussed below, *amici* fail to offer any basis for concluding that heightened scrutiny should not apply.

A. Heightened Scrutiny Applies to Classifications Based on Sexual Orientation

Amici's brief does not assist the Court in determining whether classifications on the basis of sexual orientation warrant heightened scrutiny. First, *amici* appear to misunderstand the well-established legal standards governing equal protection analysis.

Second, *amici* fail to engage the legal criteria for establishing a suspect class or to grapple with the issue of whether the State has a substantial or compelling justification for keeping same-sex couples out of marriage. As a result of these defects, *amici*'s brief provides no assistance to the Court in ruling on the issues presented by the parties.

As a preliminary matter, *amici* misstate the appropriate legal standard by arguing that plaintiffs are not entitled to heightened scrutiny because excluding gays and lesbians from marriage satisfies rational basis. (*See, e.g., Amici* Br. at 12 ("Plaintiffs' claims should not be subjected to heightened scrutiny because the limits on who may marry are rationally related to legitimate state interests."); *see also id.* at 5) In other words, in arguing that heightened scrutiny does not apply because the marriage law is rationally related to a legitimate state interest, *amici* have turned the equal protection analysis on its head. Whether a law satisfies rational basis (which, for the reasons argued below and in our other briefs, New York's DRL does not) simply has no bearing on the level of scrutiny that is applied.

Moreover, *amici*, like the State, largely ignore the indicia of a suspect class set out by the Supreme Court and adopted by the New York Court of Appeals: whether a group has (1) "experienced a history of purposeful unequal treatment;" *or* (2) been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities;" *or* (3) 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). Instead, *amici* appear to collapse these separate and independent indicia into a single prong: whether discrimination is sufficiently "longstanding and widespread to require special legislation." (*Amici* Br. at 6)[1] *Amici* argue

---

[1] *Amici*'s argument that sexual orientation is related to ability to "perform" such that a same-sex couple cannot constitute a married couple (*Amici* Br. at 5 n.5) rests on the untenable assertion that

that "whenever elevating a class of persons to a protected civil rights category, the natural question must be 'why?'", and conclude that plaintiffs have not met their evidentiary burden of showing why gays and lesbians should be elevated to protected class status. (*Amici* Br. at 6) But this is not the legal test for determining whether gays and lesbians (or any other class) constitute a suspect class. Plaintiffs discussed the above-enumerated indicia of a suspect class extensively in our moving brief and demonstrated how gays and lesbians met each of the indicia of a suspect class. (Plaintiffs' Moving Br. (hereinafter, "Pl. Br.") at 18-34) *Amici* simply offer no response.

Instead, *amici* challenge plaintiffs on the sufficiency of plaintiffs' showing that there exists a history of discrimination against gays and lesbians. But *amici* fail to understand that there is no evidentiary dispute on this motion for summary judgment and plaintiffs do not need to meet such a purported factual showing. The Supreme Court did not require the evidentiary showing seemingly called for by *amici* in concluding that this country has a history of racial discrimination against African-Americans and other minorities. *See Korematsu* v. *United States,* 323 U.S. 214, 216 (1944). Nor did the Supreme Court require plaintiffs to carry such an evidentiary burden when it held that women constituted a suspect class requiring heightened scrutiny. *See Frontiero* v. *Richardson*, 411 U.S. 677, 684-86 (1973) (plurality opinion). Nor, as the State has conceded and as this Court acknowledged early in this case[2], is an evidentiary showing required here.

---

marriage is a static institution that is reserved for opposite-sex couples and cannot be altered. But that assertion ignores the reality of the evolution of conceptions of marriage in our society. See *infra*.

[2] *See* Letter from Justice Joseph C. Teresi to Counsel, dated June 28, 2004 (noting that this case "appears to raise a pure constitutional issue" and directing the parties to enter into an expedited briefing schedule for summary judgment motions).

Furthermore, *amici*'s specific evidentiary arguments are unpersuasive. For instance, *amici* would like to rewrite history by claiming there is no "real evidence of longstanding, widespread discrimination" against gays and lesbians. (*Amici* Br. at 6) As we pointed out in our moving brief, every court to address the question has concluded that gay men and lesbians have been subject to a history of discrimination. (Pl. Br. at 18 n.7) Nor do *amici* in any way contest the lengthy history of discrimination against gays and lesbians in New York that we recounted in our moving brief. (Pl. Br. at 18-25) Instead, *amici* attempt to dismiss this showing of a lengthy history of discrimination by suggesting that plaintiffs have not shown any "modern" evidence of discrimination. (*Amici* Br. at 7) But *amici*, again revealing their fundamental misunderstanding of equal protection analysis, ignore the fact that one of the indicia of a suspect class is whether that class has "experienced a *history* of purposeful unequal treatment." *Murgia*, 427 U.S. at 313. And, it is ironic—in addition to patently wrong and highly offensive—that *amici* argue against the existence of modern-day discrimination while simultaneously relying on purported "scientific evidence" supporting conversion therapy and arguing that gay marriages undermine the fabric of our society. (*Compare Amici* Br. at 38 *with id.* at 24-26)

Amici also make several unpersuasive arguments in an attempt to show that gays and lesbians have not been discriminated against in the political process. As a preliminary matter, *amici* do not focus on the political process in New York, instead arguing based on data from the country as a whole. But it is New York's Constitution that is being applied here and the relevant facts as to political powerlessness—as with the history of discrimination—are those that deal with New York. *Amici* do not dispute our showing that gays and lesbians face significant obstacles in the political process in New York. (Pl. Br. at 27-34)

Instead, *amici* argue that gays and lesbians are not politically powerless because a number of states have passed laws that prohibit discrimination based on sexual orientation or that offer other protections to gays and lesbians. But the existence of such laws, to the extent it is even relevant to the issue of access to New York's political process, does not alter the equal protection analysis here. Such laws only further demonstrate that gays and lesbians have been subject to a history of discrimination. And, as we showed in our moving brief, laws offering similar protections on the basis of race or sex did not prevent the Supreme Court from subjecting laws classifying on the basis of race or sex to heightened scrutiny. (Pl. Br. at 32) In fact, a number of state laws offering protections to gays and lesbians have been repealed at the ballot box by voters (Pl. Br. at 33), demonstrating yet again the reality that lesbians and gay men cannot reliably protect themselves from discrimination through the political process.

Amici also argue that plaintiffs cannot meet their supposed "burden of proof" with respect to numbers of gays and lesbians holding political office because plaintiffs can point only to "known" gays and lesbians. (*Amici* Br. at 11) *Amici*'s argument again misses the point. There is no evidentiary burden of proof on this issue. And the fact that there may be gays and lesbians holding political office who are not openly gay further supports plaintiffs' political powerlessness point. These individuals holding office (like Governor McGreevey) evidently do not believe that they can win election if the public knows of their sexual orientation. And *amici* only prove our point by pointing out that, in addition to failing ever to elect a gay man or lesbian as President, this country has also never elected a female or African-American to that office. (*Amici* Br. at 11) Indeed, African-Americans and women are also classes that have been "relegated to such a position of political powerlessness as to

command extraordinary protection from the majoritarian political process." *Murgia*, 427 U.S. at 313.

In short, *amici* offer no reason for the Court to decline to apply heightened scrutiny based on discrimination on the basis of sexual orientation.

B. Heightened Scrutiny Also Applies to Classifications Based on Gender

Nor do *amici* succeed in arguing that New York's domestic relations law does not discriminate on the basis of gender. *Amici* do not address the other same-sex marriage cases decided under other state constitutions that we cited in our moving brief. (Pl. Br. at 35) *Amici* do not even address *Loving* v. *Virginia*, 388 U.S. 1 (1967), which held that the anti-miscegenation law improperly classified marriage rights on the basis of race despite its equal application to multiple races, logic that applies equally to finding that the exclusion of same-sex couples from marriage improperly classifies marriage rights on the basis of sex despite its equal application to both sexes.

Instead, *amici* rely on two cases, neither of which supports their argument. First, *amici* rely on *Matter of Jacob/Dana*, 86 N.Y.2d 651 (1995) in arguing that the marriage laws do not classify on the basis of sex. *Amici* rely on a single reference from that opinion in which the Court of Appeals referred to the inability of Dana's biological mother and her female partner to marry due to Dana's mother's sexual orientation. 86 N.Y.2d at 668. This single reference, in a case that did not present any issue relating to same-sex marriage, cannot hold the weight *amici* seek to place upon it. The fact that the marriage laws discriminate on the basis of sexual orientation does not mean that they do not *also* discriminate on the basis of sex. Thus, there is no inconsistency between the Court's opinion in *Jacob/Dana* and plaintiffs' argument that the marriage laws discriminate on the basis of sex.

Amici also rely on *Singer* v. *Hara*, 522 P.2d 1187 (Wash. 1974). In *Singer*, two men who were denied a marriage license appealed that denial. The court, finding that Washington law defined marriage as the legal union of one man and one woman, held that the "appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself." *Id.* at 1196; *see also id.* at 1192 (appellants "are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex."). In *Singer*, the court assumed the very question to be decided: the court first found that the definition of marriage could only be between a man and a woman, and then held that appellants were not denied a marriage license because of their sex. But the issue presented here is not whether the couples seeking to marry were denied a marriage license on the basis of their sex, but whether the marriage law itself, by excluding same-sex couples, contains a sex-based classification. And the cases cited in our moving brief, like *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion) and *Brause* v. *Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743, at *6 (Alaska Super. Feb. 27, 1998), have held that marriage laws do in fact contain a classification on the basis of sex.

C. While Conceding That There Exists a Fundamental "Right to Marry," *Amici* Incorrectly Define the Right Here at Issue as the "Right to Same-Sex Marriage"

Like the State, *amici* do not dispute that the right to marry has long been recognized as a fundamental right warranting heightened scrutiny. Rather, *amici* argue that, because "marriage" is *by definition* a civil union between a man and a woman, plaintiffs are seeking the establishment of a new fundamental right: the right to same-sex marriage. (*Amici* Br. at 37) ("The right to marry has always been understood in law and tradition to apply only to opposite-sex couples."). *Amici* thus conclude that, because marriages by same-sex couples

were "inconceivable to the vast majority of people, including gay men and lesbians, until well into the latter half of the twentieth century," such unions cannot possibly be protected by the fundamental right to marry that has long been recognized in this country. (*Amici* Br. at 38)

Amici, however, rest their argument on the same incorrect premise employed by the State in its cross-motion for summary judgment: that the right here at issue may be narrowly redefined as the "right to same-sex marriage" in order to exclude plaintiffs.[3] Moreover, *amici* have ignored the reality that the fundamental right to marry has repeatedly been recognized as encompassing couples who historically and traditionally were excluded from the institution of state-sanctioned marriage. *See generally Lawrence* v. *Texas*, 123 S. Ct. 2472, 2480-83 (2003) ("As the constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."). In point of fact, and as discussed in greater detail in plaintiffs' moving brief (at 42-46), marriage was historically restricted to exclude interracial couples, persons who had already married once, and prison inmates, among others. *See also infra* Part II.A (noting the development of the marriage laws). Indeed, the *amici* who submitted briefs in support of the State of Virginia in *Loving* v. *Virginia,* 388 U.S. 1 (1967), similarly argued that the long-standing nature of the states' anti-miscegenation laws meant that the constitutional protections afforded African-Americans could not be interpreted to require interracial marriages. *See* Brief of the State of North Carolina as *Amicus Curiae*, No. 395, 1967 WL 93614 (U.S. Jan. 24, 1967) (annexed as Ex. A to Affirmation of Audra J. Soloway, dated Sept. 3, 2004). Similarly, the argument of *amici* here amounts to nothing more than the proposition that because the fundamental right to

---

[3] On this point, *amici* simply repeat arguments made by the State and fail to engage the legal authorities and arguments previously discussed by plaintiffs. Rather than reiterating those arguments here, we respectfully refer the Court to the plaintiffs' moving brief (at 37-47) and plaintiffs' opposition brief (at 21-23).

marry has never before been extended to same-sex couples, it never can be. For the reasons discussed above and in plaintiffs' moving papers, the *amici*'s argument is simply wrong.

II.
EVEN UNDER A RATIONAL BASIS ANALYSIS, EXCLUDING SAME-SEX COUPLES FROM MARRIAGE FURTHERS NO LEGITIMATE STATE INTEREST

For the reasons discussed *supra, amici* have failed to demonstrate why heightened scrutiny should not be applied in this case. However, even under the less rigorous rational basis standard, *amici* offer no explanation for how excluding same-sex couples from marriage furthers a legitimate state interest and, much like the State, simply fail to engage the rational basis arguments set forth in plaintiffs' opening brief. Relying on conclusory statements about what marriage "is" and on social science research that has been resoundingly rejected as methodologically and ethically flawed, *amici*'s arguments contribute nothing of substance to the analysis of the legal issues in this case.

A. Preservation of a Discriminatory Status Quo Is Not an Independent Justification for Excluding Same-Sex Couples from Marriage

Amici do not respond to plaintiffs' argument that preserving the traditional definition of marriage furthers no legitimate state interest because the tradition and the classification are one and the same—reserving marriage for opposite-sex couples—which makes it a "classification for its own sake," *Romer*, 517 U.S. at 635, that fails even rational basis review. (Pl. Br. at 49-52) Instead, *amici* simply assert that marriage is an immutable institution whose definition cannot be altered. (*Amici* Br. at 14) This assertion ignores the fact that the definition of marriage has changed significantly over time. Marriage used to be a property interest that gave men complete control of their wives, and women's entire legal identity was submerged into that of their husbands. Women have since come to have independent legal identities despite being married. *See generally* Nancy F. Cott, Public

Vows: A History of Marriage and the Nation (2000). As discussed above, marriage throughout America was defined in racial terms until the late 1960s, when anti-miscegenation laws in 16 states were struck down in *Loving v. Virginia*, 388 U.S. 1 (1967). And marriage used to be a status from which there was no exit, but as divorce became more common, what it meant to be married underwent significant change. *See* Cott, Public Vows: A History of Marriage and the Nation. Each of these limitations on marriage was at one time thought to be an essential part of marriage itself, but those aspects have changed, leaving marriage as a recognition and protection of committed adult relationships.

Amici attempt to defend the exclusion of same-sex couples from marriage by trying to resuscitate the discredited notion that sexual orientation is changeable. (*Amici* Br. at 19 n.10) Such a suggestion runs counter to the position taken by all of the respected social science organizations in the country. The American Psychiatric Association, the American Psychological Association, and the American Academy of Pediatrics have all reiterated that lesbians and gay men cannot change, and should not be forced to change, their sexual orientation.[4] Similarly, the National Association of Social Workers requires that social

---

[4] *See* American Psychiatric Association, *APA Position Statement on Therapies Focused on Attempts to Change Sexual Orientation ("Reparative" or "Conversion" Therapy)* (December 1998) (stating that because "there is no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation," the APA "opposes any psychiatric treatment, such as 'conversion' or 'reparative' therapy, which is based upon the assumption that homosexuality per se is a mental disorder, or based upon the a priori assumption that the patient should change his or her sexual orientation."), available at <http://www.psych.org/public_info/ gaylesbianbisexualissues22701.pdf> (last visited August 25, 2004); American Academy of Pediatrics, Homosexuality and Adolescence, Policy Statement, (Oct. 1993) ("Therapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation."), available at <http://www.apa.org/pi/sexual.html> (last visited August 25, 2004); American Academy of Pediatrics, *Homosexuality and Adolescence*, Policy Statement, (Oct. 1993) ("Therapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation."), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics; 92/4/631.pdf> (last visited August 25, 2004); *see also* 92 Pediatrics 631, 633 (Oct. 1993).

workers must explain to clients the lack of documented successful attempts at changing sexual orientation.[5]

Instead of these respected authorities, *amici* point to a controversial article by Dr. Robert Spitzer about "conversion" therapy. (*Amici* Br. at n.10) What *amici* fail to tell the Court, however, is that peer commentators have resoundingly rejected Spitzer's analysis as unreliable, scientifically unsound, and ethically flawed.[6] In fact, there are no data demonstrating that so-called "reparative" or conversion techniques are effective. *See, e.g.,* Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. of Consulting and Clinical Psychology 221, 222-26 (1994).

---

[5] National Association of Social Workers (NASW), *Policy Statement on Lesbian, Gay and Bisexual Issues* (Aug. 1996) (approved by NASW Delegate Assembly), *reprinted in* NASW, *Social Work Speaks: NASW Policy Statements* 230 (6th ed. 2003).

[6] *See, e.g.,* A. Lee Beckstead, *Understanding the Self-Reports of Reparative Therapy "Successes,"* 32 Archives of Sexual Behavior 399, 423 (Oct. 2003) ("Spitzer's description of his data is misleading."); Kenneth M. Cohen and Ritch C. Savin-Williams, *Are Converts to Be Believed? Assessing Sexual Orientation "Conversions,"* 32 Archives of Sexual Behavior 399, 427 (Oct. 2003) (criticizing Spitzer's "apparent conceptual misunderstanding about the purpose of his study," "methodological procedures that create doubt about whether Spitzer used proper scientific methods to ensure the validity of his data," and "subject selection biases that raise serious questions about the veracity of subject claims of reorientation"); Lawrence Hartmann, *Too Flawed: Don't Publish*, 32 Archives of Sexual Behavior 399, 436 (Oct. 2003) ("I think Spitzer's paper is too flawed to publish"); Gregory M. Herek, *Evaluating Interventions to Alter Sexual Orientation: Methodological and Ethical Considerations*, 32 Archives of Sexual Behavior 399, 438 (Oct. 2003) ("Spitzer's data are ultimately the testimonials of a highly selective sample of activists from groups whose *raison d'etre* is to promote efforts to change homosexuals into heterosexuals. It is difficult to imagine how his recruitment strategy would have yielded anything other than reports of substantial shifts to a heterosexual orientation."); Craig A. Hill and Jeannie D. DiClementi, *Methodological Limitations Do No Justify the Claim That Same-Sex Attraction Changed Through "Reparative Therapy,"* 32 Archives of Sexual Behavior 399, 441 (Oct. 2003) ("The study by Spitzer suffers from substantial limitations that render his conclusions virtually meaningless."); Milton L. Wainberg, et al., *Science and the Nuremberg Code: A Question of Ethics and Harm*, 32 Archives of Sexual Behavior 399, 455 (Oct. 2003) (combined comments of "14 researchers in the social and behavioral sciences from diverse backgrounds who have serious concerns about Spitzer's study on sexual orientation change through 'reparative therapy'" because it "suffers from bias introduced via the recruitment strategy and other serious methodological flaws, rendering it problematic from a scientific point of view").

Amici's reliance on the research of Dr. Robert Spitzer and their promotion of "conversion" or "reparative therapy" reveal *amici*'s true agenda. *Amici* are not merely opposed to marriage for same-sex couples. Rather, by suggesting that a person's homosexual orientation can and should be changed, they question the basic notion that lesbian and gay people should be treated as equal citizens in our democracy. The State of New York has rejected such arguments by adopting antidiscrimination laws and other measures to affirm the dignity and equality of its lesbian and gay citizens. (*See* Pl. Br. at 26-27) This Court should likewise reject *amici*'s legal analysis, which is based on inaccurate and biased science.

B. Excluding Same-Sex Couples from Marriage Does Not Rationally Promote Procreation

Amici insist that the State's decision to limit marriage to heterosexual couples furthers the State's interest in fostering procreation. (*Amici* Br. at 20-24) But no-one could rationally think that anyone's decision to bear children would be influenced one way or another by excluding same-sex couples from the protections and responsibilities of marriage. *See 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.") (annexed as Ex. B to the Affirmation of Roberta A. Kaplan, dated Aug. 16, 2004).

Unable to explain how keeping gay couples from marrying would logically make anyone else decide to procreate, *amici* assert that the "proper question" is whether the legislature could conclude that heterosexual marriage is what "best normalizes, stabilizes, and links the acts of procreation and child rearing." (*Amici* Br. at 20) Thus, *amici* apparently see marriage as the State's way of imposing responsibility on heterosexual couples who procreate, in order to provide a stable environment for raising children. But that is not an argument that

keeping gay people out of marriage furthers procreation, it is an argument that keeping gay people out of marriage creates stability that is better for children. As explained below, however, the idea that excluding same-sex couples from marriage promotes children's welfare completely ignores the reality that thousands of children in New York are already being raised by same-sex couples, many with the sanction and assistance of the State itself. *Amici* offer no explanation for how those children would be helped by excluding their parents from the stability and other protections of marriage. *See infra* Point II.C.

Amici effectively admit that procreation is a secondary reason for the State's protection of marriage (*Amici* Br. at 20), in light of the fact that opposite-sex couples are not required to procreate in order to marry, many opposite-sex couples procreate outside of marriage, and same-sex couples procreate and parent using artificial reproductive technology. But *amici* fail to respond to plaintiffs' argument that it is impossible to believe that the State could rationally choose this blunt and overbroad instrument—excluding same-sex couples from the entire range of protections and responsibilities that come with marriage, most of which are focused on the adult relationship—in order to further its interest in procreation, which is only a secondary purpose of marriage. *See Romer* v. *Evans*, 517 U.S. at 632-35 (where the State chooses a classification that is "so far removed from" and "so discontinuous with" the reasons offered for it that they are "impossible to credit," the classification lacks a rational basis).[7]

---

[7] *Amici* are surely right that the State could not limit marriage to individuals who are both able and willing to procreate, since all individuals enjoy constitutionally protected privacy and autonomy rights under *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992). But plaintiffs' argument is not that the State *should* limit marriage to those able and willing to procreate, but that the fact the State does not do so reflects the fact that the link between marriage and procreation is not particularly close. *See* Pl. Opening Br. at 61-65. And it is "impossible to believe" that the State could rationally choose to further an interest in procreation by excluding

Amici suggest that allowing same-sex couples to marry would cause heterosexuals to have more children out of wedlock, asserting that such a trend is evident in Scandinavian countries where same-sex couples may either marry or gain other forms of relationship protection. (*Amici* Br. at 22) What the facts actually show, however, is that the rise in nonmarital cohabitation actually peaked prior to the passage of the registered partnership laws, and that "the change in non-marital births was exactly the same in countries with partnership laws as it was in countries without."[8] *Amici*'s attempts to blame same-sex couples for social trends that they find disturbing are thus both unfounded and irrelevant.

C. Far From Promoting the Welfare of Children, the Exclusion of Same-Sex Couples from Marriage Harms Thousands of Children of Gay and Lesbian Parents in New York State

Amici assert that the State's exclusion of same-sex couples from marriage somehow promotes the welfare of children. But *amici* can provide no reason why the protections that marriage gives to children of heterosexual couples should be denied to the children of lesbian and gay couples.

Plaintiffs agree with *amici* that "children born from [marital] relationships will have better opportunities to be nurtured and raised by two parents within long-term committed relationships, which society has traditionally viewed as advantageous for children." (*Amici* Br. at 23) To the extent that children benefit from the structure and protections of marriage, however, *amici* provide absolutely no justification for denying the children of same-sex

---

same-sex couples from the broad range of protections that marriage brings; the "disconnect" is simply too great. *Romer*, 517 U.S. at 632-35.

[8] *See* M.V. Badgett, *Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia?*, May 20, 2004, available at http://slate.msn.com/id/2100884/ (last visited August 25, 2004). Furthermore, amici's reports of the demise of heterosexual marriage in Scandinavia are greatly exaggerated. Marriage rates in Denmark, Sweden, Norway and Iceland are all actually higher than in the years before the passage of those countries' "registered partnership" laws, which provided marital or near-marital status to same-sex couples. *Id.*

couples those same benefits. Nor could they, as no such reason exists. Instead, the children of gay and lesbian couples who are prevented from marrying live in a state of legal instability and uncertainty. (*See* Pl. Br. at 10) (describing tangible effect of marriage exclusion on children of same-sex couples).

In an effort to distract the Court, *amici* cite to discredited and distorted social science research that *amici* contend shows that lesbian and gay parents are inferior to heterosexual parents. This very suggestion, however, has already been rejected by the New York Court of Appeals, which held in *Matter of Jacob/Dana*, 86 N.Y.2d 651 (1995), that same-sex couples must be afforded the same second-parent adoption rights as opposite-sex couples. While *amici*'s presentation of the science is biased and flawed, this question is in the end irrelevant to whether the State protects children by denying them and their gay and lesbian parents the benefits and responsibilities that come with marriage.[9]

In addition, several decades of reputable social science studies demonstrate that children are more likely to thrive in two-parent households, rather than single-parent households, because two parents are better able to provide both the emotional and economic support that children need. These factors apply equally to children of heterosexual and gay parents. *See generally* Brief *Amicus Curiae* of the National Association of Social Workers ("NASW") at 4-15. Therefore, the State's exclusion of same-sex couples from marriage—the institution everyone agrees brings stability, legal protections, and economic advantages to the

---

[9] Plaintiffs respectfully request that this Court disregard the Affidavit of Maggie Gallagher, annexed as Exhibit 9 to *amici*'s brief. To the extent that *amici* attempt to inject this affidavit into the record as purported scientific, expert evidence, it is not properly before the Court because, *inter alia, amici* have failed to establish Ms. Gallagher's expert qualifications and have also stepped well beyond their role as *amici* in submitting such an affidavit. In any event, the primary conclusion drawn by Ms. Gallagher regarding the issue of same-sex marriage is that children are better off with a mother and a father than with two mothers or two fathers. (Gallagher Aff. ¶¶ 20-23) The New York Court of Appeals has already rejected this argument in *Matter of Jacob/Dana*, 86 N.Y.2d 651 (1995).

family—completely detracts from, instead of furthering, its legitimate interest in promoting the welfare of children. The numerous empirical studies conducted by leading child development scholars no longer leave any room for debate: Children's welfare is advanced when the couples raising them are allowed to marry. *See id.*

In support of their argument, *amici* rely on both distortions of social science research in the field and on partisan propaganda that cannot be considered science at all. For example, *amici* cite to work by Paul Cameron to suggest that children raised by same-sex couples fare worse than the children of two heterosexual parents. (*Amici* Br. at 25 n.15) What *amici* fail to tell the Court is that Cameron's work has been censured and rejected by both the scientific community and several courts as unethical and a distortion of the science. For example, Cameron was expelled by the Nebraska Psychological Association and was officially censured by the American Sociological Association for consistently misrepresenting and misinterpreting sociological research on sexuality, homosexuality and lesbianism. He resigned from the American Psychological Association to avoid an investigation into charges of unethical conduct as a psychologist.[10] In addition, federal courts have refused to rely on Cameron's work about the effects of parental sexual orientation on children's development, work one federal court described as "a total distortion" of the data. *Baker v. Wade*, 106 F.R.D. 526, 536 (N.D. Tex. 1985); *see also Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1330 (5th Cir. 1984) (dismissing Cameron's conclusions and holding there "was no historical or empirical basis" for his "speculative evidence"). *Amici*'s reliance on Paul Cameron for support makes patently clear just how far their position departs from anything that can rightfully be called science.

Amici also distort the relevant scientific literature. For example, the Stacey & Biblarz article they cite (*Amici* Br. at 25) does not suggest that there are any material differences in the development or adjustment of children raised by gay parents. Instead, the article concludes that "every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent child relationships or on children's mental health or social adjustment." Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 Am. Sociological Review 159, 176 (2001).[11] In addition, *amici* cite numerous articles that discuss the difficulties that children face when being raised in households "lacking either a father or a mother figure" (*Amici* Br. at 24), without noting that *none* of these studies address parenting by gay people. Instead, they discuss the problems that *single* parents of both sexes face in raising children alone, problems that have nothing to do with their sexuality.

In short, *amici* offer only a prejudicial and politically motivated diatribe, rather than reasoned or persuasive argument, in support of their opposition to marriage for same-sex couples.

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

In previous briefing, plaintiffs have argued that civil marriage must be understood as an institution created by the State that provides important expressive opportunities; and that by conferring access to civil marriage upon heterosexual couples but

---

[10] Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 Am. Sociological Review 159, 161 (2001); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sexuality 133, 152 (1991).

[11] The court in *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004), improperly relied upon Cameron's research and mischaracterized the Stacey & Biblarz research, just as *amici* do.

not same-sex couples, the State is providing differential access to the expressive opportunities presented by the institution of civil marriage in violation of the free speech provision of the State Constitution.

Amici offer two responses: First, that marriages do not amount to "protected speech." Second, that even if marriage were regarded as an expressive institution created by the State, it is an institution in which the State is the exclusive speaker. Essentially, *amici* argue that the State speaks through the legislative process in deciding who may avail themselves of the institution of marriage and who may not and that courts must defer to the government where, as here, the legislature is the speaker. Both arguments are without merit.

In asserting that marriages "are not protected speech" (*Amici* Br. at 40), *amici* do not seriously claim that the institution of civil marriage provides no expressive opportunity. Indeed, *amici* grudgingly recognize that "civil marriage ... might have some 'kernel' of expression." (*Id.*) Therefore, *amici*'s argument that marriage is "not protected speech" ultimately turns upon the contention, drawn from *United States* v. *O'Brien*, 391 U.S. 367, 376 (1976), that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on free expression." Thus, in the end, *amici*'s argument turns upon their belief that the differential treatment created by the New York statute rests upon "important governmental interests." But, as plaintiffs have repeatedly demonstrated throughout this litigation, no such important interests support the distinction upon which the DRL rests.

Amici are, therefore, left to argue that the New York statute that imposes the differential treatment upon heterosexual and same-sex couples vis-à-vis civil marriage is itself a speech-act by the Legislature to which courts must defer. Under this reasoning, however,

every enactment by the Legislature is a form of expression that, under *amici*'s view, would be entitled to deference by the courts. Thus, for example, if Congress were to enact reduced mailing rates for the Democratic and Republican parties but no other political parties, under *amici*'s conception, the enactment would be regarded as a statement by Congress that this democracy operates most effectively under a two-party system; that, therefore, the two major parties should be supported; and that minor parties should not be given the opportunity to compete equally. Congress may well have been intending to advance such an ideological position when, in 1980, it enacted such a law. But, as we know from *Greenberg* v. *Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980), such an enactment conferring differential expressive opportunities upon political parties was found unconstitutional. The fact that Congress sought to express its support for the two-party system in a piece of legislation did not render the enactment a form of government speech to which courts were required to defer. So too here, the fact that the State Legislature has enacted a law conferring differential access to the expressive opportunities of civil marriage does not render the enactment a form of expression to which this Court must defer.

Conclusion

For all of the foregoing reasons, as well as the reasons stated in our memoranda in support of our motion, 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
September 3, 2004

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: Audra J. Soloway

Roberta A. Kaplan
Andrew J. Ehrlich
Audra J. Soloway
Douglas M. Pravda
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

- and –

James D. Esseks
Matthew Coles
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004-2400
(212) 549-2500

- and -

Arthur Eisenberg
Palyn Hung
New York Civil Liberties Union Foundation
125 Broad Street, 17th Floor
New York, New York 10004
(212) 344-3005

Attorneys for Plaintiffs