SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

-against-

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

Defendants.

Index No 1967-04

Hon. Joseph C. Teresi

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

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Preliminary Statement

Plaintiffs are same-sex couples who seek to be civilly married in New York. They allege that the New York State Domestic Relations Law [D.R.L.] violates the State Constitution's Equal Protection, Due Process and Free Speech clauses, insofar as it prohibits the issuance of marriage licenses to same-sex couples. Defendants are the New York State Department of Health ["Department"] and the State of New York, who assert that the licensing scheme is constitutional. The parties now cross-move for summary judgment, seeking a declaration as to the constitutionality of relevant provisions of the D.R.L.

While plaintiffs assert their interest in sharing certain legal protections reserved to married couples, they do not contest that the State of New York, through its Legislature and the Executive, has recognized and taken extensive action to protect persons who face discrimination on the basis of their sexual orientation in employment, public accommodations, the provision of state services, housing, education, and credit. Additionally, the Legislature has repealed the consensual sodomy law in New York, and expanded the definition of hate crimes and aggravated harassment to include crimes based on sexual orientation. On the state and local levels, same-sex domestic partners and their families are increasingly eligible to receive a variety of benefits and recognition, ranging from health care coverage to hospital visitation rights.

Instead, plaintiffs challenge the Legislature's authority to determine the legal requirements for civil marriage in the State of New York. In defining civil marriage as a legal contract between a man and a woman, the Legislature has authorized the issuance of marriage licenses only to opposite-sex couples, and assigned to the Department the duty to supervise municipal clerks who implement this policy. While conceding that the "State unquestionably has legitimate goals in creating and protecting the institution of marriage" (Plaintiffs' Memorandum dated June 30, 2004

[“Plaintiffs’ Brief”]), they nevertheless ask this Court to usurp the Legislature by setting aside this essential element of the marriage licensing scheme.

That request should be rejected, because the D.R.L. fully comports with the State Constitution. Its marriage scheme readily passes the rational basis test, which, contrary to plaintiffs' arguments, is the governing standard in this case. Only one state licenses same-sex marriages, and the federal government does not recognize such marriages at all. New York's marriage licensing scheme is consistent with this legal and factual reality, and reflects the well-recognized historical tradition of opposite-sex marriage in our culture. The D.R.L. also comports with the due process clause of the New York Constitution. Civil marriage of same-sex couples is plainly not so rooted in our nation's history as to constitute a fundamental right. Finally, plaintiffs’ novel free speech claim is meritless and utterly lacking in precedential support. Thus, the extraordinary judicial intervention sought by plaintiffs is wholly unwarranted.

STATEMENT OF THE CASE

A. Statutory Requirements for Marriage

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

B. <u>The Role of the Department in the Marriage Licensing Scheme</u>

Article 3 of the D.R.L. governs "solemnization, proof and effect" of civil marriages and accords the Department a central role in these matters. The registration and recording of all civil marriages outside the City of New York are under the supervision of the State Commissioner of Health. D.R.L. § 23. Pursuant to D.R.L. § 20, the Department keeps and indexes the original affidavits, statements, consents, licenses with certificates of solemnization, and written contracts of marriage. The Commissioner of Health is authorized to issue certifications of marriage records registered under Article 3 of the D.R.L. D.R.L. §§ 20-a, 20-b. The Department must "carefully examin[e]" marriage records, and "shall require such further information to be supplied as may be necessary to "make the record complete and satisfactory." Id. The Commissioner of Health may inspect the record and index of marriage licenses issued by any town or city clerk and promulgate rules and regulations for ensuring complete registration. D.R.L. § 23.

A town or city clerk commits a misdemeanor if he or she violates any of the provisions of Article 3. D.R.L. § 22. When the Commissioner of Health "shall deem it necessary," she must report cases of violation to the appropriate district attorney. See D.R.L. § 23.

C. <u>This Action</u>

Plaintiffs do not dispute that the D.R.L. does not permit marriage licenses to be issued to same-sex couples and that requests to municipal clerks to issue licenses to such couples are futile. See Complaint ¶¶ 99, 115. Plaintiffs seek a declaration as to the constitutionality of the D.R.L. in this regard.

ARGUMENT

PLAINTIFFS HAVE NOT ESTABLISHED BEYOND A REASONABLE DOUBT THAT GRANTING MARRIAGE LICENSES ONLY TO OPPOSITE-SEX COUPLES VIOLATES THE NEW YORK STATE CONSTITUTION.

Plaintiffs have not demonstrated that the provisions of the D.R.L. at issue here are unconstitutional. Statutory provisions enjoy a strong presumption of constitutionality, Klein v. Hartnett, 78 N.Y.2d 662, 666 (1991), cert. denied, 504 U.S. 912 (1992), grounded in part on "an awareness of the respect due the legislative branch." Dunlea v. Anderson, 66 N.Y.2d 265, 267 (1985); see also Montgomery v. Daniels, 38 N.Y.2d 41, 54-56 (1975). Thus, plaintiffs can prevail only by establishing the statute's unconstitutionality "beyond a reasonable doubt." Schulz v. State, 84 N.Y.2d 231, 241 (1994), cert. denied, 513 U.S. 1127 (1995); Hope v. Perales, 83 N.Y.2d 563, 574-75 (1994). Judicial deference and restraint are particularly warranted here because the licensing of civil marriage in New York is solely the creature of statute. Cf. Matter of Ralph, 274 A.D.2d 965 (4th Dep't 2000) (adoption statute must be strictly construed because authorization to adopt derives solely from state statute).

Plaintiffs have not shown beyond a reasonable doubt that New York's statutory marriage scheme, as applied to them, violates the equal protection, due process, or free speech clauses of the New York Constitution. Plaintiffs wholly fail to establish that the State's licensing scheme is in any way invidiously discriminatory. Rather, plaintiffs seek to redefine "marriage" under New York law to encompass "same-sex couples who seek recognition of the commitment that they have already made to each other." Complaint ¶ 6. The Court should decline this invitation to redefine marriage and should instead defer to the Legislature's determination that marriage licenses be issued to opposite-sex couples only. Limiting the issuance of marriage licenses to opposite-sex couples is

rationally related to the State's legitimate interests in preserving the traditional concept of civil marriage and in assuring consistency among state and federal governments in the legal definition of marriage.

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

1. The Legislature's Decision to Permit Only Opposite-Sex Couples to Obtain Marriage Licenses Must Be Upheld if It Bears a Rational Relationship to a Legitimate State Interest.

The Legislature's restriction of marriage licenses to opposite-sex couples readily satisfies the demands of the equal protection clause of the State Constitution. That clause provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall because of race, color, creed or religion be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

(N.Y. Const., art. 1, § 11). The State provision "'embodies in our Constitution the provisions of the [equal protection clause of the] Federal Constitution which are already binding upon our State and its agencies.'" Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530-32 (1949) (quoting 2 Rev. Record of N.Y. State Constitutional Convention, 1938, at 1065), cert. denied, 339 U.S. 981 (1950). Accordingly, the Court of Appeals has "equat[ed]" the federal and State equal protection clauses and has held repeatedly that the State provision "is no broader in coverage than the Federal provision." Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 360 n.6 (1985) (citing authorities).

Under both the state and federal constitutions, courts apply one of three standards of review to analyze equal protection challenges to statutory classifications. The first, strict scrutiny, applies

when reviewing legislative classifications based on race, alienage, or national origin ("suspect classifications"), and requires the government to establish that the classification is narrowly tailored to serve a compelling state interest.[1] The second, heightened scrutiny, applies when reviewing classifications based on gender or illegitimacy (sometimes referred to as "quasi-suspect classifications"), and requires the government to prove that the classification is substantially related to an important governmental interest. See People v. Santorelli, 80 N.Y.2d 875, 876 (1992); People v. Liberta, 64 N.Y.2d 152 (1984), cert. denied, 471 U.S. 1020 (1985). The third, rational basis review, applies to all other classifications and requires the challenger to prove that the classification is not rationally related to any legitimate state interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985).

Plaintiffs urge this Court to apply a high level of scrutiny to New York's statutory marriage scheme. They claim that heightened scrutiny is justified because the relevant statutes classify on the basis of gender. Plaintiffs' Brief, p. 34. They also ask this Court to create, for the first time in New York, a new suspect class consisting of homosexuals and apply strict scrutiny. Id., pp. 15-17.

However, because no suspect or quasi-suspect classification is at issue here, rational basis review is appropriate. The Legislature limited the issuance of marriage licenses to opposite-sex couples. That limitation is not grounded on a gender-based classification. And creation of a new suspect class is not justified in this case because plaintiffs have not established that the characteristics required for suspect classification are present here. No New York court has applied

[1] Strict scrutiny also applies to legislation affecting fundamental rights. Plaintiffs assert at length that same-sex marriage is a fundamental right and, therefore, strict scrutiny under the Equal Protection clause applies. Plaintiffs' Brief pp. 37 - 47. Defendants address plaintiffs' erroneous analysis of the fundamental right to marriage in Part B of this Argument, below.

strict or even heightened scrutiny to classifications based on sexual orientation. Indeed, our courts have invariably applied rational basis review. See, e.g., Matter of Cooper, 187 A.D.2d 128, 133 (2d Dep't), appeal dismissed, 82 N.Y.2d 801 (1993). At least one court has held that Cooper is binding on lower courts in that it compels the conclusion that same-sex couples may not marry and can constitutionally be denied marriage licenses in New York State. See Storrs v. Holcomb, 168 Misc. 2d 898, 899 (Sup. Ct. Tompkins County 1996) (marriage in New York "is limited to opposite sex couples"), action dismissed, 245 A.D.2d 943 (3d Dep't 1997) (dismissed for failure to join a necessary party).

This Court should follow Cooper, and the persuasive authority of virtually every other court that has considered the matter, and analyze the constitutionality of New York's statutory marriage scheme by applying the rational basis test.

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

The D.R.L.'s marriage-licensing scheme does not embody a discriminatory gender-based classification triggering heightened scrutiny. The applicable sections of the D.R.L. do not deprive one gender of a right that is given to the other, or confer on one gender a benefit that the other is denied, or restrict one gender's conduct but not the other's. Both men and women have the same right: to obtain a license to marry someone of the other gender. Both men and women are subject to the same restriction: neither a man nor a woman can obtain a license to marry someone of his or her own gender.

Plaintiffs' analogy (Plaintiffs' Brief, pp. 36-37) between New York State's statutory marriage licensing scheme and the Virginia antimiscegenation statute struck down in Loving v. Virginia, 388

U.S. 1 (1967), does not withstand analysis. The statute under scrutiny in Loving prohibited and punished interracial marriages between "any white person and colored person." The State of Virginia argued that the statute, despite its racial classification, did not work an invidious racial discrimination because it punished equally the white and non-white participants in an interracial marriage. The Supreme Court rejected this "equal application" argument and, applying strict scrutiny, held that restricting the freedom to marry solely because of race violated the Equal Protection Clause.

The fact that the antimiscegenation statute in Loving expressly classified on the basis of race was critically important to the Court's analysis. The 14th Amendment specifically prohibits racial discrimination, and its "clear and central purpose . . . was to eliminate all official state sources of invidious racial discrimination in the States." Loving v. Virginia, 388 U.S. at 10. As the Supreme Court explained in Loving, where a statute contains a racial classification, "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." 388 U.S. at 8-9. In contrast, this case obviously does not involve a racial classification.

Moreover, the Virginia statute in Loving was enacted with clear discriminatory intent. The title of the 1924 Act was "an Act to Preserve Racial Integrity," and the Supreme Court concluded that its plain purpose was to maintain white supremacy. 388 U.S. at 11. In contrast, plaintiffs here have proffered no evidence that the drafters of the D.R.L's marriage licensing scheme were motivated by an intent to discriminate against anyone as a class.

Other state courts have rejected the Loving analogy and the argument that a marriage statute that restricts marriage to one man and one woman discriminates on the basis of gender. See Lewis

v. Harris, 2003 WL 23191114 at *20-21 (N.J. Super. Ct. Nov. 5, 2003) (copies of all cases with solely electronic citations appear in a separate Appendix) (rejecting the applicability of Loving and applying rational basis scrutiny to New Jersey marriage statute after noting that state constitution did not outlaw statutory classifications based on sexual orientation); Morrison v. Sadler, 2003 WL 23119998 at *4-5 (Ind. Super. Ct. May 7, 2003) (rejecting the Loving analogy because "[u]nlike anti-miscegenation laws, restrictions against same-sex marriage reinforce, rather than disrupt, the traditional understanding of marriage as a unique relationship between a woman and a man"); Baker v. Vermont, 744 A.2d 864, 880 n. 13 (Vt. 1999) (holding that Vermont marriage laws did not discriminate on the basis of gender because they prohibited men and women equally from marrying a person of the same gender and therefore were not subject to heightened scrutiny); Dean v. District of Columbia, 653 A.2d 307, 363 n.2 (D.C. Ct. App. 1995) (rejecting sex discrimination argument because marriage statute applies equally to men and women); Singer v. Hara, 522 P.2d 1187, 1191-92 (Wash. Ct. App 1974) (holding that Washington statutory prohibition of same-sex marriage does not violate equal rights amendment to state constitution or the federal constitution because appellants were not being denied entry into the marriage relationship because of their gender but because their relationship did not comport with the definition of marriage as one between members of opposite sexes); Baker v. Nelson, 191 N.W.2d 185, 186-87 (Sup. Ct. Minn. 1971) (rejecting Loving analogy), appeal dismissed, 409 U.S. 810 (1972); but see Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993) (holding that Hawaii marriage statute establishes a gender-based classification and discriminates against a suspect class and therefore is subject to strict scrutiny). This Court should follow this great weight of authority, reject plaintiffs' Loving analogy, and hold that the D.R.L. does not contain a gender-based classification.

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

New York's statutory marriage licensing scheme does not contain any other classification that warrants heightened or strict scrutiny. Plaintiffs ask this Court to be the first in New York State to hold that homosexuals are a "suspect class" for purposes of analyzing constitutional challenges based on the State equal protection clause. Neither the United States Supreme Court nor the vast majority of other federal and state courts have applied strict scrutiny to classifications based on sexual orientation.[2] This Court should decline plaintiffs' invitation to fashion a new suspect class in this case.

Courts have been, and should be, extremely hesitant to label a statutory classification as "suspect" for purposes of equal protection analysis. Such a judicial determination implicates especially serious separation of powers concerns. Once a class is so labeled, all governmental action based on that classification becomes the subject of strict scrutiny, perhaps unnecessarily so. As the Supreme Court explained in City of Cleburne:

> Doubtless, there have been and there will continue to be instances of discrimination . . . that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us.

473 U.S. at 441-42, 446.

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[2] Indeed, the New York Court of Appeals has noted that other "courts have uniformly refused" to apply strict scrutiny in determining equal protection challenges to classifications based on sexual orientation. Under 21 v. City of New York, 665 N.Y.2d 344, 364 (1985).

Accordingly, courts have found few classes entitled to enhanced protection under the equal protection clause. At present, only race, national origin, and alienage get the protection of strict scrutiny; illegitimacy and gender are quasi-suspect classes. Infra, p. 6.

Not surprisingly, the overwhelming majority of federal and state courts have declined to recognize sexual orientation as a suspect classification when analyzing equal protection challenges arising under federal or state constitutions. See, e.g., Lewis v. Harris, 2003 WL 23191114 at *21 (N.J. Super. Ct. Nov. 5, 2003); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950-51 (7th Cir.), cert. denied, 123 S. Ct. 435 (2002); Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998); Baker v. Vermont, 744 A.2d 864, 878 n.10 (Sup. Ct. Vt. 1999) (and cases cited therein); but see Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998), pet. for review denied, 994 P.2d 129 (Sup. Ct. Oregon 1999).

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

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

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

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

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

At the local level, the City of New York and at least 20 other local jurisdictions include sexual orientation as a protected category in their anti-discrimination policies and laws. In addition, several municipalities, including Albany, provide for the registration of domestic partnerships (see Plaintiffs' Brief, p. 30), the benefits of which some of the plaintiffs have exercised and enjoy. See, e.g., New York City Administrative Code, § 3-241 et seq.; see Complaint ¶¶ 24, 30, and 76.

This collective response from the State Legislature, the Governor, and other elected officials "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary" and "negates any claim that [homosexuals] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." City of Cleburne v. Cleburne Living Ctr., 473 U.S. at 443, 445, supra. Thus, this Court should scrutinize plaintiffs' equal protection challenge under a rational basis standard.

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

The Legislature's decision to allow marriage licenses to issue only to opposite-sex couples readily passes the rational basis test. The rational basis standard of review is "a paradigm of judicial restraint." Affronti v. Crosson, 95 N.Y.2d 713, 716 (2001), cert. denied, 534 U.S. 826 (2001); Port Jefferson Health Care Facility v. Wing, 94 N.Y.2d 284, 290 (1999) (quoting Federal Communications Commn. v. Beach Communications, 508 U.S. 307, 314 (1993)), cert. denied, 530 U.S. 1276 (2000). Under such review, a statute will be upheld unless the disparate treatment is "so unrelated to the achievement of any combination of legitimate purposes that . . . [it is] irrational."

Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 (2000) (internal quotation omitted).

Since the challenged statute is presumed to be valid, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . whether or not the basis has a foundation in the record." Heller v. Doe, 509 U.S. 312, 320-21 (1993) (internal quotation omitted); see also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (challenger must persuade the court that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker" [internal quotation omitted]). Indeed, with respect to an equal protection challenge to a state statute, "the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Affronti v. Crosson, 95 N.Y.2d at 719, supra (internal quotation omitted).

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

Finally, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." Heller v. Doe, 509 U.S. at 321 (internal quotation omitted).

Plaintiffs have not met their burden of negating every conceivable rational basis that could support a legislative scheme allowing a marriage license to be issued only to opposite-sex couples. Indeed, the State has several legitimate interests in restricting the issuance of a marriage license to opposite-sex couples, all of which plaintiffs have failed to negate in their submissions.

First, that licensing scheme comports with the current regime, under which the federal government and at least 40 states deny legal effect to same-sex marriages. Under the laws of the United States and most states, opposite-sex married couples have a unique legal relationship. Federal law confers a host of rights and benefits on married opposite-sex couples, including income, gift and estate tax benefits, Social Security benefits, immigration rights, and health care and nursing home benefits. Report of the United States General Accounting Office, GAO/OGC-97-16, Defense of Marriage Act, January 31, 1997 (http://www.gao.gov/archive/1997/og97016.pdf); Report of United States General Accounting Office, GAO-04-353R, Defense of Marriage Act: Update to Prior Report, February 24, 2004 (http://www.gao.gov/atext/d04353r.txt).

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

record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C.

Thus, the federal government does not recognize same-sex marriage, and DOMA provides that the states are not obliged by the Full Faith and Credit Clause to do so. As of today, at least 40 states (though not New York) have enacted "mini-DOMAs," other legislation, or amended their state constitutions in order to either prohibit same-sex marriages or to deny recognition to marriages between same-sex couples, or both.[3] Consequently, a same-sex couple married in New York probably would not have access to the benefits available to married persons in those states or from the federal government, regardless of what the Court determines here.[4] Moreover, that couple might not have access to a state court to obtain a divorce, a separation or related support and custody orders. See Burns v. Burns, 560 S.E.2d 47, 49 (Ga. App. 2002); Rosengarten v. Downes, 802 A.2d 170 (Conn. App. 2002).

These substantive differences in legal status make it rational to call the license issued to

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[3] States with such laws include Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. Alaska, Nebraska and Nevada have passed amendments to their state constitutions.

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

opposite-sex couples alone a "marriage license." The terminology reflects the reality that the legal status of same-sex couples differs from that of opposite-sex married couples. See Opinions of the Justices of the Supreme Judicial Court of Massachusetts to the Senate, 802 N.E.2d 565, 574-76 (2004) (Opinion of Justice Martha B. Sosman) (addressing the constitutionality of a proposed bill providing for the establishment of "civil unions" for same-sex couples in Massachusetts).

Second, the State has legitimate interests in preserving the historic legal and cultural understanding of marriage. Plaintiffs assert that the "honest answer as to why New York excludes same-sex couples from marriage is simply that it has always done so." Plaintiffs' Brief, p. 49. This is a mischaracterization of both the State's position and the realities of opposite-sex marriage in our history, tradition and culture. The law has protected opposite-sex marriages because of the long-standing societal benefits they are recognized to provide. Among those benefits are social continuity and economic equity. As plaintiffs note, "[l]aws about property and taxes, for example, generally reflect the understanding that married people function not as separate individuals, but as a unit." Plaintiffs' Brief, p. 5.

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

Similarly, New York judicial decisions have consistently recognized the significance of the

tradition of heterosexual marriage as a social institution in which procreation occurs. See Matter of Cooper, 187 A.D.2d 128, 133, supra (referring to "'[t]he institution of marriage as a union of man and woman,'" quoting Baker v. Nelson, 191 N.W.2d at 186); Storrs v. Holcomb, 168 Misc. 2d 898, 900 (Sup. Ct. Tompkins County 1996), action dismissed, 245 A.D.2d 943 (3d Dep't 1997) ("The long tradition of marriage, understood as the union of male and female, testifies to a . . . political, cultural, religious and legal consensus" that denying a marriage license to a same-sex couple does not destroy a fundamental right).

As stated in Matter of Cooper, 149 Misc. 2d 282, 287 (Surr. Ct. Kings Co. 1990), aff'd, 187 A.D.2d 128 (2d Dep't 1993), "the State has a compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or in nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values." See also Lawrence v. Texas, 123 S. Ct. 2472, 2487-88 (2003) (O'Connor, J., concurring) (describing "preserving the traditional institution of marriage" as a legitimate state interest); Lewis v. Harris, 2003 WL 23191114 at *26 (N.J. Super. Ct. Nov. 5, 2003) ("The State's interest in preserving the long-accepted definition of marriage . . . is substantial. . . . The institution of marriage has played a unique role in the formation of our society. Its status as the union of people of different genders has remained unchanged throughout history.").

Plaintiffs contend that the D.R.L. is not rationally related to these legitimate state interests. This contention, however, is foreclosed by Matter of Cooper, 187 A.D.2d 128, supra. In Cooper, the Second Department refused to allow the surviving partner of a same-sex couple to be treated as a "spouse" for purposes of inheritance. In further rejecting the surviving partner's constitutional

challenge, the court applied rational basis review and held this construction of the EPTL comported with the equal protection clause of the New York State Constitution. Id. at 133-34. It relied primarily on the reasoning set forth in Baker v. Nelson, in which the Minnesota Supreme Court concluded that denying marriage licenses to same-sex couples is not "irrational or invidious discrimination" in violation of the Equal Protection Clause of the Fourteenth Amendment. Baker, 191 N.W.2d at 187, supra. Cooper also cited Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), in which the Ninth Circuit held that an immigration statute, construed to limit the term "spouse" to opposite-sex couples, satisfied rational basis scrutiny. That court explained that Congress could rationally decide not to prefer the "spouses of homosexual marriages" because, among other reasons, "they are not recognized in most, if in any, of the states, [and] violate traditional and often prevailing societal mores." Id. at 1042-43.

Plaintiffs' contention -- that the D.R.L. violates the Equal Protection Clause because it authorizes marriage only between a man and a woman -- rests on the same underlying legal theory that was raised and rejected in Cooper. It therefore must be rejected here as well. See, e.g., Storrs, 168 Misc. 2d at 899 ("the ratio decidendi forged by the Court includes holding[ ] that marriage, in this State, is limited to opposite sex couples . . . Needless to add, we are bound by the ruling of the Second Department . . . .").[5]

[5] Neither Lawrence v. Texas,123 S.Ct. 2472, supra, nor Romer v. Evans, 517 U.S. 620 (1996) overrules Cooper. Lawrence expressly notes that it "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 123 S. Ct. at 2484. Romer held unconstitutional an amendment repealing all existing state ordinances that barred discrimination against gays and prohibiting the future enactment of any similar protections. The Court concluded that the challenged provision "seems inexplicable by anything but animus toward the class it affects . . . ." 517 U.S. at 632. By contrast, there is no indication that the century-old D.R.L. was motivated by animus against same-sex couples.

The State's interest in preserving the traditional definition of marriage cannot be equated with moral disapproval of homosexuality. The morality of homosexual conduct and same-sex relationships is not at issue here. This case is thus very different from Lawrence v. Texas, 123 S. Ct. 2472, supra, where the State of Texas asserted that moral disapproval, standing alone, was a legitimate state interest justifying a statute that banned homosexual sodomy. The Supreme Court rejected this argument, holding that the statute violated the Due Process Clause because it did not further any "legitimate state interest which can justify its intrusion into the personal and private life of the individual." 123 S. Ct. at 2484. The Court, however, clearly limited the reach of its holding by stating that it did not involve "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 123 S. Ct at 2484. Justice O'Connor, in her concurring opinion, also was careful to point out that the Court's holding did not extend to other laws that distinguished between heterosexuals and homosexuals:

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

123 S. Ct. at 2487-88. (Emphasis supplied). By comparison, as Justice O'Connor's concurrence suggests, a legitimate interest does exist in continuing to restrict use of the traditional label "marriage license" to licenses issued to opposite-sex couples.

The mere fact that plaintiffs could derive economic benefits, should the definition of civil marriage in New York be changed to encompass them, does not provide a basis for striking down

the statute. Under the rational basis test, a classification "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" Goodwin v. Perales, 88 N.Y.2d 383, 398 (1996), quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970). See Standhardt v. Superior Court, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2003), review den. 2004 Ariz. LEXIS 62 (May 25, 2004); Baker v. Vermont, 744 A.2d at 882 ("It is, of course, well settled that statutes are not necessarily unconstitutional because they fail to extend legal protection to all who are similarly situated."). Perhaps, with respect to same-sex marriage, the line could be drawn differently. That, however, is for the Legislature to decide, because rational reasons exist for the line as currently drawn, see FCC v. Beach Communications, Inc., 508 U.S. 307, 313-16 (1993), and because the formulation of social policy and its enactment into law are matters for the legislative branch of government, not the courts.

Finally, the statutory marriage scheme in the D.R.L. is not unconstitutionally underinclusive simply because, as plaintiffs urge "[p]eople who marry often do not procreate, people who cannot procreate may nevertheless marry, many people (both straight and gay) procreate outside of marriage, and many people in same-sex couples have biological children through artificial insemination, surrogacy, or prior relationships or parent through foster care or adoption." Plaintiffs' Brief, p. 63 (footnotes omitted). That the State's generalization proves to be an inadequate proxy in any individual case is irrelevant. "[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316 (1976), quoting Dandridge v. Williams, 397 U.S. at 485, supra. Accord Goodwin v. Perales, 88 N.Y.2d at 398, supra.

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

As demonstrated above, plaintiffs' equal protection claim fails in light of well-settled precedent established in the courts of this State and other states, and in the Supreme Court of the United States. The few precedents from sister states that have departed from established equal protection doctrine are distinguishable or wrongly decided. For example, Baker v. Vermont, 744 A.2d 864 (Vt. 1999), which held that Vermont was constitutionally required to extend to same-sex couples the benefits and protections that flow from marriage under state law, is of no utility to this Court, for several reasons. First, the Vermont court based its decision not on the equal protection or due process clauses, but on the unique "Common Benefits Clause" of the Vermont Constitution. The Common Benefits Clause provides, in pertinent part, "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . ." Vt. Const., ch. I, art. 7. The Vermont court noted that the Common Benefits Clause was adopted nearly a century before the federal government adopted the Equal Protection Clause of the Fourteenth Amendment and that the state provision "differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development." 744 A.2d at 870.

Second, the framework for analyzing constitutional challenges under the Common Benefits Clause is very different from the framework for analyzing equal protection challenges in New York. Under the Common Benefits Clause, there is no presumption in favor of the constitutionality of the statute. Rather, there is a core presumption of inclusion of all members of the Vermont community in the provision of protections, benefits and security of a challenged law. 744 A.2d at 879.

Moreover, Common Benefits Clause analysis does not follow the traditional three-tiered scrutiny applicable to equal protection claims. 744 A.2d 878. Instead, the court determines what part of the community is disadvantaged by the law and then examines whether the classification is reasonably necessary to accomplish the State's claimed objectives. 744 A.2d at 878.

Third, in the end, the court did not order same-sex marriage in Vermont. Rather, the court left the ultimate remedy to the legislature.

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

Baehr is inapplicable here because it rests on the false premise that a statute prohibiting same-sex marriage discriminates on the basis of gender. As demonstrated above, the D.R.L. does not discriminate on the basis of gender, and is therefore not subject to heightened scrutiny.[6]

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[6] Plaintiffs also mention Li v. Oregon, 2004 WL 1258167, an unpublished case currently on appeal. Plaintiffs' Brief, p. 53, n. 42. Li held, among other things, that Oregon's failure to provide the substantive benefits of marriage to same-sex couples violated the privileges and immunities clause of Article I, section 20 of the Oregon Constitution, which provides: "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." The Oregon Court's analysis is of little utility in interpreting New York State's Equal Protection Clause. As noted in Li, Oregon appellate courts have found that sexual-orientation can be a suspect classification.

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

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

In sum, New York's marriage licensing scheme, insofar as it authorizes the issuance of marriage licenses only to opposite-sex couples, preserves the long-standing cultural and legal definition of marriage as a union between one man and one woman with the potential for

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Therefore, insofar as the decision in Li found gender and sexual orientation discrimination under Oregon's provision, it is distinguishable. In any event, the Court fashioned a remedy similar to that adopted in Vermont, allowing the State legislature to provide benefits without altering the definition of civil marriage in the State. See Plaintiffs' Brief p. 79, et seq.

procreation. It also reflects the reality that "same-sex marriages" and "opposite-sex marriages" have a very different legal status under federal law and the laws of most states. Because plaintiffs have not negated "every conceivable basis which might support" the Legislature's marriage scheme, their equal protection challenge should fail. Affronti v. Crosson, 95 N.Y.2d at 719, supra, quoting Heller v. Doe, 509 U.S. at 320-21, supra.

More importantly, insofar as the defendants rely upon the presumption of constitutionality herein and plaintiffs have failed to meet their burden upon their motion, the plaintiffs' motion for summary judgment should be denied and defendants' granted. See, e.g., Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 325 (1986).[7]

B. Civil Marriage of Same-sex Couples Is Not a Fundamental Right; The State's Marriage Licensing Scheme Does Not Offend the State Constitution's Due Process Clause.

Contrary to plaintiffs' assertions (see Plaintiffs' Brief, pp. 37 - 47), civil marriage of same-sex couples is not a fundamental right and the State's marriage licensing statute comports with the due process clause of the State Constitution as the licensing scheme is rationally related to legitimate governmental interests.

The due process clause provides "that no person shall be deprived of life, liberty or property without due process of law." N.Y. Const., art. 1, § 6. If the statutory scheme under review burdens

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[7] The decisions of the Town of New Paltz Town Justices in People v. West and People v.Greenleaf (see Appendix) addressing the constitutionality of New York State's marriage licensing scheme should not be followed. Those cases involved criminal prosecutions of a mayor and two members of the clergy charged with violations of D.R.L. §17 for solemnizing same-sex marriages without marriage licenses. The criminal courts dismissed the proceedings against the defendants on the grounds that the D.R.L. was unconstitutional as to same-sex couples, none of whom were before the court. Moreover, the prosecutor in those proceedings urged that there was no need for the courts to address the constitutional issues in light of the plain language of D.R.L. § 17.

a fundamental right, then strict scrutiny will apply and the statutory scheme will be found unconstitutional unless the government establishes that it is necessary to promote a compelling State interest and the statute is narrowly tailored to achieve its purpose. If a fundamental right is not in issue, the statutory scheme will survive if it has a rational relationship to the governmental interest to be obtained. See Hope v. Perales, 83 N.Y.2d at 577, supra, citing Golden v. Clark, 76 N.Y.2d 618, 624 (1990).

Thus, the threshold inquiry in any substantive due process analysis is determining whether or not a "fundamental right" has been burdened. The Supreme Court has urged extreme caution in attaching the "fundamental right" label to an asserted liberty interest. In doing so, the Court has warned, the judiciary takes the substantive matter completely out of the political arena and arrogates to the courts powers that heretofore had been exercised by the legislature:

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

Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (internal citations omitted); see also Hope v. Perales, 83 N.Y.2d 563, 575 (1994) ("It is not the role of the courts to pass upon the wisdom of the Legislature's policy choice, even though there may be differences of views about the [Legislature's] decision . . ."). Plaintiffs concede that to "identify the rights protected by the Due Process Clause, courts look for rights 'which are, objectively, "deeply rooted in this Nation's history and tradition,"and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."' Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal

citations omitted)." Plaintiffs' Brief, p. 42.

Plaintiffs cannot seriously contend that civil marriage of same-sex couples is a right so rooted in the Nation's history and tradition as to be fundamental. Many states have already found that no such right exists. See, e.g., Standhardt v. Superior Court, supra (prohibition against same-sex marriage does not violate a fundamental liberty interest protected by due process); Matter of the Application for a Marriage License for Nash, 2003 Ohio 7221, 2003 Ohio App. LEXIS 6513 (Ohio Ct. App. 2003) (no violation of equal protection to deny post-operative former female a marriage license for a marriage with a female); Morrison v. Sadler, 2003 WL 23119998, at *4 (Ind. Super. May 7, 2003); Lewis v. Harris, 2003 WL 23191114, supra; Dean v. District of Columbia, 653 A.2d 307, 361-64 (D.C. Ct. App. 1995) (finding no equal protection impediment to prohibiting same-sex marriage) (opinions of Terry and Steadman, Assoc. J.J., concurring); Singer v. Hara, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (rejecting equal protection and due process clause challenges); Jones v. Hallahan, 501 S.W.2d 588, 590 (Kentucky Ct. App. 1973) ("We find no constitutional sanction or protection of the right of marriage between persons of the same sex"); Baker v. Nelson, 191 N.W.2d at 186-87, supra (finding no due process or equal protection violation).

Likewise, several states have recently amended their constitutions to provide that "marriage" does not encompass same-sex relationships within those states. See, e.g., Alaska Const. art. I, § 25 (effective Jan. 3, 1999) (providing that valid marriage "may exist only between one man and one woman")[8]; Nebraska Const. art. I, § 29 (adopted 2000, Initiative measure No. 416) ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons

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[8] This constitutional amendment followed Brause v. Bureau of Vital Statistics (No. 3A-95-6562 CI, 1998 WL 88743, at *4-5 [Alaska Super. Ct. Feb. 27, 1998][trial court finding that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy under the Alaska Constitution]).

of the same sex in a civil union, domestic partnership, or other similar same sex relationship shall not be valid or recognized in Nebraska"); Nevada Const. art. 1, § 21 (ratified in general elections of 2000 and 2002) ("Only a marriage between a male and female person shall be recognized and given effect in this state"); see also Hawaii Const. art. I, § 23 (added by election of Nov. 3, 1998) (providing "The legislature shall have the power to reserve marriage to opposite-sex couples").[9]

Even plaintiffs seem to admit that what they seek is not a fundamental right but an expansion of a fundamental right into new territory. In that regard, they quote Cooper v Marin, 49 N.Y.2d 69, 79 (1979), which noted, in quoting Wilkinson v Skinner, 34 N.Y.2d 53, 58 (1974), that "[t]he requirements of due process are not static; they vary with the elements of the ambience in which they arise'". See Plaintiffs' Brief, p. 40. Plaintiffs thus echo the courts that have addressed the issue, which have repeatedly recognized that same-sex couples challenging marriage statutes seek not to exercise an existing fundamental right but to re-define civil marriage to encompass something it has not heretofore included. What couples such as plaintiffs really seek, the courts recognize, is not the right to marry but the right to marry a person of the same sex, which they have not had.

Thus, for example, the Court of Appeals of Kentucky found "no constitutional sanction or protection of the right of marriage between persons of the same sex" and declined to require the issuance of marriage licenses to same-sex couples "because what they propose is not a marriage."

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[9] This constitutional amendment followed Baehr v. Lewin, 852 P.2d 44, supra (State Supreme Court held that the state marriage statute confining marriage to a union between one man and one woman was subject to strict scrutiny as a gender-based classification under the equal protection provision of the Hawaii Constitution) and Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996) (On remand the lower court found that the State failed to demonstrate that the statute was narrowly tailored to advance a compelling state interest). Following the amendment to the State Constitution, this decision was reversed in an unpublished dispositional order by the Hawaii Supreme Court. See Baehr v. Miike, 994 P.2d 566 (1999) (Table No. 20371).

Jones v. Hallahan, 501 S.W.2d 588, 590 (1973). Similarly, the Court of Appeals of Washington noted that same-sex couples were not denied a fundamental right to marry because it could not be said that legal recognition of same-sex couples was "fundamental." Singer v. Hara, 522 P.2d 1187, supra.

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

Thus, plaintiffs' substantive due process challenge, like their equal protection claim, must fail. Where, as here, a statutory scheme under review does not burden a fundamental right, the statutory scheme must be found constitutional if it has a rational relationship to the legitimate governmental interest being asserted. See Hope v. Perales, 83 N.Y.2d at 577, supra (citing Golden v. Clark, 76 N.Y.2d at 624, supra). As discussed earlier in this brief, New York's statutory marriage scheme, insofar as it limits the issuance of marriage licenses only to opposite-sex couples, is rationally related to the state's legitimate interests in preserving the traditional legal and cultural concept of marriage and ensuring consistency among federal law and the laws of other states. That is enough to render it constitutional under the due process clause.

C. Issuing Marriage Licenses Only to Opposite-Sex Couples Does Not Offend the State Constitution's Free Speech Clause.

The marriage licensing scheme of the D.R.L. does not burden plaintiffs' right to the free expression protected by article I, section 8 of the New York Constitution.[10] According to plaintiffs, the D.R.L. implicates free-speech protection by "prohibiting [them] from expressing their commitment to one another through marriage" and denying "access to [an] expressive opportunity" (Plaintiffs' Brief, p. 70). But marriage is not "speech." It is rather, as plaintiffs themselves acknowledge (Plaintiffs' Brief, p. 70), a legal status. As indicated in the D.R.L., marriage is "a civil contract." D.R.L. § 10. It requires no particular form of words. See D.R.L. § 12 ("[n]o particular form or ceremony is required when a marriage is solemnized . . . but the parties must solemnly declare . . . that they take each other as husband and wife"). The D.R.L. does not prohibit same-sex couples from speaking or writing whatever they may chose to say about their relationships. What is denied to plaintiffs is a legal status, not speech, and this denial cannot be recast as a prohibition on speech in order to give them more protection than the Constitution otherwise offers them.

Although plaintiffs characterize their argument as based on "well-settled law" (Plaintiffs' Brief, p. 73), in fact it is quite novel. The only court to have addressed such an argument rejected it out of hand. See Goodridge v. Department of Public Health, 14 Mass. L. Rep. 591, 2002 Mass. Super. LEXIS 153 (Sup. Ct. Mass. Suffolk 2002), vacated on other grounds and remanded, 798 N.E.2d 941 (2003). For the proposition that marriage is entitled to protection as speech, plaintiffs rely (Plaintiffs' Brief, p. 72) on a single case: Turner v. Safley, 482 U.S. 78, 95 (1987), in which the

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

Supreme Court, reciting the reasons that prison inmates retain a constitutional "right to marry" subject to due process protections, acknowledged that one "attribut[e] of marriage" is that it is an "express[ion] of emotional support and public commitment." The Court did not, however, scrutinize the marriage prohibition at issue in Turner in terms of its restriction of speech, even though the other prison regulation involved in the case implicated and was discussed in terms of the First Amendment. See Turner, 482 U.S. at 92-93.

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

Even if entry into marriage has an expressive component, New York's prohibition of same-sex marriage does not infringe free-speech protections. Under both the State and federal constitutions, expressive conduct "may be regulated, or even prohibited, 'if [the regulation] is within the constitutional power of the Government; if it furthers an important or substantial governmental

interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." People v. Hollman, 68 N.Y.2d 202, 207 (1986) (quoting United States v. O'Brien, 391 U.S. 367, 377 [1968]).

The prohibition against same-sex marriage readily passes this test. Regulation of marriage is concededly within the Legislature's constitutional powers, and, as discussed above in Part A(2) of this Argument, the restriction of marriage to opposite-sex couples furthers important governmental interests. These interests are, moreover, entirely unrelated to the suppression of free expression. The State is concerned with recognizing the reality that, under federal law and the laws of most states, the legal status of same-sex couples differs from that of opposite-sex couples. It also seeks to preserve the historic legal and cultural understanding of marriage. These interests are not immune from – although, as noted above, they withstand – constitutional scrutiny. But they have nothing to do with the suppression of speech.

That is why the present case is distinguishable from the Supreme Court's flag-burning cases, upon which plaintiffs rely (Plaintiffs' Brief, p. 74). In United States v. Eichman, 496 U.S. 310 (1990) and Texas v. Johnson, 491 U.S. 397 (1989), the Court declined to use the "less stringent" First Amendment standards applicable to expressive conduct, applying instead "a more demanding standard," precisely because the interest asserted by the governments in those cases was directly related to suppression of expression. See Eichman, 496 U.S. at 315-18; Johnson, 491 U.S. at 407-10. Because this is not true of the interests New York asserts here, the more lenient standard of O'Brien applies.

The scheme of the D.R.L. comfortably satisfies that standard. The Court of Appeals uses the

O'Brien approach, under which, it has noted, the "no greater than is essential" standard is satisfied as long as a restriction on conduct with an incidental burden on speech "'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Town of Islip v. Caviglia, 73 N.Y.2d 544, 559 n.7 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 [1985]). Plaintiffs do not and could not argue that this standard is violated: If, as noted above, the government's interests in prohibiting same-sex marriage are substantial, it is difficult to see how anything but such a prohibition would achieve them more effectively.

Plaintiffs instead mistakenly suggest that the State Constitution requires more scrutiny of regulation of expressive conduct than the "no greater than essential" prong of the O'Brien test requires, and that this heightened scrutiny is fatal to the State's marriage laws. They rely for this contention on Arcara v. Cloud Books, Inc., 68 N.Y.2d 553 (1986). In Arcara, the Court of Appeals had relied on O'Brien to invalidate governmental action under the First Amendment. 65 N.Y.2d 324 (1985). The Supreme Court reversed, concluding that the regulated conduct had no expressive component. 478 U.S. 697 (1986). On remand, the Court of Appeals held that the conduct did indeed have a protected expressive component that, under the State Constitution, could be regulated only by State action that is "no broader than needed to achieve its purpose." Arcara, 68 N.Y.2d at 558.

Arcara does not impose more exacting scrutiny than does O'Brien. The cases differ only in terms of what they regard as expressive conduct. Even assuming arguendo that marriage has an expressive component implicating free-speech protection – and thus that Arcara is even relevant to this case – it remains subject to the lenient scrutiny mandated by O'Brien. There is no difference between requiring that a regulation be "no broader than needed to achieve its purpose," as Arcara requires, and that it be "no greater than is essential to the furtherance of the [State's] interest" as

O'Brien demands. If a statute satisfies the First Amendment in this regard, it satisfies the State Constitution as well. And indeed, the Court of Appeals has made clear that the test under Arcara is as lenient as that under O'Brien. See Town of Islip v. Caviglia, 73 N.Y.2d at 560 (1989) (under Arcara, even though government might have used "different techniques" or chosen "alternative provisions," as long as restriction is not "overinclusive" or "unduly restrict[ive]" it satisfies State Constitution).

Nor, finally, can plaintiffs rely on the Supreme Court's "public forum" doctrine in attacking the Domestic Relations Law. The doctrine is simply inapposite. A public forum is a milieu -- a place or a means through which speech can occur. It is true, as plaintiffs note, that a forum need not be "spatial or geographic," see Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) (university "student activities fund" used to finance expressive activities was public forum). But the forum in which speech occurs and the speech itself are different. Marriage cannot be both expressive conduct – which is what plaintiffs say it is – and the medium through which such expression occurs. And if it is not such a medium, then public forum analysis does not apply.

CONCLUSION

New York's Legislature, Executive, and municipalities have taken significant action to address discrimination based on sexual orientation and have accorded many benefits to same-sex couples and their families. This demonstrated ability to change the law suggests that the question of same-sex marriage and the unique needs of committed same-sex couples should be left in the political arena, where all interested parties can have a full and fair opportunity to argue their respective positions. And of course, debate in the Legislature -- as distinct from litigation in a court -- may lead to compromise. The Legislature need not, and often does not, decide controversial matters of social policy in the all-or-nothing way that courts decide cases. See Montgomery v. Daniels, 38 N.Y.2d 41, 62 (1975) ("[I]n enacting reform, the Legislature is entitled to proceed one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.") (internal quotation omitted). There is therefore every reason for this Court to exercise judicial restraint here and leave the resolution of this important issue to the State Legislature. The defendants are entitled to judgment dismissing the complaint and declaring that the State's marriage licensing scheme does not offend the State Constitution.

Dated: Albany, New York
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