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Court of Appeals

STATE OF NEW YORK

DANIEL HERNANDEZ and NEVIN COHEN, LAUREN ABRAMS and DONNA FREEMAN-TWEED, MICHAEL ELSASSER and DOUGLAS ROBINSON, MARY JO KENNEDY and JO-ANN SHAIN, and DANIEL REYES and CURTIS WOOLBRIGHT,

Plaintiffs-Appellants,

against

VICTOR L. ROBLES, in his official capacity as City Clerk of the City of New York,

Defendant-Respondent.

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,

Plaintiffs-Appellants,

against

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

Defendants-Respondents.

BRIEF FOR AMICUS CURIAE IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

NEW YORK STATUTES

OTHER STATUTORY & REGULATORY MATERIALS

OTHER SOURCES

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York, Inc. ("LeGaL") respectfully submits this brief as *amicus curiae* in support of Appellants.

LeGaL is the only statewide lesbian, gay, bisexual and transgender ("LGBT") bar association, first incorporated in 1984 and formed (among other reasons) to facilitate and improve the administration of justice, and to promote legislative and administrative reforms, for the purpose of eliminating discrimination on the basis of sexual orientation for the purpose of assuring fair and just treatment of individuals in the LGBT community and their families by and under the law.

LeGaL is concerned with the equal rights and protections for all LGBT people and their families in our society, particularly in the area of same-sex marriage, and works with other LGBT groups and individuals to promote the achievement of those rights and protections.

LeGaL is in a special position to offer the court a unique perspective on same-sex marriage, due to its members representing the innumerable couples who are living in loving, committed, long-term relationships, who are procreating, adopting and raising children and finding that they have no rights and must be protected in special ways due to the State's denial of the right to marry.

In addition, the proposed amicus curiae has many members who are living in loving, committed, long-term relationships, while procreating and raising loving, healthy, stable children. They also find themselves without any rights and must find creative ways to protect their loved ones, due to the State's denial of their right to marry. Therefore, they are personally and directly affected by the Court's decision.

LeGaL respectfully maintains, therefore, that it has acquired a unique perspective that should be heard and that it can assist the court by filing an Amicus Curiae brief in order to share with the court its expertise in the areas of matrimonial law with respect to the treatment of loving and committed same-sex couples in the State of New York.

ARGUMENT

INTRODUCTION

Gay and lesbian Americans are an integral, indivisible part of our society's foundation. These Americans are doctors, lawyers, judges, police officers, fire fighters, soldiers, priests, teachers, fathers, mothers, sons, daughters, grandparents, grandchildren, friends, neighbors and colleagues – full participants in every aspect of the American way of life. Hundreds of thousands live here in New York State. The Appellants embody that integral participation and include a police officer, a physician, a teacher and even an elected member of the Assembly. The Appellants who have children are good parents, according to the Third Department. Each one lives, works and worships with their families, friends and communities. These Americans are good people working hard to make the world a better place for themselves, their families and their nation.

Yet despite the daily contributions made by these valued Americans, others do not credit their efforts but instead choose to see only that these Americans happen to love people of the same gender. Somehow, in the minds of others, this transforms them from valued Americans fighting for their own fundamental rights into "Homosexuals" seeking novel rights at the expense of society. That these Americans are heroes, public servants, tax payers or just ordinary citizens miraculously becomes irrelevant in the analysis. What matters to those others is to

ensure that these Americans are treated under our laws differently and more negatively than everybody else to vindicate their dogma. These divisive efforts are repugnant to our American values of equality and liberty.

Gay and lesbian Americans suffer discrimination for one reason alone: who they love differs from others' opinions of who they should love. Their dreams are no different than the Americans who have preceded them on this path to a better country with greater liberty. Their dreams are no different because the goals of gay and lesbian Americans are the same: to be judged on their merits and not on their perceived status in life. Our nation has banished many statuses in our ongoing quest for true equality: monarchy, nobility, religion, slavery, coveture and, race among them. The time has come to eliminate sexual orientation discrimination in our laws to better our nation.

These Americans seek one thing before this Court – equality under the law to be as free as anyone else in the pursuit of happiness; constitutionally characterized as our liberty interest. Our true legal traditions of liberty and equality under the law, whose core values are embodied in the Declaration of Independence, that we are all created equal and that we should do unto others as we would have them do unto ourselves have been wrongfully denied because of senseless, irrational discrimination currently masquerading in the guise of "tradition."

Today, before this Court, Appellants seek equality and we, as Amicus Curiae, support their efforts.

I. PROTECTING YOUR LOVED ONES AND YOUR COMMITTED RELATIONSHIP WITH THE RIGHTS ACCORDED THROUGH MARRIAGE IS THE DEEPLY ROOTED FUNDAMENTAL RIGHT AT ISSUE.

A. MARRIAGE IS A FUNDAMENTAL RIGHT BECAUSE IT IS A UNIQUE WAY TO PROTECT LOVED ONES AND COMMITTED RELATIONSHIPS.

Marriage is a fundamental right because it is central to our liberty interests in the pursuit of happiness. It is the unique way by which people protect the loving relationship they have with their committed partner from the vicissitudes of life. Barring same sex couples from marrying is unconstitutional because, beyond a reasonable doubt, it inhibits an individual's liberty in the pursuit of his/her own happiness throughout this life. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992).[1]

The State irrationally interferes with this fundamental right and thereby violates §§ 6 and 11 of the New York State Constitution because it arbitrarily restricts an individual's choice of whom they may marry. The State allows some people to marry who they love, but not others. One can only protect a loved one

[1] "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Planned Parenthood* at 851.

and the committed relationship through the rights accorded with marriage if you happen to love someone of the opposite sex.

The love that brings opposite sex couples together is the same love that brings same sex couples together; but only the love between opposite sex couples is honored by the State with the rights and protections accorded marriage. The State irrationally, shamefully and purposefully dishonors that same love in same sex couples by prohibiting them from marrying. By so doing, the State wrongfully denies same sex couples both fundamental liberty and essential protections needed to live and thrive as equal members in our society.

People marry for a variety of reasons, the most common of which is love. Together with that love in marrying are the societal rights, protections and expressions provided only through marriage. Collectively, the blended whole is a cornerstone of our society. Marriage accords the beloveds the ability to protect one another, and to extend that love outwards to produce a more harmonious society. Being in a sanctioned marriage shields loving, committed couples to support their relationship and their family. "The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society." *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 312 (2003).

The role of love in marriage is what distinguishes it from a business partnership; love is the motive substituted for profit in entering the partnership.

Love's role places opponents of marriage for same sex couples in a quandary. If opponents attempt to claim that love has no weight in the analysis and that marriage is essentially a nonprofit partnership limited to opposite sex couples, then barring marriage for same sex couples is patently unconstitutional because it is designed to disadvantage those of a particular sexual orientation. *See Romer v. Evans,* 517 U.S. 620 (1996). Such a contention would be akin to barring same sex couples from becoming business partners with one another because of their sexual orientation.

If opponents of marriage for same sex couples concede that love plays a leading role in marriage, then they are in the impossible position of articulating legitimate reasons for the State to prefer how love is expressed and why the love of some is more protected by the law than the love of others. Either freedom of expression or equal protection would soundly defeat such contentions. Love between same sex couples is no different than love between opposite sex couples. The same rights extend to same sex couples beyond a reasonable doubt because the reason those rights are fundamental for opposite sex couples is the same for same sex couples – love, protection and a unity against what the world may bring day in and day out. There is no differentiation that justifies the bar on marriage for same sex couples.

Protecting a same sex life partner in a committed relationship is made unduly difficult by the State. Same sex couples cannot share their names, their fortunes, their pensions, their insurance, a favorable tax treatment or even their rent stabilized apartment without Herculean efforts that are far more onerous than obtaining a marriage license. Neither one's estate can protect the other loved one if one is wrongfully killed[2]. There is no recovery if either loses the benefit of the other's consortium through the negligence of another. All of these protections are hindered or prohibited solely because a same sex couple cannot marry.

Protecting our loved ones and our loving relationships is the fundamental right deeply rooted in our nation's history and tradition, indeed far older than our nation. Because the reason for and the nature of the relationship is no different between opposite sex and same sex couples, the nature of the fundamental right is no different either. As such, regulations about marriage are subject to strict scrutiny requiring the State to proffer a compelling reason why it should deny someone who loves a person of the same sex the right to marry. As even the Third Department concedes, there are none.

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[2] There is one particularly notable exception to this – domestic partners killed on September 11, 2001. In that instance alone, the State of New York has conceded the realty of all families in a time of national unity devoid of politics, deeming domestic partners to be the surviving spouse. N.Y. Work. Comp. § 4. We, as Amicus Curiae herein, submit that how a domestic partner perishes should not be determinative of the rights of his/her surviving loved one. *But see In re Valentine,* 17 A.D.3d 38, 40-43 (3rd Dept. 2005)(No workers' compensation death benefit for surviving domestic partner when decedent died in plane crash over Queens County two months later in Nov. 2001).

The role of our judiciary is to proscribe the State from irrational, prejudicial and discriminatory determinations of who is and is not eligible to be protected by marriage. Marriage promotes a more peaceful, loving and harmonious society. The judiciary's role is to ensure equal access to marriage, its legal protections and benefits by all.

B. BY FAILING TO ACKNOWLEDGE LOVING RELATIONSHIPS AS CENTRAL TO MARRIAGE, THE RATIONALE OF THE UNDERLYING APPELLATE DECISIONS COLLAPSES.

Stunningly absent from either decision is the mention of the word "love." This failure to acknowledge the reality of love and its role in marriage dooms the analyses therein, relegating its logic to a hypothetical parallel universe with a cold and loveless world. However, we do not live in a loveless world; we live in a world where love is vitally important to our existence. Thus, from the outset, the Appellate Divisions' decisions should be disregarded *in toto* by this Court that is charged with applying our living Constitution[3] to the lives of everyday New Yorkers.

The decisions are surreal, as if this was the first time in history the question, "why do people marry?" was asked. Both Appellate Divisions wrongly opined as

[3] Our Constitution lives just as our citizens do, growing and evolving with the changing conditions of time. *See, e.g., Millington v. Southeastern Elevator Co., Inc.,* 22 N.Y.2d 498, 507 (1968).

if the slate were clean; the Third Department going to great lengths to demonstrate its ability to make rationales up in the course of its analysis, willfully blinding themselves to the obvious truth that a cornerstone of marriage (and its regulations) is its support of loving relationships[4].

By examining the purposes of marriage absent the emotional charge or the buzz of controversy of the case at bar, the answer is crystal clear from the binding decisions of this Court that protecting loved ones and loving relationships are the central purposes of marriage.

This Court has known for well over a century that the core purpose of marriage is love. *Bennett v. Bennett,* 116 N.Y. 584 (1889). In determining that a wife could sue the paramour of her husband for criminal conversation (adultery) as the rights of women emerged from coveture but prior to the repeal of heart balm actions, this Court acknowledged:

> The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. . . . Marriage gives to each the same rights in that regard. **Each is entitled to the comfort, companionship and affection of the other**. . . . Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects.

Id. at 590 (emphasis added).

[4] "Indeed, a court may even hypothesize the motivations of the State Legislature to discern any conceivable legitimate objective promoted by the provision under attack." *Samuels v. N.Y. Dept. of Health*, 2006 N.Y. Slip Op. 1213, p*7 (3rd Dept. 2006).

In upholding the constitutionality of the ban on heart balm actions, this Court concluded that the Legislature had a rational basis for banning such actions because it expressly found that at the core of marriage was love and not the avoidance of litigation. *Fearon v. Treanor,* 272 N.Y. 268 (1936) *appeal dismissed* 301 U.S. 667 (1937). *Fearon* is a critically important case wrongly relied on by Respondents and incorrectly characterized by them. *Fearon* is central to their undoing.

Oddly, the First Department's citation of *Fearon* implied that there are no constitutional restrictions on the Legislature's regulation of marriage, and that the Courts lacked the ability to invalidate any marriage statute. ("[T]he Legislature . . . has plenary power") *Hernandez v. Robles,* 805 N.Y.S.2d 354, 359 (1st Dept. 2005). This incorrect mantra is repeatedly echoed by Respondents. However, this contention is clearly erroneous because *Fearon* expressly engaged in a rational basis analysis of the Legislature's reasons for banning heart balm actions. *Fearon* at 274; *accord Loving v. Virginia,* 388 U.S. 1, 7 (1967).

The core of *Fearon* is that love is a primary basis of marriage and thus, marital love alone provided the rational basis to banish the heart balm actions. The Appellate Divisions disregarded the plain language of the case in their analyses:

> From time immemorial the State has exercised the fullest control over the marriage relation, justly believing that happy, successful marriages

> constitute the fundamental basis of the general welfare of the people. **Our people believe that marriage should be entered into freely as a matter of choice, not through fear, restraint or compulsion**. . . . [W]e view the marriage engagement as a period of probation, so to speak, for both parties, -- their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, and incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off."

Fearon at 273 (emphasis added)(internal citation omitted).

After the repeal of the heart balm actions, this Court again rightly concluded that love is central to marriage and that a wife could sue for her suffering caused by the injuries to her husband in *Millington v. Southeastern Elevator Co., Inc.,* 22 N.Y.2d 498 (1968).

Millington permitted the wife to sue the tortfeasor who injured her husband for loss of consortium after an injury restricted him to a wheelchair for life. *Millington* starkly demonstrated that it was injury to the loving relationship between the married couple that was the genesis of the wife's right to sue for compensation:

> **The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more**. . . . the mental and emotional anguish caused by seeing a healthy, loving companionable mate turned into a shell of a person is real enough. . . . . The loss of companionship, emotional support, love, felicity and sexual relations are real injuries.
>
> . . . There may not be a deterioration in the marital relationship, but it will certainly alter it in a tragic way. Even in the case of a husband the "sentimental" damages may predominate over the loss of support or

> material element. Thus to describe these damages as merely parasitic is inaccurate and cruel. The Supreme Court of Michigan effectively answered [this:]
> . . .
> ”We are now at the heart of the issue. In such circumstances, when her husband's love is denied her, his strength sapped, and his protection destroyed, in short, when she has been forced by the defendant to exchange a heart for a husk, we are urged to rule that she has suffered no loss compensable at the law. But let some scoundrel dent a dishpan in the family kitchen and the law, in all its majesty, will convene the court, will march with measured tread to the halls of justice, and will there suffer a jury of her peers to assess the damages. Why are we asked, then, in the case before us, to look the other way? Is this what is meant when it is said that justice is blind?"
> . . .
> "[There] is, in a continuing marital relationship, an inseparable mutuality of ties and obligations, of pleasures, affection and companionship, which makes that relationship a factual entity.”

Millington at 503-04 *quoting Montgomery* v. *Stephan,* 359 Mich. 33, 46, 48-49 *and Deems* v. *Western Md. Ry. Co*., 247 Md. 95, 108-109 (1967).

Love forms the foundation for marriage as *Bennett, Fearon* and *Millington* amply demonstrate. Because love is why marriage is a fundamental right and that love is no different between same sex and opposite sex couples, the *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) test is satisfied, a test that Justice Catterson felt was unmet in his concurrence. The Appellate Divisions failed to acknowledge this, and thus, their analyses are wholly inapposite. The State has no right to infringe individuals’ liberty by granting opposite sex couples the right to express their love through marriage and denying that same right to loving same sex couples. Simply because a New Yorker falls in love with someone of the same sex

is no reason to bar him or her from marrying that person to better fulfill his or her life. How it is that our law protects our "dishpans" more rigorously than our committed loving relationships is an anachronistic wonder.[5] Appellants need this Court's protection to ensure their liberty.

II. THE PURPORTED PURPOSES OF MARRIAGE ASSERTED BY THE APPELLATE DIVISIONS FAIL TO PASS CONSTITUTIONAL MUSTER.

Love, logic, and legal principles of fairness and equality were spurned by the Appellate Division in their analysis. Collectively, six assertions were proffered by the Appellate Division majorities in an attempt to legitimize blatant discrimination: a) biomechanics of procreation; b) rearing of children; c) adherence to traditional definitions; d) social stability; e) legislative deference; and f) conformity with other states' notions of equality.

Amicus Curiae argued, *supra,* that because love was omitted as the clear and central purpose of marriage the entirety of the Appellate Divisions' analyses should be disregarded. However, even if we indulge the Appellate Divisions' purported reasons, none of them make any sense as a reason to prohibit same sex couples from equally enjoying the rights afforded through marriage. Rather, they

[5] The law even protects the love a boy has for his goldfish. *People v. Garcia*, N.Y. Slip Op. 2315 (1st Dept. 2006)(Per Catterson, J., upholding enhanced 2 year prison sentence for killing pet goldfish under N.Y. Agr. & Market § 353-a(1)). Amicus submit that if our law can support and protect a relationship with a goldfish, it can protect a same sex relationship.

are pretexts utilized to distract from our core American value of equality under the law and keeping the dogma of others from governing the actions of all.

A. PROCREATION[6] IS IRRELEVANT TO MARRIAGE'S CONSTITUTIONAL CONSIDERATIONS.

Over forty years of constitutional jurisprudence went out the window with the Appellate Divisions' decisions holding that procreation was a rational basis for excluding same sex couples from marrying. If the State has the right to regulate procreation, what is really being said is that the State has a right to regulate sexual activity between consenting adults[7]. Thus, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *People v. Onofre*, 51 N.Y.2d 476 (1980), *Lawrence v. Texas*, 539 U.S. 558 (2003) and the entire body of law on the right to privacy is called into question by accepting this rationale.

The Appellate Divisions present the State's reentry into people's sex lives in the most benevolent of ways – procreation is the natural consequence of sexual relations and the State has an interest in encouraging procreation in a marital environment. In other words, the State wants people to only have sex when they are married. This is the first step on the road back into peoples' bedrooms and this

[6] Even the choice of the word procreation demonstrated the loveless, mechanical world of the Appellate Division's marriage concept. Often, the consequence of people being in love is having children; children are optimally the product of love and liberty, not a biomechanical process subject to plenary regulation by the State.

[7] More precisely, the State has a right to regulate heterosexual intercourse under their analyses but neither heterosexual sodomy nor homosexual activity.

Court should not accept the invitation to turn back the clock and eviscerate the right to privacy. The State of New York has no interest in the biomechanics of reproduction.

Although the Appellate Divisions assert their "carefulness" and restraint in ensuring that their decisions do not reflect their policy preferences, that is precisely what they do. The Appellate Divisions wrongly attempt to bootstrap procreation where the State has no interest to the rearing of children (who are citizens of our State) where the State has legitimate interests. We, as Amicus Curiae, urge the Court to draw a substantial distinction between the two.

Relying on procreation as a purpose for marriage necessarily carries with it the calculated ***political*** risk that the Legislature will not turn and bar opposite sex couples from marrying because one or the other is unable to conceive or bear children. After all, if marriage is about procreation and thereafter rearing the procreated then barring marriage to those unable (or unwilling) to have children is perfectly constitutional should the Legislature decide to do so.

We know, of course, that barring marriage to people who are too old or medically unable (or mentally unwilling) to have children is preposterous. The self-evident reason why it is preposterous is that the purpose of marriage is pursing happiness with the one you love in the course of exercising your liberty. The entire struggle of the over/under inclusiveness of the regulatory purpose on the

procreation point is a farcical indulgence of the facially incorrect assertion that procreation is a state interest[8]. Thus, procreation as an asserted purpose of marriage is legally impossible to sustain.

B. REARING CHILDREN FOCUSES ON THE WRONG RELATIONSHIP IN EVALUATING WHO MAY MARRY.

While the State does not have an interest in people's sex lives, gently characterized as an interest in procreation, it does have a strong interest in children because they, like adults, are citizens of this State. What matters to society and the State is the rearing of children under the best possible circumstances of home, safety, education and economic security. The best home for a child is a loving home, regardless of the parent's sex, sexual orientation or marital status. *See Matter of Jacob*, 86 N.Y.2d 651 (1995). Unmarried same sex couples make equally good parents as a married couple. *Samuels v. Dept. of Health*, 2006 N.Y. Slip Op. 1213, p*9 (3rd Dept. 2006). A loving home provides New York's citizens under the age of majority the best opportunity for a happy, productive life.

The Appellate Divisions wrongly held that rearing children in a home with married opposite sex parents justified the ban on marriage for same sex couples. This contention is incorrect because the Appellate Divisions focused on

[8] If New York, the third most populous state in the union, is concerned about its population it has numerous other proven incentives such as tax and immigration policies it can utilize alone or in conjunction with the federal government that infringe no one's rights.

the wrong relationship – the parent/child relationship rather than the spouse/spouse relationship. This is the same type of error this Court rightly reversed in *Matter of Raquel Marie X.,* 76 N.Y.2d 387 *cert den. sub nom,* 498 U.S. 984 (1990).

Raquel Marie found unconstitutional unwed father/mother cohabitation requirements in order for the father to maintain his parent/child relationship when the mother wished to put the baby up for adoption. "[T]he State's objective cannot be constitutionally accomplished at the sacrifice of the father's protected interest by imposing a test so incidentally related to the father child relationship[.]" *Id.* at 426; *see also Tucker v. Toia,* 43 N.Y.2d 1 (1977)(State improperly focused on parent/child relationship to determine eligibility of young emancipated adults for public assistance benefits).

*Raquel Marie'*s logic applies in this situation as well – the parent/child relationship cannot determine the nature of the spouse/spouse relationship. The rationale is the same – the State cannot interfere in a loving relationship between two loving people. Just as the State could not take the love a father has for his infant child by permitting an adoption without his consent, the State cannot interfere with the loving relationship two adults of the same sex have with each other by denying them the right to marry.

The final blow to child rearing as a justification for banning marriage for same sex couples lies with the children being reared in the homes of same sex

relationships. The Third Department holding that the State could rationally prefer the "better opportunities to be nurtured and raised by two parents with long-term, committed relationships" leaves the children of same sex relationships without the same benefits although they have good parents. In other words, children whose procreation was achieved in one way (heterosexual marital sex) are entitled to better opportunities than children who entered families in other ways such as adoption or insemination. How is it that children of same sex relationships should have fewer benefits than children of married (or divorced) heterosexuals?

C. EQUALITY IS THE PARAMOUNT MORAL AND CONSTITUTIONAL TRADITION TO BE UPHELD; NOT THE FADING DISCRIMINATORY ONE MAN/ONE WOMAN DEFINITION.

1. EQUALITY IS THE PARAMOUNT MORAL AND CONSTITUTIONAL TRADITION TO BE UPHELD.

For well over a century, this Court has employed rational basis analyses to strike down statutes designed to enforce a particular morality of the day because liberty and equality are our paramount values. Equality is the paramount moral and constitutional tradition to be upheld by this Court. Despite repeatedly holding that equality is more important than popular morality, this Court again faces a

similar question: May the "morality[9]" of some be binding as the law of all? This Court has faced this question several times and each time has held that the answer is no. History demonstrates that this Court has regularly upheld equality over the popular morality of the day and that by doing so, it has reinforced the foundation upon which better futures have been built by our citizens.

Initially, constitutional protection exercised in the pursuit of happiness found its first expression in the right to work. The fundamental right to work prevailed over popular morality about acceptable trades or conditions. Typically, these morally popular laws involved legislative restrictions on the right to manufacture or sell undesirable products.

When the Temperance Movement targeted tobacco as an "evil" of modern society[10], and the Legislature responded by banning the rolling of cigars in tenement houses typically inhabited by politically impotent immigrants, this Court struck down the statute as irrational and infringing on the right to work. *In re Jacobs,* 98 N.Y. 98 (1885). Purportedly, this statute was a health regulation in an age prior to the establishment of the cancer-tobacco linkage, but this Court recognized the reality of its purpose – regulating tobacco, at that time considered a

[9] "Morality" is neither discriminatory nor detrimental to loving relationships. That the Appellate Divisions decisions reflect a moral, as well as constitutional, judgment is clear. *Hernandez* at 389 (Saxe, P.J., dissenting).

[10] Cigars, which were smoked almost exclusively by men, were an early target of the Women's' Christian Temperance Movement. *See, e.g.,* "Leaflet for Mothers' Meetings" titled "Narcotics", by Linda B. Ingalls *available at* www.historian.org/bysubject/tobacco2.htm.

harmless product. In striking down the statute, this Court opined over 120 years ago that

> Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint of his person, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.

Id. at 106.

Similarly during this era, this Court struck down criminalization of: the sale of margarine in *People v. Marx,* 99 N.Y. 377 (1885); offering of any gifts or prizes in connection with the sale of food in *People v. Gillson,* 109 N.Y. 389 (1888)(to discourage public gambling by offering lottery tickets with food purchases) [11]; and restrictions on the licensure of dance schools in *People v. Duryea,* 198 N.Y. 1 (1910)(dancing being immoral in some religious communities).

Other types of morally based restrictions are also noteworthy, particularly *People v. Williams,* 189 N.Y. 131 (1907). At a time when a woman's place was in the home, this Court upheld the right of women to work after 9 p.m., holding that the statute banning such work by women was unconstitutional because men could work after 9 p.m. In an age when legal employment opportunities were severally

[11] This case also demonstrates that the equal protection of New York's constitution is broader than the federal constitution. Both decisions, rendered in an age prior to computerized legal research could not locate such a decision. However, *Gillson* (at 407) notes the New York constitution's equal protection must be broader because the Supreme Court held that the federal constitution permitted a ban on the sale of margarine in *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (upholding a Pennsylvania ban on margarine) that the New York constitution prohibited in *Marx*.

limited to women, striking down this statute ran contrary to the morality of the role of women in society.

This Court has also revisited the constitutionality of work restrictions more recently. When blue laws, prohibiting business to be conducted on Sundays, became riddled with so many legislative exceptions as to be nothing more than a nod to religious piety, this Court struck down the entire statutory scheme in *People v. Abrahams,* 40 N.Y.2d 277 (1976)[12]. *Abrahams* is a particularly apt case for consideration by this court because of its similarities with the case at bar. Both marriage and the Sabbath day laws spring from religious origins. In both cases, the law has slowly but surely eroded the complete bar of the original statutory schemes. For the Sabbath laws, virtually all commercial activity was banned under the original 1695 colonial law and its 1788 restatement into state law. *Abrahams* at 281. Thereafter, the Legislature began making a series of exceptions so that by 1976, the purpose of the statute had vanished; the exceptions swallowing the rule. *Id.*

The same evolution is happening with the ban on same sex relationships. Maintaining a ban on marriage for same sex couples serves no salutary purpose other than a continuing nod to the religious piety of some segments of society that require the control of others' actions as vindication of their dogma. Plainly, there is

[12] The blue laws survived a 1915 challenge in *People v. C. Klinck Packing Co.,* 214 N.Y. 121 (1915), a case which *Abrahams* did not cite but implicitly reversed.

no impact on opposite sex married couples by allowing same sex couples to marry. But, the ban on marriage for same sex couples causes material harm to same sex couples, their children and their families.

Same sex couples can effect partially marital like arrangements under the law. In some circumstances, the law has evolved to treat same sex and opposite sex couples similarly. The brightest example of this is the lack of discrimination for September 11 benefits, when the law permitted surviving same sex partners to recover economic damages through the Victims Compensation Fund and one time amendments to the Workers' Compensation Law which the courts of this State upheld. N.Y. Work. Comp. § 4; 49 U.S.C. § 49101 (VCF Fund); *see Cruz v. McAneney,* Decisions of Interest, Vol. 11, Pg. 18 N.Y.L.J. (July 16, 2004) (imposing TRO sought by same sex surviving partner on use of VCF funds by surviving brother/administrator pending clarification from Special Master). The State now permits a surviving domestic partner to make the burial arrangements for a deceased loved one. N.Y. Pub. Health § 4201. Additionally, wills leaving the estate to a surviving same sex partner no longer face the "undue influence" challenges that they used to, as was the case in *In re Anonymous*, 75 Misc. 2d 133 (Surr. Ct., Nassau Co. 1973). Same sex couples who marry in Canada or Massachusetts can then reside in New York with spousal rights. Op. Att'y Gen. No. 2004-1. Health care decisions can be delegated to a same sex partner though a

proxy. *See* N.Y. Pub. Health § 2981. Same sex couples can adopt children. *Matter of Jacob*, 86 N.Y.2d 651 (1995). They can take the name of their partner. *Matter of Daniels,* Legal Briefs, N.Y.L.J. (1/23/2004) Vol. 231, pg. 18. They can live together. *McMinn v. Oyster Bay,* 66 N.Y.2d 544 (1985). They can be intimate without fear of criminal prosecution. *People v. Onofre,* 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981). They can succeed to rent stabilized and controlled tenancies. *Braschi v. Stahl Assoc. Co*., 74 N.Y.2d 201 (1989); 9 N.Y.C.R.R. §2204 *et seq.* And as the Third Department notes:

> … gays and lesbians in New York have, in recent years, advocated and successfully obtained passage of a broad array of rights from the Legislature (*see, e.g.,* Civil Rights Law § 296; Education Law § 313; Executive Law § 296; Insurance Law § 2701 (a); Penal Law §240.30(3); L. 2002, chs 73, 467, 468).

Samuels at p* 11, n. 13.

Without doubt, there are still significant rights that same sex partners cannot possess without marriage which is the purpose of this litigation.[13] The current system of separate but less than equal will not suffice under our State Constitution. However, there is no doubt that the law has evolved to recognize the existence and validity of same sex relationships. Thus, like the Sabbath law that became so riddled with exceptions as to eviscerate its purpose, so it is becoming with the legal status of same sex partners. Yet, rather than acknowledge the obvious, the Legislature prefers this piecemeal, halfway house to marriage. This Court, as it did

[13] Discussed, *infra,* at part III.

with the Sabbath laws and for the same reasons, should strike down the ban on marriage for same sex couples.

2. THE "TRADITIONAL" ONE MAN/ONE WOMAN DEFINITION IS MOOT.

Our traditional definition of equality under the law is subordinated in the Appellate Divisions' decisions that instead prefers, as a policy matter, a so-called "traditional" definition of marriage. However, the Appellate Divisions' desire to preserve the traditional definition of marriage is moot. Our sister state of Massachusetts no longer defines it as such, and our law would seem to uphold Massachusetts marriages here. Op. Att'y Gen. No. 2004-1. Thus, in New York, the definition of marriage as one man and one woman has begun to fade and no longer may define exclusively opposite sex coupling in our state.

Our Canadian neighbors and European allies have changed the definition. The legislature of our sister state of California has sought to change the definition, although that effort was rebuffed (for now) by the governor's veto there. The highest courts of neighboring New Jersey and Washington are considering changing the definition. Thus, even though they are trying to enforce their own policy decision about the definition of marriage, the Appellate Divisions hold no monopoly on the English language and the word's meaning is evolving with each passing day. It has evolved to the point today where opposite sex spouses are no

longer the exclusive definition. Thus, our living Constitution requires acknowledgment of this fact and this rationale cannot be a basis to discriminate against same sex partners.

D. SOCIAL STABILITY IS ESTABLISHED THROUGH LOVING RELATIONSHIPS.

The First Department's reliance on social stability as a factor to keep loving people from marrying is patently absurd and utterly without any evidentiary foundation. In our sister state of Massachusetts, there are neither riots nor mayhem as a result of the marriage of loving same sex couples. Across our national border in Canada, our Quebecois neighbors are not marching with torches in the dark of night. Even in the epicenter of American marriage for same sex couples at Provincetown, Massachusetts, where over 1,200 licenses in a town with 3,000 permanent residents have been issued, all remains quiet and peaceful[14]. People who love each other get married without any negative impact whatsoever on social stability. The contention is wholly specious.

What is true about social stability, however, is that marriage without love is powerless to assist in the effort. Our Family and Supreme Courts are brimming with the vitriol of loveless marriages in dealing with domestic violence, abandonment and divorce. Marriage without love is helpless to cure our societal

[14] *Available at* www.provincetowngov.org.

ills. More love equals more stability in our society, the relationship being directly proportional. "The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society." *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 310 (2003).

E. RELEGATING THIS MATTER TO THE LEGISLATURE IS A WHOLESALE ABDICATION OF JUDICIAL RESPONSIBILITIES.

Our judiciary's responsibility is to interpret the State and Federal Constitutions to address the scope of rights provided by these social contracts. *Marbury v. Madison,* 5 U.S. 137 (1803)[15]; *In re Jacobs,* 98 N.Y. 98, 110 (1885)("Generally it is for the legislature to determine what laws and regulations are needed… [but] the determination of the legislature is not final or conclusive"); *Fearon v. Treanor,* 272 N.Y. 268 (1936) *appeal dismissed* 301 U.S. 667 (1937).

[15] "It is emphatically the province and duty of the judicial department [the courts] to say what the law is. Those [judges] who apply the rule [of law] to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law [e.g., a statute or treaty] be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law [e.g., the statute or treaty].

This doctrine would subvert the very foundation of all written constitutions."
5 U.S. at 177-78.

The First Department wrongly opined that the issue of marriage for same sex couples was not (or ought not) be justicable.

To state that the Legislature decides rights, and not the courts, creates a tyranny by the majority that the Bill of Rights (both state and federal) was expressly ratified to prevent. This decision demonstrates not what it portends to decide; rather, it demonstrates why this Court must squarely face its constitutional duty to determine the scope of rights under our constitution with the same equality and integrity that it employs in other contexts. Marriage for same sex couples is no exception to constitutional rights merely because some may feel discomfort with the Appellants, their children and their families.

F. NEW YORK IS A LEADING STATE, NOT A FOLLOWING STATE, PLUS CONFORMITY SUGGESTS RECOGNITION OF SAME SEX RELATIONSHIPS.

Similarly, the Third Department rests its decision on the need to conform to the laws of other states. This is antithetical to the spirit of New York. Our citizens are leaders, not followers. Since 1778, our state motto has been Excelsior, not Subsequor. N.Y. State § 70. As Appellants amply demonstrate, the variety in laws of our sister states as compared to ours varies so widely that there is nothing to conform to. Brief of Plaintiff-Appellants (*Samuels*) at p. 65, New York does not

need Missouri, Alabama, and Wyoming to decide what is right for the citizens of our state. Comity doctrines wholly addresses these issues.

Even were conformity to be a factor, conformity to our neighbors' laws would be a stronger factor than others. Massachusetts, Vermont, Connecticut, New Jersey, Quebec and Ontario all provide some degree of legal recognition of same sex relationships. Only Pennsylvania does not. Thus, conformity suggests that recognition for same sex relationships in New York is warranted.

III. THE DAILY EXPERIENCES OF THIS AMICUS AMPLY DEMONSTRATE THE DUE PROCESS INEQUITIES GAY AND LESBIAN CITIZENS REGULARLY ENDURE BECAUSE THE PRESENTLY EXISTING SYSTEM OF SEPARATE BUT LESS THAN EQUAL IS A FAILURE.

New York currently has separate and unequal bodies of law for same sex partners and married opposite sex partners. The rights and privileges that the law provides an opposite sex couple are essentially a codification of the commonly intended relations between the two, which they are thereafter free to alter largely as they wish. The codification of marriage laws are not the bestowing of legislatively invented rights in this Amicus' analysis, rather it is a statutory default system of how a loving couple would typically treat each other much as the Uniform Partnership Act is a codification of common law business practices in dealing with partners. N.Y. Partnership § 10.

For a same sex couple, however, the rules are very different. Even when the law provides a pale imitation of marital rights, same sex couples bear the burden of proof in every instance under state law to demonstrate opting into quasi marital arrangements. There must be writings, lawyers and legal fees in each instance. Further, there is no 'package' available. For each situation a new document is required, leaving ample room for devastating traps and pitfalls. The following table below itemizes the documentary work required to establish a marital like relationship, and shows that no amount of careful planning can fully emulate marriage. The list is long, the pile of papers high, the cost of preparation still higher and the result still falls short of marriage simply because you want to share your life with someone of the same sex.

COMPARISON OF THE MUTUALITY OF RIGHTS
IN THE CONTEXT OF MAJOR LIFE EVENTS
FOR SAME SEX COUPLES.

EVENT	PROCEDURE TO CONVEY MUTUAL RIGHTS
Children	Second Parent Adoption. N.Y. D.R.L. § 110
Health Care Benefits	No remedy.
Health Care Decisions	Health Care Proxy. N.Y. Pub. Health § 2981.
Name Change	Name Change Proceeding. N.Y. Civ. R. § 60
Property Purchases	Joint Tenancy. N.Y. Real Prop. §240-b(1)
Business/Financial Affairs	Power of Attorney and/or joint accounts
Income Tax Minimization	No remedy
Relationship Dissolution	Equitable concepts only; no equitable distribution
Spousal Support	No remedy
Domestic Violence	Criminal Order of Protection. C.P.L. § 530.12
Death	Will. N.Y. E.P.T.L. § 3-1.1.
Succession	Succession litigation. *See* 9 N.Y.C.R.R. § 2204
Burial	After Aug. 3, 2006, by will or burial proxy[16]
Loss of Consortium	No remedy[17]
Estate Tax	No remedy
Loss of Consortium	No remedy
Wrongful Death	No remedy
Workers' Comp. Benefits	No remedy[18]
Other Survivorship Benefits	No remedy

This table demonstrates that due process is substantively and procedurally violated because of the burdens and prohibitions placed on same sex couples to

[16] N.Y. Public Health L. § 4201 (effective 8/3/2006)

[17] Loss of consortium not permitted to same sex couples in New York, but is in New Jersey. *Compare Lennon v. Charney,* Decisions of Interest, p.25 N.Y.L.J. (July 1, 2005)(Westchester Co. Supreme Ct, LaCava, J.)(denying loss of consortium claim) *with Buell and Moffett v. Clara Maass et al,* (Supr. Ct., Essex Co., N.J. Rothschild, Jr., J.)(Docket No. L-5144-03, 5/11/05)(permitting loss of consortium claim).

[18] Unless the domestic partner perished in the World Trade Center on September 11, 2001. N.Y. Workers' Comp. § 4 (domestic partners deemed spouses).

convey mutual rights to one another; it also demonstrates the equality violation under the law when compared to opposite sex couples. The due process violation infringes the liberty interest in being free to pursue happiness with the one you love; and the equality violation exists because opposite sex couples are free to pursue the exact same happiness and mutual rights through the licensure of marriage.

A. THE STATE BURDENS SAME SEX COUPLES' FINANCES.

1. PROHIBITING SAME SEX COUPLES FROM THE ECONOMIC PARTNERSHIP OF MARITAL LIFE IS BURDENSOME.

Quizzically, the State permits any two people to enter into a partnership for the purpose of making money; but those same two people cannot enter into a partnership to make a home unless they are of the opposite sex. *See* N.Y. Partnership § 10. Because same sex couples cannot marry, they cannot utilize the benefits of the economic partnership that is an important element of marriage. *See O'Brien v. O'Brien,* 66 N.Y.2d 576 (1985); N.Y. D.R.L. § 236B(5)(d).

This is a material disadvantage because in any relationship, the record and beneficial interest in a particular asset can easily vary for a number of reasons such as creditworthiness, or licensure assets (such as professional degrees like law or medicine). Titling of assets becomes virtually determinative without regard to

beneficial interests, and financially disparate couples face harsh results if they break up.

Marriage also alters the valuation of contributions to the relationship. When a same sex partner cooks dinner, cleans the bathroom and picks up the dry cleaning, the law accords it no value. When a spouse of the opposite sex does precisely the same tasks, it is an element to be considered in the equitable distribution of the marital estate. N.Y. D.R.L. § 236B(5)(d)(6).

2. TAXATION IS MORE ONEROUS FOR SAME SEX COUPLES.

Same sex couples pay more in tax than similarly situated married couples. Take, for example, a hypothetical same sex couple where the family's income comes from one partner's earnings of approximately $75,000 per year. That couple will pay almost $400 a year, each year, more in state tax than a similarly situated married couple because of the higher marital deduction. *Compare* N.Y. Tax L. § 601(a)(2) *with* §(a)(5)(using 2005 tax year). In addition, the same couple will pay an additional $400 (approximately) because the health insurance benefits from the employed partner's workplace are an additional taxable fringe benefit to the employee. N.Y. Tax L. § 607; I.R.S. Priv. Ltr. Rul. 9603011. With a premium

of $500/mo.[19], that is an additional $411 per year for health insurance. Thus, each year, a same sex couple pays over $800 more, a 9% higher state tax burden than that of a married couple when one partner works and one stays at home because of the structure of our tax laws.

Although this Court cannot address the federal taxation issues, it is noteworthy that this same sex couple would pay $6,834 more in federal tax. The total federal and state tax burden for the same sex couple is $20,049; for the married couple, $12,407.[20] The total tax burden for same sex couples is a whopping 62% higher because they cannot marry.[21]

B. THE STATE MAKES FAMILY LIFE HARDER ON SAME SEX COUPLES.

1. THE STATE PROHIBITS SAME SEX COUPLES FROM EXPRESSING THEIR FAMILY VALUES THEREBY INFRINGING THEIR FREEDOM OF EXPRESSION.

The State also prohibits same sex couples from expressing support for family values by prohibiting them from marrying. The Third Department

[19] The figure is derived as a conservative approximation from the N.Y. Insurance Department's Premium Rates for Standard Individual Health Plans, March 2006 (utilizing New York and Albany counties) *available at* www.ins.state.ny.us/ihmoindx.htm

[20] These figures are derived from the 1040EZ instructions. The married couple having $75,000 of income; the same sex couple having $81,000 and $0 of income (respectively, on separate returns; there is a $6,000 higher income because the health insurance is a taxable fringe benefit to the same sex couple but not the married couple).

[21] Municipal taxes, such as New York City's and Yonker's add yet another straw to the proverbial camel's back.

conceded that marriage is an expressive speech. After conceding the point, the decision attempts to minimize the speech interest by characterizing it as a "kernel," finding all action can be considered speech and that the under-girding governmental interest trumps free expression. *Samuels* at p*10[22].

Nevertheless, the free expression exists; it is speech when people marry. Public speech is required to marry. N.Y. D.R.L. § 12. Contrary to the assertion of the Third Department what is at stake here is expression that is far more significant than "walking down the street or meeting one's friends." *Samuels* at p*10 (*quoting City of Dallas v. Stanglin,* 490 U.S. 19, 25 (1989)).

One of the facets of marrying is a demonstrable expression of the value an individual places in home, fidelity and family – family values. Because gay and lesbian Americans cannot marry, same sex couples are prohibited by law from expressing this idea in the same manner as others. Ironically, the Third Department has concluded that tradition prevents same sex couples from being traditional.

Put a different way, governmental discrimination reserves expression of family values via marriage ceremonies exclusively for heterosexuals. Clearly such

[22] The decision's reliance on *City of Dallas v. Stanglin,* 490 U.S. 19 (1989) is misplaced because while dancing in a hall is not expressive, marrying the one you love is unquestionably a public expression of your love for and commitment to each other.

a position unconstitutionally creates an exclusive forum and favors a particular message of some citizens to the detriment of others.

2. THE STATE MAKES REARING CHILDREN HARDER FOR SAME SEX COUPLES.

The ban on marriage for same sex couples also materially interferes with the loving relationship between children and their parents. The Third Department acknowledged that same sex parents are equally good parents in the rearing of their children. *Samuels* at p*9. ("We start by accepting for purposes of this case the following observations . . . many same-sex couples currently raise children and both partners are good parents[.]")

Same sex parents who conceive through reproductive assistance techniques such as artificial insemination are treated very differently than a married couple. The spouse lacking a genetic link is deemed the parent of the child. N.Y. D.R.L. § 73. In contrast, the same sex partner without a genetic link to the child must endure a laborious adoption proceeding. N.Y. D.R.L. § 110 *et seq.*

3. THE STATE MAKES CARING FOR AN ILL LOVED ONE HARDER FOR SAME SEX COUPLES.

As *Samuels* Appellants Carol Snyder and Heather McDonnell well know, assisting your same sex loved one and participating in his or her health care is more burdensome because you cannot marry. R. 325 *et seq.*

In the absence of a health care proxy, the next of kin typically makes health care decisions. The rationale is that the next of kin is most likely to have a loving relationship with the patient and know his or her wishes. Here again, the law makes no room for the reality of loving same sex relationships. Because a same sex couple cannot marry, they must have a health care proxy to opt into a marital like arrangement. Another document for the pile of papers required to effect a quasi marriage. Opposite sex couples need not bother because these rights are appurtenant to the marriage.

Further, both Amicus' and Appellants' practical experience ratify that even with a health care proxy, there are often continuing challenges to the proxy's authority. *Id.* Thus, the proxy does not function as a marital equivalent in practice.

C. THE STATE MAKES DEATH HARDER ON THE SURVIVOR OF A SAME SEX RELATIONSHIP.

Whether or not you are married, the death of your life partner is one of the most wrenching, stressful and grievous periods for the survivor. While the State

eases that grief for a surviving spouse, for a surviving domestic partner the journey is made all the more burdensome by the State.

1. BURIAL RIGHTS, ONCE BARRED, WILL REMAIN FRAUGHT WITH GAPS.

Making burial arrangements for your loved one is typically one of the first tasks undertaken. Today, surviving same sex domestic partners do not have the right to make those arrangements without the consent of the decedent's relatives. If a relative objects, the relative's wishes prevail even if the domestic partners have been together for 30 or 40 years. *See Correa v. Maimonides Medical Ctr.*, 165 Misc. 2d 614, 617 (Sup. Ct., Kings Co. 1995). On August 3, 2006, section 4201 of the Public Health Law will take effect permitting domestic partners to have priority over the wishes of objecting family members in making burial arrangements. While the law is ameliorative, it continues the separate and less than equal arrangements that pervade all domestic partnership rights because of the more onerous procedure required to assert those rights. While testate decedent domestic partners can convey the right to make burial arrangements to their surviving partner, intestate decedents thrust their partner into a maze of qualifying criteria, unless a burial proxy was executed without a will.

The intestate's surviving domestic partner must prove up the domestic partnership in order to prevail over an objecting family member, typically a sibling

or a parent. To do that, the survivor has to show one of the following: 1) domestic partnership registration in a municipal or other governmental entity (*if* available); 2) coverage under employment benefits or health insurance (again, *if* available); or 3) prove up the relationship through a series of documents. However, a review of the list shows that low income domestic partners in New York City and elsewhere are not likely to have these types of documents because there is very little money or other assets to hold in any account, let alone a joint one; the landlord will not add domestic partners to the lease; and neither is likely to own a car, insurance or other devisable benefits.

Presumably, the hospital's counsel or coroner's office will make the preliminary determination subject to judicial review. The statute essentially appoints the caretaker, typically a non-government agent, to be the initial fact finder.

This is more onerous to same sex couples than it is to married couples. With marriage comes the unquestioned right to bury your loved one. For same sex couples without wills, the survivor is at the mercy of circumstance. Did they live in a municipality with a same sex registry? Did they travel elsewhere to so register? Did they marry in Massachusetts? Was the decedent employed with fringe benefits that would permit such a designation? Did the parties' health insurer write coverage for domestic partners? What procedure will be employed

by the caretaker of the remains? Further, all of this presumes that in the depths of grief, the survivor will have the presence of mind to undertake these efforts. Surviving spouses need not deal with such issues.

2. INTESTACY IS DEVASTATING TO A SURVIVING PARTNER.

In the views of this Amicus Curiae, the intestacy laws, N.Y. E.P.T.L. § 4-1.1 *et seq.*, are a codification of societal presumptions about who a typical decedent would want to bequeath his or her possessions to upon death. The foundation of the statutory scheme is love – that the State makes certain assumptions about who you loved during your life and assumes how you would want your estate to take care of them after you pass away. These conclusions are reached because of the nature of the relationships between the decedents and devisees.

Because same sex couples cannot marry, they are precluded from the protection of the statutory scheme. The bar is complete without a valid will. The State refuses to acknowledge such a loving relationship[23], and can distribute the estate to the "laughing heirs"[24] of the decedent.

A poignant and timely example of this type of devastation occurred to Sam Beaumont who lost his partner Earl Meadows to cancer. The two lived together on

[23] Except during the brief clarity provided after September 11, 2001. N.Y. Work. Comp § 4.
[24] "Laughing heirs" is a term of art, but the substantive point that the heirs are much further removed from the grief for the loss of the decedent, as well as financial dependence, is nevertheless present. *See* Dukeminier & Johanson, Wills, Trusts and Estates (4th Ed.) 112.

Mr. Meadows' ranch for over 20 years. Mr. Meadows became ill and executed a will leaving the ranch to Mr. Beaumont. But, tragically, the will was not properly executed because it lacked the requisite number of witnesses (4) under Oklahoma law. Seizing upon the opportunity, Mr. Meadows' cousins – the family, as they self stylized themselves despite the 23 year relationship of the two men that reared the surviving Beaumont's three children – successfully sought to invalidate will. Mr. Beaumont lost his partner, his home and his retirement. Now, the cousins are suing him for back rent during the period he lived with his partner on the ranch. [25] This legal travesty vividly demonstrates how others' opinions of how gay and lesbian Americans ought to live wreaks havoc in people's lives.

3. THE WRONGFUL DEATH STATUTE LACKS A RATIONALE AS APPLIED TO SAME SEX COUPLES.

Langan v. St. Vincent's Hosp., 25 A.D.3d 90 (2nd Dept. 2005) aptly demonstrates why the ban on marriage for same sex couples is so onerous to same sex couples. Our statutes on wrongful death permit the recovery of pecuniary losses to distributees. N.Y. E.P.T.L. § 5-4.1. The only reason a distributee has a pecuniary loss is because he/she benefited from the financial abilities of the decedent. What follows from this is that the distributee financially benefited from

[25] Partner's death ends happy life on ranch, Indianapolis Star, Dec. 31, 2005, *available at* www.indystar.com/apps/pbcs.dll/article?AID=2005512310342.

the decedent because the distributee was loved, cared for, and relied upon the decedent because of the mutual love that family members share for one another. The purpose of the statute is to codify the presumptions of loving familial relationships. Even relatives as far removed as the decedent's cousins are protected by the statute if they were economically dependent on him because of the presumption of family ties. *See id.*; N.Y. E.P.T.L. § 4-1.1(a)(6). However, same sex partners lack the ability to participate, even when they did everything in their power to do so[26], as was the case in *Langan.* The bar on recovery is complete and insurmountable.

4. SURVIVORS OFTEN MUST FIGHT TO KEEP THEIR RENT REGULATED HOME.

Another area in which same sex couples are treated in a materially different manner is succession rights to rent stabilized and rent controlled apartments. The surviving spouse has a right to succeed to the tenancy, assuming primary residence, regardless of the time or circumstances of cohabitation. *Westbeth Corp. v. Castagna,* 24 H.C.R. 347A[27] (N.Y.L.J., 6/19/96; Civ. Ct., NY Co)(Despite marriage's purpose being solely to succeed to tenancy, surviving spouse entitled to

[26] Notably, the beneficiaries of a potential wrongful death action are cannot be altered by a will. *See* N.Y. E.P.T.L. § 5-4.1(1)
[27] H.C.R. refers to the Housing Court Reporter.

renewal lease even though they had married just 13 days prior to tenant's death while the tenant was ill and was 26 years older than wife).

Same sex partners, pursuant to *Braschi* and its judicial and regulatory progeny, also have a right to succeed but have a very different standard to meet. Rather than prove marriage, they must prove a financial and emotional interdependence paired with use of the apartment as a primary residence by the successor for two years prior to the tenant of record's death.[28] 9 N.Y.C.R.R. § 2400. Every bill, bank record, document, photograph, piece of personal correspondence and live testimony of friends, family, neighbors and the superintendent becomes relevant evidence in favor and against the successor's effort. *See id.* Quite literally, putting evidence stickers on original love letters and anniversary cards and then publishing them to the court is required for the survivor to meet the burden of proof. Further, this burden often must be borne on the heels of burying his/her life partner. To characterize the difference in procedure as disparate is putting it mildly. *See, e.g., Dindyal v. 70 Remsen Street,* No. L&T 01 K 079513 (Civ. Ct., Kings Co.)(surviving domestic partner of 10 year relationship sought succession to rent controlled apartment in 3 year litigation effort).

[28] As *Westbeth* demonstrates, the succeeding spouse need not be emotionally or financially connected to the deceased tenant nor even have a minimum cohabitation period with him/her. Rather, the successor only needs to be married to the decedent on the date of death.

D. THE STATE MAKES 'DIVORCE' HARDER FOR SAME SEX COUPLES.

Life does not always go as planned. Sometimes people fall out of love with each other. The dissolution of same sex relationships are made harder by the State. While not divorce in name, the end of a same sex relationship is certainly divorce in substance because it is a dissolution of the emotional and economic partnership. In dissolving the economic partnership portion of the relationship, the State willfully applies a wholly different set of principles to these equitable dissolutions because rather than equitable distribution, only general principals of equity exist for same sex couples.

1. MAINTENANCE IS UNAVAILABLE FOR SAME SEX PARTNERS.

Regardless of their economic circumstances, same sex partners have no legal right to maintenance. Same sex separation agreements (when the parties can agree upon them) awkwardly rest on general legal and equitable principles designed for business transactions. By contrast, married couples begin with the Domestic Relations Law as their agreement template. Consequently, these same sex agreements are often widely disparate from what marital agreements would have produced. Further, there is no ability to subsequently modify a same sex agreement because of changed circumstances pursuant to N.Y. D.R.L. §236B(9).

Silver v. Starrett, 176 Misc. 2d 511 (Sup. Ct., N.Y. Co. 1998) is an apt example. Ms. Silver was an unskilled deaf woman and her former partner of 14 years, Dr. Starrett, was a successful physician. Dr. Starrett owned her practice, three New York real properties and a beach home time share. Ms. Silver had worked in Dr. Starrett's office and made emotional/financial contributions to the 14 year relationship.

Without the legal foundations of the N.Y. D.R.L. at her disposal, Ms. Silver's counsel was limited to negotiating equitable claims. Ms. Silver's contributions, her medical disability or her ability to earn a living had no role in equitably distributing the substantial assets acquired during the long term relationship. Fortunately, counsel negotiated an agreement to provide Ms. Silver with about $105,000 which was, incredibly, then challenged as being unconscionable and lacking consideration.

Were these two married, the deaf Ms. Silver would have received lifetime maintenance and half of the assets acquired during the marriage in a separation agreement. The challenged agreement would have been set aside as being unfair pursuant to N.Y. D.R.L. §236B(3)(3) and as risking that Ms. Silver might become a public charge. N.Y. Gen. Oblig. Law §5-311; N.Y. Fam. Ct. Act. § 463. But, because these statutory foundations were unavailable to her in that negotiation, Ms. Silver's rights and thus her negotiating position were severely compromised solely

because she loved a woman and not a man. *Silver v. Starrett* is no outlier of what same sex couples experience in these situations, it was just one case of many that happened to be a reported decision. Without the safety net of the law, people like Ms. Silver face the abyss of destitution alone.

2. ASSET DISTRIBUTION CAN RESULT IN WINDFALLS TO ONE PARTNER OVER THE OTHER.

Without the right to marry, same sex couples have been relegated to the same position as pre-1980 married couples concerning property distribution on dissolution:

> Prior to the enactment of the [equitable distribution] statute, . . . [w]hen the marriage was dissolved, absent actual fraud or other ground for equity. . . all the property went to the title holding spouse, notwithstanding the contributions made toward the property or toward the marriage by the non-titled spouse.

McKinney's Practice Commentaries, Introduction, N.Y. D.R.L. § 236B.

Today's married couples enjoy an "economic partnership" that on dissolution is distributed according to equitable and additional statutory principles. *O'Brien v. O'Brien,* 66 N.Y.2d 576 (1985). Meanwhile, other Americans like Scot Laney and James Siewert who cohabited for 15 years, must litigate who paid the mortgage with what check and whether paying more than half at the time was "gift," "loan," or reflected the true percentage of the cooperative's ownership at

hundreds of dollars per hour each for attorney's fees. *See Laney v. Siewert,* N.Y. Slip Op. 1083 (1st Dept. Feb. 9, 2006)(further proceedings at Index No. 603211/03, Supr. Ct., NY Co., now pending trial after First Department affirmed denial of summary judgment on basis of who paid what expense).

Plainly, there is no rational basis to differentiate between what occurs when a long term childless same sex relationship ends as opposed to a childless long term opposite sex relationship, yet because same sex couples cannot marry, they have been banished to pre-1980 notions of equity.

3. THERE IS NO VISITATION OR CHILD SUPPORT FOR PARENTS.

Unlike other children who have the ability to spend time and receive support from their parents, the unadopted children of same sex parents are vulnerable to losing both the love and support that parent provided while in a relationship with the biological parent. *See Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991). Like *Bowers v. Hardwick,* 478 U.S. 186 (1986), the wisdom of *Alison D.* has not weathered the test of time and significant commentators argue for its obsolescence. Marriage Commission, Report to the Chief Judge of the State of New York at 63 (2006). The reason for seeking these revisions is the same: the State has no place

in interfering with a loving relationship whether it be spousal or parental. Loving relationships are fundamental rights free from governmental interference.

E. THIS AMICUS CURIAE'S ROLE AS GATEKEEPER FOR OUR COURTS PRECLUDES A FULLY DEVELOPED RECORD.

Each day, Amicus Curiae's members counsel people about the realities of living in a State with discriminatory laws such as the ban on marriage between same sex couples. Our job is to do our best to deal with this separate but less than equal legal environment for the good of our clients. We try to ensure that the system "gets it" when it comes to same sex relationships[29], keep our clients from being gored by another's animus, and ensure our clients understand the potential consequences of the law's harshness in disregarding their relationships and realities. While the cases cited herein are about real people with real problems, these parties are just the tip of the iceberg beneath the surface of reported and unreported cases. For each reported case, there is a much larger group of

[29] For example, while the Third Department considers there to be just a "kernel" of truth in the claim that being unable to marry is a free speech impediment, Amicus Curiae suggest the following experiment to demonstrate that the kernel is a brimming silo of truth: In social contexts over the next few days in describing leisure activities with friends and colleagues, voluntarily refrain from using the following words: "husband," "wife," "spouse" , the spouse's name (to mask their implied gender) or a gender specific pronoun for the spouse. In short order, the realization arises that conversations are shorter, more stinted and not wholly accurate to avoid the descriptive void. These words are a shorthand, a type of societal trademark, of both attaining a desirable social status and a declaration of love that same sex partners cannot access because of the government's speech restriction.

individuals in similar positions who do not litigate because of time, money, desire or ability, or whose cases are unreported or sealed.

We ask the Court to take notice that the situations referred to herein are only the tip of the discriminatory iceberg, extrapolate upon our presentation in order to fully contemplate the enormity of wrongs suffered by hundreds of thousands of Americans here in New York State who happen to love a person of the same sex, and understand that these wrongs are inflicted on good, hard working Americans merely because they love who others think they not.

IV. THE SENSIBLE CONCLUSION IS TO PERMIT SAME SEX COUPLES TO MARRY EACH OTHER.

This Court will move New York forward to greater equality under the law or backward toward reestablishing innate statuses that preclude some in our society from full participation based on their merits. Regardless of the result of this Court's decision here, the opinion will be a significant event in the history of American civil rights. The status quo ante is gone and this Court must decide in which direction it will take the State.

Gay and lesbian Americans are hard working people, thousands of whom are rearing children like so many other families in this State. The opinion of others, that gay and lesbian Americans ought to love someone other than who they do

love, should no longer be enshrined in our laws so that we all may move forward to a better future.

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Respectfully submitted,

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