Court of Appeals
STATE OF NEW YORK

New York County Clerk's Index No. 103434/04

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.

Albany County Clerk's Index No. 1967/04

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 OF CIVIL RIGHTS GROUPS ANTI-DEFAMATION LEAGUE, ASIAN AMERICAN JUSTICE CENTER, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN EQUALITY, EQUALITY FEDERATION, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL GAY & LESBIAN TASK FORCE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND VERMONT FREEDOM TO MARRY TASK FORCE, AS AMICI CURIAE

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STATEMENT OF INTEREST

Amici curiae are civil rights and public interest organizations with long histories of supporting the equal rights of all individuals, including gay men and lesbians. Through education and advocacy, each is dedicated to combating discrimination, protecting civil and constitutional rights and securing the fair and equal treatment of same-sex couples and their equal participation in the institution of marriage. Descriptions of the *amici* are attached hereto as an appendix.

PRELIMINARY STATEMENT

The issue before this Court—the right of two loving and committed individuals to marry notwithstanding discriminatory laws—is not novel. Considering a similar question, another state's highest court declared that recognition of such a right "would be judicial legislation in the rawest sense of that term." Undoubtedly viewing the matter as one requiring restraint and deference to the people's elected representatives, that court did as the respondents in these cases urge: it deflected all inquiry to "the legislature [rather than] this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate." That was the response Virginia's highest court gave to Richard Loving (a white man) and Mildred Jeter (a black woman) in 1966. *Loving v. Commonwealth*, 147 S.E.2d 78, 82 (Va. 1966), *rev'd*, 388 U.S. 1 (1967).

This Court has never taken so jaundiced a view of the role entrusted to it by the people of this state. Rather, when the status quo falls short of the exacting standards of due process and equality mandated by New York's constitution, the courts assume their "crucial and necessary function in our system of checks and balances [of] safeguard[ing] the rights afforded under our State Constitution." *People v. LaValle*, 3 N.Y.3d 88, 128, 783 N.Y.S.2d 485, 509 (2004).

The First Appellate Department disagreed with the New York County Supreme Court's order that marriage licenses be granted without regard to the sex of the applicants. (Hernandez Record on Appeal ("Hernandez R") at 15A) (claiming that the trial court "upon determining the statute to be unconstitutional, proceeded to rewrite it and purportedly create[d] a new constitutional right, an act that exceeded the court's constitutional mandate and usurped that of the Legislature"); *see also* (Samuels Record on Appeal ("Samuels R") at R671-72) (Third Appellate Department holding that the parameters of marriage are best left to the Legislature to define). *Amici* seek to address the First Appellate Department's total abdication of its constitutional responsibilities when it declared that "[r]ights are defined by the Legislature, not the Judiciary." (Hernandez R17A) (citations omitted). Both the First and Third Appellate Departments were wrong to defer to the Legislature in this matter. Courts are charged with the constitutional duty and are well-equipped to fashion a full and proper remedy for appellants. It

has long been established that where the legislature's laws "interfere[] with [a citizen's] personal liberty, then it is for the courts to scrutinize the act" and determine whether it is validly enforceable. *In re Jacobs*, 98 N.Y. 98, 110 (1885).

If, as it should, this Court agrees with appellants that same-sex couples are currently denied their right to "liberty" guaranteed under the due process clause, N.Y. CONST. art. I, § 6, or to "the equal protection of the laws of this state," N.Y. CONST. art. I, § 11, a critical corollary question emerges: Must these citizens be afforded what they have so far been unconstitutionally refused—the right to marry—or will a lesser, politically expedient "remedy" (such as so-called civil unions) suffice?

Full marriage rights are the only constitutionally permissible answer. As organizations with a long commitment to equality of rights under law, *amici* urge this Court to recognize that equal access to civil marriage for all loving, committed couples—without regard to sexual orientation—is fully consistent with the broad liberty principles underlying landmark civil rights cases such as *Brown* and *Loving*. The denial of the right to marry and to equal protection is not merely a denial of the collective rights and duties that married New Yorkers enjoy (though those rights and duties are surely important). To deny some New Yorkers the right to marry—even if some or all of the legal and economic benefits that inhere in marriage are provided through an alternative arrangement, such as civil unions—is

itself a denial of due process and the equal protection of this state's laws. *See* Point I, *infra*. Alternatively, the question may be cast as one of remedies. Marriage is still the only legally proper answer in that event, as it presents the only possibility for making appellants whole. *See* Point II, *infra*.

For these reasons, this Court should direct respondents to issue marriage licenses without regard to the sex of the applicants.

ARGUMENT

I. THE CONSTITUTIONAL VIOLATION IS THE DENIAL OF THE RIGHT TO MARRY—NOT ONLY THE DENIAL OF THE INCIDENTS OF MARRIAGE

A. Denial Of Marriage Licenses Violates Appellants' Fundamental Right To Marry

Civil marriage rightly enjoys the respect and support of the state because marriage is an individual's strongest possible public statement of one's love, fidelity and life-long commitment. It "anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the [state] identifies individuals . . . ." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

While marriage is, in some respects, a deeply private matter between two loving individuals who commit to living their lives together, the civil institution of marriage also bears the unique *imprimatur* of the state. *Fearon v. Treanor*, 272 N.Y. 268, 271-72 (1936) ("[t]here are, in effect, three parties to every

marriage"—the two individuals committing themselves to each other and the state). The private aspect of marriage is coupled with a public—and publicly enforced—declaration of that commitment. *Goodridge*, 798 N.E.2d at 952 ("for all the joy and solemnity that normally attend a marriage," a state's marital statutes are effectively licensing laws).

Marriage, accordingly, is an area the state zealously regulates. *Morris v. Morris*, 31 Misc. 2d 548, 549, 220 N.Y.S.2d 590, 591 (Sup. Ct. Westchester Co. 1961) (it is "a status or personal relation in which the state is deeply concerned and over which the state exercises exclusive dominion"). "The marriage relation is created by contract of the parties thereto, but the parties do not determine the scope of the obligations arising from the marriage status. The State does that in the enforcement of its public policy." *Haas v. Haas*, 271 A.D. 107, 109, 64 N.Y.S.2d 11, 13 (2d Dep't 1946).

Given the honored place accorded the institution of marriage by the laws and customs of this state, it should come as no surprise that the violation being challenged in this case is *not* merely the denial of the specific rights that are incident to marriage, such as the opportunity to avail oneself of spousal health insurance or to inherit intestate.[1] Rather, appellants have taken issue with their

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[1] These rights are certainly important and should not be denied, but exclusion from the institution of marriage is exclusion from so much more than only economic and legal benefits.

exclusion from "a social institution" that is a fundamental requisite to "the orderly constitution of society." *Di Lorenzo v. Di Lorenzo*, 174 N.Y. 467, 472 (1903). Like other New Yorkers, appellants wish to participate in, and benefit from, the unique protections, stability and support that are provided only by marriage.

The First Department erred when it suggested that past marriage rights cases are not applicable to same-sex couples' right to equal treatment under New York's marriage laws. Respondents urge this Court to adopt the First Department's miserly reading of *Loving v. Virginia*, 388 U.S. 1 (1967), incorrectly stating that "[t]he fact that the antimiscegenation statute in *Loving* expressly classified on the basis of race was critical to the Court's analysis." *See* Brief for Respondents State of New York and Department of Health and for Attorney General as Intervenor in Hernandez ("State Respondents Brief"), at 27. The First Department's refusal to acknowledge the broad application of *Loving* and claim that it only applies to discrimination against African-Americans, (Hernandez R24A), is flatly inconsistent with U.S. Supreme Court precedent. "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (noting that the result in *Loving* could have been justified exclusively on the equal treatment of the races,

but the *Loving* court instead found a deprivation of a fundamental liberty—the liberty to marry).

Likewise, this Court has never read *Loving* to be so restrictive. *See, e.g., Crosby v. Workers' Comp. Bd.*, 57 N.Y.2d 305, 312, 456 N.Y.S.2d 680, 683 (1982) (*Loving* established the right to decide "whom one will marry"). Further, if the First Department were correct that *Loving* applies exclusively to interracial couples, then *Turner v. Safley*, 482 U.S. 78 (1987), which held that prison inmates had a fundamental right to marry, would be limited to those incarcerated within prison walls and say nothing about a right to marry. Such a construction contradicts precedent and history. The legally correct approach is to acknowledge that these cases establish a right not to be arbitrarily excluded from marriage and are properly relied on by appellants.

Moreover, in its attempt to distinguish all prior civil rights cases from the discrimination that appellants suffer, the First Department concurrence further erred in requiring appellants to meet an improperly high standard to make out their claims of discrimination. The concurrence mistook the U.S. Supreme Court's observation in *Lawrence* that the only purpose for anti-sodomy laws was an animus towards gay people as a *requirement* that future plaintiffs show that the original intent of a law was to promote bias towards a particular group.

(Hernandez R45A) (citing to the Texas Supreme Court decision overruled by the U.S. Supreme Court) (Catterson, J., concurring).

No such specific showing of animus is required to establish a due process or equal protection violation. In *United States v. Virginia ("VMI")*, potential female cadets were not required to show that VMI was established in 1839 to promote hostility between the sexes. 518 U.S. 515 (1996). Rather, the Court noted that the original men-only admissions policy was rooted in widely-held, but outdated, "views about women's proper place." *Id.* at 536-37. Similarly, excluding same-sex couples from civil marriage today is "founded upon a discriminatory assumption, taken for granted by the Legislature and society generally, that marriage is a right necessarily limited to heterosexuals." (Hernandez R62A) (Saxe, P.J., dissenting).

B. Creating A Separate, Quasi-Marital Status For Same-Sex Couples Would Exacerbate Rather Than Rectify The Due Process And Equal Protection Violations

1. Discrimination Of Any Stripe Is Degrading And Pernicious

As Justice Brandeis once observed, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

> [T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive

> rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as *innately inferior* and therefore as *less worthy participants in the political community*, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) (emphasis added).

To decide whether the creation of civil unions would ever be equal to marriage, this Court need only consider whether married heterosexuals in New York would accept for themselves the status of civil unions and give up the right to be married. As Justice Jackson recognized:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Ry. Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

Yet appellants, and other same-sex couples in New York, are singled out for exclusion from civil marriage—a fact that the sub-marital alternatives of civil union and domestic partnership would not ameliorate. They recognize the paradox in New York's willingness to extend to them some similar legal rights and benefits of civil marriage, while simultaneously denying them the right actually to marry.[2] Appellants describe the "stigma of exclusion" suffered as a direct result of this inequality:

> As long as we cannot marry, we are not full citizens. We are not equal. Domestic partnership, commitment ceremonies, and legal protection documents are not enough. We are still assigned the status of second-class citizens, for practical purposes and as a matter of basic dignity. Without the right to marriage itself, we are denied full respect and dignity for our families.

(Affidavit of Michael Elsasser, Hernandez R498).[3]

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[2] "For me, some kind of domestic partnership or other status short of marriage would not be enough . . . . Even if it provided us all the same rights, a second-class recognition of my relationship with Nevin would continue to dishonor the life we have built with one another as somehow something less than other couples' shared lives." (Affidavit of Daniel Hernandez, Hernandez R44).

[3] Appellants in the Third Department feel similarly. "Denying us the ability to marry also sends a message to society that our relationship does not deserve the same recognition or respect that heterosexual couples receive." (Affidavit of Michael Hahn, Samuels R317). As Appellant Heather McDonnell explains, domestic partnerships will not make her and her partner whole: "In place of legal documents and phrases unfamiliar to many in society, one word, 'married,' would define our relationship and the way that others would be required to treat us under the law in a way that everyone understands." (Samuels R328). Indeed, in deciding whether the Massachusetts legislature could confer civil union status upon same-sex couples while reserving marriage rights for opposite-sex couples, that state's highest court noted that the choice of language was "more than semantic" and "not innocuous." The court held that civil unions

The guarantee of equality "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). That married heterosexuals would never accept for themselves a status of mere civil union is ample evidence of the inequality between marriage and civil unions.

Even when discrimination takes what its proponents call an "innocuous" form,[4] its deleterious effects inevitably surface. Attempts to provide "equal" educational opportunities to black children, for example, were destined to fail so long as "equal" meant "separate":

> Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. * * * To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community

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would "have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits." *In re Opinions of the Justices*, 802 N.E.2d at 570.

[4] *See, e.g., Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004) (Sosman, J. dissenting) (no constitutional violation in maintenance of separate "civil union" scheme "where same-sex couples who are civilly 'united' will have literally every single right, privilege, benefit, and obligation of every sort that our State law confers on opposite-sex couples who are civilly 'married'"; the difference is merely "a squabble over the name to be used"); *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 798 (D. Kan. 1951) (no constitutional violation in maintenance of separate schools for black children where "the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable"), *rev'd*, 347 U.S. 483 (1954).

> that may affect their hearts and minds in a way unlikely ever to be undone.

Brown v. Bd. of Educ., 347 U.S. 483, 493-94 (1954). Appellants, in these cases, are similarly concerned about the message that a separate status would send to their own children: "[W]e want to be able to have any child we raise have all the protections for his or her family that the government provides other families, and to know that his or her family and parents are not 'second rate' in the eyes of the law." (Affidavit of Daniel Hernandez, Hernandez R448-49).[5]

It was this same concern about the stigmatizing effects of discrimination that led Justice Harlan to dissent from the Supreme Court's endorsement of "separate but equal" public accommodations in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Legislating "separate" railroad coaches for blacks and whites, Justice Harlan recognized, "proceed[ed] on the ground that [African Americans] are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens," and thus no such coaches could ever be "equal." *Id.* at 560 (Harlan, J., dissenting).

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[5] Appellants Mary Jo Kennedy and Jo-Ann Shain also worry about the impact a mere domestic partnership will have on Aliya, their daughter: "[Aliya] was so excited to celebrate. So to the tune of Aliya singing 'Here Comes the Bride,' we had a short procession from the kitchen to the living room . . . . But we knew that being registered domestic partners had little meaning, legal or cultural, compared to being married. And we knew that it was just a matter of time before this would become obvious to Aliya as well." (Affidavit of Mary Jo Kennedy, Hernandez R527).

As the Court later acknowledged in *Brown* and subsequent cases, the guarantee of equal protection does not permit a state to justify discrimination against a particular group simply by claiming to provide "equal" accommodations. No amount of facial "equality," however well intentioned, can overcome "stigmatizing injury often caused by . . . discrimination," which "is one of the most serious consequences of discriminatory . . . action." *Allen v. Wright*, 468 U.S. 737, 755 (1984).[6]

The Supreme Court's *VMI* decision is instructive. There, in an attempt to remedy a men-only admissions policy at the prestigious and state-supported Virginia Military Institute, Virginia offered women enrollment in a parallel, but distinctive, program. *VMI*, 518 U.S. at 526. The constitutional infirmity in the state's desire for a "separate" facility that would nonetheless be "equal" was plain: the state argued "that admission of women would downgrade VMI's stature . . . and with it, even the school . . . ." *Id.* at 542-43. Aspiring female cadets, accused of potentially destroying the very institution to which they

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[6] While the principle that the Constitution demands equality for its own sake in order to prevent the psychological and social consequences of invidious discrimination was first articulated in response to racial segregation, the U.S. Supreme Court also has rejected other forms of governmental discrimination that send the same message that some members of our community are not as worthy as others. For example, the Court now recognizes that rules and policies that relegate women to a separate sphere are discriminatory and serve to reinforce stereotypes that women are "innately inferior." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (sex discrimination "deprives persons of their individual dignity").

sought admission, found their exclusion to be a government-endorsed statement of their inferiority as a class. If they were actually "equal," why would their inclusion in the same program "downgrade" the school? Ultimately, the Supreme Court found that arguments like these—arguments that have been used to exclude women and discriminate against them for generations—were meritless. *Id.* (holding that such assertions were "hardly different from other 'self-fulfilling prophec[ies],' once routinely used to deny rights or opportunities").

Same-sex couples seeking to marry today are similarly accused of "downgrading" the stature of marriage. The First Appellate Department, for example, insisted that the exclusion of same-sex couples "preserves" marriage, suggesting that the very act of allowing gay and lesbian couples to publicly undertake the rights and obligations of spouses would undermine the institution of marriage. (Hernandez R24A) (First Dept. majority indicating that appellants seek to "redefine" traditional marriage); *see also* (Hernandez R55A) (opining that "preserving the traditional institution of marriage" is a legitimate government interest) (Catterson, J., concurring); *see also* (Samuels R675). Likewise, an *amicius* brief filed in support of respondents below went so far as to compare

same-sex couples to white supremacists, arguing that both are intent on co-opting and ultimately dismantling the institution of marriage.[7]

It is from this belief—that opening the possibility of marriage to loving, committed same-sex couples would destroy the institution—that the drive for a remedy of less than full marriage rights arises. To sanction second-class citizenship by reserving the civil status of marriage for only opposite-sex couples is to "confer[] an official stamp of approval on the destructive stereotype that same-sex relationships are . . . inferior to opposite-sex relationships and are not worthy of respect." *Goodridge*, 798 N.E.2d at 962. This Court should ask, as the U.S. Supreme Court did in the *VMI* case: if civil unions really are "equal" to civil marriage and do not mark a class of citizens as innately inferior, then why do opponents argue that including same-sex couples in marriage would destroy the institution itself?[8]

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[7] First Dept. Brief of *Amicus Curiae* United Families International ("UFI"), at 22. Tellingly, UFI argues on its website that "[t]here is little room for optimism that legal unions would change homosexuals for the better; it seems far more probable that homosexuals would change marriage for the worse." *See* www.unitedfamilies.org/documents/UFIfamilyIGSOfullpage_000.pdf.

[8] *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (laws criminalizing sodomy are unconstitutional because their continued existence is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (excluding black men from juries "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to . . . race prejudice").

2. Shunting Same-Sex Couples Into A Separate Institution Would Itself Be Discriminatory

The very act of creating a separate institution—whether denominated a "civil union," a "domestic partnership," or anything other than full-fledged marriage—would constitute "a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." *Opinions of the Justices*, 802 N.E.2d at 570. Appellants seek redress for this very injury:

> Because we are not allowed to marry one another, Nevin and I again and again are made to feel that our relationship is valued less than other people's and that we are less worthy of obtaining the rights and assuming the responsibilities the law provides others in our society. I want the whole world to acknowledge our relationship in a way that will happen only if we are married.

(Affidavit of Daniel Hernandez, Hernandez R448). "The thin disguise of 'equal' accommodations," Justice Harlan presciently wrote in another context, "will not mislead any one." *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting) (noting that racial segregation "puts the brand of servitude and degradation upon a large class of our fellow citizens—our equals before the law").

A judicial decree that grants anything less than full marriage rights to same-sex couples would simply misapprehend the nature of the violation proven. That is, by leaving same-sex partners "outliers to the marriage laws," *Goodridge*, 798 N.E.2d at 963, any perpetuation of New York's current legislative scheme

(whether by the Legislature or this Court) would continue to deny these couples the rights and privileges that lawfully married couples enjoy—rights and privileges that extend far beyond any economic and legal benefits that are often quantified to demonstrate the harmful effects of excluding certain couples from marriage.

Promising same-sex couples allegedly equal financial and legal benefits, while important, without allowing them to marry would stigmatize an entire class of individuals who would continue to be excluded from the public support, respect and stability provided only by marriage. To be excluded from this institution by the government merely because the term "marriage" is reserved for opposite-sex couples is to be inherently inferior in the eyes of the law.

3. Other Courts That Have Considered This Question Have Concluded That "Almost Equal" Is Not Good Enough

After the Massachusetts Supreme Judicial Court, ruled that same-sex couples could not be denied the right to marry,[9] the Massachusetts State Senate asked the Court whether an acceptable remedy would be to relegate same-sex couples to a "civil union" status. In rejecting that proposal, the Supreme Judicial Court held that such a purported solution to the constitutional violation found in *Goodridge* would actually *maintain* and *foster* the very stigma of expressly

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[9] *See Goodridge*, 798 N.E.2d at 969 ("barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution").

reserving for opposite-sex couples a "status that is specially recognized in society and has significant social and other advantages." *Opinions of the Justices*, 802 N.E.2d at 570. Put simply, the court recognized that allowing opposite-sex couples to marry, while forcing same-sex couples merely to "union" or "partner," would create "a separate class of citizens by status discrimination." *Id.*

Also recognizing this same point, the British Columbia Court of Appeal, in mandating equal marriage for same-sex couples, held that "[a]ny other form of recognition for same-sex relationships, including the parallel institution of [registered domestic partnerships] falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal,' or to leave it to governments to choose amongst less-than-equal solutions." *EGALE Can., Inc. v. Canada (Attorney Gen.)*, [2003] 13 B.C.L.R.4th 1 ¶ 156.

The Ontario Court of Appeal likewise agreed that an alternative system for recognizing same-sex relationships was insufficient, explaining that the right to equality ensures not only equal access to economic benefits, but also equal access to "fundamental societal institutions." *Halpern v. Toronto (City)*, [2003] 65 O.R.3d 161, ¶¶ 102-07. Excluding same-sex couples from marriage, the court held, "perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships." *Id.*

South Africa's highest court recently came to a similar conclusion:

> [The] exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples.

Minister of Home Affairs v. Fourie, 2005 CCT 60/04 (CC), at ¶ 71 (S. Afr.).[10]

Notably, the South African court recognized the similarities between excluding same-sex couples from marriage and that nation's own painful history of racial discrimination: "Same-sex unions continue in fact to be treated with the same degree of repudiation that the state until two decades ago reserved for interracial unions; the statutory format might be different, but the effect is the same. The negative impact is not only symbolic but also practical, and each aspect has to be responded to." *Id.* at ¶ 81. Any remedy short of full marriage equality was held to be a "new form[] of marginialisation." *Id.* at ¶ 150. The Court recognized that a "separate but equal" civil union status would be a "threadbare cloak for covering distaste or repudiation by those in power of the group subjected to segregation." *Id.* Arguments that allowing same-sex couples to marry would

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[10] The Constitutional Court's opinion is published on the court's website: www.constitutionalcourt.org.za/Archimages/5257.PDF.

demean the institution were rejected as "profoundly demeaning to same-sex couples, and inconsistent with the constitutional requirement that everyone be treated with equal concern and respect." *Id.* at ¶ 112.

The court relied on American precedent, including both *Loving* and *Brown*, in support of its conclusion that "civil unions" would not be an adequate remedy. *Id.* at ¶¶ 150, 153. This reading of *Loving* and *Brown* is more faithful to the letter and spirit of those decisions than the construction adopted by the appellate courts below and urged by respondent and various *amici* in this Court. (Hernandez R45A-46A) (arguing *Loving* is inapplicable because it would logically bar only a statute prohibiting *different*-sex marriages) (Catterson, J., concurring).

II. AS A MATTER OF REMEDIES, GRANTING CIVIL MARRIAGES TO SAME-SEX COUPLES IS THE ONLY MEASURE THAT CAN REDRESS THE VIOLATION OF APPELLANTS' RIGHTS

A. Appellants Are Entitled To Make-Whole Relief For The Violation Of Their Constitutional Rights

As set out in detail in Appellants' brief, denial of the right to enter into one of the fundamental societal institutions based solely on a characteristic such as sexual orientation is a denial of the rights secured by New York's Constitution. N.Y. Const. art. I, § 11 (prohibiting denial of "the equal protection of the laws of this state"); N.Y. CONST. art. I, § 6 (prohibiting deprivation of "liberty . . . without due process of law"). Appellants are entitled to have this constitutional violation fully remedied because the equal protection guarantee

enshrined in New York's Constitution "define[s] judicially enforceable rights and provide[s] citizens with a basis for judicial relief against the State if those rights are violated." *Brown v. State*, 89 N.Y.2d 172, 186, 652 N.Y.S.2d 223, 231-32 (1996).[11]

It is this Court's duty to redress constitutional violations that are properly brought before it. The judiciary is in a unique position to "safeguard the rights afforded under our State Constitution," *LaValle*, 3 N.Y.3d at 128, 783 N.Y.S.2d at 509, and courts are routinely charged with upholding the fundamental constitutional rights of minority groups:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). As Justice Saxe noted in dissent in the First Department decision below, "It is precisely because we cannot expect the Legislature, representing majoritarian interests, to act to protect

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[11] Indeed, New York's Constitution, even more consistently than its federal counterpart, has "long safeguarded any threat to individual liberties." *LaValle*, 3 N.Y.3d at 129-30, 783 N.Y.S.2d at 510; *see also People v. Simonian*, 173 Misc. 131, 134-35, 18 N.Y.S.2d 371, 374 (Sup. Ct. Albany Co. 1940) ("It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' This much, however, is certain . . . If a party is deprived of any right accorded to others, it is not due process of law.").

the rights of the homosexual minority, that our courts must take the necessary steps to acknowledge and act in protection of those rights." (Hernandez R77A) (Saxe, P.J., dissenting). Courts are "well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights." *Campaign for Fiscal Equity v. New York*, 100 N.Y.2d 893, 931, 769 N.Y.S.2d 106, 129 (2003).

The relief appellants seek is necessarily equitable in nature, *e.g., M. v. M.*, 69 Misc. 2d 653, 655, 330 N.Y.S.2d 934, 936 (Fam. Ct. Kings Co. 1972) ("It is basic that courts acting in the realm of marriages and the effects thereof are courts of equity."), and "when grounds exist calling for the exercise of equitable power to furnish a remedy, the courts *will not hesitate to act*." *Duncan v. Laury*, 249 A.D. 314, 317, 292 N.Y.S. 138, 141 (2d Dep't 1937) (emphasis added); *cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a . . . court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

> A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination. * * * A proper remedy for an

> unconstitutional exclusion, we have explained, aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future.

VMI, 518 U.S. at 547.

Respondent has argued that even if the court finds a constitutional violation, it should nevertheless stay its decision so that the legislature can devise a response. This Court, however, is responsible for providing the relief to which the appellants are entitled by law. Failing to do so would be unwarranted and would set a dangerous precedent: the rights of certain individuals can be "postponed." That is not the law.

B. The Remedy For Past Inequality Is Equality Going Forward

"[T]he equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Gay and lesbian New Yorkers will not be protected by "equal laws" if they are confined to an entirely separate "civil union" or "domestic partnership" scheme that reserves marriage for other, presumably more worthy, citizens.

First, alternative arrangements to marriage, such as "civil unions" or "domestic partnerships," are qualitatively different, and provide far fewer social benefits, than does marriage. *Slattery v. City of New York*, 266 A.D.2d 24, 25, 697 N.Y.S.2d 603, 605 (1st Dep't 1999) ("there are enormous differences between marriage and domestic partnership"); *see also Sweinhart v. Bamberger*, 166 Misc.

256, 260, 2 N.Y.S.2d 130, 134 (Sup. Ct. Bronx Co. 1937) ("Marriage is more than . . . a mere economic device to regulate the proprietary rights of the persons concerned."); *Knight v. Super. Ct.*, 26 Cal. Rptr. 3d 687, 699 (Ct. App. 2005) (marriage and domestic partnerships are not co-equal because "marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership").

But even if the differences were less pronounced, there is simply no justification for providing all of the rights and duties of the marital relationship but arbitrarily withholding the explicit term "marriage" from a class of New Yorkers. *See, e.g., Watson v. Memphis*, 373 U.S. 526, 538 (1963) (allegedly "adequate" or "sufficient" status of separate facilities is "beside the point; it is the segregation by race that is unconstitutional"). "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

Where, as here, a legislative enactment is "constitutionally defective because of under-inclusion," the Court has essentially two choices: "it may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formerly excluded." *People v. Liberta*, 64 N.Y.2d 152, 170, 485 N.Y.S.2d 207, 218 (1984); *see also Califano v. Westcott*, 443 U.S. 76, 89-90 (1979). Justice Brandeis wrote that "when the right invoked is that of equal

treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931). Certainly no party has suggested that this Court strike down New York's statutory scheme for marriage in its entirety, and such a "remedy" would clearly not be what the Legislature intended.

The prudent and straightforward way to remedy the violation here is merely to read the state's marriage laws to include those who previously have been excluded. Reading an underinclusive statute as gender-neutral (such as replacing "bride" and "groom" with "spouse") is a solution routinely chosen by courts in this state. *See, e.g., Goodell v. Goodell*, 77 A.D.2d 684, 685, 429 N.Y.S.2d 789, 791 (3d Dep't 1980) (reading alimony laws as gender-neutral); *Lisa Marie UU v. Mario Dominick VV*, 78 A.D.2d 711, 711, 432 N.Y.S.2d 411, 412 (3d Dep't 1980) (same, child support).[12]

That some may disapprove of same-sex couples marrying is no justification for arbitrary discrimination by the government. Courts have long recognized that government discrimination is particularly destructive when it is

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[12] *See also Liberta*, 64 N.Y.2d at 172-73, 485 N.Y.S.2d at 219; *Matter of Jessie C.*, 164 A.D.2d 731, 734-35, 565 N.Y.S.2d 941, 943 (4th Dep't 1991); *Rachelle L. v. Bruce M.*, 89 A.D.2d 765, 766, 453 N.Y.S.2d 936, 938 (3d Dep't 1982); *People v. M.K.R.*, 166 Misc. 2d 456, 462, 632 N.Y.S.2d 382, 386 (Justice Ct. Del. Co. 1995).

designed to accommodate societal prejudice. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 448 (1985) (constitutional guarantees may not be sidestepped "by deferring to the wishes or objections of some fraction of the body politic"). In short, "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[13]

Defendants-Respondents also cite vague "conflicts and anomalies that would result if New York's marriage licensing scheme were inconsistent with the laws of the United States and the vast majority of other states." *See* State Respondents Brief, at 43. No explanation was given, however, of the relevance such conflicts have to this Court's protection of the rights of New Yorkers granted by the laws of this state. More fundamentally, "conflicts" like this are part-and-parcel of our federalist system of government. *E.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States

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[13] *See also Watson*, 373 U.S. at 535 ("constitutional rights may not be denied simply because of hostility to their assertion or exercise"); *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) ("A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.").

must be equally free to engage in any activity that their citizens choose for the common weal . . . .").

To the extent this Court chooses to consider other states' laws, any complexities that do arise will be far from unmanageable or unprecedented. Family law, of course, is no stranger to the federalist system. In the past, some states have passed laws that would prohibit two individuals from marrying, while in other states, such laws were deemed unconstitutional.[14] Marriage statutes continue to vary greatly to this day, yet courts routinely resolve the choice of law issues that arise from such differences. *E.g., Lopes v. Lopes*, 852 So. 2d 402 (Fla. App. 2003) (resolving choice of law issue concerning validity of divorce); *Mason v. Mason*, 775 N.E.2d 706 (Ind. App. 2002) (same, as to permissible degree of consanguinity for marriage); *Police & Firemen's Disability & Pension Fund v. Redding*, No. 01AP-1303, 2002 WL 1767362 (Ohio App. Aug. 1, 2002) (same, regarding validity of common law marriage).

Complexities will arise even if this Court chooses not to recognize the marital rights of same-sex couples because the marriage laws of other jurisdictions

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[14] For instance, anti-miscegenation laws varied greatly over time across jurisdictions until they were struck down as unconstitutional in *Loving*. *See* Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996).

continue to evolve.[15] New York courts will increasingly face such complexities because two of those jurisdictions, Canada and Massachusetts, share a common border with this state. Contrary to respondent's assertions, its proposal would ironically increase the level of complexity, as civil unions (or any similar institution) would remain equally, if not more, subject to non-recognition by foreign jurisdictions.

* * *

Civil marriage is unique in its social significance; it is the quintessential expression of two individuals' enduring commitment to one another; it is a life-defining moment for countless New Yorkers. Regardless of same-sex couples' access to the rights and obligations attendant to marriage, barring them from marriage itself does not comport with the exacting guarantees of New York's Constitution, or with the judiciary's responsibility to vindicate the rights of those unlawfully denied equality.

CONCLUSION

An order from this Court granting relief to appellants will be wholly incomplete unless accompanied by instructions to enter a judgment according full

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[15] Renwick McLean, *First Gay Couples Apply For Marriage Under New Spanish Law*, N.Y. TIMES, July 5, 2005, at A3 (Spain, Canada, Belgium and the Netherlands have given equal marriage rights to same-sex couples). *See also Goodridge*, 798 N.E.2d 941; *Minister of Home Affairs v. Fourie*, 2005 CCT 60/04 (CC) (S. Afr.).

marriage rights to same-sex couples in New York. Anything less would result in the continued denial of due process and the equal protection of the laws of this state.

Dated: New York, New York
April 18, 2006

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APPENDIX

STATEMENTS OF INTEREST

THE ANTI-DEFAMATION LEAGUE

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, it is one of the world's leading civil and human rights organizations combating all types of prejudice, discriminatory treatment, and hate. ADL's history is marked by a commitment to protecting the civil rights of all persons, and to assuring that each person receives equal treatment under the law. ADL has filed *amicus* briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws. These include many of the Supreme Court's landmark cases in the area of civil rights and equal protection.[1]

ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

The Asian American Legal Defense and Education Fund ("AADLEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public

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[1] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP* , 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Taxman v. Bd. of Educ.*, 92 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Grutter v. Bollinger,* 539 U.S. 306 (2003); and *Lawrence v. Texas,* 539 U.S. 558 (2003).

information. AALDEF has throughout its long history supported equal rights for all people including the rights of gay and lesbian couples.

THE ASIAN AMERICAN JUSTICE CENTER

The Asian American Justice Center (formerly National Asian Pacific American Legal Consortium) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy advocacy and community education on discrimination issues. Asian Americans have a long history of being classified as second class citizens by the courts. They were prevented from citizenship and owning land, and were subject to miscegenation laws. AAJC was an amici in support of plaintiffs in Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass 2003) and likewise the question presented by this case is of great interest to AAJC because it implicates the availability of civil rights protections for Asian Americans in this country.

ASIAN EQUALITY

Asian Equality (formerly APACE) is a national ad hoc coalition of Asian Pacific Islander (API) leaders and organizations determined to fight marriage discrimination against our communities. It represents a broad alliance of API lesbian, gay, bisexual, and transgender affinity groups, as well as major API and LGBT civil rights organizations throughout the country. Asian Equality recognizes the historical legacy of marriage discrimination in the United States and its profound impact on API families. Through community education and coalition building, we seek to empower our API communities to challenge this legacy and to confront present-day marriage discrimination against same-sex couples. In doing so, we want to affirm the lesbian, gay, bisexual, and transgender members of our communities and acknowledge the enriching presence of their love and lives.

EQUALITY FEDERATION

The Equality Federation is a network of state/territory organizations committed to working with each other and with national and local groups, including groups throughout New York State, to strengthen statewide lesbian, gay,

bisexual, and transgender advocacy organizing and to secure full civil rights in every U.S. state and territory.

NATIONAL CENTER FOR LESBIAN RIGHTS

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbians and gay men and their families through a program of litigation, public policy advocacy, free legal advice and counseling, and public education. Since its founding in 1977, NCLR has played a leading role in protecting and securing fair and equal treatment of lesbian and gay parents and their children.

NATIONAL GAY & LESBIAN TASK FORCE

The National Gay and Lesbian Task Force ("Task Force"), founded in 1973, is the oldest national lesbian, gay, bisexual and transgender (LGBT) civil rights and advocacy organization. With members in every U.S. state, including New York, the Task Force works to build the grassroots political strength of the LGBT community by conducting research and data analysis; training state and local activists and leaders; and organizing broad-based campaigns to advance pro-LGBT legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal participation of same-sex couples in the institution of civil marriage.

PEOPLE FOR THE AMERICAN WAY FOUNDATION

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, PFAWF now has more than 600,000 members and activists across the country, including more than 90,000 in New York, as well as a regional office in New York City. PFAWF has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of gay men and lesbians. PFAWF regularly participates in civil rights litigation, and has supported litigation to secure the right of same-sex couples to marry. PFAWF joins this brief because any remedy for the denial of equal marriage rights to same-sex couples that does not include the right to marry

would condemn gay men and lesbians in New York to the status of second-class citizens in violation of the New York Constitution.

THE VERMONT FREEDOM TO MARRY COALITION

The Vermont Freedom to Marry Task Force ("VFMTF") represents a coalition of individuals and organizations in Vermont who support the freedom for same-sex couples to legally marry. VFMTF has consistently advocated full inclusion in marriage for same-sex couples, and supported the passage of Vermont's civil union law as a first step toward that goal. VFMTF continues to educate Vermonters about the need for full inclusion in marriage for same-sex couples. VFMTF is well-positioned to offer insight into the ways in which Vermont's civil union law, while a step forward for same-sex couples in Vermont, falls short of the constitutional requirement of full equality and inclusion.

AFFIRMATION OF SERVICE

Paul A. Saso, an attorney admitted to practice in the courts of the State of New York, affirms under penalty of perjury, that on April 18, 2006, he caused three true and correct copies of the within Brief of Civil Rights Groups Anti-Defamation League, Asian American Justice Center, Asian American Legal Defense And Education Fund, Asian Equality, Equality Federation, National Center for Lesbian Rights, National Gay & Lesbian Task Force, People For The American Way Foundation and Vermont Freedom To Marry Task Force, As *Amici Curiae*, to be served on the following:

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Dated: April 18, 2006
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