SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

DUKE L. FUNDERBURKE, Plaintiff, - against - NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, DANIEL E. WALL in his official capacity as PRESIDENT OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, ROBERT W. DUBOIS in his official capacity as DIRECTOR OF THE EMPLOYEE BENEFITS DIVISION OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, UNIONDALE UNION FREE SCHOOL DISTRICT, WILLIAM K. LLOYD, in his official capacity as SUPERINTENDENT OF THE UNIONDALE UNION FREE SCHOOL DISTRICT, LAWRENCE D. BLAKE, in his official capacity as ASSISTANT SUPERINTENDENT FOR BUSINESS AFFAIRS FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT, MYRTLE E. DICKSON, in her official capacity as DIRECTOR OF PERSONNEL FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT, Defendants.	Index No. 05/006186 IAS Part 3 J.S.C. Edward W. McCarty, III Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AGAINST ALL DEFENDANTS AND IN OPPOSITION TO THE DCS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATUTES

Plaintiff Duke L. Funderburke respectfully submits this memorandum of law in support of his cross-motion for summary judgment against all defendants and in opposition to the motion for summary judgment of defendants New York State Department of Civil Service ("DCS"), Daniel E. Wall in his official capacity as DCS President, and Robert W. Dubois in his official capacity as Director of DCS's Employee Benefits Division (collectively, the "DCS Defendants").[1]

PRELIMINARY STATEMENT

In this action, plaintiff seeks only what he is entitled to under New York's Civil Service Law ("CSL") and the contracts governing his benefits as a retired schoolteacher: health insurance coverage for his spouse. This result follows from straightforward application of a common law rule so deeply imbedded in our jurisprudence that it predates the founding of our nation. Under the long-standing marriage recognition rule, a marriage validly contracted in the place where it was celebrated — be it a sister state or another nation — must be respected in New York whether or not the same marriage could have been entered into within this State. Only two narrow exceptions to the rule exist, and neither is applicable here. Defendants are therefore required to recognize plaintiff's legal Canadian marriage to his life partner of over 40 years, Bradley S. Davis, and to allow Mr. Davis to be enrolled as a spouse under plaintiff's health insurance plans.

Invoking principles from unrelated areas of the law and inviting the Court to ignore binding precedent, the DCS Defendants ask this Court to set aside the marriage recognition rule; read the DSL's mandate of spousal health insurance coverage as applying to

[1] On January 13, 2005, the DCS Defendants moved for summary judgment against plaintiff. The other defendants have not joined that motion. Because there are no material facts in dispute, plaintiff now moves for summary judgment against all defendants.

some marriages but not others; and therefore refuse to order that Mr. Funderburke's marriage be respected in New York for purposes of granting him the health benefits to which he is entitled. The DCS Defendants argue that recognition of plaintiff's Canadian marriage to his same-sex spouse "would amount to inappropriate judicial activism and would intrude upon the legislative domain." DCS Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("DCS Br."), dated January 12, 2006, at 3. But it is the DCS Defendants that advocate improper judicial activism by urging the Court to ignore what defendants acknowledge is binding Court of Appeals precedent. The DCS Defendants' inappropriate request should be rebuffed, and the Court should apply the well-settled marriage recognition rule to order that Mr. Funderburke's spouse receive health insurance benefits.

The material facts are not in dispute. Mr. Funderburke, a retired public school teacher formerly employed by defendant Uniondale Union Free School District ("District"), is an enrollee in several medical insurance plans. Among these is the Empire Plan, which is available exclusively to public employees and administered by DCS. In October 2005, plaintiff married Mr. Davis in Canada, where by law same-sex couples may marry exactly as different-sex couples may. Thereafter, plaintiff requested that his spouse be enrolled as a dependent under plaintiff's health insurance plans. The District, relying on the advice of DCS, denied plaintiff's request, asserting that "the Empire Plan, the provider of health benefits to District retirees, does not recognize same-sex marriages for the purpose of spousal coverage." (Affidavit of Duke L. Funderburke ("Pl. Aff."), sworn to February 7, 2006, Exh. C).

Defendants' denial of Mr. Funderburke's request for spousal health coverage plainly runs afoul of CSL § 164, which provides that "[e]ach employee" of a school district, "shall be entitled to have his spouse . . . included in [insurance] coverage," and of the marriage

recognition rule. Whether or not New York must itself allow same-sex couples to marry — a question that is not before this Court and, contrary to the DCS Defendants' suggestion, not appropriately addressed in this case — the marriage recognition rule commands that New York respect a marriage from a jurisdiction such as Canada that *does* affirmatively allow such marriages. The DCS Defendants all but concede that plaintiff's marriage does not come within the narrow exceptions to the rule. Plaintiff and his spouse are therefore entitled to the same insurance coverage that other District retirees and their spouses receive.

The Attorney General, State Comptroller, Mayor of New York City, and numerous other state and local officials have acknowledged that New York law requires respect for the legitimate, out-of-state marriages of same-sex couples, and private sector actors have followed suit. It is thus defendants, not plaintiff, that urge a result that would create confusion and inconsistency in the law.

Although the issue need not be reached if the settled and binding marriage recognition rule is followed, defendants' actions here also run afoul of the State Constitution's guarantee of equal protection of the laws. The government defendants may not deny plaintiff's valid out-of-state marriage the legal respect accorded other out-of-state marriages simply because plaintiff's spouse is of the same sex. In refusing to apply the marriage recognition rule to a valid out-of-state marriage and confer an important employment benefit for this reason, defendants discriminate against plaintiff on the basis of his sexual orientation and sex. This discrimination lacks even a legitimate or rational government purpose.

STATEMENT OF FACTS

A. Plaintiff and His Marriage

Plaintiff was employed by the District as a certified teacher from 1963 until his retirement in 1988. (Pl. Aff. ¶ 3; Affidavit of Robert W. Dubois in Support of the DCS

Defendants' Motion for Summary Judgment ("DCS Aff."), sworn to January 12, 2006, at ¶ 5; Affidavit of Vera Pohoreckyj in Support of the District Defendants' Motion to Dismiss the Complaint or, in the Alternative, to Compel the Addition of Necessary Party Defendants ("District Aff."), sworn to June 9, 2005, at ¶ 16 (attached as Exh. A to the Affidavit of Norman C. Simon ("Simon Aff."), sworn to February 10, 2006)). Throughout his years as a teacher, to this day, plaintiff has been in a permanent committed relationship with his spouse, Mr. Davis. (Pl. Aff. ¶ 2). Since 1963, plaintiff and Mr. Davis have lived together in New York. (*Id.* at ¶ 6). They have provided for each other as best they can throughout their relationship. They have continually had joint bank accounts since 1963, and Mr. Davis has always been plaintiff's life insurance beneficiary. (*Id.* at ¶ 7). Since preparing wills in the early 1970s, they have been each other's primary beneficiary. For the past 25 years, they have named each other in their respective health care proxies and have given each other reciprocal powers of attorney in the event of incapacity. (*Id.*).

When New York City adopted a Domestic Partnership registration law, plaintiff and Mr. Davis were among the first to register. (*Id.* at ¶ 8). The limited benefits of such registration, however, are minimal compared to those of civil marriage. For example, that law did not allow plaintiff the option of a retirement plan providing the widower benefits available to different-sex married retirees. (*Id.*). It also did not allow him to obtain dependent health coverage. (*Id.*). Further, as the DCS Defendants point out, the District was not required to provide Mr. Davis with health insurance benefits even as plaintiff's registered domestic partner. (DCS Br. 6; *see also* Pl. Aff. ¶ 9).

Although plaintiff and Mr. Davis desired to be married during the course of their long-term partnership, only recently could they make that dream a reality. In 2003, Canada

announced that same-sex couples could marry. Knowing that a marriage executed in Canada would be respected under New York law, Messrs. Funderburke and Davis traveled from New York to Ontario and were legally married in October 2004. (Pl. Aff. ¶¶ 10-11 & Exh. A). Mr. Funderburke describes this occasion as "a happy day for us to finally achieve the legal recognition for our relationship that we had so long been denied." (*Id.* at ¶ 11).

B. The District's Health Plans

The District provides health insurance coverage to its retired employees through the New York State Health Insurance Program ("NYSHIP"), which is established and governed by the CSL and administered by DCS. (DCS Aff. ¶¶ 2, 4; District Aff. ¶¶ 4, 6). As enrollees in NYSHIP, retired District employees are entitled to choose from a variety of health plans. (DCS Aff. ¶ 4; District Aff. ¶ 5). One of these is the Empire Plan, which is available exclusively to public employees in New York. (DCS Aff. ¶ 4; District Aff. ¶ 7). Among other benefits, enrollees in the Empire Plan are covered for hospital services, physician's bills, prescription drugs, and other covered medical expenses. (District Aff. ¶ 5). These benefits are available under the terms of the Empire Plan to both active and retired District employees, and to their spouses. (DCS Aff. ¶ 4; District Aff. ¶ 7).

In addition to NYSHIP, the District provides its active and retired employees with several other forms of health coverage. (District Aff. ¶¶ 4, 14). These include supplemental medical insurance benefits, which are available from the District's provider of group excess medical insurance, The First Rehabilitation Life Insurance Company of America ("First Rehabilitation"), and dental benefits through the District's self-insured dental plan (collectively, the "District Supplemental Health Plans"). (District Aff. ¶¶ 4, 14 & Simon Aff., Exhs. B & C). Enrollees in the District Supplemental Health Plans are entitled to extend coverage to their spouses. (Simon Aff., Exhs. B & C). Indeed, First Rehabilitation has expressly represented that

same-sex partners who are eligible for spousal coverage under the Empire Plan are also entitled to receive supplemental medical coverage. (Simon Aff., Exh. D).

C. Defendants' Refusal to Enroll Plaintiff's Spouse in the District Health Plans

As a retired employee, plaintiff is enrolled in the Empire Plan and the District Supplemental Health Plans. (Pl. Aff. ¶ 3). On October 29, 2004 plaintiff requested that his coverage under these plans be amended to include spousal coverage for Mr. Davis, providing the District with proof of his Canadian marriage. (Pl. Aff. ¶ 12 & Exh. B; District Aff. ¶ 20).

On December 20, 2004, the District denied plaintiff's application. (Pl. Aff. ¶ 13 & Exh. C; District Aff. ¶ 22). The District claimed that "the Empire Plan, the provider of health benefits to District retirees, does not recognize same-sex marriages for the purpose of spousal coverage. As a result, we cannot provide you with the requested medical coverage." (Pl. Aff., Exh. C). The District based its denial on advice provided by DCS. Specifically, DCS advised the District "that since same-sex marriages are not statutorily permitted in New York State, that DCS would not provide dependent spousal coverage in NYSHIP to same-sex spouses of eligible employees and retirees. . . ." (District Aff. ¶ 21).

ARGUMENT

I.

DEFENDANTS' ARE OBLIGATED TO RESPECT PLAINTIFF'S MARRIAGE AND PROVIDE SPOUSAL COVERAGE UNDER NEW YORK'S LONG-STANDING MARRIAGE RECOGNITION RULE

A. The Marriage Recognition Rule

For over a century, New York law has required that marriages validly executed in other jurisdictions must be respected for all purposes in this state. *See Van Voorhis v. Brintnall*, 86 N.Y. 18, 25 (1881) ("the [common law] rule recognizes as valid a marriage considered valid

in the place where celebrated"); *Decouche v. Savetier*, 2 Johns. Ch. 190, 211 (N.Y. Ch. 1817) ("There . . . [is] no doubt of the general principle that the rights dependent upon nuptial contracts are to be determined by the *lex loci*."). As the Court of Appeals has explained, "the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated." *In re Estate of May*, 305 N.Y. 486, 490 (1953). This rule, which dates back centuries, *see Scrimshire v. Scrimshire*, 161 Eg. Rep. 782, 790 (Consistory Ct. 1752), is predicated on the unique nature of the marital contract. *See Dickson v. Dickson's Heirs*, 1 Yerg. 110, 1826 WL 438, *2 (Tenn. Err. & App. 1826) (cited in *Van Voorhis*, 86 N.Y. at 26) ("[M]arriage is of a nature so widely differing from ordinary contracts . . . producing interests, attachments, and feelings, partly from necessity, but mainly from a principle in our nature, which together, form the strongest ligament in human society . . . it is a connection of such a deep-toned and solemn character, that society has even more interest in preserving it than the parties themselves."). The rule remains vital today. *See Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289 (1980); *In re Estate of Watts*, 31 N.Y.2d 491 (1973); *People v. Haynes*, 26 N.Y.2d 665 (1970); *Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44 (1970); *Black v. Moody*, 276 A.D.2d 303 (1st Dep't 2000); *Lancaster v. 46 NYL Partners*, 228 A.D.2d 133 (1st Dep't 1996); *Hulis v. M. Foschi & Sons*, 124 A.D.2d 643 (2d Dep't 1986).

Under the marriage recognition rule, a marriage must be recognized in New York if valid where performed, *even if it would have been invalid if performed in New York. See, e.g., Thorp v. Thorp*, 90 N.Y. 602, 605 (1882) ("the validity of a marriage contract is to be determined by the law of the State where it is entered into. If valid there, it is to be recognized as such in the courts of this State"). For example, pursuant to Domestic Relations Law ("DRL") § 5(3), a marriage between an uncle and niece is invalid and void if celebrated in New York.

Nevertheless, if an uncle and niece marry in another state or country, their marriage will be deemed valid in New York. *See May*, 305 N.Y. at 492. Similarly, although a proxy marriage — that is, one concluded at a ceremony attended by only one of the parties — cannot be contracted in New York, such a marriage will be deemed valid under the marriage recognition rule if valid where performed. *See Fernandes v. Fernandes*, 275 A.D. 777, 777 (2d Dep't 1949); *In re Will of Valente*, 18 Misc. 2d 701, 705 (Sur. Ct. Kings Cty. 1959). Likewise, common law marriages, although not permitted under New York law, are respected from other jurisdictions. *See Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d at 293 ("It has long been settled law that although New York does not itself recognize common-law marriages . . . a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted") (internal citations omitted); *Katebi v. Hooshiari*, 288 A.D.2d 188, 188 (2d Dep't 2001) ("the plaintiff demonstrated that as a result of the parties' sojourns in Pennsylvania and family vacations in Georgia, a valid common-law marriage existed under the laws of those states which was deserving of recognition . . . in New York").

The marriage recognition rule is stronger than ordinary comity principles, although it shares common roots in respect for other jurisdictions. *See Van Voorhis*, 86 N.Y. at 25 ("By the universal practice of civilized nations the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated") (*quoting Cropsey v. Ogden*, 11 N.Y. 228, 236 (1854)). Under a standard comity analysis, New York courts "apply the laws of other States where the application of those laws does not conflict with New York's public policy." *Crair v. Brookdale Hosp. Med. Ctr.*, 94 N.Y.2d 524, 528-29 (2000). In assessing New York's public policy in the comity inquiry, courts "look to the law as

expressed in statute and judicial decision and to the prevailing attitudes of the community." *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 580 (1980).

In contrast, the marriage recognition rule — rooted as well in the paramount importance of the marriage contract to individuals and society — permits no such comparative policy analysis. The rule *requires* recognition of marriages valid where contracted *regardless* of whether the DRL would permit such marriages or whether New York's law or public policy otherwise coincides with that of the foreign jurisdiction. *See Mott*, 51 N.Y.2d at 292-93; *May*, 305 N.Y. at 491-93; *Bronislawa K. v. Tadeusz K.*, 93 Misc. 2d 183, 184-85 (Family Ct. Kings Cty. 1977) (contrasting "sophisticated" principles considered in comity or full faith and credit analysis with clear "*lex locus*" rule requiring recognition of marriages valid where contracted).

The marriage recognition rule is subject only to two narrow exceptions, neither of which applies here. First, the rule will not apply if a statute explicitly declares that a given class of marriages, when concluded in another jurisdiction, will be considered void in New York. *See Van Voorhis*, 86 N.Y. at 26 ("prohibition by positive law" constitutes exception to marriage recognition rule); *May*, 305 N.Y. at 491 (same). Second, the rule may not apply if an out-of-state marriage is "offensive to the public sense of morality to a degree regarded generally with abhorrence." *May*, 305 N.Y. at 493. This abhorrence exception requires an overwhelming social consensus that a marriage is patently repugnant to the morality of the community. *Id*. The exception is so narrow that, throughout the lengthy history of the marriage recognition rule, only polygamous and closely incestuous marriages have been held to meet its stringent criterion. *Van Voorhis*, 86 N.Y. at 26 (exception applies in cases "of incest or polygamy coming within the prohibitions of natural law"); *Earle v. Earle*, 141 A.D. 611, 613 (1st Dep't 1910) ("the *lex loci*

contractus governs as to the validity of the marriage, unless the marriage be odious by common consent of nations, as where it is polygamous or incestuous by the laws of nature").

Consistent with the long-standing marriage recognition rule, New York's Attorney General has opined that marriages between same-sex couples validly entered in other jurisdictions must be respected in New York. *See* Op. Att'y Gen. No. 2004-1, March 3, 2004 (Attached as Exh. C to the Affidavit of Alphonso B. David ("David Aff."), sworn to February 13, 2006). Specifically rejecting the notion that marriages between same-sex partners could fit the abhorrence exception, the Attorney General concluded that "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." *Id.* The Attorney General filed an *amicus* brief to the same effect in *Langan v. St. Vincent's Hospital*. (David Aff., Exh. D.).[2]

The New York State Comptroller also issued an opinion applying the marriage recognition rule to find that same-sex marriages should be respected for the purposes of benefits received through the New York State Retirement System. *See* Op. of N.Y. State Comptroller, October 13, 2004 (David Aff., Exh. E) ("Based on current law, the Retirement System will recognize a same-sex Canadian marriage in the same manner as an opposite sex New York marriage."). Moreover, a number of New York municipalities, including New York City, Albany, Buffalo, Ithaca, Nyack, Rochester, and Brighton have issued similar public statements that, consistent with the marriage recognition rule, these municipal governments will respect marriages of same-sex couples validly performed outside the State. (David Aff. ¶ 14 & Exhs. F-L). Finally, public and private employers across the State are respecting marriages of same-sex

[2] As discussed below (at p.14), the recent decision in *Langan v. St. Vincent's Hosp.*, 802 N.Y.S. 2d. 476 (2d Dep't 2005), is fully consistent with plaintiff's claims here.

couples in New York, as are numerous corporations that conduct business in New York. (David Aff. ¶¶ 16-20 & Exhs. M-O).

B. The DCS Defendants Invoke Choice-of-Law Rules That Are Inapplicable to this Dispute

Recognizing that a straightforward application of the marriage recognition rule would require judgment for plaintiff, the DCS Defendants try to dodge that result by arguing that a choice of law "interest analysis" should govern here instead. (DCS Br. 11). The "interest analysis" framework, however, has no application to a dispute concerning the recognition of an out-of-state marriage. It is expressly reserved for tort cases. When the issue is whether an out-of-state marriage should be respected under New York law, the *only* applicable test is the marriage recognition rule. Indeed, the DCS Defendants cannot cite *a single case* in which the courts have departed from the well-settled marriage recognition rule and applied a choice of law analysis to determine whether an out-of-state marriage should be respected in New York. The governing analysis should not be changed for this case.

Our Court of Appeals has made clear that different choice of law approaches may be appropriate, depending on the nature of the dispute. For tort cases, the proper framework is an "interest analysis"; for contract cases, it is a "grouping of contacts" analysis. *See Schultz v. Boy Scouts of Am.*, 65 N.Y.2d 189, 196-97 (1985) (torts); *In re Arbitration between Allstate Ins. Co. and Stolarz*, 81 N.Y.2d 219, 227 (1993) (contracts). The court has emphasized the distinctiveness of these choice-of-law tests and their application only to the specific substantive contexts in which they have been held to be relevant. *See Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 319 (1994) ("[C]onsideration of governmental interests does not transform the analytical paradigm into one of 'interest analysis,' our approach to choice of law questions in tort cases.").

The marriage recognition rule, in turn, is a distinct mode of analysis, applicable here as a matter of settled New York law, that itself *forecloses* any further choice of law inquiry — including through an "interest analysis." Indeed, the Court of Appeals' earliest pronouncement of the marriage recognition rule relied in part on a previous case that observed, "[M]arriage is of a nature so widely differing from ordinary contracts . . . that society has even more interest in preserving it than the parties themselves." *Dickson*, 1826 WL at *2 (cited in *Van Voorhis*, 86 N.Y. at 26). In light of the unique nature of marriage, our courts reject a case-by-case choice-of-law analysis in favor of a clear-cut, predictable rule that presumes a marriage will be respected in New York if valid where contracted.[3]

Not surprisingly, the DCS Defendants do not cite a single case applying "interest analysis" in the context of marriage recognition. The DCS Defendants do rely on several cases that concern distribution of marital property, usually after a marriage contracted out-of-state had ended due to death or divorce. *See* DCS Br. 11 & 14 (citing, among other cases, *In re Estate of Clark*, 21 N.Y.2d 478 (1968), and *In re Estate of Crichton*, 20 N.Y.2d 124 (1967)). In each of these cases, the validity of an out-of-state marriage was not before the court. Rather, the court determined which state had the greatest interest in the *disposition of the property* in question, but

[3] Apart from its erroneous view of which standard should govern this issue, the DCS Defendants also urge the Court to *misapply* the inapposite "interest analysis." For example, the DCS Defendants claim that New York has "a strong interest in discouraging its domiciliaries from evading New York law." (DCS Br. 12). However, defendants concede that *May*, the leading case applying the marriage recognition rule, involved an evasive marriage. (DCS Br. 13) ("*May* involved an uncle and niece, both domiciled in New York, where the law did not authorize them to marry. The parties, however, traveled to Rhode Island to celebrate a marriage, where the law did authorize an uncle and a niece to marry."). Nevertheless, the Legislature has not overruled *May* by enacting an evasion statute, as some other states have done. *See, e.g.*, Mass. Gen. Laws Ann. Ch. 207, § 10 (enacted in 1913) ("If any person residing . . . in this commonwealth is . . . prohibited from contracting marriage under the laws of this commonwealth and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void . . . .").

did not question the validity of the underlying marriage. For example, in *Clark*, the Court of Appeals looked to the state of the decedent's domicile to determine a widow's elective share. Similarly, in *Crichton*, the Court applied the law of the domicile to detemine a widow's distribution of marital property.

These cases are fully consistent with the marriage recognition rule. New York has a strong interest in ordering the disposition of its domiciliaries' marital property. However, when called upon to determine the *validity* of a marriage contracted outside of the state — not merely to settle the disposition of property incidental to a marriage — New York courts apply the marriage recognition rule. In other words, if a New York domiciliary was validly married in Canada, his marriage is presumed valid; in contrast, the determination of whether or not he is now divorced or how to divide his property is a matter of New York law.

Relying on inapposite cases like *Clark* and *Crichton*, the DCS Defendants urge the Court to determine that the marriage recognition rule is no longer good law and to ignore it. They argue: "*May* should not survive the Court of Appeals subsequent decisions" applying the "interest analysis" used in tort cases. (DCS Br. 13). Such a request is improper; only the Court of Appeals may change this well-settled rule, and notwithstanding the "choice-of-law revolution" described by the DCS Defendants (*id.* at 14), it has not done so. To the contrary, and as the DCS Defendants concede, again and again the court has reaffirmed the marriage recognition rule in cases that post-date this supposed "revolution." (*Id.* at 15 (citing cases) and above at p.7). These cases implicitly reject the argument espoused by the DCS Defendants here. They are powerful evidence that the marriage recognition rule is alive and well in New York, a robust aspect of our

law that remains fully consistent with the case-by-case conflicts approaches applied to other types of issues.[4]

Finally, the DCS Defendants put misplaced reliance on the Appellate Division's recent decision in *Langan*, 802 N.Y.S.2d 476. *Langan* concerned a wrongful death claim brought by a party to a civil union — not, as here, a marriage — who sought to bring a wrongful death claim as a spouse of his deceased partner. The Appellate Division declined to extend the marriage recognition rule to treat parties to a civil union as "married." The court reasoned that equating a civil union with a marriage would "create a relationship never intended by the State of Vermont in creating civil unions or by the decedent or the plaintiff in entering into their civil union." *Id.* at 479.[5] Unlike in *Langan*, here plaintiff *is* married and asks that his marriage be respected by a straightforward application of this State's settled common law rule. The question before this Court is thus different from that presented in *Langan*.

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[4] The DCS Defendants' reliance on the legitimacy provision codified in DRL § 24(1) does not advance their argument that this Court should set aside the marriage recognition rule. (DCS Br. 15). This provision is consistent with the rule and shows nothing more than a legislative intent to respect foreign marriages. Moreover, there are policy reasons for the marriage recognition rule apart from legitimacy of children, including, for example, avoiding disruption of marriages validly performed elsewhere and myriad consequences of uncertainty about the validity of marriages ranging from questions about intestate succession to creditors' rights. *See, e.g.*, *Scrimshire*, 161 Eng. Rep. at 790 (rule avoids "infinite mischief and confusion" that would arise "with respect to legitimacy, *successions, and other rights*") (emphasis added). Contrary to the DCS Defendants' position, the legislature's enactment of a specific statute to underscore the status of children does not "eliminate[e] any further need for a judge-made, place-of-celebration rule" (DCS Br. 15) — much less does it effectuate an overruling of settled precedent.

[5] Indeed, the court expressly distinguished a *marriage* by a same sex couple, which became lawful in Massachusetts while the appeal was pending: "The fact that since the perfection of this appeal the State of Massachusetts has judicially created such right for its citizens is of no moment here since the plaintiff and the decedent were not married in that jurisdiction. They opted for . . . a civil union pursuant to the laws of the State of Vermont." *Id.* at 479.

C. Plaintiff's Marriage Is Valid, and None of the Exceptions to the Marriage Recognition Rule Apply

Once the DCS Defendants' invocation of irrelevant choice-of-law rules is rejected, this case may be resolved simply by applying the marriage recognition rule.

There is no dispute that plaintiff and Mr. Davis were legally married in Canada. Since June 10, 2003, by virtue of the decision of the Court of Appeal for Ontario in *Halpern v. Attorney General*, 172 O.A.C. 276 ¶ 71 (2003), marriages between same-sex couples have been deemed legal in Ontario. The legalization of marriage between same-sex couples in Canada has since been codified by the national legislature. *See* S.C. 2005 c. 33 (2005); David Aff. ¶¶ 6-10.

It is well established that a marriage validly executed in a foreign nation — such as the Canadian marriage at issue here — is entitled to the same presumption of validity in New York as one contracted in another of the several states. *See*, *e.g.*, *Van Voorhis*, 86 N.Y. at 24 ("it is a general rule of law that a contract entered into in another State *or country*, if valid according to the law of that place, is valid everywhere") (emphasis added). For example, in *In re Will of Valente*, the court held that a legally constituted Italian proxy marriage was valid in New York. 18 Misc. 2d at 702. The Court discerned that this "State regards as settled law that the legality of a marriage between persons . . . is to be determined by the law of the place where it is celebrated." *Id.* at 704. *See also Bronislawa K.*, 90 Misc. 2d at 184 (Polish marriage); *In re Sood*, 208 Misc. 819, 821 (Sup. Ct. Onondaga Cty. 1955) (Indian marriage). In particular, Canadian marriages have been recognized as valid by New York courts for decades. *See In re White*, 129 Misc. 835, 836 (N.Y. Sur. Ct. 1927) ("[V]alidity of the [marriage] ceremonial must be tested, not by . . . the laws of this state, but by the laws of the place where the ceremony took place, which was the province of Ontario . . . ."); *Donohue v. Donahue*, 63 Misc. 111, 112 (N.Y.

Sup. Ct. 1909) ("The parties were competent to contract a lawful marriage in the Province of Ontario, Canada; and the marriage was lawful there, and, therefore, is valid in this State.").

Neither of the two narrow exceptions to the marriage recognition rule is applicable to plaintiff's marriage. First, New York has not enacted a law explicitly banning recognition of out-of-state marriages between same-sex couples. Indeed, the Legislature has repeatedly declined to pass such legislation.[6] Second, plaintiff's marriage does not fall within the abhorrence exception to the marriage recognition rule, which has been limited only to polygamous and closely incestuous unions and should not be broadened for the first time in more than a century to include marriages between same-sex couples.

Notably absent from the DCS Defendants' moving papers is any express invocation of the abhorrence exception to the marriage recognition rule. This is unsurprising because defendants could not possibly satisfy the weighty burden that is required for this exception to apply. To prevail, defendants must demonstrate that plaintiff's marriage violates a settled consensus of social morality. In other words, defendants must show not merely that New York does not currently authorize the marriage in question, but that it affirmatively and strongly disapproves of and condemns the marriage. *See May*, 305 N.Y. at 491. In determining whether such a community-wide consensus exists, courts have looked to a variety of sources for evidence

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[6] The DCS Defendants observe that in jurisdictions that *do* have such affirmative prohibitions, Canadian marriages between same-sex couples have not been recognized. (DCS Br. 12-13 (citing in *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) and *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (2005)). Apart from the fact that neither of these cases is binding here, both are completely inapposite. In *Kandu*, a bankruptcy judge found that the definition of marriage in federal law "directly conflict[s]" with the definition in Canadian law, and under the Defense of Marriage Act ("DOMA"), he was required not to recognize the marriage. 315 B.R. at 133. In *Hennefeld*, a New Jersey tax court found that specific legislative findings during the enactment of that state's Domestic Partnership Act ("DPA") militated against recognition of the Canadian marriage. New York has neither an affirmative prohibition like DOMA nor specific legislative findings as in New Jersey's DPA. 22 N.J. Tax at 195-96.

of a consensus of social abhorrence. Only where courts have found approval lacking in virtually all quarters have they declined to recognize a marriage. Again, *May* is instructive. There, the Court of Appeals noted that the marriage was prohibited by a New York statute, but nevertheless found that the abhorrence exception did not apply because the marriage at issue — between an uncle and niece — was condoned by the parties' observed religious laws and traditions. 305 N.Y. at 493. Similarly, in *In re Will of Valente*, the Court found a proxy marriage valid because, even though it was prohibited by New York statute, such unions were recognized in a handful of other states. 18 Misc. 2d at 704-05. *See also Bronislawa K*, 90 Misc. 2d at 185 (finding evidence of approval of proxy marriages in practices of other countries).[7]

As evidenced by its laws and judicial decisions, New York State increasingly regards same-sex partnerships with respect and tolerance, negating the consensus of abhorrence that defendants must demonstrate to invoke this narrow exception to the marriage recognition rule. All three branches of State government provide health insurance benefits to domestic partners of State employees. (David Aff. ¶ 23 & Exhs. P&Q). The State legislature has enacted numerous measures to provide same-sex domestic partners with legal rights and benefits otherwise reserved to spouses. *See*, *e.g.*, S.5590/A.5342, 2003 Sess. Law of N.Y. Ch. 679 (enabling same-sex domestic partners of credit union members to become members as well and have full access to banking services). Numerous municipalities — including both New York City and Rochester — have created "domestic partner registries," which afford registered same-sex partners the same benefits spouses would receive under various municipal programs. *See*, *e.g.*, N.Y.C. Admin. Code § 3-241 (2000); City of Rochester Admin. Code 47B-1 (2000). For

[7] In addition to Canada, marriages between same-sex couples are legal in a number of other jurisdictions, including Massachusetts, the Netherlands, Belgium, Spain, and — soon — South Africa. (*See* David Aff. ¶¶ 3-5).

instance, in New York City, registered domestic partners are eligible for visitation rights in city hospitals and correctional facilities; child care and bereavement leave if they are serving as city employees; and succession rights in city housing. *See* NYC Code Tit. 3, Ch. 2, Subch. 3, Refs & Annos.[8] New York City recently strengthened its policy of respecting domestic partner relationships by amending its Human Rights Law to include "partnership status" as a class protected against unlawful discrimination in employment, housing and public accommodations. *See* Int. No. 22-A, the Local Civil Rights Restoration Act of 2005.[9]

New York's growing acceptance of same-sex partnerships has also been manifested in the decisions of its courts: In a variety of instances, courts have interpreted statutes and legal rules to afford such partners benefits akin to those received by spouses. *See, e.g.*, *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 211 (1989) (same-sex "lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and

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[8] Same-sex partners were also afforded spousal-like benefits in connection with various programs implemented to assist those affected by the September 11 tragedy. *See* Executive Order No. 113.30, 9 N.Y.C.R.R. § 5.113.30 (Oct. 10, 2001) (surviving same-sex partners entitled to same benefits as spouses from state's Crime Victims Board); September 11th Victims and Families Relief Act, 2002 Sess. Laws of N.Y. Ch. 73, § 1 (2002) (legislative intent section specifies that domestic partners should be eligible for September 11 Federal Fund awards); S7685/A11307, 2002 Sess. Law of N.Y. Ch. 467 (amending State's workers' compensation law to provide same-sex domestic partners of September 11 victims same death benefits provided to spouses); S7792/A11812, 2002 Sess. Law of N.Y. Ch. 176 (same-sex domestic partners of September 11 victims and their children eligible for state's World Trade Center memorial scholarship program). More recently, New York has enacted legislation that provides same-sex couples the ability to make decisions about the disposition of partner remains (S.1924/A.1238 (2005)), and the same rights as spouses when taking care of loved ones in hospitals, nursing homes and health-care facilities (S.7688/A.9872-A (2004)).

[9] In the private sector, same-sex relationships are also recognized and respected for health insurance purposes. Employer benefits for same-sex partners of employees are now a common part of the economic landscape in New York and nationwide. For example, by the end of 2003, 40 percent of Fortune 500 companies offered benefits to same-sex partners of employees. Employers offering these benefits report that they result in little or no cost increase. *See* http://hrc.org/Template.cfm?Section=Home&CONTENTID=18792&TEMPLATE=/ContentManagement/ContentDisplay.cfm

interdependence" qualify as 'family members" for purposes of state rent control law); *In re Jacob*, 86 N.Y.2d 651, 656 (1995) (allowing life partner of child's biological parent to adopt under DRL with "second parent" status); *Levin v. Yeshiva*, 96 N.Y.2d 484 (2001) (same-sex couple could bring claim for violation of NYC Human Rights Law for being denied married student housing); *East 10th Street Assocs. v. Estate of Goldstein*, 154 A.D.2d 142, 145 (1st Dep't 1990) (extending *Braschi* to rent-stabilized apartments); *Stewart v. Schwartz Brothers-Jeffer Mem'l Chapel, Inc.*, 159 Misc. 2d 884, 888 (Sup. Ct. Queens Cty. 1993) (man had standing to assert his deceased partner's final wishes because of their "spousal-like relationship").

New York also has enacted powerful provisions to protect individuals from discrimination on the basis of their sexual orientation. *See* Sexual Orientation Non-Discrimination Act ("SONDA"), 2002 Sess. Laws of N.Y. Ch. 2 (2002) (prohibiting discrimination on basis of sexual orientation in employment, education, and housing accommodations); Hate Crimes Act of 2000, N.Y. Penal Law § 485.05 (1)(a), Part 4, Title Y (New York's hate crimes law includes sexual orientation).

Finally, the lack of a social consensus opposing marriages between same-sex couples is confirmed by the absence of any statutory provision in New York that renders void such a marriage if celebrated *in* New York. This stands in contrast to polygamous and incestuous marriages, which are expressly barred. *See* DRL §§ 5, 6. Such a statutory provision may constitute evidence of the community's social norms. *See People v. Ezeonu*, 155 Misc. 2d 344, 346 (Sup. Ct. Bronx Cty. 1992) ("recognition of a polygamous marriage is repugnant to public policy as evidenced by [DRL] Section 6 . . ."); *Rubman v. Rubman*, 140 Misc. 658, 670 (Sup. Ct. N.Y. Cty. 1931) ("'The statutory provision that a marriage is void if contracted by a person whose husband or wife by a former marriage is living, is declarative of public policy'").

Where, as here, there is no statute expressing disapproval of the type of marriage in question, the abhorrence exception should not apply.

In light of New York's history of increasing support for and protection of same-sex relationships, any attempt to bring plaintiff's marriage within the scope of the abhorrence exception should be rejected. While New Yorkers do not all agree on the full scope of rights to be accorded same-sex couples, there is certainly no social consensus that such relationships are abhorrent to public morality, and this exception to the marriage recognition rule is inapplicable.

D. The DCS Defendants' Attempt to Carve Out New Exceptions to the Marriage Recognition Rule is Futile

Unable to meet their burden to show that plaintiff's marriage falls within the abhorrence exception to the marriage recognition rule, the DCS Defendants advance a series of baseless arguments to distinguish *May* and render the marriage recognition rule inapplicable.

First, the DCS Defendants argue that plaintiff's marriage to his same-sex spouse is "different in kind" rather than "different merely in degree" from the marriage between an uncle and niece in *May*. (DCS Br. 16). This argument distorts the common law rule, which does not allow courts discretion to determine whether certain marriages are more or less "different" than other marriages, but only whether certain categories — namely, incestuous or polygamous marriages — are so abhorrent to well-settled, virtually universal sentiment as to be against public policy. Notably, the DCS Defendants do not — and, for the reasons set forth above (pp.16-19), cannot — argue that there is that type of consensus in New York today about marriages of same-sex couples. In any event, despite significant "differences" between the marriages permitted in the DRL and, for example, marriages between uncles and nieces or common law marriages, the latter categories of marriages are still respected under the rule if valid where contracted.

Next, the DCS Defendants argue that because plaintiff seeks a state benefit, the Court should not recognize his marriage in Ontario because it is the "sovereign's liability" that is at stake and not a private dispute, as in *May*. (DCS Br. 17). But the sole case cited for this novel proposition, *Estate of Borax v. Comm'r of Internal Revenue*, 349 F.2d 666, 671 (2d Cir. 1965), merely held valid, for purposes of federal tax law, a divorce that previously had been invalidated by a New York court. *Borax* did not address the marriage recognition rule articulated in *May*, nor make any distinction between a public or private dispute. In short, *Borax* provides no support for DCS's contention that because plaintiff seeks some State — as opposed to purely private — benefits, his marriage should not be recognized. In any event, as noted above (p.10), the State's Comptroller has opined that the marriage recognition rule applies to benefits received through the New York State Retirement System. (David Aff., Exh. E). The spouses of state employees, whether same-sex or different-sex, are thus entitled to receive retirement benefits predicated on a valid Canadian marriage. This fact directly contradicts the DCS Defendants' contention that there is something unique about State benefits that preempts application of the marriage recognition rule.

The DCS Defendants further attempt to distinguish *May* because in that case the Court of Appeals recognized a marriage only after one spouse had died, whereas here, plaintiff's marriage is ongoing. According to the DCS Defendants, "New York courts . . . have uniformly refused to recognize ongoing, unauthorized marriages." (DCS Br. 17-18). In every case cited in support of this proposition, however, the court refused to recognize a *polygamous* marriage, which is abhorrent to the policy of the state. *See People v. Ezeonu*, 155 Misc. 2d at 346; *Bell v. Little*, 204 A.D. 235, 236-37 (4th Dep't 1922), *aff'd*, 237 N.Y. 519 (1923); *Earle*, 141 A.D. at 615; *In re Sood*, 208 Misc. at 821. These cases are fully consistent with the settled marriage

recognition rule as articulated in *May*. Contrary to the DCS Defendants' contention, no New York court has drawn a distinction between a marriage that has ended in the death of a spouse and an ongoing marriage, and it would make no sense to do so.

Finally, the DCS Defendants' argument that plaintiff's marriage to his same-sex spouse violates "public policy" (DCS Br. 18-19) is simply an attempt to dilute the abhorrence exception. This case is *not* about the evolving body of law on the right of lesbians and gay men to marry in this State, but rather about the application of a strict and specific rule. The Attorney General has characterized the very argument made by the DCS Defendants here — namely, that respecting plaintiff's marriage would violate public policy because "[t]he State of New York has a deep-rooted tradition of marriage as a union between one man and one woman" (DCS Br. 18) — as "meritless," explaining that "[t]he recognition rule applies *regardless* of whether the out-of-State union in question would have been valid if executed in New York." (David Aff., Exh. D at 21 (emphasis in original)). The Legislature has *not* acted to bar recognition of out-of-state marriages of same-sex couples, and there is far from any social consensus that such marriages are "abhorrent" as a matter of public policy. Just as there is a "tradition" in this State of not allowing uncles and nieces to marry and not allowing common law marriages under the DRL, the so-called "tradition" of barring same-sex couples from marrying *in* this State has no bearing on application of the marriage recognition rule.

E. Defendants Are Bound to Provide Plaintiff's Spouse Coverage Under the Empire Plan and District Supplemental Health Plans

Plaintiff's marriage is valid for all purposes under New York law, and defendants are thus obligated to provide him with the health care benefits to which this status entitles him, including the right to add his spouse as a covered enrollee.

The DCS Defendants assert that CSL § 164, which "entitle[s]" an employee "to have his spouse" included in insurance coverage, must be read to apply only to opposite-sex spouses. (DCS Br. 9). This position finds no support in the statute, which on its face is gender-neutral. Although the DCS Defendants concede that "[n]either CSL § 164 nor the regulation thereunder, 4 NYCRR § 73.1(h), defines 'spouse,'" they nevertheless argue that the term should be given the "usual and customary meaning" of "a man or a woman in an opposite-sex marriage." (*Id.*). However, the cases cited for this proposition concerned attempts to apply the term "spouse" to include persons in statuses *other than* marriage. (*See id.* (citing *Valentine v. Am. Airlines*, 17 A.D.3d 38, 39 (3d Dep't 2005) (registered domestic partner seeking spousal status); *Langan*, 802 N.Y.S.2d at 479 (party to civil union seeking spousal status); *In re Estate of Cooper*, 187 A.D.2d 128, 129-30 (2d Dep't 1993) (surviving partner in same-sex relationship seeking spousal status)). These cases have no bearing on the marriage recognition rule, which requires that a valid out-or-state *marriage* be respected in New York. To misread these cases as allowing discrimination between two classes of out-of-state marriages — those between different-sex versus same-sex couples — as opposed to limiting the definition of "spouse" to those who have entered into marriages, would create an unnecessary constitutional conflict. *See* Point II below. Plaintiff is married. On the face of CSL § 164, he is therefore entitled to have his legally married spouse included in his insurance coverage.

In fact, applying the marriage recognition rule here is consistent with the legislative priorities underlying CSL § 164, which were primarily about (i) providing health care for State workers in order to be competitive with the private sector and (ii) avoiding dependence

on public medical assistance.[10] Applying the marriage recognition rule evenhandedly to require that plaintiff's marriage be respected furthers the purposes of the statute.

Because Mr. Funderburke is eligible for spousal health care coverage, the District is obligated to provide it. First, it has conceded as much, admitting that "[a]s a participating agency in NYSHIP, the District has no discretion or role in the decision of whether or not same-sex spouses are eligible for dependent coverage in NYSHIP or the Empire Plan." (District Aff. ¶ 23). Second, even to the extent the District has not already conceded its obligation to pay for this benefit by its posture in the instant litigation, it has done so by way of its agreement with the Uniondale Teachers Association ("UTA"), the recognized collective bargaining representative of the District's teachers. Under the terms of its collective bargaining agreement with the UTA, the District has agreed that it "shall pay 100% of the Premium for the State Health Insurance Plan." (DCS Aff., Exh. B at 32). This provision does not reserve for the District any discretion to deny coverage to qualifying retirees.

Mr. Funderburke's eligibility for spousal health benefits under the Empire Plan entitles him to such coverage under the District's supplemental medical plan as well. The District concedes that it "is not responsible for making policy decisions or interpreting rules and laws affecting the provisions" of this plan and that "[r]ather, First Rehabilitation. . . is principally responsible for making policy decisions and interpreting rules and laws affecting the provisions

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[10] *See* Letter from Governor Averell Harriman to Legislature, dated February 16, 1956 ("In recent years employers and unions in private industry have found it possible to conclude agreements which provide substantial health protection to employers . . . . In the majority of cases, the employer also contributes to the cost of similar protection for the employee's dependents. It is high time [that] the State's employees enjoyed similar opportunities."); Letter from State Senator George R. Metcalf to Daniel Gutman, dated March 31, 1956 ("As a legislative proposal, it is to be commended for the inclusion of retired state employees; the placing of these persons and their dependents under a program of health insurance is a rather advanced step. A majority of men and women, as you know, are dropped from insurance rolls when they reach age 65, and this is the precise time when the need can be greatest.").

of the plan, including determining who is an eligible insured or dependent covered under the plan." (District Aff. ¶ 15). First Rehabilitation has represented that, "if Mr. Funderburke succeeds in obtaining spousal coverage for his spouse, Mr. Davis, under the Empire Plan, such coverage would be available under the First Rehab Life Excess Group Medical Policy once Mr. Davis is enrolled during the Open Enrollment Period in November and December after payment of the appropriate premium." (Simon Aff., Exh. D).

Finally, the District must provide plaintiff with spousal coverage under its dental plan, which defines the term "dependent," entitled to coverage, to mean "[y]our spouse." (Simon Aff., Exh. C). The plan does not limit the term "spouse" based on the gender or sexual orientation of the parties to a marriage.

In short, as plaintiff's legal spouse, Mr. Davis plainly qualifies to be added as an enrollee under the Empire Plan and District Supplemental Health Plans. Since defendants are required to respect plaintiff's marriage under the marriage recognition rule, they have no discretion to deny plaintiff the right to enroll his spouse in the plans.

II.

DEFENDANTS' REFUSAL TO GRANT HEALTH INSURANCE TO PLAINTIFF'S LEGAL SPOUSE VIOLATES THE STATE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION

The State Constitution's Equal Protection Clause, Art. I, § 11, provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." New York's equal protection guarantee "imposes a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment." *Brown v. State*, 89 N.Y.2d 172, 190 (1996). While the Court need not reach the constitutional question presented by plaintiff given that application of CSL § 164 and the marriage recognition rule

alone require a ruling in plaintiff's favor (Point I, above),[11] it remains the case that defendants' refusal to extend health insurance benefits to Mr. Funderburke's spouse clearly discriminates on the basis of sexual orientation and sex in contravention of plaintiff's right to equal protection.

The DCS Defendants misapprehend the nature of plaintiff's constitutional challenge. Plaintiff does *not* assert that New York must affirmatively grant him the right to marry his same-sex partner, and it would be inappropriate for that issue to be reached here. Accordingly, the DCS Defendants are incorrect when they assert that plaintiff's constitutional claim is foreclosed by certain authority rejecting equal protection challenges by same-sex couples seeking to marry in New York. (DCS Br. 20-21). Plaintiff's constitutional claim instead is directed at defendants' different treatment for purposes of the CSL of similarly situated couples who marry out of state. In refusing to recognize plaintiff's marriage, defendants have drawn an arbitrary line between out-of-state marriages involving different-sex couples and those involving same-sex couples. This discrimination in the provision of health insurance under CSL § 164 runs afoul of the State Constitution's Equal Protection Clause.

Even under the lowest level of constitutional scrutiny, defendants' actions violate plaintiff's equal protection rights because their discrimination cannot "rationally further some legitimate, articulated state purpose." *Doe v. Coughlin*, 71 N.Y.2d 48, 56 (1987) (quotations and citation omitted). A justification that fails to explain why one group was singled out for adverse treatment fails rational review. *See, e.g., City of Cleburne v. Cleburne Liv. Ctr.*, 473 U.S. 432, 446 (1985) (equal protection will not permit "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). Further, justifications

[11] "It is hornbook law that a court will not pass upon a constitutional question if the case can be disposed of in any other way." *People v. Felix*, 58 N.Y.2d 156, 161 (1983).

that reflect disapproval of one group — as appears to be the case here — are illegitimate. *See Romer v. Evans*, 517 U.S. 620, 624 (1996); *People v. Onofre*, 51 N.Y.2d 476, 490-92 (1980).

The relevant question here is whether any rational purpose is served by discriminating between same-sex and different-sex couples who have been validly married elsewhere for the purpose of providing spousal insurance coverage. All the supposed reasons for not affirmatively allowing same-sex couples to marry *within* New York — which are themselves specious, but are well beyond the scope of this case — do not apply to this narrower question. For example, discrimination between classes of already married couples in the distribution of spousal health benefits has nothing to do with a supposed interest in procreation and childrearing. (DCS Br. 27-29).[12] Another of the DCS Defendants' suggested rational bases — "to maintain uniformity with the federal government and at least 45 sister states" (DCS Br. 29) — cannot excuse their discrimination in New York. *See, e.g.*, *People v. P.J. Video*, 68 N.Y.2d 296, 304 (1986) ("practical need for uniformity can seldom be a decisive factor" in justifying deprivation of constitutional rights). More fundamentally, where the Attorney General and numerous State and local officials have consistently acknowledged the application of the common law marriage recognition rule and private actors throughout the State are respecting out-of-state marriages by same-sex couples (*see* above at pp. 10-11; David Aff. ¶¶ 11-20 & Exhs. C-O), it is the *defendants themselves*, through their defiance of the marriage recognition rule, that are creating inconsistency. Finally, the DCS Defendants' proffered justification of maintaining consistency with New York law (DCS Br. 33) is as irrational as it is remarkable —

[12] In any event, the legislative record does not support the notion that CSL § 164 was intended to further procreation or to "preserve[] the long-standing social, cultural and legal definition of marriage as a union between one man and one woman" (*Id.* at 27). *See* p.28 n.9.

by refusing to follow a rule so deeply imbedded in New York jurisprudence that it predates even the founding of our nation, once again it is *defendants* that frustrate this purported rationale.[13]

Moreover, defendants' discrimination is based on sexual orientation and sex, which warrants heightened scrutiny of defendants' actions. While the Court of Appeals has expressly reserved the question whether to accord heightened State constitutional scrutiny to classifications based on sexual orientation, *see Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 364 (1985), it is clear that gay people satisfy any of the relevant criteria for such a status. These include whether (1) the group historically has been subjected to purposeful discrimination; (2) the trait used to define the class is unrelated to the ability to perform and participate in society; or (3) the group cannot sufficiently protect itself through the political process. *See Cleburne*, 473 U.S. at 440-41; *Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 431 (2001).[14] There can be no dispute that gay people have long experienced purposeful discrimination. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 571, 575 (2003) ("for centuries there have been powerful voices to condemn homosexual conduct as immoral"; "state-sponsored condemnation" of gay people has led to "discrimination both in the public and in the private spheres."); SONDA, § 1 ("many residents of this state have encountered prejudice on account of their sexual orientation" which "has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering."). Nor can there be any genuine dispute that sexual orientation is unrelated to one's ability to perform and participate in society. For example, plaintiff was fully qualified to serve as a public school teacher and served the District for 25

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[13] The Attorney General has likewise addressed and rejected the DCS Defendants' arguments regarding DOMA. (David Aff., Exh. D at 15-18).

[14] The Supreme Court has consistently identified these criteria using the conjunctive "or" and has never required all three to find that a classification involving a particular group warrants heightened scrutiny. *E.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

years. (Pl. Aff. ¶ 3). Finally, while gay people have been granted some protections from discrimination from some quarters in New York after long years of effort, they continue to face significant disadvantages in the political process. Defendants' discrimination based on plaintiff's sexual orientation thus warrants heightened scrutiny.[15]

In addition, the law is clear that a classification based on sex warrants heightened scrutiny and "violates equal protection unless the classification is substantially related to the achievement of an important governmental objective." *People v. Liberta*, 64 N.Y.2d 152, 168 (1984). The discrimination here is sex-based; that is, plaintiff's marriage is not recognized solely because he married a man rather than a woman. The sex classification could not be starker.[16] The DCS Defendants' argument that both sexes are treated identically (DCS Br. 22) is irrelevant. That defendants deny insurance benefits to a man who validly marries a man and to a woman

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[15] The DCS Defendants assert that "the overwhelming majority of federal and sister-state courts agree that sexual orientation is not a suspect classification." (DCS Br. 25). Most of these cases relied on the discredited holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), reasoning that homosexuality could not give rise to suspect classification if gay people could be criminally prosecuted for their sexual conduct. *See, e.g.*, *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989). In *Lawrence*, the Supreme Court concluded that "*Bowers* was not correct when it was decided and it is not correct today. It ought not to remain binding precedent." 539 U.S. at 578. Accordingly, these cases do not provide support for the DCS Defendants' position.

[16] The DCS Defendants observe that in an "analogous context" — an acknowledgment that this case does *not* involve a constitutional claim for affirmative marriage rights for same-sex couples — "federal and sister-state courts" have rejected plaintiff's sex discrimination claim. (DCS Br. 23 (citing cases)). The DCS Defendants fail to inform the Court that many courts and jurists have *accepted* this argument as a basis for extending marriage equality to gay couples. *See Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *6 (Baltimore Cty. Cir. Ct. Jan. 20, 2006); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Lewin*, 74 Haw. 530, 533, 852 P.2d 44, 60 (Haw. 1993); *Li v. Oregon*, No. 0403-03057, 2004 WL 1258167, at *6 (4th Cir., Multnomah Cty. Apr. 20, 2004); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 345-46, 798 N.E.2d 941, 947 (2003) (Greaney, J., concurring).

who validly marries a woman does not prove that defendants allocate benefits without regard to gender, but rather that *both* men and women are subjected to sex discrimination.[17]

There can be no question that defendants' refusal to respect plaintiff's marriage violates his constitutional right to equal protection. While the application of the marriage recognition rule and the plain language of CSL § 164 render a constitutional inquiry unnecessary here, to the extent the Court does not grant plaintiff relief on common law and statutory grounds it should find that defendants' actions violate plaintiff's rights under the State Constitution.

[17] The U.S. Supreme Court rejected a similar "equal application" argument in a case involving peremptory challenges based on gender stereotypes, emphasizing that regardless of whether the government's practice was to stereotype both men and women in the venire, "individual jurors" of either gender had a right not to be discriminated against. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-41 (1994). The Court rejected the dissenting view, *id.* at 159, that there could be no discrimination because members of both sexes are subject to peremptory challenge, *id*. at 141 n.12. *See also Loving v. Virginia*, 388 U.S. 1, 8 (1967) ("reject[ing] the notion that the mere 'equal application' of a statute containing [discriminatory] classifications is enough to remove the classifications from the [constitutional] proscription of all invidious . . . discriminations.").

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court (i) deny the DCS Defendants' motion for summary judgment, and (ii) grant plaintiff's cross-motion for summary judgment against all defendants.

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