SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Daniel HERNANDEZ and Nevin COHEN, *et al.*,	
Plaintiffs-Appellees,	Index No. 04-103434
-vs.-	
Victor L. ROBLES, in his official capacity as CITY CLERK of the City of New York.,	*On Appeal From The Supreme Court, New York County (Hon. Doris Ling-Cohan)*
Defendant-Appellant.	

BRIEF OF ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN EQUALITY, EQUALITY FEDERATION, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, 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

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017-3954
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

Attorneys for Amici Curiae

Of Counsel:

Joseph F. Tringali
Robert J. Pfister
Paul A. Saso

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STATEMENT OF INTEREST

Amici curiae are public interest organizations with long histories of supporting the equal rights of all individuals, including gays 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.

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 defendants in this case 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) .

New York's courts have never taken so jaundiced a view of the role entrusted to them 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).

If, as it should, this Court agrees with appellees 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 answer. 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 answer in that event, as it presents the only possibility for making appellees whole. *See* Point II, *infra*.

For these reasons, this Court should affirm the trial court with instructions to enter a judgment directing appellant 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 Appellees' 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 very 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 rights that are incident to marriage, such as the opportunity to avail oneself of spousal health insurance or inherit intestate.[1] Rather, appellees have taken issue with their exclusion from "a

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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 economic or legal benefits.

social institution" that is a fundamental requisite to "the orderly constitution of society." *Di Lorenzo v. Di Lorenzo*, 174 N.Y. 467, 472 (1903).

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

Even when discrimination takes what its proponents call an "innocuous" form,[2] its deleterious effects inevitably surface eventually. 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 that may affect their hearts and minds in a way unlikely ever to be undone.

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[2] *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).

Brown v. Bd. of Educ., 347 U.S. 483, 493-94 (1954).

It was this same concern about the stigmatizing effects of discrimination that led Justice Harlan to dissent passionately from the Court's endorsement of "separate but equal" in the context of public accommodations in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Legislating "separate but equal" 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." *Id.* at 560 (Harlan, J., dissenting).

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).[3]

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[3] 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

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 ("VMI"), Virginia offered women enrollment in a parallel, but distinctive, program. *United States v. Virginia*, 518 U.S. 515, 526 (1996) ("*VMI*"). The state's desire for a "separate" facility that would nonetheless be "equal" was made 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 they sought admission to, 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—that have been used to exclude women and discriminate against them for generations—were meritless. *Id.* (holding that Virginia's proposed separate program for women violated the Equal Protection Clause).

Same-sex couples seeking to marry today are similarly accused of "downgrading" the stature of marriage. Opponents of same-sex marriage insist

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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").

that the exclusion of same-sex couples "preserves" marriage, suggesting that their admission, much like the proposed admission of women into VMI, would "destroy" the institution of marriage. *Shields v. Madigan*, 5 Misc. 3d 901, 907, 783 N.Y.S.2d 270, 276 (Sup. Ct. Rockland Co. 2004) (holding that "preserving" marriage is a legitimate government interest).[4]

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. As Justice Brandeis 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

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[4] For example, United Families International, an organization that has submitted an amicus brief in support of appellant, argues on its website that "There 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.

> 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).[5]

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. "The thin disguise of 'equal' accommodations," Justice Harlan presciently wrote in a different but equally compelling 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").

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[5] *Accord 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").

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 only institution that is synonymous with lifelong commitment, love and fidelity. 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, applying its own state constitution, ruled that same-sex couples could not be denied the right to

marry,[6] the legislature proposed 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 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 to merely "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. Can. (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

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[6] *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").

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, paras. 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.*

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 [United States] 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).

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). Civil unions would limit this new status to same-sex couples exclusively because married heterosexuals would never accept for themselves a status of mere civil union. This simple fact alone underscores the inequality of marriage and civil unions.

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

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

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"). Appellees 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).

New York's Due Process Clause, unlike 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.").

It is the courts' duty to redress constitutional violations that are properly brought before them. The judiciary is in a unique position to "safeguard the rights afforded under our State Constitution," *id.*, 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). 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 appellees 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.

Appellant argues 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 appellees

are entitled by law. *See* Section II.A., *supra*. 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 itself 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 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 US 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).[7]

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 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,

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[7] *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).

but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[8]

Appellant also cites vague "complexities" that "inevitably will result from the lack of recognition of same-sex marriages by the Federal government and most states." *See* Appellant's Br. at 53. No explanation is 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. "Conflicts" are merely a consequence of our nation's federalist structure and, the marriage laws of other states should have no bearing on this Court's ruling.

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.[9] Today, marriage statutes

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[8] *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.").

[9] For instance, anti-miscegenation laws varied greatly over time across jurisdictions until they were struck down as unconstitutional in *Loving*, 388 U.S. 1. *See* Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996).

continue to vary greatly[10] - from Mississippi, where one must be twenty-one years old in order to marry legally, to California, Kansas and Massachusetts, where no age requirement exists for couples that seek to marry so long as they have their parents' consent.[11]

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 continue to evolve.[12] 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 appellant's assertions, its proposal would

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[10] New cases continue to be heard in such other areas of legal diversity as divorce, *Lopes v. Lopes*, 852 So. 2d 402 (Fla. App. 2003) (applying Florida law and declining to recognize a Dominican Republic divorce obtained by a Connecticut husband at a time he and his wife were domiciled in Connecticut); first-cousin marriage, *Mason v. Mason*, 775 N.E.2d 706 (Ind. App. 2002) (recognizing a first-cousin marriage that was valid under the law of the place of celebration, but not under the law of the parties' post-marriage domicile); common-law marriage, *Police & Firemen's Disability & Pension Fund v. Redding*, No. 01AP-1303, 2002 WL 1767362 (Ohio App. Aug. 1, 2002) (preserving the pension eligibility of an Ohio policeman's widow by declinging to recognize her common-law marriage under the law of her Wyoming domicile); and civil union, *Langan v. St. Vincent's Hosp. of N.Y.*, 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct. Nassau Co. 2003) (granting a member of a Vermont civil union the status of a spouse under New York's wrongful death statute).

[11] *See* CAL. FAM. § 300-303; KAN. STAT. ANN. § 23-106; MASS. GEN. LAWS Ch. 207 § 7, 24-25.

[12] 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 legalized gay marriage). *See also Goodridge*, 798 N.E.2d 941.

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.

* * *

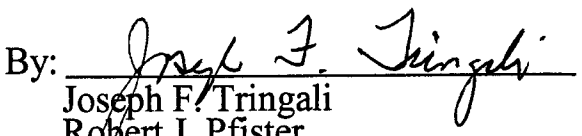
Civil marriage is unique in its social significance; it is the quintessential expression of two individuals' enduring commitment to one another; it is a life-defining moment for countless New Yorkers. Regardless of same-sex couples' access to the rights and obligations attendant to marriage, barring 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 appellees will be wholly incomplete unless accompanied by instructions to enter a judgment according full 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
July 22, 2005

SIMPSON THACHER & BARTLETT LLP

By: 

Joseph F. Tringali
Robert J. Pfister
Paul A. Saso
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

Attorneys for Amici Curiae