SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DANIEL HERNANDEZ and NEVIN COHEN, LAUREN ABRAMS and DONNA FREEMAN-TWEED, MICHAEL ELSASSER and DOUGLAS ROBINSON, MARY JO KENNEDY and JO-ANN SHAIN, and DANIEL REYES and CURTIS WOOLBRIGHT, Plaintiffs, - against - VICTOR L. ROBLES, in his official capacity as CITY CLERK of the City of New York, Defendant.	Index No. 103434/2004 Hon. Doris Ling-Cohan

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO MEMORANDUM OF LAW ON BEHALF OF *AMICI*

LAMBDA LEGAL DEFENSE AND EDUCATION FUND
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

KRAMER LEVIN NAFTALIS & FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Pages

STATUTES

MISCELLANEOUS

Plaintiffs Daniel Hernandez and Nevin Cohen, Lauren Abrams and Donna Freeman-Tweed, Michael Elsasser and Douglas Robinson, Mary Jo Kennedy and Jo-Ann Shain, and Daniel Reyes and Curtis Woolbright ("plaintiffs"), by their attorneys Lambda Legal Defense and Education Fund and Kramer Levin Naftalis & Frankel LLP, respectfully submit this memorandum of law in response to the memorandum of law submitted on behalf of Ruben Diaz, Sr., Daniel Hooker, Michael Long, Raymond Meier, and the New York Family Policy Council (collectively, "*amici*") in opposition to plaintiffs' motion for summary judgment and in support of the cross-motion filed by defendant Victor L. Robles, in his official capacity as Clerk of the City of New York ("defendant").

PRELIMINARY STATEMENT

Amici's brief adds nothing that helps resolve this case seeking to end denial of the right to marry in New York for same-sex couples. Reflecting a lack of understanding of our State's tradition of independent constitutional adjudication and heightened respect for individual liberties, the brief instead wrongly attempts to inject into the case discredited and distorted assertions about gay people and their families that New York law resoundingly rejects.[1]

Amici's arguments flow primarily from their rote insistence that "[m]arriage, by definition . . . *is* a union between a man and a woman." (*Amici* Br. at 2.) As noted in plaintiffs' earlier submissions, this definitional approach improperly seeks to short-circuit constitutional inquiry by using historical discrimination as the very basis for perpetuating it. Constitutional analysis requires more: Since it is undisputed that the freedom to marry is deeply rooted in our constitutional tradition, the question before this Court is whether that fundamental right can be

[1] *Amici*'s brief also is replete with confusing non sequiturs, including responses to points and authorities not mentioned in the briefs in this case, purported quotations of language from plaintiffs' briefs that is not contained in them (*see, e.g., Amici* Br. at 5 n.4, 6-8, 10 n.8, 33), and even references in *amici*'s Table of Contents to a freedom of expression claim that plaintiffs have not asserted.

denied to plaintiffs absent a compelling governmental purpose that can be served only by limiting marriage to different-sex couples.

In a further effort to justify the marriage law's discrimination against gay people, *amici* make a number of assertions that so distort the historical and social science record as to deprive their arguments of any credibility whatsoever. For example, *amici* oppose heightened scrutiny for discrimination based on sexual orientation by denying that gay people have been subject to any history of discrimination (*Amici* Br. at 5-8) — a startling proposition at odds with holdings of the U.S. Supreme Court and many other federal and state courts, myriad legislative findings, a massive body of historical and social science data, and common knowledge.[2] They further claim that permitting same-sex couples to marry would interfere with a purported State purpose in promoting marriage as the setting for procreation, a position so illogical as to fail even rational basis review. *Amici* resort to the all too familiar tactic of trying to justify discrimination by scapegoating its victims, asserting that trends in marriage rates among heterosexuals in Scandinavian countries should be blamed on legal recognition accorded to same-sex couples there. They even suggest that barring same-sex couples from marriage is necessary to protect children — invoking discredited social science theories while ignoring the severe *harm* to the children of same-sex couples caused by their parents' exclusion from marriage, which is of grave concern to the professionals who work with children. *Amici*'s embrace of such arguments — which defendant, despite otherwise vigorously defending this

---

[2] Many of the assumptions on which *amici*'s arguments are based — *e.g.*, that there is no pervasive discrimination against gay people in society, that sexual orientation may be "changed" through therapy, and that children are harmed by being raised in same-sex households — are amply rebutted by an *amicus* brief recently filed by the American Psychological Association in *Lewis v. Harris*, a pending New Jersey state court suit concerning the right of same-sex couples to marry. In further response to *amici*, plaintiffs attach this brief ("APA Br.") as Exhibit 34 to the Supplemental Affirmation of Jeffrey S. Trachtman, dated November 10, 2004 ("Trachtman Suppl. Aff.").

action, has *not* endorsed — reflects only antipathy towards gay people and adds nothing proper to resolution of the important constitutional questions presented by this case.

Amici's attempt to trivialize plaintiffs' constitutional rights and legitimize far-fetched state "interests" in excluding plaintiffs from civil marriage also ignores the specific factual context in which this case must be decided: the powerful and uncontradicted evidence that plaintiffs' relationships are strong and successful partnerships every bit as deserving of the respect and protection of marriage as those of different-sex couples.[3] As summarized in plaintiffs' opening brief (*see* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, dated July 29, 2004 ("Pl. Br.") at 5-11) and established in greater detail in the underlying and undisputed affidavits:

- Plaintiffs represent a broad economic and ethnic cross-section of New Yorkers who contribute to the City and State in such roles as healthcare workers, environmental planners, and nonprofit administrators. They work, pay taxes, and volunteer in their communities like thousands of their neighbors.

- As couples, they are committed to each other financially, emotionally, and spiritually in the same manner as different-sex married couples. They have supported each other through lean times, comforted each other through family tragedies, purchased homes together, planned for retirement together, and otherwise intertwined their lives in all the ways that married couples do.

- Like many (but far from all) married couples, plaintiffs are parents or hope to be in the future. Michael Elsasser and Douglas Robinson together raised two boys adopted as infants from the New York City foster care system, devoting tremendous care and resources to help their sons overcome psychological and health challenges and grow into thriving, successful young adults. Mary Jo Kennedy and Jo-Ann Shain have together raised a happy, well-adjusted teenage girl, and Lauren Abrams and Donna Freeman-Tweed are the devoted parents of two small sons.

---

[3] In his reply brief, as in his moving brief, defendant concedes that he does not contest the "material facts set out in plaintiffs' motion for summary judgment," but asserts that he does not necessarily admit "contentions" asserted by plaintiffs. *See* Amended Memorandum of Law in Further Support of Defendant's Cross Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("Def. Reply Br."), at 1. This is hair-splitting. Defendant introduced no evidence to contradict the extensive affidavits submitted by plaintiffs and their family members in support of summary judgment. The material undisputed facts fully support plaintiffs' legal claims.

- Plaintiffs face all the challenges and difficulties that confront families in New York City, but they do so without the myriad protections and benefits bestowed upon married couples, including the right to make healthcare decisions for an incapacitated spouse; the ability to obtain health and other insurance or receive workers compensation, retirement, and other benefits conferred on spouses; protections for children including presumptions of legitimacy and parentage and increased economic security and stability — as well as the powerful, intangible benefits of respect for their relationships that only equal access to civil marriage can provide.

- Moreover, while plaintiffs have attempted, where possible, to replace the automatic protections of marriage with contractual substitutes like wills and powers of attorney, and while legislatures have provided limited, piecemeal relief in the form of domestic partner registration and measures like the recently enacted hospital visitation statute, such steps neither eliminate the hurtful stigma of exclusion from civil marriage nor adequately replicate the full range of rights and protections that come with marriage. To invoke a statute providing visitation rights and hope that it will be honored is neither the practical nor the symbolic equivalent of being able to declare in an emergency "this is my spouse."

This factual picture should shape and inform the Court's consideration of *amici's* arguments. In supporting each other, contributing to society, raising children, and linking their lives together in good times and bad, plaintiffs embody the modern ideal of civil marriage. Their relationships fully deserve the protections the New York Constitution confers on the rights to marry and to equality under the law. And as plaintiffs' lives also demonstrate, the State lacks even a rational or legitimate basis for withholding from them full marriage rights and depriving their families of the vital respect and protections that come only with marriage.

ARGUMENT

I.

IN RE COOPER IS NOT A BAR TO PLAINTIFFS' CLAIMS

Like defendant, *amici* attempt to deter the Court from reaching the merits of plaintiffs' constitutional claims by arguing that *In re Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), is controlling authority foreclosing a ruling in plaintiffs' favor. (*Amici* Br. at 3; Def. Reply Br. at 12-19, 26-29.) But as defendant's counsel and the New York Attorney General

both acknowledged prior to this litigation, *Cooper* has no precedential value in the analysis of either plaintiffs' due process claim or their equal protection claim.

Significantly, defendant's current insistence that *Cooper* controls in this case directly contradicts the public and widely circulated opinion his counsel issued to him just days before this litigation commenced. The Corporation Counsel advised in that opinion — correctly — that "*the appellate courts of New York have not addressed whether the statutory exclusion of same-sex couples from the opportunity to marry is consistent with the federal and state constitutions*." Opinion of the Corporation Counsel of the City of New York, dated March 3, 2004, at 8, attached as Exhibit 3 to Affirmation of Jeffrey S. Trachtman, dated July 29, 2004 ("Trachtman Aff.") (emphasis added); *see also id.* at 2 ("[t]he constitutionality of the [DRL's] exclusion of same-sex couples from the right to marry *has not been addressed by a New York appellate court*") (emphasis added). Similarly, prior to commencement of the marriage litigation, the New York Attorney General also concluded that *Cooper* is "of limited utility" in determining whether the DRL's limitation of marriage to different-sex couples is unconstitutional. Opinion of the Attorney General, dated March 3, 2004, at 14 (Trachtman Aff., Ex. 4); *see also id.* at 11 ("existing New York precedent . . . does not . . . confront the constitutional considerations" regarding right of same-sex couples to marry). Defendant's sudden about-face is nothing more than eleventh-hour litigation posturing.[4]

---

[4] Defendant's counsel likewise took into account *Raum v. Restaurant Assocs., Inc.*, 252 A.D.2d 369, 675 N.Y.S.2d 343 (1st Dep't 1998), on which defendant and *amici* also now rely, in asserting in the March 3, 2004 legal opinion that no New York appellate court has addressed the constitutionality of the marriage laws as applied to same-sex couples. Trachtman Aff., Ex. 3 at 7-8. *Amici* further claim that this Court should follow *Storrs v. Holcomb*, 168 Misc. 2d 898, 645 N.Y.S.2d 286 (Sup. Ct. Tompkins Cty. 1996), but neglect to bring to the Court's attention that the Appellate Division dismissed the case for failure to join a necessary party. *Storrs v. Holcomb*, 245 A.D.2d 943, 666 N.Y.S.2d 835 (3d Dep't 1997). (*Amici* Br. at 3; *see also* Def. Reply Br. at 14.) As another court recently observed, *Storrs* therefore "does not stand as authority for any proposition." *Langan v. St. Vincent's Hosp.*, 196 Misc. 2d 440, 455, 765 N.Y.S.2d 411, 422 (Sup. Ct. Nassau Cty. 2003).

As plaintiffs discussed in earlier briefing, the *Cooper* court was never squarely presented with a claim for marriage by a same-sex couple. Instead, the case involved a will challenge by a gay litigant whose deceased partner of three years had left the bulk of his estate to his prior partner. The litigant sought to be deemed a "spouse" under the EPTL in order to receive a spouse's elective share of the property, in contravention of the will. *Cooper* thus involved the conflicting interests of two claimants to an estate, not constitutional claims by committed same-sex couples to enter into civil marriage. (*See* Pl. Br. at 53 n.47; Memorandum of Law in Further Support of Plaintiffs' Motion for Summary Judgment and In Opposition to Defendant's Cross-Motion for Summary Judgment, dated Sept. 24, 2004 ("Pl. Reply Br.") at 40 n.25.)

Furthermore, as defendant acknowledges (Def. Reply Br. at 27-29), the *Cooper* claimant did not even raise due process arguments in the case and so *Cooper* lacks any bearing on plaintiffs' due process claim.[5] With respect to equal protection, the *Cooper* court's analysis was expressly "[b]ased on . . . authorities" outside of New York that addressed claims under the federal, not New York, constitution, 187 A.D.2d at 133-34, 592 N.Y.S.2d at 800-01. These authorities all predated *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas,* 123 S. Ct. 2472 (2003), which rejected moral disapproval of gay people as a legitimate basis for lawmaking and cast doubt on — and in the case of *Bowers v. Hardwick,* 478 U.S. 186 (1986), expressly overruled — these older precedents. As the New York Attorney General asserted in discussing one of these decisions, *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972), these cases therefore "no longer carr[y] any precedential value

[5] Though acknowledging this, defendant nonetheless claims that *Cooper* "explicitly stated" a finding under due process, relying on two passing references to due process that were part of block quotes in the decision. (Def. Reply Br. at 28.) Such stray references, unrelated to the Court's reasoning, have no precedential value. *Cooper* was not a due process case and certainly does not foreclose plaintiffs' due process claim here.

with respect to the federal Equal Protection Clause." Trachtman Aff., Ex. 4, at 21.[6] Thus, the cases on which *Cooper* was premised, like *Cooper* itself, carry no precedential weight in analyzing plaintiffs' equal protection claim under the New York Constitution. Just as the Corporation Counsel and the Attorney General rightly concluded prior to this litigation that *Cooper* is not binding authority on the constitutional questions raised in this case, so too should this Court.

II.

THE PROHIBITION AGAINST MARRIAGE BETWEEN SAME-SEX PARTNERS VIOLATES PLAINTIFFS' RIGHT TO DUE PROCESS UNDER THE NEW YORK CONSTITUTION

Amici neglect in their brief even to acknowledge what cannot be ignored in analyzing the constitutional questions posed by this case: New York's independent and distinctively robust protection of personal liberties guaranteed under the State Constitution. (*See* Pl. Br. at 26-29.) *Amici* also ignore the import of U.S. Supreme Court landmarks like *Loving v. Virginia*, 388 U.S. 1 (1967), and *Lawrence*, which teach that fundamental rights cannot be narrowly defined to exclude unpopular groups from their reach, regardless of how deeply entrenched might be society's assumptions disadvantaging those groups.

Instead, *amici* advocate the same incorrect premise urged by defendant, that the right at stake here may be narrowly framed not as the right all share to marry the partner of one's choice, but as a "new" right to "same-sex marriage" that *amici* claim finds no support in the Constitution. But as plaintiffs demonstrated in their earlier briefs, the liberty interest at stake

---

[6] *Baker v. Nelson* opined that excluding same-sex couples from civil marriage was justified by a "definition" of marriage grounded in "the book of Genesis," a tautological and illegitimate basis for perpetuating discrimination. 291 Minn. at 312, 191 N.W.2d at 186; *see also* Pl. Reply Br. at 21-23 (distinguishing *Baker*). *Cooper* relied in addition on *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), which upheld the federal rule that only different-sex marriages satisfy immigration requirements in light of the courts' special deference in the immigration context, where "Congress has almost plenary power and may enact statutes which, if applied to citizens, would be unconstitutional." *Id.* at 1042.

cannot be mis-framed to comprise the very exclusion being challenged. To acknowledge that marriage has traditionally been viewed as an exclusively male-female union does not answer the real question here: whether restricting access to civil marriage on that basis violates bedrock constitutional guarantees of liberty and equality. *See Goodridge v. Department of Pub. Health*, 440 Mass. 309, 320, 798 N.E.2d 941, 953 (2003) (the "long-standing . . . understanding . . . that 'marriage' means the lawful union of a woman and a man . . . does not foreclose the constitutional question"); *see also* Pl. Br. at 34-51; Pl. Reply Br. at 12-20.

Amici's flawed logic is laid bare in their contention that *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), *Loving,* and *Zablocki v. Redhail*, 434 U.S. 374 (1978), affirmatively *support* the exclusion of same-sex couples from the scope of the fundamental right to marry because none of those cases involved claims by gay litigants to marriage. (*Amici* Br. at 35-36.) From this, *amici* attempt to fashion a rule that only different-sex couples are endowed with the right to marry. But what cases like *Loving* and *Zablocki* actually demonstrate is both that legislatures' supposed "plenary" power over the subject of marriage (*see Amici* Br. at 16) is subject to constitutional limits and that the fundamental right to civil marriage may not be restricted on the basis of deeply rooted traditional notions of who may marry. These cases certainly did not address, much less hold, that the right to marry applies only to different-sex couples. Nor did they define the right in terms so narrow as to exclude, in *Loving*, inter-racial couples whose relationships were criminalized in Virginia since colonial days or, in *Zablocki*, fathers who fail to support their children (in itself a strong refutation of *amici*'s claim that the *sine qua non* of marriage is to foster responsible procreation).[7] (*See* Pl. Br. at 33-34, 39-41.)

---

[7] *Amici* and defendant further assert that *Loving* is irrelevant to the constitutional issue before the Court because it addressed discrimination in marriage on the basis of race. (*Amici* Br. at 18-19; Def. Reply Br. at 18-19.) But subsequent Supreme Court decisions make clear that the reach of *Loving* and the due process and equality principles on which it rests are far broader. For example, *Lawrence* explicitly invoked the lessons of the anti-miscegenation cases in according gay and lesbian couples the same

Instead, these cases illustrate a core principle of our constitutional system: The framers "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 123 S. Ct. at 2484.[8]

---

fundamental liberty recognized for married and unmarried heterosexuals. *See Lawrence*, 123 S. Ct. at 2483. *Zablocki* also followed *Loving* in striking on due process and equal protection grounds a prohibition on marriage for a parent subject to a child support order, where race was not at all the issue. As *Zablocki* observed, "[t]he Court's opinion [in *Loving*] could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry. . . . Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals." 434 U.S. at 383-84 (citations omitted).

[8] *Amici*'s reliance on several opinions' deeply flawed readings of *Lawrence* is undermined by their failure to inform the Court that those cases are still under review, s*ee Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004), *cert. petition filed*, No. 04-478, 2004 WL 2289198 (U.S. Oct. 1, 2004); *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004), *petition for review granted*, 2004 Kan. LEXIS 284 (May 25, 2004); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Sup. Ct. Nov. 5, 2003), *appeal pending,* Docket No. A-2244-03T5 (N.J. App. Div.); and *In re Kandu*, 315 B.R. 123 (Bank. W.D. Wash. 2004), *appeal filed*, C04-5544-FDB (W.D. Wash. Aug. 26, 2004), and by their failure to mention conflicting authority that reads *Lawrence* with fidelity and with the respect due U.S. Supreme Court decisions. *See, e.g.*, *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 n.6 (2d Cir. 2004) (citing *Lawrence* for proposition that "individuals have a due process right to be free from undue interference with their procreation, sexuality, and family"); *Doe v. Miller*, 298 F. Supp. 2d 844, 871, 874 (S.D. Iowa 2004) (relying on *Lawrence*'s holding that Due Process Clause protects "privacy and choice in one's personal and sexual relationships" to strike down law that prohibited convicted sex offenders from living with family members near certain facilities); *Hodgkins v. Peterson*, No. 1:04-CV-569, 2004 WL 1854194, *6 (S.D. Ind. July 23, 2004) (relying on *Lawrence* to overrule prior decisions that had framed asserted constitutional right at issue too specifically and "failed to appreciate the extent of the liberty interest at stake"); *United States v. Marcum*, 60 M.J. 198, 205 (U.C.M.J. 2004) ("What *Lawrence* requires is searching constitutional inquiry."); *Goodridge*, 440 Mass. at 329, 798 N.E.2d at 959 (citing *Lawrence* along with other U.S. Supreme Court due process landmarks for proposition that "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family — these are among the most basic of every individual's liberty and due process rights").

III.

THE EXCLUSION OF SAME-SEX COUPLES FROM CIVIL MARRIAGE VIOLATES PLAINTIFFS' RIGHT UNDER THE NEW YORK CONSTITUTION TO EQUAL PROTECTION AND CANNOT SATISFY THE HEIGHTENED SCRUTINY TO WHICH IT IS SUBJECT

Plaintiffs set forth in detail in their earlier briefs the multiple reasons why their equal protection claims require heightened scrutiny of the marriage exclusion. (Pl. Br. at 52-63; Pl. Reply Br. at 24-36.) In addition to the strict scrutiny that denial of the fundamental right to marital choice must trigger, heightened scrutiny is warranted because the marriage exclusion discriminates on the grounds of both sexual orientation and sex. *Amici*'s additions to defendant's arguments on these points serve only to highlight the need for greater protection for plaintiffs' rights.

Despite *amici*'s attempt to confuse the issue,[9] the level of scrutiny to be applied to sexual orientation discrimination under the New York State Constitution remains an open question of law. Although the First Department has strongly suggested that heightened scrutiny is appropriate, the Court of Appeals expressly reserved judgment on the issue. *See Under 21 v. City of New York*, 108 A.D.2d 250, 257, 488 N.Y.S.2d 669, 675 (1st Dep't), *modified on other grounds*, 65 N.Y.2d 344, 492 N.Y.S.2d 522 (1985). *Lawrence* and *Romer*, cited by *amici*, in no way settle the question of the level of scrutiny because they struck down discriminatory provisions as lacking even a legitimate or rational basis, thus obviating the need to address heightened levels of scrutiny. *See Lawrence*, 123 S. Ct. at 2484 ("The Texas statute furthers no

---

[9] *Amici* seem not to understand the basic principles of equal protection doctrine. Their argument that "elevating one class of persons to a protected civil rights category" provides "special protection" that somehow causes other categories to lose protection (*Amici* Br. at 6) fails to appreciate that heightened scrutiny applies to characteristics such as race and sex (and, plaintiffs argue, sexual orientation) that everyone has, and therefore does not privilege any group of persons over any other. Moreover, the argument that civil rights protections provide "special rights" to minority group members was firmly rejected by the U.S. Supreme Court in *Romer v. Evans,* 517 U.S. 620, 631 (1996).

legitimate state interest . . . ."); *Romer*, 517 U.S. at 635 (Colorado constitutional amendment "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests").

Moreover, these federal cases set the floor, but not the ceiling, for New York's own jurisprudence of individual rights. Indeed, as noted in plaintiffs' reply brief, the New York Court of Appeals embraced a more flexible "intermediate" standard of scrutiny for certain equal protection claims even before the U.S. Supreme Court did. *See Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 334, 384 N.Y.S.2d 82, 89 (1976) ("we do not feel constrained to apply either traditional test [strict scrutiny or rational basis] but instead are ready to adopt middle ground tests in situations where such review is warranted").[10] In subsequent cases as well, New York courts have on occasion applied intermediate scrutiny to provide greater protection than that provided by the federal Equal Protection Clause. *See, e.g., In re Tanya P.*, Feb. 28, 1995 N.Y.L.J. 26, col. 6 (Sup. Ct. N.Y. Cty.) (finding discrimination based on pregnancy to constitute sex discrimination triggering intermediate scrutiny, despite contrary holding of U.S. Supreme Court); *Isabellita S. v. John S.*, 132 Misc. 2d 475, 477-78, 504 N.Y.S.2d 367, 370 (Family Ct. Richmond Cty. 1986) (same). In view of this tradition of independent analysis, and following the lead of the First Department in *Under 21*, this Court should find that heightened scrutiny is appropriate here.

Amici's arguments to the contrary are unavailing. As noted in plaintiffs' briefs (Pl. Br. at 55; Pl. Reply Br. at 26-27), both federal and state courts commonly have looked to several factors to determine whether a classification should be deemed "suspect" and therefore

---

[10] *Alevy* applied intermediate scrutiny in the context of a claim of reverse racial discrimination, prior to the U.S. Supreme Court's adoption of intermediate scrutiny as a standard for evaluating some equal protection claims. Plaintiffs inadvertently referred to *Alevy* in their reply brief (Pl. Reply Br. at 30) as concerning gender discrimination.

trigger heightened scrutiny, including (1) whether the group historically has been subjected to purposeful discrimination; (2) whether the trait used to define the class is unrelated to the ability to perform and participate in society; or (3) whether the group cannot sufficiently protect itself through the political process.[11] The first two factors are so obviously established with respect to gay men and lesbians that defendant has not challenged them.

Remarkably, however, *amici* claim that there is no "longstanding and widespread" history of discrimination against gay people. (*Amici* Br. at 5-6.) This incredible assertion flies in the face of *Lawrence* itself, which noted that "for centuries there have been powerful voices to condemn homosexual conduct as immoral" and that this condemnation was an obvious — although illegitimate — motivation for state action restricting the rights of gay people. *See* 123 S. Ct. at 2480-82. *Amici's* argument also is at odds with myriad legislative findings, including the New York Legislature's statement in connection with the recent passage of SONDA that "many residents of this state have encountered prejudice on account of their sexual orientation" and that "this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering" and fostering "a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual." 2002 N.Y. Sess. Laws Ch. 2, § 1. *Amici's* assertion is further refuted by a large body of social science studying harassment and violence directed at gay people and a widely documented history of social, political, and legal discrimination, not to mention general common knowledge. *See* Brief of *Amicus Curiae* Human Rights Campaign, et al. in support of Petitioners, filed in *Lawrence*, available at No. 02-102, 2003 WL 152347, at *6-10 (U.S. Jan. 16, 2003) (Trachtman Suppl. Aff., Ex. 35).

---

[11] Moreover, the courts have not required that all three of these factors necessarily be present for heightened scrutiny to be required. (*See* Pl. Reply Br. at 26-27.)

To support their theory that gay men and lesbians have not been subjected to discrimination, *amici* also invoke the canard that gay people are more affluent than others. (*Amici* Br. at 8.) This stereotype does not refute the overpowering evidence of significant, long-standing discrimination against gay people. It is also untrue. Statistical evidence suggests that gay, lesbian, and bisexual people do not have higher incomes than heterosexuals, and that, if anything, gay men earn less than similarly qualified heterosexual men, likely as the result of systemic employment discrimination. *See* M.V. Lee Badgett, Ph.D, *Income Inflation: The Myth of Affluence Among Gay, Lesbian, and Bisexual Americans* (1998), at 4, 12-13 available at http://www.thetaskforce.org/downloads/income.pdf. (Trachtman Suppl. Aff., Ex. 36). Moreover, the undisputed record in this case shows that gay people come from varied economic strata.[12]

The indisputable fact that gay people have been subject to a long history of discrimination based on a trait unrelated to their ability to contribute to society itself establishes the need for heightened scrutiny. (*See* Pl. Reply Br. at 26.) The courts have not required a further finding of political powerlessness to justify heightened scrutiny. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531 (1996) (focusing on long history of unjustified discrimination against women, not political powerlessness, as basis for heightened scrutiny); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (stressing lack of relationship between

---

[12] *Amici*'s suggestion that sexual orientation is not an immutable characteristic is equally groundless. While researchers have not determined the full extent to which sexual orientation is influenced by genetic, environmental, or other factors, homosexuality is today understood by the leading professional health organizations to be a normal variation rather than a disorder and in most people extremely resistant to change. *See* APA Br. at 11-13, 55-56 n.90 (Trachtman Suppl. Aff., Ex. 34). So-called "reorientation" or "reparative" therapy, touted by *amici* (*Amici* Br. at 19 n.11), has been repudiated by mainstream mental health professionals as both scientifically groundless and potentially dangerous. *See* APA Br. at 55-56 n.90. Most importantly, however, immutability does not refer to whether a characteristic can be changed, but rather whether the characteristic is so fundamental to one's identity that the government cannot require it to be changed in order to obtain equal treatment. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."); *Watkins v. U.S. Army*, 875 F.2d 699, 711, 726 (9th Cir. 1989) (Norris, J., concurring).

characteristic and capabilities as key factor requiring heightened scrutiny); *see also* Brief *Amicus Curiae* of National Lesbian and Gay Law Association, et al., submitted in *Lawrence*, available at No. 02-102, 2003 WL 152348, at *12-13 (U.S. Jan. 16, 2003) (Trachtman Suppl. Aff., Ex. 37).

In any event, the "political process" factor — the only one defendant himself has challenged — also cuts in favor of heightened scrutiny here. On this point, *amici* add nothing of value. The passage of piecemeal legislation to provide limited protections to gay people and their families is evidence that they have been subjected to discrimination in need of remedy, not that they have such political power as to make heightened scrutiny of discriminatory government classifications unnecessary. The passage of much more far-reaching protections for racial minorities and women has not negated the need for heightened equal protection scrutiny for discrimination affecting those groups. (Pl. Br. at 58; Pl. Reply Br. at 27-28.) The question is not whether plaintiffs have proven an "inability to participate in the political process" (*Amici* Br. at 10), but whether plaintiffs have been able to protect their crucial individual liberties through that process. The evidence of backlash against efforts to secure marriage rights for same-sex couples set forth in defendant's briefs amply demonstrates gay people's limited ability to secure their rights through the political process at the state and federal level, underscoring the need for courts to play their traditional role in protecting individual liberties.

Amici's treatment of plaintiffs' claim of sex discrimination also adds nothing to the arguments of defendant, already refuted in plaintiffs' reply brief. (Pl. Reply at 30-36.) *Amici* cite one 30-year old case, *Baker v. Nelson*, 291 Minn. 310, 314, 191 N.W.2d 185, 187 (1971), *appeal dismissed*, 409 U.S. 810 (1972), declining to characterize a marriage challenge as based on sex discrimination, while ignoring the several more recent opinions that have recognized that the ban on marriage for same-sex couples facially discriminates on the basis of sex as well as sexual orientation. (*See* Pl. Reply Br. at 33-34; pp. 6-7, above, discussing *Baker*.)

See also Opinion of New York Attorney General (Trachtman Aff., Ex. 4), at 21 (*Baker* was decided before "contemporary equal protection doctrine" on gender discrimination and "no longer carries any precedential value" with respect to claim that marriage restriction discriminates on this basis as well). *Amici* also cite *In re Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995), for its characterization of discrimination in adoption rights as being based on sexual orientation. (*See Amici* Br. at 33-34.) But that plaintiffs here, like the prospective adoptive parent in *Jacob*, are being denied their rights on account of sexual orientation does not mean that they are not *also* being discriminated against on the basis of their sex. (*See* Pl. Reply Br. at 35 n.20) (discussing link between anti-gay hostility and discriminatory attitudes about gender roles). *Cf. Con Edison Co. v. New York State Div. of Human Rights*, 77 N.Y.2d 411, 419, 568 N.Y.S.2d 569, 573 (1991) (affirming finding that failure to promote employee was based on both race and sex discrimination). The simple fact is that if Mary Jo Kennedy were a man, she would be permitted to marry Jo-Ann Shain. Since she is a woman, she is not. This is sex discrimination, pure and simple.[13]

[13] Defendant in his reply brief similarly ignores the opinions recognizing that excluding same-sex couples from marriage constitutes sex discrimination. (Pl. Reply Br. at 33-34.) He instead cites a series of other state and federal cases for the proposition that laws classifying on the basis of sex *may* be upheld where physical differences between the sexes (*e.g.*, in the context of determining parentage or regulating topless dancing) create an important government interest that can withstand intermediate scrutiny. (Def. Reply Br. at 20-21.) Here, in contrast, gender differences are immaterial to plaintiffs' ability to participate in marriage together since procreation is not a necessary element of marriage and many same-sex couples, including several of plaintiffs, can and do have children together through reproductive technology and adoption. Defendant certainly has not satisfied his burden of identifying a state interest in marriage discrimination that could satisfy intermediate scrutiny. Defendant's vague reference to "the different roles of men and women in procreation" (Def. Reply Br. at 20), as explained below, does not establish an important government purpose in excluding same-sex couples from civil marriage. (*See* Pl. Br. at 71-72 and Point IV.B, below.)

IV.

THERE IS NOT EVEN A LEGITIMATE AND RATIONAL BASIS TO DENY PLAINTIFFS THE RIGHT TO MARRY

Neither *amici* nor defendant seriously contends that excluding same-sex couples from marriage serves a compelling State interest. Instead, both claim that the restriction is subject only to a rational review so deferential as to operate in effect as a rubber-stamp of the Legislature's action. But even under this lower level of review — when properly applied as more than an automatic free pass for the Legislature — the marriage restriction cannot be found to further a rational or legitimate government interest. Neither the tradition nor procreation arguments raised by defendant and seconded by *amici*, nor other unfounded assertions espoused by *amici* alone, can justify banning same-sex couples and their families from the protections of civil marriage.

As a threshold matter, *amici*, like defendant, ignore the extensive authority, New York and federal, demonstrating that "conventional and venerable" principles require that legislative discrimination must, at minimum, "bear a rational relationship to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 633, 635 (1996); *see also People v. Liberta,* 64 N.Y.2d 152, 163, 485 N.Y.S.2d 207, 213 (1984). A State interest asserted to support the discriminatory marriage restriction must be based on real world facts, not mere speculation or justifications premised in majoritarian moral disapproval. *See Romer*, 517 U.S. at 632-33, 635 (laws must be "grounded in a sufficient factual context for [court] to ascertain some relation between the classification and the purpose it serve[s]"; singular desire to "disadvantag[e] the group burdened by [a] law" is not a "legitimate purpose or objective."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (zoning ordinance held unconstitutional "[b]ecause in our view the record does not reveal any rational basis for believing that the [group home for mentally retarded residents] would pose any special threat to the city's legitimate

interests"); *Liberta*, 64 N.Y.2d at 163-166, 485 N.Y.S.2d at 213-15. Moreover, a State interest that is legitimate in the abstract but not rationally *furthered* by the restriction at issue fails rational review. (*See* Pl. Reply Br. at 41-42 n.27.) The courts' review under the rational basis test is especially meaningful and searching when, as here, the challenged legislation "inhibits personal relationships"[14] or is premised on traditional attitudes disadvantaging an unpopular group.[15] The marriage restriction cannot satisfy these "conventional and venerable" principles. (*See* Pl. Br. at 64-69; Pl. Reply Br. at 36-49.)

A. *Amici*'s Desire to Preserve a Discriminatory "Traditional Definition of Marriage" Is Not an Independent and Legitimate Justification for Depriving Same-Sex Couples of the Right to Marry

Amici fail to respond to plaintiffs' argument that preserving a "traditional" definition of marriage as limited to a male-female union does not offer an independent and legitimate State interest but merely restates the classification under challenge. This is no "independent" justification at all, but an illegitimate "classification of persons undertaken for its own sake." *Romer*, 517 U.S. at 635; *Foss v. City of Rochester*, 65 N.Y.2d 247, 260, 491 N.Y.S.2d 128, 135 (1985) ("Perpetuation of the status quo is not a legitimate end of government, however, if the status quo has been judicially found wanting."). (*See* Pl. Br. at 69-70; Pl. Reply Br. at 38-45.)

Amici claim that the bald desire to adhere to a traditional conception of marriage that excludes same-sex couples has nothing to do with the animus and moral disapproval

---

[14] *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring); *see also McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548, 498 N.Y.S.2d 128, 130 (1985).

[15] *See, e.g., Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring) ("When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause"); *Liberta*, 64 N.Y.2d at 164, 495 N.Y.S.2d at 213-14; *People v. Onofre*, 51 N.Y.2d 476, 490, 434 N.Y.S.2d 947, 952 (1980).

historically harbored against gay people (*Amici* Br. at 14) — a State "interest" that the U.S. Supreme Court and New York Court of Appeals have both held an impermissible basis for discrimination. *See, e.g., Lawrence*, 123 S. Ct. at 2474; *Liberta*, 64 N.Y.2d at 164, 495 N.Y.S.2d at 213-14; *Onofre*, 51 N.Y.2d at 490, 434 N.Y.S.2d at 952; Pl. Br. at 65-67; Pl. Reply Br. at 39-40. *Amici*'s claim is particularly unconvincing given that *amici* asserted in their attempt to intervene in this action that they oppose permitting same-sex couples to marry based on "religious and moral objections." *Hernandez v. Robles*, 5 Misc. 3d 1004(A), No. 103434/2004, 2004 WL 2334289, at *2 (Sup. Ct. N.Y. Cty. Aug. 20, 2004) (unpublished disposition). The pretense by both *amici* and defendant that an illegitimate State interest premised on moral disapproval has nothing to do with this issue cannot mask that the categorical exclusion of same-sex couples is at bottom an expression of just that. As Justice Scalia himself recognized, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples." *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

Amici claim that plaintiffs' view of marriage is "individual centered," but that the "purpose" of marriage is "society-centered." (*Amici* Br. at 18.) While it is far from clear what *amici* mean by this, there should be no mistake that gay and lesbian couples need access to civil marriage to serve the same personal *and* societal interests marriage furthers for heterosexuals. Plaintiffs seek marriage to express their love and commitment to one another, but also for the myriad protections for their families to which civil marriage is the exclusive gateway and that benefit not only them but also society at large. (*See, e.g.*, Pl. Br. at 5-25.) As the Supreme Court described in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), marriage is both an "expression[] of emotional support and public commitment," and the "pre-condition to the receipt of government benefits . . . , property rights . . . , and other, less tangible benefits." This includes legally enforceable commitments of mutual support and interdependence that in turn make marital

partners less dependent on the State fisc. *See, e.g.*, N.Y. Soc. Serv. § 101 (obligation to provide financial support to spouse receiving public assistance). Permitting same-sex couples to assume the mutual commitments of marriage thus only advances *amici's* purported concern for broader societal interests. In sum, there is nothing inherent to the institution of civil marriage that does not fully describe and fit plaintiffs' committed relationships.

B. Excluding Same-Sex Couples from Civil Marriage Does Not Rationally Further a State Interest in Fostering Procreation in Marriage

Amici's claim that the State has an interest in excluding gay couples from marriage in order to promote procreation within marriage is too illogical and baseless to be credited. *Amici* cannot explain how prohibiting same-sex couples to marry encourages heterosexuals to marry and procreate. They further claim that allowing same-sex couples to marry would cause heterosexuals to bear children out of wedlock, asserting that such a trend has emerged in Scandinavian countries that have extended marriage or other forms of relationship protection to same-sex couples. (*Amici* Br. at 22.) But the source on which *amici* rely has been criticized for its failure to show any causal link between protections for same-sex unions in recent years on the one hand and a rise in non-marital heterosexual cohabitation over a longer time period on the other, a trend that can be traced to other powerful social factors.[16] Amici's attempt to scapegoat same-sex couples who *choose* to enter into legal unions as the cause of the decision by some heterosexual couples in Europe *not* to marry does not amount to a material or

---

[16] *See* M.V. Lee Badgett, Ph.D., *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage? Evidence from Scandinavia and the Netherlands,* July 2004, at 5, available at http://www.contemporaryfamilies.org/media/same%20sex%20marriage%20briefing%20paper.htm (Trachtman Suppl. Aff., Ex. 38) ("Overall, there is no evidence that giving partnership rights to same-sex couples had any impact on heterosexual marriage in Scandinavian countries and the Netherlands. Marriage rates, divorce rates, and nonmarital birth rates have been changing in Scandinavia, Europe, and the United States for the past thirty years. But those changes have occurred in all countries, regardless of whether or not they adopted same-sex partnership laws, and these trends were underway well before the passage of laws that gave same-sex couples rights.").

rational basis for New York's exclusion of gay couples from marriage. Recently in *Andersen v. King County,* No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8 (Wash. Super. Ct. Aug. 4, 2004), the Washington court recognized the irrationality of excluding committed gay couples from marriage as a means to shore up the institution for heterosexuals:

> Some declaim that the institutions of marriage and family are weak these days and, in fact, stand threatened. . . . It is not difficult, however, to identify both the causes of the present situation and the primary future threat. They come from inside the institution, not outside of it. . . . Before the Court stand eight [same-sex] couples who credibly represent that they are ready and willing to make the right kind of commitment to partner and family for the right kinds of reasons. All they ask is for the state to make them able.

If *amici* mean to suggest that the marriage restriction will cause gay and lesbian individuals like plaintiffs to forsake same-sex life partners and instead enter into marriage with different-sex partners for the purpose of procreating, they propose a constitutionally suspect government intention. Denying gay people the right to marry the partner they love no more encourages them to enter into successful heterosexual marriages than could criminalizing their sexual intimacy with their partners. *See Lawrence*, 123 S. Ct. at 2484 (gay people "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."); *Onofre*, 51 N.Y.2d at 492, 434 N.Y.S.2d at 953 ("no showing has been made as to how, or even that, the statute banning consensual sodomy between persons not married to each other preserves or fosters marriage."); *see also* APA Brief at 56 (Trachtman Suppl. Aff., Ex. 34) ("neither scientific evidence nor logic supports the notion that the best interest of the child could be furthered by pressuring gay people to marry partners of the other sex").

Amici recognize that marriage assists those who procreate to provide a stable environment for raising children, yet persist in the nonsensical contention that to *deny* this

environment to gay and lesbian couples, many of who *do* procreate, somehow *promotes* marriage as the setting in which procreation should occur. However, as addressed below, the legitimate interests the State does have in fostering procreation and child-rearing within marriage apply with equal force to the families of same-sex couples. Moreover, the State does not limit marriage to different-sex couples who can or will procreate, recognizing that the couple's bonded relationship, not procreation, is the *sine qua non* of marriage, and that any other rule would infringe on the constitutionally protected rights to privacy and autonomy in marital and sexual relations. (Pl. Reply Br. at 20-21, 44-45.) In sum, the State's categorical ban on marriage for same-sex couples is so egregiously under- and over-inclusive that it cannot be considered rationally related to any legitimate state interest in promoting marriage as the institution in which procreation should occur. (*See* Pl. Br. at 71-72; Pl. Reply Br. at 44-45.)

C. Denying Marriage to Same-Sex Couples Hurts, Rather Than Promotes, the Welfare of Children

Amici make the irrational and offensive argument that denying marriage to same-sex couples serves the State's interest in advancing the welfare of children. To support this claim, they assert, based on discredited and distorted social science, that gay and lesbian adults are inferior to heterosexuals as parents.

Significantly, to its credit, *the government defendant himself does not assert* that a rational relationship exists between excluding gay couples from marriage and promoting the welfare of children. Likewise, the government defendant in *Shields v. Madigan*, No. 1458/04, an Article 78 proceeding filed in Rockland County seeking the right to marry for same-sex couples, also does not make this baseless contention.[17] Given New York's firm respect and support for

[17] *See* Memorandum of Law in Support of the Answer of the N.Y. State Dep't of Health, dated May 24, 2004, at 22-29 (Trachtman Aff., Ex. 5). In a terse opinion offering virtually no analysis of the constitutional issues, the Rockland County Supreme Court last month denied the same-sex petitioners' Article 78 petition. *See Shields v. Madigan*, No. 1458/04, 2004 WL 2364897 (N.Y. Sup. Ct. Rockland

lesbian and gay parents and the children they raise, the State could not assert such a government interest as conceivable under current New York law and public policy.[18] To the contrary, the State has conceded that same-sex couples "and their families are entitled to dignity and respect, . . . children raised in those families can thrive, and . . . same-sex couples can be as committed, stable, loving and nurturing as opposite sex couples." Trachtman Aff., Ex. 5 at 1. The *Goodridge* majority explicitly rejected the purported child welfare arguments raised by dissenting Justice Cordy and relied on heavily by *amici* here (*Amici* Br. at 23-28) as irrational in view of Massachusetts' similar support of parenting by gay and lesbian adults: "We presume that the Legislature is aware of [purported authorities cited by Justice Cordy] and has drawn the conclusion that a child's best interest is not harmed by being raised and nurtured by same-sex parents." *Goodridge*, 440 Mass. at 339 n.30, 798 N.E.2d at 966 n.30 (citations omitted). *Amici*'s claim to a government interest, not avowed by the government itself, in barring same-sex couples from marriage in order to protect the State's children should likewise be rejected as irrational and at odds with New York law.

Not only is *amici*'s invocation of child welfare concerns contrary to New York policy and the State's asserted interests, but it is also based on distortions of social science research and groundless propaganda that should not be considered at all. The American

---

Cty. Oct. 18, 2004). The opinion sheds no light on the constitutional questions at stake, much less does it bind this Court.

[18] It has long been recognized in New York that a gay or lesbian sexual orientation does not bear on fitness to parent children. *See In re Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995) (second parent adoption by gay or lesbian parent serves best interests of child); *In re Adoption of Carolyn B.*, 6 A.D.3d 67, 68, 774 N.Y.S.2d 227, 228 (4th Dep't 2004) (same-sex couples may adopt jointly); *In re Adoptions of Anonymous*, 209 A.D.2d 960, 960, 622 N.Y.S.2d 160, 161 (4th Dep't 1994) ("application for adoption may not be precluded solely on the basis of homosexuality," and "[i]n the context of child custody cases, . . . a parent's sexual orientation . . . is not determinative"); *In re Adoption of Jessica N.*, 202 A.D.2d 320, 609 N.Y.S.2d 209 (1st Dep't 1994) (lesbian foster mother permitted to adopt in best interests of foster child); *Guinan v. Guinan*, 102 A.D.2d 963, 964, 477 N.Y.S.2d 830, 831 (3d Dep't 1984); 18 N.Y.C.R.R. 421.16(h)(2) ("Applicants [to adopt] shall not be rejected solely on the basis of homosexuality").

Psychological Association, the nation's leading association of professional psychologists, which has far more authority on questions of child welfare than do *amici*, has thoroughly rebutted *amici*'s unfounded claims on these issues, most recently in its New Jersey *amicus* brief. *See* APA Br. at 37-57 (Trachtman Suppl. Aff., Ex. 34). In contrast, *amici* do not even claim to have professional expertise in social science or mental health issues.

For example, *amici* rely on claims by Paul Cameron that children raised by same-sex couples fare worse than children of two heterosexual parents. (*Amici* Br. at 25.) *Amici* do not disclose to the Court, however, that Cameron's work has been censured and rejected both by courts and the scientific community as unethical and misrepresenting the scientific data. *See, e.g., Baker v. Wade*, 106 F.R.D. 526, 536 (N.D. Tex.) (Cameron engaged in "fraud," "misrepresentations," and "total distortion of . . . data" in sworn testimony to the court and was charged by APA with "unethical conduct," including "inflammatory and inaccurate public statements about homosexuals"), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985); *see also* APA Brief at 47-48 n.77 (Trachtman Suppl. Aff., Ex. 34); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 161 (2001) (Trachtman Suppl. Aff., Ex. 39) (Cameron expelled from APA and denounced by American Sociological Association for "willfully misrepresenting research"). That *amici* rely on Cameron demonstrates how far they will reach in their efforts to defeat the claims of gay people to equality under the law.

Amici resort to further distortions of the relevant scientific literature. For example, contrary to *amici*'s suggestion (*Amici* Br. at 25 n.17), the Stacey and Biblarz article they cite does not find any material differences in the development or adjustment of children raised by gay parents or offer any support for denying marriage to same-sex parents. To the contrary, it concludes that "every relevant study to date shows that parental sexual orientation

per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment." Stacey & Biblarz, *supra*, at 176 (Trachtman Suppl. Aff., Ex. 39). This is fully consistent with the conclusions of the APA and other leading child health and welfare professional organizations as well. *See* APA Br. at 40-49 (Trachtman Suppl. Aff., Ex. 34); *see also* Pl. Reply Br. at 43 n.28.[19]

Amici also claim that marriage rights should be denied same-sex couples on the basis of wholly irrelevant studies addressing problems of children raised by *single* (and not necessarily gay) parents. (*See Amici* Br. at 24.) But these studies have absolutely no bearing on the experience of children raised in households of two same-sex parents and therefore are immaterial to this litigation. Plaintiffs certainly agree that children benefit from being raised by two parents who share the stability and legal and financial protections that come exclusively with marriage, but that argues only in *favor* of permitting plaintiffs to marry; it certainly does not provide a rational ground for *denying* them that right. (*See, e.g.*, Pl. Br. at 11-25.) *See also Goodridge*, 440 Mass. at 335, 798 N.E.2d at 963; *Baker v. Vermont*, 170 Vt. 194, 249, 744 A.2d 864, 882 (1999) ("If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against."); *see also* APA Br. at 49-54 (Trachtman Suppl. Aff., Ex. 34). There is simply no rational connection between the marriage restriction and promoting the welfare of thousands of children in New York now being raised in same-sex couple homes. (*See* census data cited in Pl. Br. at 47.) *Amici*'s efforts to skew the litigation through their distorted and biased presentation should be rejected out of hand.

---

[19] It is telling that *amici* cite out of context and then neglect to include in their court exhibits or appendix the Stacey and Biblarz article, which actually *affirms* the irrationality of withholding the rights and protections of marriage from the families of same-sex couples.

CONCLUSION

For all the bluster in the opposing briefs to the effect that the right of same-sex couples to marry in New York must be left in the hands of the Legislature, defendant, at least, knows better. In his March 3, 2004 opinion, the Corporation Counsel advised defendant that "when, as seems likely, the constitutionality of our State [marriage] statue is challenged . . . , *it will be for the courts to resolve the constitutional issues*." *Id.* at 9 (emphasis added). Plaintiffs now turn to the Court to enforce their constitutional rights to liberty and equality and to require the State to extend them full access to civil marriage.

For the foregoing reasons and those explained in our prior submissions, plaintiffs respectfully submit that their motion for summary judgment should be granted and defendant's cross-motion for summary judgment should be denied.

Dated: New York, New York
November 10, 2004

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND
By: Susan L. Sommer
Susan L. Sommer
David S. Buckel
Alphonso David
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

KRAMER LEVIN NAFTALIS
& FRANKEL LLP
By:
Jeffrey S. Trachtman
Norman C. Simon
919 Third Avenue
New York, New York 10022
(212) 715-9100
Attorneys for Plaintiffs