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PRELIMINARY STATEMENT

Claimant-appellant William S. Valentine ("appellant," "Valentine," or "Bill"), by his attorneys Lambda Legal Defense and Education Fund, Inc., respectfully submits this brief in support of his appeal from the final decision of the Office of Appeals of the New York State Workers' Compensation Board (the "Board" or "respondent Board"), dated July 30, 2003 (the "Board's decision"). Appellant claims death benefits as the life partner and surviving spouse of Joseph Lopes ("Lopes" or "Joe"), decedent, under New York Workers' Compensation Law § 16 (2004).

The facts relevant to this claim were undisputed in the Board proceedings. For over 21 years, Valentine and Lopes lived together in a stable, committed, interdependent, and loving relationship until Joe's tragic death. Joe, a flight attendant, was killed on November 12, 2001 when American Airlines Flight 587 out of John F. Kennedy Airport crashed after take-off. Record on Appeal at 12 (Affidavit of William S. Valentine, dated August 5, 2002, at ¶ 1 ("Valentine Aff.")).[1] Bill and Joe regarded themselves as spouses, as did their respective families, friends, neighbors, work colleagues, employers, landlords, and others, many of whom provided statements to the Board indicating that Valentine and Lopes' relationship was as strong and committed as any healthy marriage. R 13, 17-23, 71-84 (Valentine Aff. ¶¶ 4-5, 22-30, 33, Exhibits A, B, T-Y). They did everything they could legally to protect and formalize their relationship under New York law as it existed during their 21 years together. R 16-17, 24-70 (Valentine Aff. ¶¶ 7-21, Exhibits C-S). For example, they were among the first to register as Domestic Partners with the City of New York when it became legal to do so in 1994. R 16-17,

1 Hereinafter, citations to the Record on Appeal will appear as "R #," where "#" is the Record page containing the cited material.

70 (Valentine Aff. ¶ 20-21, Exhibit S).

The Board premised its denial of Valentine's claim on the legal error that a marriage certificate is a prerequisite to spousal status. *See* R 6 (Board panel's decision dated July 30, 2003). The Board did not cite a single authority to support this conclusion. New York's Workers' Compensation Law has long recognized as spouses, and extended full spousal death benefits to, survivors who had no marriage certificates, no domestic partnership registrations, no wills, health care proxies, powers of attorney, evidence of interdependence, nor any of the many other legal documents and proof of a genuine, serious, and life-committed relationship that Valentine has submitted in support of his claim. No rational legal principle could support the awards in those cases, while denying Valentine the same recognition and financial protection. The Board's decision should be reversed, and Valentine should be granted the Workers' Compensation spousal death benefits.

QUESTIONS PRESENTED FOR REVIEW

1. Where New York's courts have consistently extended Workers' Compensation spousal death benefits to heterosexual survivors of relationships involving no legally recognized marriage certificates or other formal legal indicia, based on the New York doctrine that Workers' Compensation is a remedial statute that serves humanitarian purposes and should be construed liberally, should the same doctrine protect the survivor of a same-sex couple who took every available step in New York to formalize, legalize, and protect the relationship?

The Board answered this question in the negative.

2. Do New York's equitable principles that respect a relationship's day-to-day functional realities warrant accepting that Bill Valentine is Joe Lopes' surviving spouse based on

how they lived throughout their 21 years together in an exclusive, committed, interdependent and caring relationship, especially where they formalized, legalized, and protected their relationship in every way feasible, and were regarded by friends, family members, neighbors and colleagues as spouses?

The Board answered this question in the negative.

3. Whether construing New York's Workers' Compensation Law to preclude Valentine's standing as a surviving spouse would raise significant equal protection concerns under the New York State Constitution?

The Board failed to answer this question.

FACTUAL BACKGROUND

The facts that appellant established were not refuted in Board proceedings below by any of the respondents.[2] As Workers' Compensation Law Judge ("WCLJ") William Griff held, "Claimant Valentine has submitted documents and affidavits showing a long and established

2 Employer American Airlines' ("respondent employer") New York Workers' Compensation carrier is National Union Fire Insurance Company ("National Union"), claims against whom are administered by AIG Claim Services, Inc. ("AIG Claim") (collectively, "respondent carrier"). AIG Claim and National Union are both subsidiaries of American International Group ("AIG"), which boasts "$678 billion in assets and growing" as "the world's leading international insurance and financial services organization, with operations in more than 130 countries" and "the most extensive worldwide property-casualty and life insurance networks of any insurer." American International Group Home Page *at* http://www.aig.com/GW2001/aboutaig (last visited Aug. 25, 2004). The slogan "AIG: WE KNOW MONEY[SM]" prominent throughout its corporate literature, *see id.*, AIG openly and aggressively lobbies to reduce workers' compensation coverage for injured employees and their families. *See Governor Plans Fund-Raisers*, Contra Costa Times (California), Nov. 23, 2003, at 4, *available at* 2003 WL 75793533 ("Last week, [Gov. Arnold Schwarzenegger's] campaign reported a $100,000 contribution from American International Group, the state's largest provider of private workers' compensation insurance. AIG has lobbied on previous workers' comp bills. The governor is proposing a workers' compensation overhaul. AIG is a major stakeholder that will benefit from his reforms."); *see also Companies Hosting Dozens of Dem Convention Parties*, Dow Jones Int'l News, July 7, 2004 (Center for Public Integrity identified AIG among handful of "special interests . . . sponsoring dozens of private parties and receptions at the Democratic National Convention in Boston"). A recent AIG "White Paper" touts the "impact" of legal change AIG promoted, predicts "cost savings for the employer," and urges strategic "implementation" to further "narrow" workers' compensation for employees. *See* AIG Claim Services, *White Paper: California Workers' Compensation Reform Analysis, Impact and Implementation* (July 2004), *available at* http://www.aigcs.net (last visited Aug. 25, 2004).

relationship with the decedent." R 123-128 (*In re Joseph Lopes (Employer: American Airlines)*, WCB Case No. 0016-3762 (N.Y. Workers' Comp. Bd. Dec. 4, 2002)). The undisputed facts of this relationship are as follows:

Lopes and Valentine met in San Francisco in January 1980 and began dating on October 1, 1980, when Joe was twenty-four and Bill was twenty-six. They celebrated October 1 as their anniversary. Since that date, Bill has felt that their souls were always united. R 12 (Valentine Aff. at ¶ 2). During their 21 years together, Lopes and Valentine held themselves out to, and were recognized by, family, friends, employers and society as spouses in a committed life partnership. In fact, since Joe's death, Joe's former employer, American Airlines, has termed Bill Joe's "surviving spouse." R 13 (*Valentine Aff.* at ¶ 4); R 20 (Exhibit A (letter from American Airlines extending surviving spousal travel benefits to Bill and addressed "Dear Surviving Spouse.")) Both before and since Joe's death, American Airlines has extended travel benefits to Bill as Joe's spouse. Since Joe's death, American Airlines has further treated Bill as a spouse by sending him a check to cover expenses relating to Joe's death as well as Joe's final paycheck. R 13 (Valentine Aff. at ¶ 4).

Moreover, Lopes' father, the only other person who could make a claim in this proceeding, fully supports Valentine's claim to Workers' Compensation spousal death benefits. He has submitted a notarized letter to the Workers' Compensation Board, stating: "I hereby surrender to William Valentine any Workers' Compensation claim that I may have arising out of the death of my son, Joseph Lopes." R 22 (Exhibit B (letter of John Michael Lopes)). He asks the Board to extend the Workers' Compensation death benefit to Valentine "because of the length, nature and commitment of [Bill and Joe's] relationship." R 22. Joe's father further

states: "My son and Bill were in a committed life partnership for more than 20 years, until Joe's death. They lived together throughout all those years, and through good times and bad, they supported each other, financially, emotionally and in all other ways." R 22.[3]

Lopes and Valentine rented their first apartment together in 1982 in San Francisco. From that date onward, they shared common expenses such as housing, utilities, mortgage, car payments and insurance. R 14 (Valentine Aff. at ¶ 7); R 24-25 (Exhibit C (Contract of Sale for apartment and Financing Statement for mortgage listing both as jointly responsible parties)); R 26 (Exhibit D (co-op insurance billing statement, naming both partners)). At various times they established joint checking accounts to assist in the management of household funds. R 14 (Valentine Aff. at ¶ 8), R 27-28 (Exhibit E (statement from joint checking account, as well as checks from that account bearing both names)). They also held their savings in a joint mutual fund account. R 14(Valentine Aff. at ¶ 9), R 29-30 (Exhibit F (statement from T. Rowe Price Mutual Fund, as well as checks from that account bearing both names)).

In 1983, Lopes was able to pursue his life dream of flying when he was offered a position as a flight attendant with American Airlines. The position required an eight-week training program followed by re-assignment to an American base in Chicago. Because Valentine wanted Lopes to pursue his dream, he actively encouraged Joe to take the job with American. This support was vital to Joe's decision to proceed. R 14 (Valentine Aff. at ¶ 10). After training and before relocating to Chicago, Lopes wrote to Bill, "I owe my strength completely to your loving support. . . . [P]lease know that while distance will surely be painful, in my mind, there is *no*

3 Joe's father lives in San Francisco, California and is elderly. He submitted the notarized letter in lieu of making a long cross-country trip to appear at the hearing to surrender his claim in support of Bill's claim. R 22 (Valentine Aff. at ¶ 6).

barrier for my feelings for you. In short, *nothing* will change. I love you more than I could possibly tell you." R 14 (Valentine Aff. at ¶ 11); R 31 (Exhibit G (Undated 1983 card)).

In September of 1984, to be with Valentine, Lopes transferred to New York City, where Valentine had relocated for work. Joe was assigned first to LaGuardia Airport and then to Kennedy Airport. R 15 (Valentine Aff. at ¶ 12). With their move to New York City, Joe and Bill were able to spend more time with Bill's family, who live in Connecticut, Massachusetts, and New Hampshire. Together they regularly attended family holiday gatherings, weddings, birthday celebrations, and other events. R 15 (Valentine Aff. at ¶ 13); R 33-34 (Exhibit H (photographs of Joe and Bill with extended family)).

Following their move to New York City, Joe and Bill returned to California on an almost annual basis so that they could continue to be involved with Joe's family. Together they attended the wedding of Joe's sister in Marin County, California, in 1988. In 1990, they held their tenth anniversary party in San Francisco so that Joe's family and friends could attend. In 1994, they flew back to San Francisco to say goodbye to Joe's brother Tony, who was dying. R 15 (Valentine Aff. at ¶ 14); R 80-81 (Exhibit X (letter of Lorraine Carpou)).

Early on in their relationship, Lopes and Valentine named each other as sole beneficiaries of their respective life insurance and retirement policies, specifically designating each other as "domestic partners." R 15 (Valentine Aff. at ¶ 15), R 35-40 (Exhibit I (life insurance and retirement beneficiary designation forms)). In February 1990, they executed wills, designating each other as executors and sole beneficiaries of their respective estates. Based on Lopes' will, on January 31, 2002, the Surrogate's Court of New York County issued to Valentine Letters Testamentary to administer Lopes' estate. R 15-16 (Valentine Aff. at ¶ 16); R 41-47 (Exhibit J

(Lopes' will)); R 48-55 (Exhibit K (Valentine's will)); R 56-57 (Exhibit L (Letters Testamentary)).

At the same time that they executed wills, they also executed powers of attorney, health care proxies and hospital visitation authorizations designating one another to have decisionmaking ability for the other and first priority in visitation if hospitalized. R 16 (Valentine Aff. at ¶ 17); R 58-60 (Exhibit M (Lopes' power of attorney designating Valentine)); R 61-63 (Exhibit N (Valentine's power of attorney designating Lopes)); R 64-65 (Exhibit O (Lopes' health care proxy designating Valentine)); R 66-67 (Exhibit P (Valentine's health care proxy designating Lopes)); R 68 (Exhibit Q (Lopes' hospital visitation authorization designating Valentine)); R 69 (Exhibit R (Valentine's hospital visitation authorization designating Lopes)).

In 1993, Lopes began studies for a Masters Degree in Social Work at Columbia University. During his final year of Social Work school in 1995-96, Columbia University, where Valentine was employed, for the first time extended tuition remission benefits to domestic partners. Bill was able to pay for most of Joe's final year through this benefit. R 16 (Valentine Aff. at ¶¶ 18-19).

In 1994, right after the City of New York first established a Domestic Partnership registry, Lopes and Valentine registered as Domestic Partners. R 16 (Valentine Aff. at ¶ 20); R 70 (Exhibit S (Affidavit of Domestic Partnership)).

In 1995, Lopes and Valentine moved into a co-op apartment on West 123rd Street, which they purchased together and for which they obtained a mortgage in both their names. Valentine's parents visited with the couple in their apartment for a weekend every holiday season. R 5-6 (Valentine Aff. at ¶ 21); R 24-25 (Exhibit C). Lopes was known as Uncle Joe to

Bill's nieces and nephews, and Valentine as Uncle Bill to Joe's nieces and nephews. R 6 (Valentine Aff. at ¶ 22); R 74-75 (Exhibit U (letter of Janet Lopes)); R 78-79 (Exhibit W (letter of Eugene and Anne D'Angelo)). Bill continues to be involved in the lives of Joe's family, having hosted his eldest niece and her boyfriend in April 2002. They became engaged while they were in New York City, and they chose Valentine as the first person to whom they gave this news. R 6 (Valentine Aff. at ¶ 22); R 74-75 (Exhibit U (letter of Janet Lopes)).

Lopes' and Valentine's total commitment to and love for one another is memorialized in the seven notarized letters from friends, family members, and others submitted with Valentine's claim. *See, e.g.*, R 71 (Valentine Aff., Exhibit T (letter of John Patrick Lopes) ("The love Joe and Bill shared was not to be mistaken for just any love. The bond they shared was truly a marriage of two kindred souls.")); R 74-75 (Exhibit U (letter of Janet Lopes) ("Uncle Bill's relationship with Uncle Joe is so strong and united that I can feel Uncle Joe within Uncle Bill. The pain has turned into pleasant memories and I continue to share new times with Uncle Bill and Uncle Joe's spirit.")); R 76 (Exhibit V (letter of Joseph Collins) ("[F]rom my point of view as both a friend and landlord/neighbor, it was clear that they were in a committed, loving relationship.")); R 79 (Exhibit W (letter of Eugene and Anne D'Angelo) ("They were as committed to each other as my wife and I are as a married couple.")); R 22 (Exhibit B (letter of John Michael Lopes) ("My son and Bill were in a committed life partnership for more than 20 years, until Joe's death.")); R 80 (Exhibit X (letter of Lorraine Carpou) ("[W]hen I called Bill . . . to confirm my brother's passing, I referred to myself as Bill's 'sister-in-law'")); R 82 (Exhibit Y (letter of James and Heidi Valentine) ("When the tragedy of AA587 occurred last November, Heidi and I lost a brother in law [and] our daughter lost an uncle.")).

Just like married couples, Lopes and Valentine were a partnership in every way possible – emotionally, financially, legally and in their day-to-day lives. R 13 (Valentine Aff. at ¶ 31); R 85 (Exhibit Z (photographs of the couple together in their day-to-day lives and on vacation)); R 22-23, 71-84 (Exhibits B, T through Y (letters of family and friends)). For example, when Bill had his appendix out in 1987, Joe took him to the hospital, stayed with him through the operation, contacted family members and friends after the surgery was over to let them know Bill was okay, brought Bill home from the hospital, and took care of Bill for the next several weeks while he recovered. R 18 (Valentine Aff. at ¶ 31). When Joe's brother died in 1995, Bill provided Joe with crucial emotional support. *Id.* Lopes and Valentine were financially interdependent for such day-to-day necessities as paying the rent, buying food, and paying their bills from their joint accounts. R 18 (Valentine Aff. at ¶ 31); R 24-28 (Exhibits C, D, E).

Moreover, Lopes and Valentine had a long-term financial plan that would have allowed Bill to leave his job by 2004 or 2005 to go to journalism school and fulfill his dream of becoming a writer. Joe was going to support Bill financially, just as Bill had supported Joe financially when the latter went to social work school. Lopes' American Airlines health insurance plan would have covered Valentine's health insurance. With Joe's death, Bill cannot fulfill these plans without the financial assistance that he should receive as a surviving spouse through sources such as Workers' Compensation. R 18-19 (Valentine Aff. at ¶ 32).

Bill regards the love that he shared with Joe as a gift that he will treasure for the rest of his life. R 19 (Valentine Aff. at ¶ 33). The continued support of Joe's family has been an added

blessing for Bill. *Id.* It reaffirms what Joe and Bill knew since the beginning of their relationship: that even though the formal legal sanction of marriage was denied to them, they were in fact one another's spouse, and each became a member of the other's family. *Id.* In short, the loss and grief that Bill has suffered since Joe's death on November 12, 2001, is just as severe and just as painful as that experienced by any widow or widower who loses a spouse under such tragic circumstances.

THE PROCEEDINGS BELOW

Appellant submitted to the tribunal below the Affidavit of William S. Valentine, dated August 5, 2002, with exhibits, demonstrating the aforementioned facts, a Hearing Memorandum of Law, dated August 5, 2002, a Reply Memorandum of Law, dated November 5, 2002, and an Administrative Appeals Memorandum, dated January 3, 2003. Respondent National Union Fire Insurance Co. c/o Specialty Risk Services, Inc., submitted Respondent's Hearing Memorandum, dated October 21, 2002, and an Administrative Appeals Rebuttal Memorandum, dated January 31, 2003, both of which expressly adopted appellant's "Statement of Facts," as restated above, and thereby effectively conceded that the facts of this claim are uncontroverted.

A final hearing was held at the Workers' Compensation Board's Manhattan office on November 5, 2002, before WCLJ Griff. Because the facts were undisputed, no further oral testimony was taken. Though the WCLJ concluded that Bill and Joe had the "long and established relationship" described in the record evidence, he denied Bill's claim as surviving spouse without any legal analysis or citation to any authority, in a reserved decision filed December 4, 2002. R 123-124 (*In re Joseph Lopes: (Employer: American Airlines)*, WCB Case No. 0016-3762 (N.Y. Workers' Comp. Bd. Dec. 4, 2002)). Further, the decision concluded that

"decedent's father, to the extent that he is entitled to Workers [*sic*] Compensation benefits, may not waive or surrender such rights," again citing no authority. R 123 (*Id.* at 1). Finally, the decision did conclude that Joseph Lopes "had a work related injury resulting in death." R 124 (*Id.* at 2).

In a decision dated July 30, 2003, a three-judge panel of the Board's Office of Appeals affirmed. R 6-9 (*In re Joseph Lopes: (Employer: American Airlines)*, WCB Case No. 0016-3762 (Mem. N.Y. Workers' Comp. Bd. Decision July 30, 2003)). The Board panel made no mention of the length of the relationship, the supporting testimony from the couple's family, friends, neighbors, and work colleagues, nor most of the other evidence supporting Bill's claim to legal spousal status. The panel did note that Bill and Joe legally registered as domestic partners in 1994, and then summarily asserted (without citation) that "New York Courts [*sic*] have held that legal spouses are those persons in valid marriages." Having begged a central question raised in this proceeding — whether unmarried, legal domestic partners may ever qualify as legal spouses — the panel ignored the entirety of appellant's discussion showing that they have drawn that conclusion in the past and should also in this case. In two sentences, the Board then disposed of a weighty question that appellant never raised, never briefed, and that this matter does not properly present: whether same-sex couples may marry.

Returning to the meaning of the term "spouse," the panel cited New York Workers' Compensation Law § 4 ("section 4"), which defines the domestic partners of those killed in the September 11, 2001, terrorist attacks as legal spouses. The panel neither quoted nor paraphrased section 4, a law that facially contradicts the panel's immediately preceding unsupported assertion that only married couples can be legal spouses. Instead, the panel reasoned that section 4's

express protection of surviving domestic partners of 9/11 victims as "legal spouses" necessitated exclusion of identically situated domestic partners from section 16's protections for all legal spouses. The panel did not mention the legislative history undermining its reading of section 4; did not identify any legitimate societal interest rationally related to hinging spousal status on date of death; and did not otherwise acknowledge appellant's constitutional arguments.

Finally, the panel ruled that decedent's father could not surrender his claim to appellant, and that even if he could, "such waiver would not render [section] 4 applicable to the decedent's life partner."

Appellant timely served all respondents, including the New York Workers' Compensation Board and the State Attorney General (the "respondent Board"), the respondent employer, and the respondent carrier, with his Notice of Appeal to this Court.

ARGUMENT

THE STANDARD OF REVIEW ON THIS APPEAL

Respondent carrier having conceded the facts below, this Court is presented with pure questions of law regarding the meaning of the terms "surviving spouse" and "legal spouse" in the Workers' Compensation Law, and whether weighty constitutional concerns mandate construction of those terms so as not to exclude virtually all survivors of same-sex couples, including appellant. Because this is an issue of statutory interpretation that is not within "any special competence or expertise of the Board," the Board's interpretation is not entitled to any deference from this Court. *De Mayo v. Rensselaer Polytech Inst.*, 74 N.Y.2d 459, 462, 548 N.Y.S.2d 630, 631-632 (1989) ("[T]he Appellate Division erred in reviewing the rationality of the [Workers' Compensation] Board's determination and according great weight to the Board's interpretation of the statutory penalty provision."); *see also Weingarten v. Bd. of Tr. of N.Y. City Teachers' Ret. Sys.*, 98 N.Y.2d 575, 576, 579-580, 750 N.Y.S.2d 573, 575-576 (2002) (state agency determinations on questions of law reviewed *de novo*); *In re Gruber*, 89 N.Y.2d 225, 231-232, 652 N.Y.S.2d 589 (1996) (same). Reviewing *de novo* the Board's unsupported and conclusory determination that Valentine may not be deemed a legal surviving spouse entitled to Workers' Compensation spousal death benefits, this Court should reverse the Board's denial of Valentine's claim.

POINT I

THE WORKERS' COMPENSATION LAW, PROPERLY CONSTRUED TO EFFECTUATE ITS REMEDIAL HUMANITARIAN PURPOSES, AFFORDS VALENTINE THE BENEFITS OF A SURVIVING SPOUSE

This Court has "repeatedly said, and so has the Court of Appeals, that the Work[ers'] Compensation Law is classed as remedial legislation and hence a spirit of liberality should characterize its interpretations." *Schmidt v. Wolf Contracting Co.*, 269 A.D.2d 201, 203, 55 N.Y.S.2d 162, 166 (3d Dep't 1945), *aff'd mem.*, 295 N.Y. 748, 65 N.E.2d 568 (1946); *see also Burns v. Robert Miller Constr., Inc.*, 55 N.Y.2d 501, 508, 450 N.Y.S.2d 173, 176 (1982) ("As a remedial statute serving humanitarian purposes, the Workers' Compensation Law should be liberally construed."); *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 508, 369 N.Y.S.2d 637, 640 (1975) ("In light of its beneficial and remedial character the Workmen's Compensation Law should be construed liberally in favor of the employee."). When an employee suffers an on-the-job injury that causes death, the Workers' Compensation Law provides that the employee's "surviving spouse" is the primary and often sole beneficiary of death benefits. Workers' Comp. Law §§ 16, 16(1-c).[4] The concept of a "surviving spouse" should be broadly construed to advance the law's "humanitarian," "beneficial," and "remedial" purposes.

In construing the coverage of the Workers' Compensation Law, this Court, the Court of Appeals, and the Workers' Compensation Board have all held that "[i]n determining whether particular persons or classes are covered it is necessary to consider the statute as a whole and the purpose embodied in its enactment." *Goldstein v. State*, 281 N.Y. 396, 401 (1939); *Schmidt*, 269

4 A "surviving spouse" with no children is entitled to "sixty-six and two-thirds per centum of the average wages of the deceased." § 16(1-c). "[E]xcess wages over six hundred dollars per week" shall not "be taken into account in computing compensation pursuant to this section." *Id.* at § 16(5). Under these provisions, Lopes' surviving spouse is entitled to Workers' Compensation death benefits of $400 per week.

A.D.2d at 203-204, 55 N.Y.S.2d at 166; *Strimple v. W. Seneca State Sch.*, 1999 WL 1039404, at *2 (N.Y. Workers' Comp. Bd. Oct. 14, 1999). This Court has held that it is "not confined to the literal meaning of the words" in the Workers' Compensation Law, but must consider "the spirit and purpose of the act and the objects to be accomplished." *Schmidt*, 269 A.D.2d at 203, 55 N.Y.S.2d at 166. "Literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted." *Id.* at 203-204, 55 N.Y.S.2d at 166 (internal quotation marks omitted).

Furthermore, "in construing a statute, [courts] should consider the 'mischief sought to be remedied,' and should favor the construction which will 'suppress the evil and advance the remedy.'" *Strimple*, 1999 WL 1039404, at *2 (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 95); *Schmidt*, 269 A.D.2d at 206, 55 N.Y.S.2d at 169; *see also* 12 N.Y.C.R.R. 300.13(f) (Workers' Compensation Board is empowered to take "any . . . action as may be in the interest of justice") This is in keeping with the guiding principle that "[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results." *In re Jacob*, 86 N.Y.2d 651, 667, 636 N.Y.S.2d 716, 724 (1995); *see also Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 208, 544 N.Y.S.2d 784, 787 (1989) ("[W]here doubt exists as to the meaning of a term, and a choice between two constructions is afforded, the consequences that may result from the different interpretations should be considered."); *Smithtown v. Moore*, 11 N.Y.2d 238, 244, 228 N.Y.S.2d 657, 661 (1962) (same legal principle). Significantly, the New York Legislature has clarified in the context of Workers' Compensation spousal death benefits for September 11 survivors that the terms "surviving spouse" and "legal spouse" indeed may appropriately include unmarried

domestic partners of victims. Here, likewise, the remedial and humanitarian purposes of the Workers' Compensation Law are fulfilled by interpreting the term "spouse" to encompass the committed and legally formalized domestic partnership that Valentine shared with Lopes.

The underlying "humanitarian purpose" of the Workers' Compensation Law's death benefits provision is to provide "a swift and sure source of benefits" to protect the financial welfare of surviving family members and dependents. *Crosby v. State Workers' Comp. Bd.*, 57 N.Y.2d 305, 313, 456 N.Y.S.2d 680, 684 (1982); *see also Johannesen v. New York City Dep't of Hous. Pres. and Dev.*, 84 N.Y.2d 129, 134, 615 N.Y.S.2d 336, 338 (1994) ("remediation purposes" "protect[] work[ers] and their dependents from want in case of injury"); *Burns*, 55 N.Y.2d at 508, 450 N.Y.S.2d at 176; Workers' Comp. Law § 16. Like most surviving spouses, Valentine has endured not only enormous emotional suffering but also financial repercussions from Lopes' death. *See* R 18-19 (Valentine Aff. ¶¶ 31-32), R 24-28 (Exhibits C, D, E). Because the Workers' Compensation Law must be broadly and liberally construed to effectuate its underlying "remedial and beneficial character" and "humanitarian purposes," Valentine should be treated as the "surviving spouse" entitled to the death benefit of two-thirds of Lopes' wages, up to a maximum of $400 per week. *See Burns*, 55 N.Y.2d at 508, 450 N.Y.S.2d at 176; Workers' Comp. Law §§ 16(1-c), 16(5).

The respondent Board erred in failing to apply (or even mention) any of these well-established principles governing construction of the Workers' Compensation Law. Indeed, a pivotal section of the Board's decision flatly violated these rules of construction by truncating a fragment from subsection 16(1-a)(2), divorcing the words from their contextual meaning, and misconstruing them to violate rather than effectuate the "remedial," "humanitarian," and

"beneficial" purposes of Workers' Compensation. The entire subsection states: "[T]he term surviving spouse shall be deemed to mean the legal spouse but shall not include a spouse who has abandoned the deceased." Workers' Comp. Law § 16(1-a)(2). Both the literal text of the subsection and the precedent applying it make clear its purpose to prevent a surviving spouse "who has abandoned the deceased" from receiving death benefits. *See, e.g., Shumway v. Albany Port Tavern*, 154 A.D.2d 751, 751, 546 N.Y.S.2d 200, 200 (3d Dep't 1989) ("We are concerned only with whether decedent's legal spouse abandoned him…pursuant to Workers' Compensation Law § 16(1-a)").

Appellant is aware of no authority, and respondent Board cited none below, to support respondent's conclusory assertion that the fragment of subsection 16(1-a)(2) quoted in its decision[5] restricts Workers' Compensation death benefits to only "those persons in valid marriages." R 7 (respondent Board's decision dated, July 30, 2003). The subsection's reference to "legal spouse" does not support respondent's assertion. Valentine and Lopes were legally and formally united in a domestic partnership, in full compliance with all laws and procedures conferring that status. Indeed, the couple took every step available in the State of New York to legalize and formalize their relationship as spouses. *See* R 16-17, 24-70. Thus, there is no question that their relationship was "legal," and as discussed below, abundant New York authority supports Valentine's claim as a legal "surviving spouse."

5 The respondent Board's decision quotes only the following portion of subsection 16(1-a)(2): "the term surviving spouse shall be deemed to mean the legal spouse." R 6-9. The Board's decision neither quoted nor mentioned the text in the same sentence of the same subsection regarding abandonment.

A. Both New York And Private Entities Recognize Unmarried Domestic Partners As "Spouses" In Appropriate Circumstances

New York courts have not construed the term "legal spouse" to limit the grant of Workers' Compensation spousal death benefits only to those who have legally recognized marriage certificates. In keeping with the humanitarian purposes of the statute, courts have already exercised great leniency in construing the concept of "legal spouse" to extend death benefits to surviving partners on the basis of so-called "common-law marriages" (hereinafter, "CLMs") that could not even be legally contracted in New York. *Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292, 434 N.Y.S.2d 155, 157 (1980).

Indeed, New York courts have extended death benefits to surviving partners based on alleged CLMs arising out of out-of-state vacations lasting as little as three days. *See, e.g., Coney v. R.S.R. Corp.*, 167 A.D.2d 582, 563 N.Y.S.2d 211 (3d Dep't 1990) (New York couple's three-day visit to Georgia sufficient to establish CLM for Workers' Compensation death benefit); *Lieblein v. Charles Chips, Inc.*, 32 A.D.2d 1016, 1016, 301 N.Y.S.2d 743, 744 (3d Dep't 1969) (one-week visit to Georgia sufficient), *aff'd*, 28 N.Y.2d 869, 322 N.Y.S.2d 258 (1971); *Cornell Laundry, Inc. v. Claimant*, 2001 WL 999527, at *3 (N.Y. Workers' Comp. Bd. Feb. 28, 2001) (visit to Pennsylvania sufficient); *John's Manville Sales Corp. v. Claimant*, 92 N.Y. Workers' Comp. L. Rep. 1202, 1992 WL 295826, at *1 (N.Y. Workers' Comp. Bd. Oct. 1, 1992) (visit to Pennsylvania sufficient). Thus for purposes of the Workers' Compensation Law, a partner with no legal marriage certificate or other traditional formalization of a spousal relationship may be deemed the "legal spouse" entitled to benefits.

The statutory scheme further makes clear that a formalized legal marriage is not the *sine qua non* for entitlement. Workers' Compensation benefits may be denied to an otherwise "legal

spouse" who has abandoned the deceased, Workers' Comp. Law § 16(1-a)(2), again in keeping with the remedial purposes of the statute. The statute considered "as a whole" and in light of its "humanitarian purposes," *see Burns*, 55 N.Y.2d at 508, 450 N.Y.S.2d at 176; *Strimple*, 1999 WL 1039404, at *2, is appropriately construed to include Valentine's relationship to Lopes under its provisions giving relief to a surviving spouse.

Recognizing Valentine as a legal spouse for purposes of the Workers' Compensation Law is also consistent with other New York decisions respecting lesbian and gay couples as family and spouses. In *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1989), the Court held that the same-sex life partner of the deceased tenant in a rent-controlled apartment was a "family member" entitled to succession rights. Significantly, at least four New York courts have applied *Braschi*'s principles to recognize that same-sex couples could be spouses under New York law. In *E. 10th St. Assocs. v. Estate of Goldstein*, 154 A.D.2d 142, 552 N.Y.S.2d 257 (1st Dep't 1990), the First Department relied on *Braschi* in construing succession rights under the independent Rent Stabilization Code. Unlike the Rent Control Law and its regulations, which did not enumerate the "family members" entitled to succession rights, the Stabilization Code specifically defined "family member" to include only "husband" and "wife," along with enumerated blood relatives and in-laws. Citing the affidavit testimony of the decedent's mother and son, "who considered the [surviving same-sex partner] to be a part of their family and . . . characterized the relationship of their son and father as that of a *spouse"* to the survivor, the court held the surviving tenant entitled to succession rights under the Stabilization Code. *E. 10th St. Assocs.*, 154 A.D.2d at 143, 552 N.Y.S.2d at 257 (emphasis supplied). Other than "spouse" and "husband," the court did not attempt to fit the appellant into

any other then-qualifying Stabilization Code categories for succession rights, nor would it be sensible to deem same-sex couples close blood relatives or in-laws (the only other categories then available). *See id*.at 143, 552 N.Y.S.2d at 257.

Thus, almost 15 years ago, the Appellate Division held that the survivor of a same-sex domestic partnership is a legal surviving "spouse" and "husband." Thereafter, other New York courts followed suit. *See Gay Teachers Ass'n v. Bd. of Educ.*, 183 A.D.2d 478, 585 N.Y.S.2d 1016 (1st Dep't 1992), *summary decision aff'g* N.Y.L.J., Aug. 23, 1991, at 22, col. 3 (Sup. Ct. N.Y. County) (denying City's motion to dismiss because health insurance benefits for "husband" and "wife" could also extend to same-sex domestic partners under *Braschi*); *Mandell v. Cummins*, 2001 WL 968362 (July 6, 2001), N.Y.L.J., July 25, 2001, at 18, col. 4 (Civ. Ct. N.Y. County) (statutory prohibitions against eviction where tenant or "spouse" is disabled "apply equally to a tenant's disabled gay life partner."); *Knafo v. Ching*, N.Y.L.J., Dec. 6, 2000, at 28, col. 2 (Civ. Ct. N.Y. County) (same). In *Knafo*, the court recognized that the gay life partners were "not just a family but nontraditional spouses. . . . All that separates them from traditional spouses is the fact that they are of the same sex and therefore cannot legally marry." *Id.*

While the question whether same-sex domestic partners may be "spouses" has not been specifically addressed in decisions in the Workers' Compensation context, the Workers' Compensation Law, like the succession provisions of the Rent Stabilization Code, is "remedial" in nature and shares the same principles of construction. "Remedial statutes should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible." *Lesser v. Park 65 Realty Corp.*, 140 A.D.2d 169, 173, 527 N.Y.S.2d 787, 790 (1st Dep't 1988) (construing housing law); *see also Burns*, 55 N.Y.2d at 508, 450 N.Y.S.2d at 176

(Workers' Compensation Law, as remedial statute, should be liberally construed).

Likewise, in *In re Jacob*, the New York Court of Appeals interpreted a statute allowing "an adult unmarried person or an adult husband and his adult wife together [to] adopt another person," to permit a partner in an unmarried lesbian couple and in an unmarried heterosexual couple to each adopt their partners' children. The court gave the statute this construction even though the statute used only the terms "husband" and "wife" to specifically designate a second parent who could legally adopt without terminating the first parent's parental rights. 86 N.Y.2d 651, 660, 636 N.Y.S.2d 716, 719. The Court rejected a "[l]iteral application" of language that "would effectively prevent these adoptions" in favor of an interpretation that promoted the "spirit behind" the statutory regime. *Id.* at 662, 636 N.Y.S.2d at 720.

In reaching this holding, the Court noted that a contrary statutory construction might raise constitutional concerns that would be "particularly weighty" with respect to the same-sex couple. "Even if the Court were to rule against him on this appeal, the male petitioner [in the unmarried heterosexual couple] could still adopt by marrying [the child's] mother." *Id.* at 668, 636 N.Y.S.2d at 724. In contrast, the child of the lesbian couple "would be irrevocably deprived of the benefits and entitlements of having as her legal parents the two individuals who have already assumed that role in her life, simply as a consequence of her mother's sexual orientation." *Id.*

In the pending case, the Board abandoned these remedial principles of statutory construction established in *Braschi*, *In re Jacob*, and their progeny, and interpreted "spouse" to apply only to different-sex married couples. It cited no authority to support its conclusion that only through marriage can one be deemed a spouse for purposes of the Workers' Compensation

Law.[6] Under the Board's erroneously narrow reading, appellant is "irrevocably deprived of the benefits and entitlements" of the Workers' Compensation Law "simply as a consequence of [his] sexual orientation." *Id.*; *see also Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, Inc.*, 159 Misc. 2d 884, 888, 606 N.Y.S.2d 965, 968 (Sup. Ct. Queens County 1993) (granting surviving same-sex partner standing to dispose of decedent's remains, over objections of decedent's mother and brother, noting "close, spousal-like relationship"); *Gay Teachers Ass'n*, 183 A.D.2d 478, 585 N.Y.S.2d 1016 (1st Dep't 1992), *summary decision aff'g* N.Y.L.J., Aug. 23, 1991, at 22, col. 3. As in *In re Jacob*, this Court should construe the statute to satisfy its remedial purposes and to avoid a violation of Valentine's constitutional equal protection rights. *See also infra*, Point III.

In contrast to the respondent Board's conclusory analysis, appellant's construction of "surviving spouse" comports with current interpretations of the concepts of "legal spouse" or "surviving spouse," *including the interpretation of those concepts by Joe Lopes' employer*. After Lopes' death, Valentine received a letter from American Airlines addressed to him as a "Surviving Spouse." *See* R 13, 20-21 (Valentine Aff. ¶ 4, Exhibit A (letter from American Airlines addressed to "Dear Surviving Spouse")). Moreover, both before and since Lopes' death, American Airlines has extended spousal travel benefits and other spousal recognition to Valentine. R 13 (Valentine Aff. at ¶ 4).

In our society, other examples of recognizing domestic partners as "spouses" abound. For example, the "Surviving Spouse Application" for the New York State World Trade Center

6 The Board's conclusion that marriage is confined to different-sex couples is not relevant to any question or argument that appellant raised below or in this Court. Moreover, even if the question were relevant to this appeal (and it is not), neither of the cases that the Board cited support the Board's assertions about marriage. *See infra*, Point I.C (discussing *In re Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993) and *Fisher v. Fisher*, 250 N.Y. 313, 317 (1929)).

Relief Fund states: "A surviving spouse includes a domestic partner" for purposes of entitlement to the death benefits available from that fund. *See* R 87-89, 90-93 (Aronson Affirmation, dated August 5, 2002 ("Aronson Aff."), at Exhibit 1 (New York State World Trade Center Relief Fund Surviving Spouse Application)). A separate application for "supported dependents" seeking relief from that fund again advises that a surviving domestic partner is a "surviving spouse." R 94-96 (Aronson Aff. at Exhibit 2). The New York State World Trade Center Relief Fund is maintained and managed by the New York State Department of Taxation and Finance, a state government agency. *See* R 91, 96 (Aronson Aff., Exhibit 1, page 2; Exhibit 2, page 3.).[7]

Indeed, a New York case suggesting that the term "spouse" does not apply to same-sex domestic partners has been effectively overruled, particularly in light of increasing recognition that a committed life partner is a "spouse." In *Secord v. Fischetti*, 236 A.D.2d 206, 653 N.Y.S.2d 551 (1st Dep't 1997), the State Crime Victims Board had determined not to extend spousal benefits to a same-sex life partner. In issuing an Executive Order following the September 11 tragedy, Governor Pataki concluded that the benefits of a "spouse" should be extended to domestic partners, a change that the State Crime Victims Board then made permanent. *See* State of New York Executive Order No. 113.30; New York State Crime Victims Board Advisory Bulletin No. 2003-01 (*available at* http://www.cvb.state.ny.us/advisory.htm) (last visited Aug. 25, 2004). The Executive Order explicitly states that the law previously had been interpreted in a way that created "unjust results." *See* State of New York Executive Order

7 Moreover, a widely circulated "Group Dental Coverage Employee Application" from Blue Cross DentalNet states that the term "spouse includes domestic partner" if the employer has elected to extend coverage to domestic partners. R 97 (Aronson. Aff., Exhibit 3 (Blue Cross DentalNet form)); *see also* R 98-99 (Aronson Aff., Exhibit 4 (National Education Association Registration Form, stating "Spouse Includes Domestic Partner")); R 100-103 (Exhibit 5 (Rutgers University Family Housing application, stating "'spouse' includes those persons approved through the Affidavit of Domestic Partnership Process")).

No. 113.30.[8]

Under well-settled principles of statutory construction, remedial statutes such as the Workers' Compensation Law must be interpreted to "avoid[] injustice, hardship, constitutional doubts or other objectionable results." *In re Jacob*, 86 N.Y.2d at 667, 636 N.Y.S.2d at 724. In the pending case, these principles require an interpretation of "spouse" like Governor Pataki's, and like the current State Crime Victims Board's, to include domestic partners. The same principles of justice forbid an interpretation like the former State Crime Victims Board's in *Secord*, which led to "unjust results" in that case, as it would here, and has since been disavowed and abrogated by the state agency itself.

B. A 2002 Amendment To The Workers' Compensation Law Clarifies That "Surviving Spouse" May Include An Unmarried Domestic Partner

The New York Legislature has confirmed specifically in the context of the Workers' Compensation spousal death benefits that construing the term "surviving spouse" to include unmarried domestic partners is consistent with the statutory language and advances the statute's remedial and humanitarian purposes. On August 20, 2002, an amendment to the Workers' Compensation Law went into effect making clear the law's application to people whose domestic partners were killed as a result of the terrorist attacks on September 11, 2001. That amendment clarifies that the domestic partner of a person killed in the terrorist attacks "*shall . . . be deemed to be the surviving spouse* of such employee for the purposes of any [Workers' Compensation]

8 *Secord* is distinguishable on yet another basis. Under Executive Law § 624(1), in addition to a spouse, "any other person dependent for his principal support upon a victim of a crime" was entitled to financial recovery. The death benefits provisions of the Workers' Compensation Law under certain circumstances permit enumerated dependent relatives to recover, but have no provision that could extend to an otherwise unrelated partner who is not deemed a "spouse." *See, e.g.*, Workers' Comp. Law §§ 16(4) – 16(4-b).

death benefit." Workers' Comp. Law § 4 (emphasis added).[9]

This provision was one of a flurry of measures by the Legislature to ease the path to benefits to which survivors of the September 11th attacks are entitled. *See, e.g.*, September 11 Victims and Families Relief Act, ch. 73, 2002 N.Y. Laws § 7356. The Legislature's purpose was "to clarify certain provisions of New York state law in order to address issues affecting the victims of the terrorist attacks of September 11, 2001 and their families." *Id.* at § 1. In addressing the Workers' Compensation spousal death benefit provision in particular, the Legislature acknowledged that the provision is susceptible to more than one interpretation in that it "does not *specify* eligibility of domestic partners for survivor benefits." Assemblywoman Catherine Nolan, Sponsor's Memo, N.Y. Assemb. B. A11307 (Aug. 28, 2002), attached to this brief as Exhibit 1.[10] The Legislature responded by expressly clarifying that unmarried domestic partners of September 11 victims indeed can and should be deemed "surviving spouses" eligible

9 Significantly, under the undisputed facts of this case, Bill easily meets both of the qualifying definitions of "domestic partner" as set forth by the legislature in section 4. First, he qualifies based solely on the couple's registration as domestic partners with the City of New York. *See* R 16, 70 (Workers' Comp. Law § 4(1)(b); Valentine Aff. at ¶ 20, Exhibit S (Affidavit of Domestic Partnership)). Second, he more than satisfies section 4's "dependence" and "mutual interdependence" factors, which are virtually identical to the factors that the Court of Appeals enumerated in *Braschi*. *Compare* Workers' Comp. Law § 4(1)(a) *with Braschi*, 74 N.Y.2d at 212-13, 544 N.Y.S.2d at 790. The legislature's reliance on *Braschi*'s principles to define domestic partners who qualify as "spouses" undermines respondent's argument below that *Braschi* is "inapplicable." Indeed, the legislative history for section 4 demonstrates that the legislature, in defining "surviving spouse," expressly relied on the more encompassing concept of "family member" that informed *Braschi* and its progeny, and that should likewise apply here to recognize Bill as a "surviving spouse." *See* Assemblywoman Catherine Nolan's Memo, N.Y. Assemb. B. A11307 (Aug. 28, 2002), attached to this brief as Exhibit 1**.**

10 The New York Legislative Service describes sponsor memos as being "the most important in determining legislative intent." New York Legislative Service, *Governor's Bill Jacket*, *available at* www.nyls.org (last visited Aug. 25, 2004).

for spousal death benefits.[11] Further, the Legislature expressly recognized the injustice of excluding domestic partners from spousal benefits, stating that the "justification" for the provision clarifying that surviving domestic partners are "surviving spouses" is that "[t]he surviving family members of those who died in the course of employment on Sept. 11, 2001 should be treated equally under the workers' compensation law." *Id.* This legislative measure follows many other instances in which domestic partners have been recognized as spouses both within and beyond the September 11 tragedy. *See supra*, Point I.A.

Thus, it is clear that the Legislature's purpose in section 4 was to clarify the inclusion of domestic partners as legal spouses under the Workers' Compensation Law. In the proceedings below, respondents turned this legislative purpose upside down. Relying on a provision solely intended to expand access to benefits, respondents argued that only those domestic partners who lost their loved ones on September 11 may be acknowledged as "surviving spouses." This narrow view invites an interpretation of the Workers' Compensation Law at odds with canons of construction that apply to such remedial legislation. "Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results." *In re Jacob*, 86 N.Y.2d at 667, 636 N.Y.S.2d at 724; *see also Braschi*, 74 N.Y.2d at 208, 544 N.Y.S.2d at 787; *Smithtown*, 11 N.Y.2d at 244, 228 N.Y.S.2d at 661.

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11 The "applicability" section's statement that the amendment applies "only to cases in which the employee's death occurred as a result of the terrorist attacks that occurred on September eleven, two thousand one" reflects the legislature's urgent focus on clarifying the law for the many victims of that tragedy. Workers' Comp. Law § 4(3). Although this "applicability" statement prevents reliance on section 4 as the sole basis for extending spousal death benefits to domestic partners outside of the September 11 context, it obviously does not prevent domestic partners from being independently recognized as "surviving spouses" in contexts other than the terrorist attacks, especially where, as here, doing so would be entirely consistent with principles of statutory construction and the Workers' Compensation Law's remedial and humanitarian purposes.

Significantly, in *Schmidt*, 269 A.D.2d 201, 55 N.Y.S.2d 162, *aff'd mem.*, 295 N.Y. 748, 65 N.E.2d 568, the Court of Appeals summarily affirmed this Court's rejection of a literal reading of a Workers' Compensation provision that would have conditioned a benefit on the date of injury:

> It is unreasonable to assume that the Legislature intended that a workman who suffers injury on [one date] is any less affected . . . . than one injured on [another date] of the same year. . . . . We cannot attribute to the Legislature an intent to make such an unfair discrimination.

Id. at 204, 55 N.Y.S.2d at 166-167.

The respondent Board is attempting to do precisely what this Court's and the Court of Appeals' decision in *Schmidt* forbids. It is irrational and supremely unjust to recognize some surviving domestic partners as "spouses" and deny that protection to others based on the date that a tragic twist of fate robbed them of their life partners. It is the nature of the relationship between the partners, not the day on which one died, that governs entitlement to spousal death benefits. Respondent can point to no just or rational reason to deem as "surviving spouses" the domestic partners of those who died in a plane that crashed into the World Trade Center but not of those who died in a plane that crashed into Queens. Such a bizarre result could not bear any rational relationship to legitimate matters of state or public concern, and would therefore violate the State's Equal Protection Clause. *See infra* Section III. This Court should therefore give every reasonable interpretation to the law that avoids this unconstitutional and unjust result. *See In re Jacob*, 86 N.Y.2d at 667, 636 N.Y.S.2d at 724; *Braschi*, 74 N.Y.2d at 208, 544 N.Y.S.2d at 787; *Smithtown*, 11 N.Y.2d at 244, 228 N.Y.S.2d at 661.

In applying the law recognizing domestic partners of September 11 victims as surviving "spouses," a recent decision by WCLJ Adam Regenbogen states: "The term 'spouse' is not specifically defined in New York State Workers' Compensation Law to only mean the opposite sex partner in a marriage." R 119 (*In re Eugene Clark (Employer: Aon Corporation)*, WCB Case No. 0015-4679, slip. op. at 2 (N.Y. Workers' Comp. Bd. Nov. 22, 2002)). The decision's careful legal analysis notes the "humanitarian purposes" of the Workers' Compensation Law as well as the fact that "'spouse' is neither masculine nor feminine but rather derives its gender from the subject to which it refers." *See id.*

The New York State Legislature, courts, government, private entities, and employer American Airlines all agree that the term "spouse" can, under appropriate circumstances, include domestic partners. The term should be given that inclusive meaning here to effectuate the remedial and humanitarian purposes of the Workers' Compensation Law and to avoid the substantial injustices, as well as constitutional infirmities, that would result from a contrary interpretation. *See infra*, Point III.

C. Respondents Relied On Inapposite Cases Construing Statutes That Do Not Share The Remedial Purposes Of The Workers' Compensation Law

In their arguments below, the respondents relied on case law involving New York's Estate Planning and Trust Law ("EPTL") and other non-remedial provisions that are entirely inapposite to this claim. New York courts consistently have described the Workers' Compensation Law as a "remedial statute" that must be "liberally construed" to achieve its "humanitarian purposes." *See, e.g.*, *Burns*, 55 N.Y.2d at 508, 435 N.E.2d at 393, 450 N.Y.S.2d at 176; *Strimple*, 1999 WL 1039404. In contrast, courts have distinguished the EPTL as a non-remedial statute that must be narrowly and literally construed "to ensure the orderly succession

of property rights among clearly defined classes of persons." *See Raum v. Rest. Assocs., Inc.*, 252 A.D.2d 369, 371, 675 N.Y.S.2d 343, 344-45 (1st Dep't 1998). Respondents' heavy reliance on *In re Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), and *Raum*, both of which construed the EPTL, is therefore misplaced.[12]

Raum relied on the EPTL's express definition and limitation of "surviving spouse" to cover only "[a] husband or a wife" to conclude that the law did not extend to a same-sex surviving partner. *Raum*, 252 A.D.2d at 370, 675 N.Y.S.2d at 344; *but see Gay Teachers Ass'n v. Bd. of Educ.*, 183 A.D.2d 478, 585 N.Y.S.2d 1016 (1st Dep't 1992), *summary decision aff'g* N.Y.L.J., Aug. 23, 1991, at 22, col. 3 (Sup. Ct. N.Y. County) (denying City's motion to dismiss because health insurance benefits for "husband" and "wife" could also extend to same-sex domestic partners); *Raum*, 252 A.D.2d at 371-373, 675 N.Y.S.2d at 345-346 (same-sex partner could be "husband or wife," and contrary ruling violates federal and state Equal Protection). In contrast to the EPTL, the Workers' Compensation Law contains no such "husband or wife" limitation, but rather extends benefits to any "legal spouse" as long as they have not "abandoned the deceased." Workers' Comp. Law § 16(1-a). Respondents below made the conclusory assertion that the phrase "legal spouse" requires a marriage, yet nowhere does the Workers' Compensation Law state that a marriage is required for legal spousal status, nor does any New

12 Likewise, the remaining cases relied on by respondent carrier below do not involve a remedial statutory scheme and therefore have no bearing on the pending claim. *See, e.g., Greenwald v. H & P 29th St. Assocs.*, 241 A.D.2d 307, 307, 659 N.Y.S.2d 473, 474 (1st Dep't 1997) (interpreting N.Y. C.P.L.R. § 4502(b), which is not a remedial statutory provision but rather protects confidential communications between a "husband" and "wife" "during marriage"); *Ortiz v. N.Y. City Transit Auth.*, 267 A.D.2d 33, 33, 699 N.Y.S.2d 370, 371 (1st Dep't 1999) (involving no statutory scheme, but rather an automobile insurance policy, and declining to decide whether "the word 'spouse' could be understood to include same-sex partners living together in a spousal-type relationship" because "plaintiff [had] fail[ed] to raise an issue of fact as to whether such was the nature of his relationship with the named insured."); *Rovira v. AT & T*, 817 F. Supp. 1062, 1068-70 (S.D.N.Y. 1993) (deciding case based on principles of contract interpretation and authority of Employees' Benefit Committee to initially determine eligibility for benefits, in accordance with the Employee Retirement Income Security Act).

York authority support that position. On the contrary, the Legislature's recognition of unmarried domestic partners whose loved ones were killed in the 9/11 terrorist attacks as "surviving spouses" defeats respondents' unsupported contentions that marriage alone confers spousal status. *See* Workers' Comp. Law § 4.

Having premised all their arguments on the fallacy that spouses must be married, respondents' subsequent argument that only different-sex couples may marry is entirely irrelevant to the questions raised on this appeal, and should not be addressed by this Court.[13]

Based on the undisputed facts in the Record and a correct interpretation of the death benefits section of the Workers' Compensation Law, Valentine is entitled to the death benefits afforded "surviving spouses." Longstanding principles requiring a broad construction of the Workers' Compensation Law consistent with its "humanitarian," "beneficial," and "remedial" purposes, and firmly rejecting a narrow literalism that defeats "the spirit and purpose" of the law, *Schmidt*, 269 A.D.2d at 203, 55 N.Y.S.2d at 166, could not abide a different result on the facts of this case.

13 In any event, the cases that respondents cite do not support their contentions about marriage. Neither the plaintiff in *Raum* nor the petitioner in *In re Cooper* sought marriage. *Raum* does not substantively discuss marriage, and *In re Cooper's* marriage discussion is unnecessary *dicta*, rendered all the less authoritative by its reliance on *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), which the Supreme Court declared wrongly decided and overruled in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2480 (2003). In *Fisher v. Fisher*, 250 N.Y. 313, 317 (1929), the Court of Appeals applied New York's longstanding rule that "[e]very presumption lies in favor of the validity" of a marriage to give full legal effect in New York to a marriage that New York law prohibited the creation of, but that was validly created on the high seas. Neither the letter nor the spirit of that decision supports any part of the Board's decision.

POINT II

LOPES AND VALENTINE FUNCTIONED AS "SPOUSES," AND VALENTINE SHOULD RECEIVE THE WORKERS' COMPENSATION DEATH BENEFIT AS A SURVIVING SPOUSE

In *Braschi*, the Court of Appeals set forth guidelines, applicable in this context as well, for determining whether a same-sex couple is in a relationship that warrants legal protection. Relevant factors include "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services." 74 N.Y.2d at 212-13, 544 N.Y.S.2d at 790. "These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control." Id. at 213, 544 N.Y.S.2d at 790.

In the pending proceeding, Lopes and Valentine's relationship easily satisfies all of the relevant factors that entitle Bill, as survivor, to legal protection and benefits under a Braschi-type standard. The couple lived together in an exclusive relationship for over 21 years. R 12 (Valentine Aff. at ¶ 1). They "completely shared a committed life together." R 12, 78-79 (Valentine Aff. at ¶ 1, Exhibit W (letter of Eugene and Anne D'Angelo)); *see also* R 22-23, 71-84 (Exhibits B, T through Y). The couple held a variety of joint accounts that demonstrated their financial interdependence. R 14, 24-30 (Valentine Aff. at ¶¶ 7-9, Exhibits C through F). They financially relied on each other to assist with day-to-day household expenses. R 18 (Valentine Aff. at ¶ 31). They held themselves out to society, including employers, family and friends, as a couple in a life partnership. R 13, 15, 22-23, 71-84 (Valentine Aff. at ¶¶ 4-6, 13-14, Exhibits B,

T through Y). They assisted one another when they were ill or needed emotional support. R 14-15, 18, 31 (Valentine Aff. at ¶¶ 10-11, 31, Exhibit G). They relied on each other for daily family services, large and small. *See, e.g.*, R 18-19 (Valentine Aff. at ¶¶ 31-32).

Lopes and Valentine legally formalized their relationship in every way available to them in New York, with domestic partnership registration, health care proxies, life insurance policy and pension plan designations, joint listings as equal partners on their co-op deed and mortgage, and wills naming each other Executor and sole beneficiary of the respective other's Estate. R 14-17, 24-30, 35-70 (Valentine Aff. at ¶¶ 7-9, 15-17, 20-21, Exhibits C through F, I through S). The couple's "dedication, caring and self-sacrifice" was evident to the day of Joe's death and beyond. *See Braschi*, 74 N.Y.2d at 213, 544 N.Y.S.2d at 790.

Lopes and Valentine were as much a couple in a committed life relationship, and were as much "spouses" to one another, as the healthiest and most stable of married couples. Joe's sister, Lorraine Carpou, who considers herself Bill's "sister-in-law," said that the "heart of the matter" is this: "My brother, Joe, worked hard to incur the benefits of his job. No one should have to die the way he did. His joy in life, his dedicated partner of 20 years, Bill Valentine, should be awarded the benefits due the both of them. It's what Joe would have wanted." R 80-81 (Valentine Aff., Exhibit X (letter of Lorraine Carpou)).

Even without reaching the legal grounds set forth in this Point or in Point I above for recognizing Valentine as Lopes' surviving spouse, this Court could and should exercise its legal authority to take any other action as may be "in the interest of justice" to award Valentine spousal death benefits. *See, e.g., Anderson v. Cent. N.Y. Developmental Disabilities Serv. Ctr.*, 2 A.D.3d 1011, 769 N.Y.S.2d 623, 625 (3d Dep't 2003) (reversing due to Board's failure to

exercise its discretionary power "in the interest of justice"); *McLaughlin v. Ludlow Valve Co.*, 64 A.D.2d 305, 307, 410 N.Y.S.2d 148, 150 (3d Dep't 1978) (reversing Board's denial of injured worker's claim "in the interests of justice"); *Kenney v. Walsh Constr. Co.*, 38 A.D.2d 31, 327 N.Y.S.2d 226 (3d Dep't 1971) ("in the interest of justice," Court may permit payments not otherwise specifically authorized by Workers' Compensation Law). The foregoing analysis demonstrates that such an award is plainly "in the interest of justice." For this additional reason, Valentine should be afforded spousal death benefits under the Workers' Compensation Law.[14]

POINT III

VALENTINE SHOULD BE TREATED AS A SURVIVING SPOUSE TO AVOID VIOLATION OF CONSTITUTIONAL EQUAL PROTECTION PRINCIPLES

Interpreting Workers' Compensation Law section 16 to recognize Valentine and Lopes' spousal relationship is not only consistent with the canons of interpretation and remedial scheme of this statute, but also with the mandates of federal and state equal protection guarantees. N.Y. Const. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof."); *see also Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996) (gay men and lesbians entitled to equal protection of the laws); *Burns*, 55 N.Y.2d at 510, 450 N.Y.S.2d at 177 (striking down provision of Workers' Compensation Law as violation of equal protection rights of children born out of wedlock); *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980) (constitutional right to privacy and equal protection extends to unmarried couples), *cert.*

14 Barring that result, at a bare minimum, this Court's "interest of justice" powers vest it with the authority to accept Lopes' father's surrender of any right to the Workers' Compensation death benefit, *see* R 22-23 (Valentine Aff., Exhibit B (sworn notarized statement of John Michael Lopes, surrendering right to Workers' Compensation claim arising out of death of his son)), with the result that the remaining $50,000 death benefit would revert to Lopes' Estate, in accordance with Workers' Compensation Law § 16(4-b). *See also DeLuca v. Gallo*, 287 A.D.2d 222, 226, 735 N.Y.S.2d 596, 599 (2d Dep't 2001) (decedent's mother, his sole distributee under the wrongful death law, could legally surrender her right to wrongful death recovery, with result that decedent's sister, next-in-line by statute, became sole distributee).

denied, 451 U.S. 987, 101 S. Ct. 2323 (1981).

It is a well-settled New York doctrine that "a statute ought normally to be saved by construing it in accord with constitutional requirements." *People v. Dietze*, 75 N.Y.2d 47, 52, 550 N.Y.S.2d 595, 598 (1989); *see also In re Jacob*, 86 N.Y.2d at 667-68, 636 N.Y.S.2d at 723-24 (doctrine applies even if construction does not promote "consistency in the law"); *Langan v. St. Vincent's Hosp. of N.Y.*, 196 Misc. 2d 440, 451-452, 765 N.Y.S.2d 411, 419-420 (Sup. Ct. Nassau County 2003) (construing New York's wrongful death law to confer standing as "surviving spouse" on unmarried same-sex survivor who had entered Vermont civil union with decedent). As discussed above, existing New York law, contemporary usage of the word "spouse," and the settled principle that the Workers' Compensation Law be liberally construed in claimants' favor and "in light of its beneficial and remedial character," *Wolfe*, 36 N.Y.2d at 508, 369 N.Y.S.2d at 640, all mandate reading section 16 to include legally registered domestic partners as "surviving spouses," including Valentine. If those factors were not enough to resolve this claim in Valentine's favor, application of the fundamental New York tenet to give statutes every reasonable construction that avoids constitutional concerns provides further support still for his claim to spousal death benefits.

Assuming that this Court finds that section 16 of the Workers' Compensation Law could not be construed to include Valentine, the law should be declared unconstitutional insofar as it violates Valentine's right to equal protection of the laws. Where state law infringes Equal Protection, New York's courts have not hesitated to enforce the rights guaranteed to every person by the State Constitution, even if that requires a declaration that a legislative act is unconstitutional.

In an Equal Protection challenge to a provision of the Workers' Compensation Law that had excluded children born out of wedlock from receiving Workers' Compensation death benefits if the decedent had not "acknowledged" the child, the Court of Appeals first examined "whether the statute may be construed in such a way that the constitutional issue need not be confronted." *Burns*, 55 N.Y.2d at 505, 450 N.Y.S.2d at 175. Concluding that it could not be, the Court confronted the constitutional Equal Protection issue, and struck down the challenged section of the Workers' Compensation Law because the acknowledgement requirement did not "substantially further any State interest." *Id.* at 507-508, 450 N.Y.S.2d at 176; *see also People v. LaValle*, 2004 WL 1402516, *16 (June 24, 2004), 2004 N.Y. Slip Op. 05484 (striking down provision of Criminal Procedure Law that violates State Constitution's due process guarantee). The exclusion of survivors of legally registered same-sex partnerships, like Valentine, from the death benefits accorded surviving spouses under the Workers' Compensation Law likewise cannot withstand constitutional Equal Protection scrutiny.

A. New York's Equal Protection Clause Zealously And Independently Safeguards The Civil Rights of All New Yorkers

New York courts have a "long tradition of reading the [federal and State constitutions'] parallel clauses independently and affording broader protection, where appropriate, under the State Constitution." Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399, 412 (1987). The recognition that the State Constitution may provide greater rights and protections than the federal floor "is not new; nor is it an illegitimate assumption of authority by state courts." *Id.* at 400. Since the earliest decisions interpreting New York's 1777 Constitution in ways more protective than its federal counterpart, state and federal courts have recognized "that the states…are the primary guardian" of the people. *Id.* at 408, 413. "This is a

premise of our federalist system." *Id.* at 408; *see also People v. Adams*, 53 N.Y.2d 241, 250, 440 N.Y.S.2d 902, 906 (1981) (discussing U.S. Supreme Court cases encouraging development of independent State constitutional doctrine "tailored to local problems and experiences").

The relatively brief history of New York's Equal Protection Clause shows a heightened concern for protecting the rights of New York citizens through independent constitutional analysis.[15] While the New York and federal equal protection guarantees have been read to provide "equally broad coverage," *Brown v. State*, ___ A.D.2d ___, ___, 776 N.Y.S.2d 643, 646 (3d Dep't 2004), *see also Matter of Esler v. Walters*, 56 N.Y.2d 306, 312-14, 452 N.Y.S.2d 333, 337 (1982), in context those statements define the scope of analysis only under the circumstances in those decisions. Indeed, the Court of Appeals has held that New York's Equal Protection Clause can provide broader protection than its federal counterpart. *See, e.g., People v. Kern*, 75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990) (rejecting federal standard and announcing more protective state constitutional standard to find that peremptory challenges to exclude jurors of

15 The legislative history of the clause's adoption suggests a distinctively New York concern with protecting individual rights. The State Equal Protection Clause, contained in Article I, § 11, was adopted at the 1938 State Constitutional Convention, the most recent convention to propose changes ratified by the voters. The State Constitutional Convention Committee clearly intended to provide a strong New York antidote to narrow judicial construction of the federal Equal Protection Clause, which had failed to adequately protect the rights of minorities. The Committee observed: "The Fourteenth and Fifteenth Amendments to the Federal Constitution . . . have . . . been narrowly construed and limited to a restricted field." Sub-Committee on Bill of Rights and General Welfare of the New York Constitutional Convention Committee, *Problems Relating to Bill of Rights and General Welfare* 222 (1938). The prevailing construction of the Civil War Amendments would "permit statutes compelling separate accommodations in public conveyances, segregation in public schools . . . or forbidding marriage between Negroes and whites." *Id.* Thus, New York needed its own provision to prohibit "practices by the State itself or any subdivision thereof which have been held not to be violative of the Federal provision." *Id.* Challenges such as the disproportionate economic impact of the Great Depression on African-Americans and the onset of Nazi persecution of Jews in Europe made the Convention acutely aware of the need to protect diverse groups in a world of rapid and unsettling change: "In the 18th and 19th centuries, . . . [the essential problem of government] was how to establish the will of the majority in representative government. In the world of today, the problem is how to protect the integrity and civil liberties of minority races and groups. The humane solution of that problem is now the supreme test of democratic principles, the test indeed, of civilized government." II Revised Record of the [1938] Constitutional Convention of New York, at 1066 (remarks of Robert F. Wagner). The U.S. Supreme Court's own Fourteenth Amendment jurisprudence has since evolved to embody many of these values as well.

particular race violate Equal Protection Clause of State Constitution); *Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 334, 384 N.Y.S.2d 82, 89 (1976) (in analyzing Equal Protection claim, New York courts should "not feel constrained to apply" U.S. Supreme Court's "traditional standards"); Prof. Pamela S. Katz, *The Case for Legal Recognition of Same-sex Marriage*, 8 J.L. & Pol'y 61, 86 (1999) ("Over time, the New York State Constitution's Equal Protection Clause has been interpreted as more progressive and as providing more protection from invidious classifications and discrimination than its federal counterpart."); Judge Stewart F. Hancock, Jr. et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute*, 59 Alb. L. Rev. 1545, 1574 (1996) ("New York has not hesitated in appropriate circumstances to provide greater protection for individual rights under the New York State Constitution than the Supreme Court affords under the federal constitution," and arguing such greater protection with respect to equal protection is consistent with "existing state constitutional law doctrine"); *cf. Cooper v. Morin*, 49 N.Y.2d 69, 79-82, 424 N.Y.S.2d 168, 174-77 (1979) (though federal Constitution does not require that female pretrial detainees receive visitation privileges, State Constitution's due process clause does); *People v. Scott*, 79 N.Y.2d 474, 489, 583 N.Y.S.2d 920, 929 (1992) (State Constitution provides stronger privacy protections than federal Fourth Amendment).

At a bare minimum, New York requires an independent State constitutional analysis of equal protection claims. *See, e.g., Kern*, 75 N.Y.2d at 653-57, 555 N.Y.S.2d at 655-58 (finding racially discriminatory peremptory challenges by the defense to violate the State and federal equal protection guarantees even though *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), expressly declined to reach the issue); *Brown*, ____ A.D. 2d at ___, 776 N.Y.S.2d at 646-

47 (despite common breadth of coverage, adverse decision on federal equal protection claim does not preclude subsequent adjudication and independent analysis of state claim).

B. Denying Valentine The Workers' Compensation Spousal Death Benefit Violates The State And Federal Constitution's Guarantee of Equal Protection Under The Heightened Scrutiny Applied to Sexual Orientation and Sex Discrimination

The exclusion of Valentine from spousal death benefits provided under New York's Workers' Compensation Law violates the Equal Protection clauses of the state and federal constitutions. Heightened scrutiny is appropriate for discrimination on the suspect basis of sexual orientation. In addition, sex discrimination cannot stand unless it is substantially related to an important government interest. The State cannot possibly justify denying Bill the Workers' Compensation spousal death benefits under these heightened standards of review.

1. Denying Valentine Spousal Death Benefits Violates Equal Protection Because It Discriminates on the Basis of Sexual Orientation

If this Court accepts respondents' understanding of the term "surviving spouse" to include only those who have been legally married, the law would unconstitutionally discriminate on the basis of sexual orientation. Under that construction of Workers' Compensation Law § 16, whether individuals could access spousal death benefits would depend entirely on whether they were in a same-sex or different-sex relationship. *All* unmarried individuals in same-sex relationships (who, by definition, are not heterosexual) necessarily would be precluded from *ever obtaining these benefits, while all unmarried individuals in different-sex relationships (who are heterosexual) may obtain the benefits by marrying.*

Throughout Valentine and Lopes' life partnership, until death did them part, New York did not (and still does not) allow same-sex couples to marry.[16] Nonetheless, like different-sex couples who secure their legal protections through marriage, Valentine and Lopes took every step New York made available to them to legally formalize and protect their relationship and each other. *See* R 16-17 (Valentine Aff. at ¶¶ 7-21 and Exhibits C-S). Under these circumstances, denying Valentine spousal death benefits discriminates against him based on his sexual orientation without any sufficient and legitimate justification.

As long as same-sex couples cannot marry in New York, any argument that a marriage-based definition of "surviving spouse" treats "all unmarried individuals, regardless of sexual orientation, the same" is circular, irrational, and precluded by both New York Court of Appeals and U.S. Supreme Court precedent. In *Levin v. Yeshiva*, 96 N.Y.2d 484, 730 N.Y.S.2d 15 (2001), the plaintiffs challenged a marriage-based university housing policy as discriminating based on sexual orientation in violation of New York City's Human Rights Law. Proceeding from the premise that the relevant comparison groups were unmarried different-sex couples and unmarried same-sex couples, the Appellate Division had concluded that the policy treated both groups the same, and affirmed dismissal of the complaint. Reversing, the Court of Appeals rejected that analysis as inherently "flaw[ed]" because "extract[ing] married medical students . . . from consideration . . . obscur[es] any realistic examination of the discriminatory effects of [the challenged] policy." *Id.* at 496. The Court held that because the defendant had conceded

16 Whether the restriction on same-sex couples legally marrying is constitutional currently is being litigated in several separate pending suits. *See, e.g., Hernandez v. Robles*, Index No. 103434/2004 (Sup. Ct. N.Y. County filed March 5, 2004). Appellant's Workers' Compensation claim does not implicate this question. Valentine and Lopes could not marry during Lopes' lifetime, and the issue is irrelevant now that Lopes is deceased. The question raised in this case – whether Valentine is entitled to spousal death benefits as an unmarried surviving spouse – is entirely independent from questions relating to marriage.

(indeed, had argued) that marriage was not available to same-sex couples, some *unmarried* same-sex couples could be "similarly situated" to different-sex *married* couples such that extending family housing benefits only to married couples could constitute legally prohibited sexual orientation discrimination. *Id.* at 495-496.[17]

As the Oregon Court of Appeals explained, the argument that policies providing different benefits to people based on whether they are married or not treats unmarried heterosexuals the same way as unmarried lesbians and gay men "misses the point." *Tanner v. Oregon Health Sciences Univ.*, 157 Or. App. 502, 525, 971 P.2d 435 (Or. 1998). As long as "[h]omosexual couples may not marry," such policies mean that "the benefits are not made available" to lesbians and gay men on an absolute basis. Thus, "for gay and lesbian couples," obtaining benefits under such policies is "a legal impossibility." *Id.* By contrast, heterosexual couples may marry and obtain the benefits. Both *Tanner* and *Levin* are consistent with the U.S. Supreme Court's observation in *Jeness v. Fortson*, 403 U.S. 431, 442, 91 S. Ct. 1970 (1971), that "sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike."

Though under any level of review, this sexual orientation-based discrimination in the allocation of spousal death benefits cannot stand, *see infra* Point III.C, heightened scrutiny is warranted because the exclusion classifies people based on sexual orientation. Classifications on certain bases have been deemed "suspect" by New York and federal courts, thus warranting heightened protection under generally applicable principles of equal protection. "Suspect classes

17 Although the discrimination claim in *Levin* was based on the New York City Human Rights Law and not the State Constitution, there is no reason that a different analysis would apply to identifying similarly situated groups for purposes of constitutional analysis.

include, *inter alia*, classifications based upon race, alienage and ancestry." *Poggi v. City of New York*, 109 A.D.2d 265, 273 n.8, 491 N.Y.S.2d 331, 337 n.8 (1st Dep't 1985). When the government draws exclusionary lines to discriminate based on a suspect classification, heightened judicial scrutiny is required under equal protection analysis. *See, e.g., Alevy*, 39 N.Y.2d at 332, 384 N.Y.S.2d at 87.

The New York Court of Appeals and the Supreme Court have looked to several factors to determine whether classifications of a particular group should be deemed suspect and therefore subjected to heightened judicial scrutiny. These include: 1) whether the group historically has been subjected to purposeful discrimination; 2) whether the trait used to define the class (e.g., sexual orientation) is unrelated to the ability to perform and participate in society; and 3) whether the group cannot sufficiently protect itself through the political process. *See Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 429-31, 730 N.Y.S.2d 1, 10-12 (2001) (classifications aimed at "discrete and insular minorities [who] can be shut out of the political process" must be the subject of "a more searching inquiry.") (internal marks deleted); *see also Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41, 105 S. Ct. 3249, 3254-55 (1985).

The Court of Appeals has expressly reserved the question whether to accord heightened state constitutional scrutiny to classifications based on sexual orientation. *See Under 21 v. City of New York*, 65 N.Y.2d 344, 364, 492 N.Y.S.2d 522, 531 (1985). Nevertheless, consistent with New York's broader respect for individual rights and liberties under its independent constitutional tradition, the First Department has suggested that heightened scrutiny is warranted where discrimination is based on sexual orientation. In *Under 21 v. City of New York*, 108 A.D.2d 250, 257, 488 N.Y.S.2d 669, 675 (1st Dep't 1985), *modified on other grounds*, 65

N.Y.2d 344, 492 N.Y.S.2d 522 (1985), the court upheld New York City Mayor's authority to mandate that city contractors not discriminate on the basis of sexual orientation. The First Department applied the factors outlined above to discrimination based on sexual orientation: gay people "constitute a significant and insular minority of this country's population" that has been the object of considerable "opprobrium" and rendered them "particularly powerless to pursue their rights in the political arena." They have been the target of "historic[] . . . hostility" based on "deep-seated prejudice rather than rationality." And the discrimination against them has often "infringe[d] various fundamental constitutional rights, such as the right[] to privacy. . . ." *Under 21*, 108 A.D.2d at 257, 488 N.Y.S.2d at 675 (internal marks deleted). The Court of Appeals reversed the Appellate Division on the limited ground that the Mayor had exceeded his political authority. *Under 21*, 65 N.Y.2d at 360-361, 492 N.Y.S.2d at 529. No longer required to reach the question, the court reserved judgment on whether "some level of 'heightened scrutiny' would be applied to governmental discrimination based on sexual orientation." *Id*. at 364, 492 N.Y.S.2d at 531.[18]

Discrimination based on sexual orientation meets the indicia of suspect classification, and legislated discrimination against gay people therefore should be subjected to heightened

18 The United States Supreme Court has not considered whether sexual orientation constitutes a suspect classification under the federal constitution. When some federal appellate courts denied heightened scrutiny to statutory classifications based on sexual orientation, they relied on *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), and reasoned that homosexuality could not give rise to suspect classification if gay people could be criminally prosecuted for their sexual conduct. *See, e.g., Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989). With *Bowers* now overruled and declared "not correct when it was decided," *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2480 (2003), the rationale for denying heightened scrutiny is gone.

scrutiny.[19] First, there can be no dispute that gay people historically and today have been the target of broad-based discrimination. This was explicitly recognized by the New York Legislature in its recent passage of the Sexual Orientation Nondiscrimination Act ("SONDA"):

> The legislature . . . finds 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. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.

SONDA, 2002 N.Y. Laws, ch. 2, § 1, 2002 N.Y. Sess. Law News, Ch. 2 (A. 1971); s*ee also Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2480 (2003) ("for centuries there have been powerful voices to condemn homosexual conduct as immoral."); *Application of Thom*, 33 N.Y.2d 609, 615-16, 347 N.Y.S.2d 571, 576 (1973) (reversing denial of corporate legal status to Lambda Legal on equal protection grounds and noting that gays and lesbians "are minorities subject to varied discriminations and in need of legal services"). "By 1961 the laws in America were harsher on homosexuals than those in Cuba, Russia, or East Germany, countries that the United States criticized for their despotic ways." David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* 15 (St. Martin's Press 2004)**.**

Second, through SONDA, numerous municipal ordinances that preceded SONDA, and well settled case law, New York has established policies prohibiting discrimination against gay people in employment, parenting, public accommodations, and other contexts, thereby

19 For a more detailed analysis of the factors that warrant heightened judicial scrutiny for sexual orientation classifications, see Brief of the National Lesbian and Gay Law Association et al., as Amici Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), *available at* 2003 WL 152348.

resoundingly rejecting the view that sexual orientation has any correlation with the ability to perform in society or is in itself a basis for differential treatment. *See Lawrence*, 123 S. Ct. at 2482 (criminalizing sexual conduct of gay people is an unconstitutional "invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

Finally, gay men and lesbians are a minority group facing significant obstacles in achieving protection from discrimination through the political process. "Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014, 105 S. Ct. 1373, 1377 (1985) (Brennan, J., dissenting from denial of *certiorari*); *Watkins v. United States Army*, 875 F.2d 699, 726-727 (9th Cir. 1989) (*en banc*) (Norris, J., concurring in the judgment, joined by Canby, J.).

After three long decades of hard work in the Legislature yielded little but disappointment, gay people only recently have secured legislative protections against discrimination in New York.[20] The gay community is not alone in being vastly outnumbered and outspent. But the inherent invisibility of this community; the isolation and alienation that most experience growing up in families that usually remain unaware of a gay relative's identity at least until their adulthood (and sometimes forever); the ignorance, indifference or even hostility that families sometimes express toward a gay relative or their concerns; the resulting reluctance of many gay people to self identify, and the associated anxiety about being discovered; and the reality that gay

20 The Sexual Orientation Nondiscrimination Act did not pass until 2002, taking 31 years to gather sufficient votes for enactment after its initial introduction in 1971. *See* Philip M. Berkowitz and Devjani Mishra, *Sexual Orientation Non-Discrimination Act*, N.Y.L.J., Jan. 9, 2003, at 5.

people will always be diffusely scattered across the widest range of backgrounds, religions, races, regions, socio-economic groups, and political persuasions – all of these factors set up tall hurdles for this community, and diminish its strength as compared to most similar-sized populations. *See Watkins*, 875 F.2d at 725-727 (Norris, J., concurring in judgment).

These are among the reasons that gay people remain significantly disadvantaged in the political process, and widely misunderstood. It is precisely in circumstances like these that heightened equal protection scrutiny by the courts is most appropriate. *See, e.g., Cleburne*, 473 U.S. at 440-41; *Under 21*, 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); *Watkins*, 875 F.2d at 724-727 (Norris, J., concurring in judgment). Indeed, classifications based on race and sex have been held to require heightened scrutiny, notwithstanding far more comprehensive enactments of federal and state protections against race and sex discrimination than have been adopted to protect gay people. *See Frontiero v. Richardson*, 411 U.S. 677, 685-88, 93 S. Ct. 1764, 1769-71 (1973). Thus, classifications like exclusion from Workers' Compensation spousal death benefits based on sexual orientation should be subject to heightened scrutiny. The State cannot meet the burden of such heightened review and, indeed, cannot satisfy even rational basis review. *See infra*, Point III.C.

2. Denying Valentine Spousal Death Benefits Violates Equal Protection Because It Discriminates on the Basis of Sex

In addition to impermissibly discriminating on the basis of sexual orientation, a construction of "surviving spouse" in the Workers' Compensation Law's death benefits section to include only people who have been in different-sex formal marriages or CLM's would

discriminate against survivors based on their sex, in violation of state and federal Equal Protection. In that situation, each individual in a same-sex unmarried relationship would be prohibited from ever obtaining death benefits due to his or her sex, while each individual in a different-sex unmarried relationship may obtain the benefits by marrying. To illustrate, if Joe had been Jo, Bill and Jo would have entered into a formal legal marriage, and Bill's legal entitlement to Workers' Compensation spousal death benefits never would have been questioned. See R 18-19 (Valentine Aff. ¶¶ 31, 33).

Respondents' insistence that Valentine cannot be a legal surviving spouse therefore creates a classification based on sex, which "violates equal protection unless the classification is substantially related to the achievement of an important governmental objective." *People v. Liberta*, 64 N.Y.2d 152, 168, 485 N.Y.S.2d 207, 216 (1984) (citations omitted); *In re Jessie C.*, 164 A.D.2d 731, 733, 565 N.Y.S.2d 941, 942 (4th Dep't 1991); *see also People v. Santorelli*, 80 N.Y.2d 875**,** 876, 587 N.Y.S.2d 601**,** 602 (1992); *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) (barring same-sex couples from marriage is sex discrimination subject to strict scrutiny under Hawaii Constitution); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (May 1994)

For purposes of equal protection analysis, it is irrelevant that both (lesbian) women and (gay) men may be denied the Workers' Compensation spousal death benefits. Equal protection applies "whether the statute discriminates against males or against females." *Liberta*, 64 N.Y.2d at 168, 485 N.Y.S.2d at 216 (citations omitted). Here, the State and federal Constitutions' guarantees of Equal Protection are violated by the denial of spousal death benefits based on sex, regardless whether those denials preclude men or women from receiving the benefits. *See Bob*

Jones Univ. v. United States, 461 U.S. 574, 605, 103 S. Ct. 2017, 2036 (1983) (rejecting contention that because ban on interracial dating applies to all races it is not a form of discrimination); *McLaughlin v. Florida*, 379 U.S. 184, 188, 85 S. Ct. 283, 286 (1964) (striking down criminal statute prohibiting unmarried interracial couples from occupying same room at night, and explaining that statute "treats the interracial couple made up of a white person and a Negro differently than it does any other couple").

An understanding of the term "legal spouse" that accords benefits and protections based on one's sex or the sex of one's spouse should be subject to the stricter standard of review applicable to sex-based classifications. Because such a classification that restricts entitlement to Workers' Compensation spousal death benefits cannot satisfy even rational review (*see infra* Point III.C), the State certainly cannot "bear the burden of showing both the existence of an important objective and the substantial relationship between the discrimination in the statute and that objective" under heightened scrutiny. *Liberta*, 64 N.Y.2d at 168, 485 N.Y.S.2d at 216 (considering limitation of forcible rape prohibition only to males); *In re Jessie C.*, 164 A.D.2d at 733, 565 N.Y.S.2d at 942 (government must demonstrate "an exceedingly persuasive justification for the classification"); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25, 102 S. Ct. 3331, 3336 (1982) (striking down policy of admitting only females to state nursing school, where discrimination was premised on "archaic and stereotypic notions" about the "roles and abilities of males and females.").

C. Denying Valentine Workers' Compensation Spousal Death Benefits Lacks Even A Legitimate And Rational Basis That Can Sustain It Against Constitutional Challenge

In sum, assuming this Court adopts a reading of the term "legal spouse" to exclude same-sex spouses, the law would deny Valentine a critical, life-altering protection solely because he is of the same sex as his loved one. The State would thus impermissibly discriminate based on sexual orientation and sex. New York's equal protection guarantee prohibits this unequal treatment under the law.

Regardless of the level of constitutional scrutiny applied, if section 16 of the Workers' Compensation Law creates an insurmountable barrier to lesbian and gay persons obtaining spousal death benefits, it certainly fails if it does not "rationally further some legitimate articulated state purpose." *Doe v. Coughlin*, 71 N.Y.2d 48, 56, 523 N.Y.S.2d 782, 788 (1987) (quotations omitted). "[C]onventional and venerable" principles require that legislative discrimination must, at a minimum, "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633, 116 S. Ct. at 1627. The classification must be both "reasonable" and "based upon some ground of difference that rationally explains the different treatment." *Liberta*, 64 N.Y.2d at 163, 485 N.Y.S.2d at 213; *see also Onofre*, 51 N.Y.2d at 491-92, 434 N.Y.S.2d at 952-53. Thus, unless the challenged difference in treatment at minimum both (1) has a legitimate purpose, and (2) rationally furthers that purpose, it cannot survive an equal protection challenge. *See id.*, 51 N.Y.2d at 492 n.6, 434 N.Y.S.2d at 953 n.6 (though sodomy statute infringed on fundamental right to privacy, rather than apply strict scrutiny, court reasoned that "we do not need to measure the statute by that test inasmuch as it fails to satisfy even the more lenient rational basis standard.").

Rational review, though deferential, is not a mere rubber-stamp of legislative action. Both the New York Court of Appeals and the U.S. Supreme Court have expressed a more searching skepticism of government justifications that operate to deny rights to a group of people, particularly where those justifications reflect traditional attitudes disadvantaging or disapproving of that group. The courts have then not hesitated to reject such justifications as illegitimate.

Thus, in striking down New York's sodomy law under rational basis review in *Onofre*, the Court of Appeals stressed that "disapproval by a majority of the populace . . . may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy." 51 N.Y.2d at 490, 434 N.Y.S.2d at 952.

Both in the Workers' Compensation Law Judge's decision, and in the Board's Office of Appeals panel decision, the Board below declined to acknowledge appellant's constitutional argument. Moreover, in its briefs to the Board, the respondent carrier failed to articulate any legitimate justification, or even an illegitimate one. Respondents' difficulty in articulating a justification that would survive rational basis scrutiny is understandable. There is none. Because appellant is not seeking any change in New York's marriage laws, no articulated state interest relating to marriage could possibly be promoted by denying appellant the Workers' Compensation relief that he seeks here. Indeed, if the state's asserted interest in encouraging marriage must give way to equal protection considerations in the adoption context, then the far more attenuated relationship between marriage and the monetary recovery sought in this case could not possibly suffice to show that the state has some legitimate marriage-related interest that

is rationally related to denying Valentine Workers' Compensation spousal death benefits. *Cf. Levy v. Louisiana*, 391 U.S. 68, 72, 88 S. Ct. 1509, 1511 (1968) (under rational basis standard, "it is invidious to discriminate against [out-of-wedlock] children [in excluding them from wrongful death recovery] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.")

Exclusion of a surviving same-sex life partner from the class of persons who could be a "surviving spouse" entitled to Workers' Compensation spousal death benefits is neither rationally related to the interests served by the Workers' Compensation Law, nor to any legitimate state public policy. In contrast, recognizing Valentine as Lopes's surviving spouse is entirely consistent with underlying purposes of the Workers' Compensation Law: "to provide economic support efficiently to the employee['s] . . . dependents when the employee has died, and to place the cost of such support on the employer . . . . As a remedial statute serving humanitarian purposes, the Workers' Compensation Law should be liberally construed." *Burns*, 55 N.Y.2d at 508, 450 N.Y.S.2d at 176.

Workers' compensation "was designed to provide economic support efficiently to the employee['s] . . . dependents when the employee has died, and to place the cost of such support upon the employer . . . . rather than upon the general public." *Burns*, 55 N.Y.2d at 508, 450 N.Y.S.2d at 176. Denying Valentine Workers' Compensation benefits turn these purposes on their head. Just as much as any other surviving spouse going through the same kind of suffering, Valentine would benefit immensely from the support of the Workers' Compensation safety net. Both Bill and Joe were law-abiding, tax-paying citizens throughout their 21 years together until Joe's death, and Bill's need to take leave from his own employment since Joe's death illustrates

the kinds of situations in which Workers' Compensation was designed to assist. Denying Valentine legal spousal status would penalize him for his sexual orientation, without remotely advancing a single purpose of the Workers' Compensation system. Indeed, denying Valentine these protections undermines the purposes of Workers' Compensation.

Neither Valentine's sexual orientation nor his sex diminishes his need for compensation and support as a result of Lopes' death, nor do any of these factors diminish society's interest in promoting the goals of Workers' Compensation, as quoted above. Thus, there is absolutely no rational basis connected to the purposes of the Workers' Compensation Law for excluding same-sex survivors from recovery. Even less is there any rational basis for granting the carrier and respondent employer a windfall at the expense of a currently unemployed and grieving widower, simply because he is gay, nor because he was in a life-long committed spousal relationship with a gay man. Denying Valentine recognition as a surviving spouse has only the perverse effect of undermining the goals that the state seeks to further through the Workers' Compensation Law.