To Be Submitted

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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JOHN LANGAN, as Executor of the Estate of
NEIL CONRAD SPICEHANDLER a/k/a NEAL
SPICEHANDLER, Deceased, and
JOHN LANGAN, Individually,

Case No. 2003-04702

Plaintiff-Respondent,

-against-

ST. VINCENT'S HOSPITAL OF NEW YORK,

Defendant-Petitioner.

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BRIEF OF

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
NEW YORK COUNTY LAWYERS' ASSOCIATION,
WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK
AND
AMERICAN ACADEMY OF MATRIMONIAL
LAWYERS -- NEW YORK CHAPTER**

AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-RESPONDENT

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A. Question Presented

Would recognition of a same-sex spouse in a Vermont civil union as a spouse under New York's wrongful death statute be abhorrent to New York public policy? The Supreme Court, Nassau County, granted recognition.

B. Interest of Amici

The Association of the Bar of the City of New York ("ABCNY") is one of the oldest and largest professional associations in the United States. It was founded in 1870 to improve the administration of justice, promote rule of law, and elevate the legal profession's standards of integrity, honor and courtesy. ABCNY has 23,000 voluntary members serving hundreds of thousands of clients, who have a vital interest in ensuring that New York courts consistently respect legal status created in other jurisdictions for individuals and couples. The comity issues in this case have profound implications for those clients and many others.

The New York County Lawyers' Association ("NYCLA"), established in 1908, has 9,000 attorneys and judges as members. NYCLA was founded to promote the public interest by advocating for reforms in the administration of justice and in the law, providing access to legal services for people in need and engaging in other activities that promote the public good. In serving the public,

NYCLA has a vital interest in ensuring that New York State courts respect the rights of New York citizens, including recognition of the legal status granted to those citizens by New York's sister states and other countries.

The Women's Bar Association of the State of New York ("WBASNY") is a statewide organization of attorneys comprised of 16 chapters with more than 3,000 members throughout the State of New York. Members include jurists, academics and practicing attorneys who work in every area of the law. Since its formation in 1980, WBASNY has been dedicated to the advancement of equal rights and equal access to the courts. As part of that mission, WBASNY advocates that New York courts acknowledge legal status that sister states and other countries create for individuals and couples.

The American Academy of Matrimonial Lawyers was founded in 1962 to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, with the goal of protecting the welfare of the family and society. Its members are recognized as expert practitioners in the field. The American Academy's New York Chapter ("AAML-NY") has been in existence more than 30 years and has approximately 177 members. As a leading organization in matrimonial law in New York, AAML-NY is deeply concerned

that New York law should recognize that American families have undergone major changes in structure and type, and that New York law should conform to this evolving reality.

C. Summary of Argument

When John Langan and Neal Spicehandler solemnized a civil union in the State of Vermont, Langan became a spouse under Vermont law, which grants "[p]arties to a civil union . . . all the same benefits, protections and responsibilities . . . as are granted to spouses in a marriage," Vt. St. Ann. tit. 15 § 1204(a) (2004). ABCNY, NYCLA and AAML-NY submit this brief *amicus curiae* to support the proposition that Langan is entitled to recognition as Spicehandler's spouse under New York's wrongful death statute, N.Y. Estates, Powers & Trusts L. (E.P.T.L.) § 5-4.4 (2004), which gives rights to a spouse as a distributee of the decedent within the meaning of N.Y. E.P.T.L. § 4-1.1 (2004).

The amici urge this Court to affirm the decision of the Supreme Court, Nassau County, which applied firmly-established New York comity rules to recognize Langan and Spicehandler as spouses under New York's wrongful death statute. Comity applies even if civil unions or same-sex marriages are unavailable under domestic New York law. The civil union, like all legal contracts entered

into outside New York that concern spousal status, must be enforced in this state except in one narrow circumstance: where the contract is "offensive to the public sense of morality to a degree regarded generally with abhorrence," In re May's Estate 305 N.Y. 486, 493, 114 N.E.2d 4, 7 (1953), so that it would be grossly contrary to New York's public policy. That rare exception does not apply here. Far from preventing recognition of Vermont civil unions, New York's public policy supports the recognition of out-of-state spousal relationships, and supports an interpretation of the New York wrongful death statute that deters tortfeasors and provides full and fair recovery to surviving spouses.

D. New York Routinely Grants Comity to Out-Of-State Spousal Relationships That Are Not Recognized under New York's Domestic Relations Law

For over one hundred years, New York courts have honored the creation and dissolution of spousal relationships in sister states, even where they would not be valid under New York's own laws. Most New York courts addressing the legality of a spousal union simply cite the long-standing rule that a union valid where celebrated is valid in New York. Underlying the "valid where celebrated" rule are principles of comity that have governed relations between sister states since our nation's founding. Modern changes in choice-of-law have left inviolate the principle that comity must be granted to a spousal relationship established in a

foreign state, even if contrary to the domestic laws of New York. The trial court's holding, recognizing Langan's status as a spouse, followed this long-standing practice.

1. History of Comity

Underlying New York's long history of recognizing foreign marriages is the even longer history of comity between sovereigns, dating to the 16th and 17th centuries. See Gary B. Born, *International Civil Litigation in United States Courts* (3d ed. 1996); Joel R. Paul, *Comity in International Law,* 32 HARV. INT'L L. J. 1, 14-15 (1991). The seminal 17th century treatise on comity, Ulrich Huber's *De Conflictu Legum (1689),* recognized that "nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law." See Born, supra, at 548 (quoting Huber (no date), cited in E. Lorenzen, *Selected Articles on the Conflict of Laws* 164-65 (1947)). Huber specifically extended comity to spousal status, as the U.S. Supreme Court explained in quoting him in an early case: "If [a marriage] is regular and valid in the place where it was contracted and celebrated, it is binding every where, under the . . . exception of not

doing prejudice to others. . . ." Emory v. Grenough, 3 U.S. 369 n.2, 1 L.Ed. 640 n.2 (1797) (conflict between Pennsylvania and Massachusetts laws).

American judges extended Huber's conception of comity from international law to relations among the several states. See Paul, supra, at 15. During the mid-19th century, Supreme Court Justice Joseph Story incorporated comity into his influential treatise, *Commentaries on the Conflict of Laws*. See Born, supra, at 548; see also Paul, supra, at 23. Referring to Huber, Story stated: "[T]he rules . . . arise . . . from a sort of moral necessity to do justice, in order that justice may be done to us in return." See Born, supra, at 549 (citing Joseph Story, *Commentaries on the Conflict of Laws* §§ 32-35 (2d ed. 1841). Story, like Huber, applied comity in the context of spousal status, "recogniz[ing] as valid a marriage considered valid in the place where celebrated." Van Voorhis v. Brintnall, 86 N.Y. 18, 25 (1881) (citing Story, *supra,* §§ 69, 79).

New York courts generally adopted this conception of comity, see Voshefskey v. Hillside Coal & Iron Co., 21 A.D. 168, 170, 47 N.Y.S. 386, 388 (2d Dep't 1897) (citing Story, *supra,* § 29 (7th ed. 1863)), with one key change: they were even more deferential to the foreign state. In New York, as Judge Cardozo stated in his famous Loucks v. Standard Oil Co. opinion:

> [T]he courts are not free to refuse to enforce a foreign right at the pleasure of the judges . . . . They do not close their doors unless [recognition] *would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.*

224 N.Y. 99, 111, 120 N.E. 198, 202 (1918) (emphasis added). Thus, New York law applied comity in all but the narrowest circumstances -- unless "enforcement . . . would be the approval of a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense." Intercontinental Hotels Corp v. Golden, 15 N.Y.2d 9, 13, 203 N.E.2d 210, 212, 254 N.Y.S.2d 527, 529 (1964).

2. New York's Choice of Law Rules Honor Out-of-State Spousal Status

In the landmark case of Van Voorhis v. Brintnall, 86 N.Y. 18 (1881), the Court of Appeals held a Connecticut marriage valid in New York even though (a) the participants were domiciled in New York, (b) the marriage could not have been entered into under New York law, and (c) the participants went to Connecticut for the sole purpose of evading New York marriage laws. Id. at 24-25. After Van Voorhis, it became immutable New York law that "the legality of a marriage . . . is to be determined by the law of the place where it is celebrated." In re May's Estate, 305 N.Y. 486, 490, 114 N.E.2d 4, 6 (1953). The New York "valid-where-

celebrated" rule instructs a forum state to grant comity and apply a sister state's law unless this would grossly violate the forum state's strong public policy by being "offensive to the public sense of morality to a degree regarded generally with abhorrence." Id. at 493, 7.

To this day, New York courts consistently honor spousal relationships that would be illegal under New York law but are legal in foreign states, including marriages involving incest or minors, common law marriages and proxy marriages. For incestuous marriages, see, e.g., In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953) (Rhode Island uncle-niece marriage); Campione v. Campione, 201 Misc. 590, 107 N.Y.S.2d 170 (Sup. Ct. Queens Co. 1951) (Italian uncle-niece marriage). For common law marriages, see, e.g., Carpenter v. Carpenter, 208 A.D.2d 882, 617 N.Y.S.2d 903, 904 (2d Dep't 1994) (Pennsylvania common-law marriage "deserving of recognition under principles of comity in New York State"); Black v. Moody, 276 A.D.2d 303, 14 N.Y.S.2d 30, 31 (1st Dep't 2000) ("New York does accord recognition to common-law marriages validly contracted in sister States"); In re Estate of Yao You-Xin, 246 A.D.2d 721, 667 N.Y.S.2d 462 (3d Dep't 1998) (fact question on existence of Pennsylvania common-law marriage); In re Estate of Gates, 189 A.D.2d 427, 596 N.Y.S.2d 194, 198 (3d Dep't 1993) (stating that a

common-law marriage "validly contracted in a sister state will be recognized as valid in New York," but finding lack of evidence that parties entered into a Rhode Island common law marriage); Cross v. Cross, 102 A.D.2d 638, 476 N.Y.S.2d 876, 877-78 (1st Dep't 1984) (question of fact as to whether common-law marriage existed under Pennsylvania or District of Columbia law). For marriages to minors, see, e.g., Simmons v. Simmons, 208 A.D. 195, 203 N.Y.S. 215 (1st Dep't 1924) (British West Indies marriage to 14 year-old); Carr v. Carr, 104 N.Y.S.2d 269, 271 (Sup. Ct. Chautauqua Co. 1951) (Michigan marriage to minor). For proxy marriages, see, e.g., In re Valente's Will, 18 Misc.2d 701, 188 N.Y.S.2d 732, 736 (Surr. Ct. Kings Co. 1959) (Italian proxy marriage); Ferraro v. Ferraro, 192 Misc. 484, 77 N.Y.S.2d 246, 249-50 (Fam. Ct. Kings Co. 1948) (District of Columbia proxy marriage). New York has refused to grant recognition only to polygamous marriages. See, e.g., People v. Ezeonu, 155 Misc. 2d 344, 588 N.Y.S.2d 116 (Sup. Ct. Bronx Co. 1992) (rejecting criminal defense that rape victim was "junior" wife under Nigerian law); In re Sood, 208 Misc. 819, 142 N.Y.S.2d 591 (Sup. Ct. Onondaga Co. 1955) (refusing to issue marriage license where man remained legally married to a woman in India).

In addition to recognizing foreign marriages, New York applies comity to define spousal status generally. Thus, New York courts have long accepted

foreign divorces on grounds not recognized in New York. See Greschler v. Greschler, 51 N.Y.2d 368, 376-77, 414 N.E.2d 694, 697-99, 434 N.Y.S.2d 194, 198-99 (1980) (recognizing Dominican Republic divorce despite spousal support waiver that was impermissible under domestic New York law); Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 89-93, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965) (recognizing Mexican "quickie divorce" that was granted on grounds of incompatibility unavailable under domestic New York law).

New York applies this generous definition of comity because of its vital interest in respecting diversity, providing freedom of movement to couples and families, and avoiding the chaos of constant case-by-case adjudications of the validity of spousal relationships. See generally Eugene F. Scoles, Peter Hay, et al., CONFLICT OF LAWS), § 13.8, at 557 (3d ed. 2000) (hereinafter "Scoles & Hay"). As a magnet for worldwide immigration, with a local economy and cultural environment dependent on attracting people from other countries and states, New York must be especially cognizant of the need to respect legal relationships formed elsewhere. In the 1990s, New York State's population grew 5.5 percent because of immigrants -- 720,000 entering from 1995 to 2000 alone. See Erika Rosenberg, *They Flee for Jobs and Warmth,* THE TIMES UNION (ALBANY, NY), Aug. 6, 2003, p. A1. A recent study also found that diversity-friendly metropolitan areas --

including gay-friendly ones -- were more likely to attract highly skilled "creative class" internal immigrants from other U.S. states. A large "creative class" component in the workforce, in turn, forms the base for a high-value economy. Richard Florida, *The Rise of the Creative Class* (2002), at 235-48, 255-58. The metropolitan New York City region is a magnet for these internal "creative class" immigrants. Id. at 246 (ranking metropolitan New York City 9th among U.S. regions). Given New York's strong national and international pull, any deviation from the traditional "valid where celebrated" rule would create legal uncertainty for large numbers of couples in relationships celebrated out-of-state and could reduce New York's attractiveness as a location.

Even outside the spousal status context, where more exceptions apply, comity encourages interstate and international commerce by ensuring greater predictability. New York's determination to honor foreign law implicitly recognizes that:

> no state is interested only in advancing the domestic policies underlying its particular laws . . . . [S]tates have long-term, systemic concerns . . . that point toward the application of foreign law in appropriate cases. These policies include comity toward other states [and] facilitating multistate activity (especially commercial activity).

Larry Kramer, *Return of the Renvoi,* 66 N.Y.U. L. REV. 979, 1025 (1991).

Promoting multistate activity by honoring legal relationships validly formed in other jurisdictions is of particular importance to New York, which has been a world commercial center for two centuries. New York cannot expect other jurisdictions to respect and uphold New York legal relationships unless it grants comity to those other jurisdictions in return. One writer has noted that "multi-state activity is less likely to occur when States do not respect each other's interests." Matthew Chait, *Renvoi in Multinational Cases in New York Courts: Does Its Past Preclude Its Future?,* 11 CARDOZO J. INT'L & COMP. L. 143, 171 (2003). As then-Chief Justice Burger stated in Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9, 92 S.Ct. 1907, 1912, 32 L.Ed.2d 513 (1972), the "expansion of American business and industry will hardly be encouraged if we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."

3. New York's Public Policy Exception Is Extremely Narrow

New York courts routinely reject invocation of the public policy exception inside and outside the spousal status context. For example, in Schultz v. Boy Scouts of America, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985), a tort case in which the plaintiffs charged a charitable corporation with negligent

hiring and supervision, the court applied New Jersey law which, unlike New York's, recognized the doctrine of charitable immunity. The court quoted Loucks approvingly and described its severe limits on the public policy exception:

> The party seeking to invoke the doctrine has the burden of proving that the foreign law is contrary to New York public policy. It is a heavy burden for *public policy is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise*. . . .

Id. at 202. (emphasis added). Similarly, in Greschler v. Greschler, 51 N.Y.2d 368, 414 N.E.2d 694, 434 N.Y.S.2d 194 (1980), the Court of Appeals reiterated that the public policy exception is extremely limited, rejecting a wife's claim that a Dominican divorce decree was void under New York policy because she waived her right to support. See also Bader v. Purdom, 841 F.2d 38, 40 (2d Cir. 1988) (New York's public policy exception inapplicable to claim of negligent supervision of a child, which would be barred under New York law, because "we cannot say that allowing such suits [under Ontario law] would violate fundamental principles of justice").

New York's comity rules compel recognition of Langan's and Spicehandler's spousal status under their Vermont civil union. The Vermont civil union law could not be clearer: parties to a civil union are "spouses," with all of the

same legal responsibilities, benefits and protections "as are granted to spouses in a marriage . . . whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law." Vt. St. Ann. tit. 15 § 1204(a) (2004). Given New York's established "valid where celebrated" doctrine, which requires recognition of spousal relationships even where they would be forbidden under New York law, and given New York's extremely limited public policy exception, this court should uphold the trial court's decision.

E. Vermont Civil Unions Are Not Abhorrent to New York Public Policy

1. New York Honors Same-Sex Relationships in Many Contexts

Far from being considered "offensive to the public sense of morality to a degree regarded generally with abhorrence," In re May's Estate, 305 N.Y. at 492-93, 114 N.E.2d at 7, same-sex relationships are legally respected in New York, which has a long history of supporting the legal rights and responsibilities of persons in committed, same-sex relationships. Acknowledging Langan's status as a surviving spouse for purposes of the wrongful death statute would not meet this narrow exception for comity. Over the course of two decades, New York's executive, legislative and judicial branches have granted rights to lesbians and gays individually, as well as to same-sex partners and their families.

Executive branch protection of individuals against sexual orientation discrimination dates back to the 1980s. Governor Cuomo issued Executive Orders prohibiting discrimination based on sexual orientation in state hiring, N.Y. Comp. Codes R. & Regs. tit. 9 § 4.28 (1983) (Cuomo, Gov.); id. at § 4.28.1 (1987) (Cuomo, Gov.), which the Pataki administration continued, id. at § 5.32 (1996) (Pataki, Gov.). Similarly, in New York City, Mayor Koch issued an Executive Order banning discrimination on the basis of sexual orientation, Exec. Order 94 (June 20, 1986) (Koch, Mayor), which has since been codified in N.Y.C. Admin. Code § 8-502.

In the 1990s, Governors Mario Cuomo and George Pataki agreed to provide health insurance benefits for the same-sex domestic partners of New York State executive branch employees. See Ian Fisher, *Cuomo Decides to Extend Domestic-Partner Benefits,* NEW YORK TIMES, June 29, 1994, p. B4; Kevin Sack, *Pataki Drops Threat to Close Down Government,* NEW YORK TIMES, Mar. 29, 1995, p.A1. In New York City, where St. Vincent's alleged medical malpractice occurred, Mayor David Dinkins established a domestic partnership registry, Exec. Order No. 48 (Jan. 7, 1993) (Dinkins, Mayor). Most recently, in the wake of September 11, 2001, Governor Pataki extended crime victim compensation benefits to surviving same-sex partners of World Trade Center victims, acknowledging that all who lost

loved ones, whether gay or straight, should receive support. See Exec. Order No. 113.30 (2001) (Pataki, Gov.); Joel Stashenko, *Pataki's Executive Order Extends Equal Benefits to Gay Partners of WTC Victims,* ASSOC. PRESS, Oct. 13, 2001 (quoting Pataki spokesperson Joseph Conway).

Legislation assisting same-sex partners followed, making the partners of World Trade Center victims eligible for benefits from the federal September 11 Victims Compensation Fund and for workers compensation claims arising from the attacks. N.Y. Session Laws 2002, c. 73, §1(7) (legislative history stating that domestic partners are intended to be eligible for federal Victims Compensation Fund). New York amended its Worker Compensation statute to enable domestic partners to receive the same benefits as married couples. See N.Y. Work. Comp. L. § 4 (2002). In the wake of the Iraq war, the State made the domestic partners of active-duty military servicemembers eligible for a number of state benefits, notwithstanding the federal "don't ask, don't tell" policy requiring the expulsion of openly gay military servicemembers. N.Y. Educ. L. §272(1)(l) (2003) (library internet access); N.Y. Exec. L. §354-b(2)(b)(i) (2003) (burial insurance); N.Y. Military L. §254(2) (2003) (video teleconferencing); N.Y. Public Service L. §92 (2003) (discounted phone rates); N.Y. Real Prop. Tax L. §925-d (2003) (property tax extension).

Court decisions at all levels have expanded the rights and responsibilities of same-sex partners. For example, in Braschi v. Stahl Assocs., the Court of Appeals interpreted rent control laws to permit succession rights of unmarried life-partners based on an objective examination of the relationship of the parties. The Court held that factors such as "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" will determine whether the parties have demonstrated the necessary "dedication, caring and self-sacrifice" to show a "family-like" relationship. 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (N.Y. 1989) (citations omitted).

Moreover, in In re Jacob/In re Dana, the Court of Appeals upheld a "second parent" adoption in which a lesbian was permitted to adopt her life partner's biological child. In reaching its decision, the Court of Appeals stressed the many emotional, social, and financial elements of family status:

> [The best interests of the child] would certainly be advanced . . . by allowing the two adults who actually function as a child's parents to become the child's legal parents. The advantages which would result from such an adoption include Social Security and life insurance benefits in the event of a parent's death or disability, *the right to sue*

> *for the wrongful death* of a parent, the right to inherit under rules of intestacy and eligibility for coverage under both parents' health insurance policies. In addition, granting a second parent adoption further ensures that two adults are legally entitled to make medical decisions for the child in case of emergency and are under a legal obligation for the child's economic support. Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents, siblings and other relatives will continue should the co-parents separate.

86 N.Y.2d 651, 658-59, 660 N.E.2d 397, 399, 636 N.Y.S.2d 716, 718 (1995) (citations omitted; emphasis added). See also Gay Teachers Ass'n v. Board of Educ., N.Y.L.J., Aug. 23, 1991, at 22, col.3 (Sup. Ct. N.Y. Co.) (health insurance benefits for "husband" and "wife" extended to same-sex domestic partners under Braschi), aff'd, 183 A.D.2d 478, 585 N.Y.S.2d 1016 (1st Dep't 1992); Mandell v. Cummins, N.Y.L.J., July 25, 2001, at 18, col. 4 (Civ. Ct. N.Y. Co.) (statutory prohibition against eviction of disabled "spouse" applied to tenant's disabled gay life partner); Knafo v. Ching, N.Y.L.J., Dec. 6, 2000, at 28, col. 2 (Civ. Ct. N.Y. Co.) (gay life partners are "not just a family but nontraditional spouses . . . . All that separates them from traditional spouses is the fact that they are of the same sex . . . ."). All of these decisions evaluate intimate relationships based not on the sex of the participants, but on how they function. See Braschi, 74 N.Y.2d at 211, 543 N.E. 2d at 53-54, 544 N.Y.S.2d at 789 (". . . a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is

long term and characterized by an emotional and financial commitment and interdependence . . . . [and] [t]his view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units").

Finally, many New York statutes explicitly recognize the needs of lesbians and gays. New York recently enacted the Sexual Orientation Non-Discrimination Act ("SONDA") N.Y. EXEC. LAW § 291 (2004; enacted Dec. 17, 2002), which bars discrimination based on sexual orientation in employment, housing, education, commercial occupancy, trade, credit and public accommodations. In addition, the Hate Crimes Act of 2000 (Ch. 107, Laws of New York), imposed increased penalties for bias-related crimes against persons victimized because of their sexual orientation.

Regardless of how the New York Domestic Relations Law addresses same-sex marriages or civil unions under New York domestic law, comity requires that New York honor a sister state's creation of a spousal relationship. As explained above, the appropriate standard is not whether a civil union could be created under New York law, but whether recognition of the civil union would be "offensive to the public sense of morality to a degree regarded generally with abhorrence." Far

from having any public policy that would prevent recognition of a same-sex union legally contracted in a sister state, New York respects such relationships.

2. The Purposes Underlying the Vermont Civil Union Law Are Not Abhorrent to New York Public Policy

The Vermont Civil Union law provides adult same-sex couples with a legal framework of state-created benefits, duties and protections because such couples "live together, participate in their communities together, . . . raise children and care for family members together . . . ." Vermont Civil Union Act, 2000 Vt. Acts & Resolves 91 §§ 1(9), 2(a). It is hard to fathom how a law that fosters community stability, encourages family preservation, facilitates child welfare, and promotes financial and emotional interdependence could be abhorrent to New York's public policy. As explained above, New York legally respects same-sex relationships in these contexts.

Any purported public policy concern would be outweighed by New York's interest in providing predictable and consistent legal treatment of family matters and protecting the reasonable expectations of its citizens. See In re Mastrogiacomo, 2003 WL 21436099, at *2 (Nassau Co. Surr. Ct. 2003) (applying law of the state of celebration to determine surviving spouse's standing in the

interest of "ensur[ing] predictability and uniformity of result" and "promoting the reasonable expectations of the parties"); Scoles & Hay, § 13.9 ("Refusal to recognize the validity of a foreign marriage has unfortunate results, for it tends to render uncertain one of the most important of human relations, a relationship in which certainty is surely as imperatively demanded as in commercial transactions").

This is particularly true for couples with children. Estimates based on data from the 2000 U.S. Census suggest that approximately 251,000 children are being raised by same-sex couples nationwide, including approximately 19,000 in New York, and these figures may substantially understate the number of couples and children.[1] Those children are entitled to the reassurance that their parents' legal

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[1] The 2000 U.S. Census revealed 594,000 same-sex couples nationwide, with 46,490 in New York alone. Reflecting a lesbian and gay baby boom accelerating over the past decade, 34.3% of female same-sex households and 22.3% of male same-sex households have children nationwide. The figures for New York are 34.3% and 21.7%, respectively. See Tavia Simmons and Martin O'Connell, *Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000* (2003) at 4, available at http://www.census.gov/prod/2003pubs/censr-5.pdf (visited Dec. 5, 2003).

The 2000 Census also says that the average family with its own children under 18 has 1.87 children. See *U.S. Census Bureau, Statistical Abstract of the United States: 2002* at 52 (Table 57: Families by Type, Race and Hispanic Origin: 2000) <http://www.census.gov/prod/2003pubs/02statab/pop.pdf> (visited Dec. 12, 2003). If we assume that the average same-sex family with children under 18 has 1.5 children -- plausible, since the lesbian and gay baby boom is of recent vintage, and same-sex couples cannot have

status -- and the corresponding obligations and rights -- will not fade in and out of existence depending on which side of the border the family happens to reside. Based on the pervasiveness and acceptance today of families headed by same-sex couples within its borders, New York has no public policy interest in finding Vermont civil unions "offensive to the public sense of morality to a degree regarded generally with abhorrence."

The federal Defense of Marriage Act ("DOMA"), 28 U.S.C. § 1738C (2003), is irrelevant to New York's public policy. DOMA purportedly granted states the right to refuse to recognize their domiciliaries' same-sex marriages, even if validly entered into in another state. It does not affect the comity doctrine or remove New York's sovereign duty to grant comity to the laws of a sister state.

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children by accident -- this would give us 251,433 children of unmarried same-sex couples nationally and 19,290 in New York.

One study compared the U.S. Census data for same-sex couples against other data in which respondents identify themselves as lesbian or gay, such as voter exit polls, and suggested that because of the reluctance of some lesbian and gay couples to identify themselves to the government via the Census, the Census figures may undercount the true number of couples by as much as 62%. David M. Smith and Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households; A Preliminary Analysis Of 2000 United States Census Data ; A Human Rights Campaign Report* 2 (2001) <http://www.hrc.org/Template.cfm?Section=Parenting&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=10286> <visited Dec. 5, 2003>. The study was sponsored by the Human Rights Campaign, a national lesbian and gay rights group, and co-authored by Gates, a Ph.D. with The Urban Institute's Population Studies Center. If, following the Smith and Gates analysis, we further assume a 62% undercount of unmarried same-sex couples, that would mean 405,537 children of unmarried same-sex couples nationally and 31,112 in New York.

New York's legislature, unlike those of some other states, has not adopted a "mini-DOMA" that bars recognition of same-sex relationships created under out-of-state law. This strongly indicates that such legislation would be contrary to New York's public policy. Nothing in DOMA changes state law or policy, or requires New York to ignore its own rules on comity or choice of law.

3. The Public Policy Behind New York's Wrongful Death Statute Requires Recognition of Langan's Standing as a Surviving Spouse

The ability to pursue a wrongful death claim is enormously important for surviving family members, and for our society in general. As the trial court correctly observed, New York's wrongful death statute "'promote[s] the public welfare'" (Langan v. St. Vincent's Hosp., 196 Misc.2d 440, 450, 765 N.Y.S.2d 411, 419 (Sup. Ct. Nassau Co. 2003) (quoting Raum v. Restaurant Assoc., 252 A.D.2d 369, 371, 675 N.Y.S.2d 343, 345 (1st Dep't 1998), Rosenberger, J. dissenting)), and its goals "'are to compensate the victim's dependents, to punish and deter tortfeasors and to reduce welfare dependency by providing for the families of those who have lost their means of support.'" Id. (quoting Raum, 252 A.D.2d at 374, 675 N.Y.S.2d at 347, Rosenberger, J. dissenting).

Thus, the wrongful death statute is meant to compensate the losses suffered by the decedent's immediate family, who are most likely to have relied on the decedent's financial support and to have experienced pecuniary injury. Id. (citing Loucks, 224 N.Y. 99, 104, 120 N.E. 198). See also Kemp v. City of N.Y., 208 A.D.2d 684, 686, 617 N.Y.S.2d 801, 803 (2d Dep't 1994) (wrongful death "is designed to compensate those who suffer pecuniary loss as a result of a wrongful act"). In the medical malpractice context, the wrongful death statute is intended to deter conduct that falls below the accepted standards of medical care. See Kogan v. Dreifuss, 174 A.D.2d 907, 609-10, 571 N.Y.S.2d 314, 316 (2d Dep't 1992) (wrongful death claim succeeds because physician departed from accepted standards of care). It would directly contradict these important public policy goals to exclude an injured dependent from recovery, or to grant a windfall to one who negligently causes death, where -- as here -- the dependent had a legal relationship with the decedent.

New York's wrongful death statute has been broadly interpreted to promote the state's strong interests in assuring the support of dependent survivors and deterring tortious conduct. For example, the New York Constitution states explicitly that the amount recoverable in a wrongful death action is not subject to any statutory limitation. N.Y. Const. Art. I § 16. In addition, courts have broadly

construed the term "pecuniary injuries" under New York law to provide fair compensation to survivors. See Mono v. Peter Pan Bus Lines, Inc., 13 F. Supp. 2d 471, 477 (S.D.N.Y. 1998) ("pecuniary injuries" includes recovery for the "economically recognized and calculable losses of the household management services of [the deceased]" and "the premature loss of the educational training, instruction and guidance [that the children] would have received from the now-deceased parent") (citing Gonzalez v. New York City Housing Auth., 161 A.D.2d 358, 555 N.Y.S.2d 107 (1st Dep't 1990); Plotkin v. New York City Health and Hosps. Corp., 221 A.D.2d 425, 633 N.Y.S.2d 585, 586 (2d Dep't 1995)) (internal quotation marks omitted).

The public policy requiring recognition of Langan's wrongful death claim is not affected by the majority opinion in Raum v. Restaurant Associates, which is wholly distinguishable. There, the First Department held that life partners who are not in a state-sanctioned relationship have no standing under New York domestic law to pursue wrongful death claims, regardless of sexual orientation. 252 A.D.2d at 370-71, 675 N.Y.S.2d at 344-45. The plaintiff in Raum had no legal status with respect to the decedent, and at the time Raum was decided, there was no state-sanctioned civil union in any state. The court opinion was based on a textual analysis of the wrongful death statute, and the central issue in the instant case,

comity, was nowhere present in Raum. Thus, Raum said nothing about comity, and did not imply that recognition of a same-sex partner's right to bring a wrongful death suit would be "offensive to the public sense of morality to a degree regarded generally with abhorrence," In re May's Estate, 305 N.Y. 486, 492-93, 114 N.E.2d 4, 7 (1953).

In re Cooper, 187 A.D.2d 128, 130-31, 592 N.Y.S.2d 797, 798 (2d Dep't 1993) appeal dismissed, 624 N.E.2d 696 (N.Y. 1993), holding that a surviving gay partner could not assert a right of election under domestic New York law, is inapposite for the same reasons. Again, the petitioner in Cooper had no legal relationship to the deceased, and the opinion was based purely on a textual analysis of N.Y. E.P.T.L. § 5-1.1(c)(1)(B), which gives a "surviving spouse" a right of election. Id. at 130-31. Cooper had nothing whatsoever to do with comity and did not in any way suggest that same-sex relationships are repugnant or abhorrent to New York public policy.

F. Conclusion

The trial court's decision should be affirmed under firmly-established New York comity principles. Respondent John Langan and the decedent, Neal Conrad Spicehandler, became "spouses" under Vermont law when they entered into a civil

union. New York respects that spousal relationship under the "valid-where-celebrated" rule. Recognizing Langan's right to bring a wrongful death suit would not remotely run afoul of New York's extremely limited public policy exception. Denying Langan's claim would, instead, frustrate New York's policy supporting gay families and frustrate the aims of the wrongful death statute. Langan should have standing to sue for wrongful death.

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Respectfully submitted,

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