To Be Submitted

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

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Index # 98084

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,
Plaintiffs-Appellants,

-against-

THE NEW YORK STATE DEPARTMENT OF HEALTH and THE STATE OF NEW YORK,
Respondents-Appellees.

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BRIEF OF
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
NEW YORK CHAPTER

AND

THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER LAW ASSOCIATION OF GREATER NEW YORK

AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

A. Question Presented.

Are same-sex couples, who are unable to legally marry in New York, treated equally with opposite-sex married couples? The Supreme Court, Albany County, held that the New York Constitution permitted unequal treatment of same-sex couples.

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 who serve hundreds of thousands of clients, and who have a vital interest in ensuring that New York grant full marriage rights to same-sex couples. ABCNY is writing this brief to emphasize the consequences of the inequalities faced by same-sex couples because they are unable to marry. These inequalities have profound implications for the clients of ABCNY members and for many others.

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 New York matrimonial law organization, 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.

The Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York ("LeGaL") was founded in 1978 and incorporated in 1981. LeGaL seeks to represent the interests of the lesbian, gay, bisexual and transgender (LGBT) legal community. Through its approximately 400 members, LeGaL works with other organizations to advocate the rights of the LGBT community, including the right to same-sex civil marriage. LeGaL members also represent thousands of individual lesbian and gay clients who, because they cannot marry, lack essential protections under New York law. As the only LGBT bar association in the greater

New York City area, LeGaL firmly believes that New York law must recognize the reality of changing family structures through marriage equality.

C. Summary of Argument.

This brief shows that New York law deprives same-sex couples of many rights and obligations that opposite-sex couples take for granted, simply because opposite-sex couples can legally marry. In countless areas – including health care, estates, torts, divorce and custody – same-sex life partners in long-term, committed relationships are denied access to the panoply of rights and benefits that automatically accrue to opposite-sex married couples. By preventing same-sex partners from marrying, the state thrusts their families into legal limbo and excludes these couples and their children from full membership in society.

As the New York State Bar Association noted in its 389-page report on same-sex marriage issues:

> What we found was a vast array of areas in which the law provides specific rights and benefits – often with correlative obligations – or default mechanisms reserved to married couples (i.e., in New York, heterosexual couples who elect to marry), from which same-sex couples that would marry if they could, are excluded. In other words, we found that same-sex couples are excluded from the broad range of "governmental benefits . . . , property

> rights . . . , and other, less tangible benefits" that the Supreme Court has identified as attaching to marriage.

New York State Bar Association, *Report and Recommendations of the Special Committee to Study Issues Affecting Same-Sex Couples* 3 (2004) [hereinafter *"State Bar Report"*], available at http://www.nysba.org/Content/ContentGroups/Reports3/Same-Sex_Marriage_Report/Same-SexIssuesReport2004.pdf <visited May 3, 2005> (internal footnote omitted; quoting *Turner v. Safley*, 482 U.S. 78, 96 (1987)). The *State Bar Report* has been formally adopted, *see* New York State Bar Association, *Resolution Adopted by House of Delegates*, (Apr. 2, 2005), and much of this brief relies on its exhaustive research. (Because the *State Bar Report* has a fine-grained table of contents, we have not cited to it in detail.) *See also* Association of the Bar of the City of New York, *Report on Marriage Rights for Same-Sex Couples in New York* (2001), *reprinted in* 13 COLUM. J. GENDER & L. 70 (2004).

Marriage has symbolic meaning and is an important social institution with deep historical roots. Also significant are the many concrete legal protections that marriage provides. The current marriage laws, as they have been interpreted by most courts, leave many families vulnerable and, as a result, are inherently unfair.

While there is rarely decisive precedent, New York courts have often given narrow interpretations to same-sex couples' rights in the absence of marriage. Even where courts have granted legal recognition to same-sex couples, as in the areas of single-family zoning and succession rights to rent stabilized apartments, the courts burden same-sex couples with detailed proof-of-relationship tests that require an unrealistic level of documentation.

While couples can eliminate some risks by cobbling together a patchwork of documentation, this is expensive and cumbersome. Many couples do not have the resources to document their relationships and wishes, or may not realize that they need to. And no amount of documentation could possibly replicate the complete bundle of rights and responsibilities that accompanies marriage.

The 2000 United States Census revealed 46,490 same-sex couples in New York -- figures that may undercount the true number of couples by as much as 62 percent. Tavia Simmons & Martin O'Connell, *Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000* 4 (2003), available at

http://www.census.gov/prod/2003pubs/censr-5.pdf <visited May 11, 2005>; David M. Smith & 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* 2-3 (2001), available at http://www.hrc.org/Content/ContentGroups/Publications1/census.pdf <visited May 11, 2005) (estimating 62% undercount).

New York law leaves these same-sex couples with vastly unequal rights compared to opposite-sex couples who marry. This denies same-sex couples their rights under New York's Constitution. (A detailed discussion of the Constitutional issues is set forth in the Plaintiffs-Appellants' brief and other amicus briefs submitted in connection with this case.) Therefore, the amici urge this Court to reverse the decision of the Supreme Court.

D. During marriage, opposite-sex couples have enforceable duties of support to each other and to children, but same-sex couples do not.

1. Spousal support.

Under the New York Family Court Act, a spouse who is unable to support him- or herself is entitled to support from the other. FAM. CT. ACT §412; *Garlock v. Garlock*, 279 N.Y. 337 (1939). A related common law doctrine holds spouses

liable to third parties who provide "necessaries." Because each spouse is liable for the other, third parties are more willing to provide vital goods and services to a spouse, knowing that they can recover from the other spouse. *Medical Business Assocs. v. Steiner*, 183 A.D.2d 86, 588 N.Y.S.2d 890 (2d Dep't 1992) (spouse obligated to pay for other spouse's medical care). Same-sex life partners have no such duty to each other, which makes one partner's destitution more likely if he or she has a financial reverse -- and increases the burden on the state welfare system. *See* Milton C. Regan, Jr., *Unmarried Partners and the Legacy of Marvin v. Marvin*, 76 NOTRE DAME L. REV. 1435, 1457 (2001).

2. Parental rights and responsibilities.

Reflecting a lesbian and gay baby boom accelerating over the past decade, 34.3% of female and 21.7% of male New York same-sex households have children. *See* Tavia Simmons & Martin O'Connell, *Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000* 4 (2003), available at http://www.census.gov/prod/2003pubs/censr-5.pdf <visited May 3, 2005>. In 2000, these same-sex couples were raising about 31,000 children in New York. *See* Jay Weiser, *Foreword: The Next Normal: Developments Since "Marriage Rights for Same-Sex Couples in New York,"* 13 COL. J. GENDER & L. 48, 49 n.5

(2004). In the absence of marriage, all these children are left with fewer protections than the children of opposite-sex married couples.

a. Stepparents' duty to provide support.

When biological parents cannot provide the necessary financial support, stepparents, to the extent financially able, must support stepchildren who are in danger of becoming recipients of public assistance. *See* FAM. CT. ACT §415 (all statutory citations are to New York statutes); *In re Monroe Co. Dep't of Soc. Servs. [Palermo] v. Palermo,* 192 A.D.2d 1114, 1114, 596 N.Y.S.2d 252, 253 (4th Dep't 1993). A legally recognized "step-relationship" does not exist outside of marriage, so this important financial safety net is unavailable if the child's parent is living in a same-sex relationship.

b. Adoption.

One unmarried same-sex life partner may adopt the other partner's biological child (known as a "second-parent adoption") because this provides the child with additional parental support, *In re Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995). Domestic Relations Law §110 expressly permits adoptions by single, unmarried persons or by married couples. While the Fourth Department has extended this to hold that same-sex life partners may jointly adopt a non-biological child, *see In re*

Adoption of Carolyn B., 6 A.D.3d 67, 70, 774 N.Y.S.2d 227, 230 (4th Dep't 2004), other New York courts have not yet considered the issue. Thus, in the absence of marriage, some children of same-sex couples may be deprived of the security provided by having two legally recognized parents.

c. Alternative Insemination.

Lesbian life partners who have children through alternative insemination, unlike opposite-sex married couples who use the same procedure, face potential challenges to their parental rights. For opposite-sex married couples, when a doctor performs alternative insemination and the patient and her spouse give written consent, any child thus conceived is considered the legitimate child of the biological mother and her spouse for all purposes. When a couple is unmarried, however, in order to become the legal parent of the child, the unmarried lesbian partner of an inseminated woman must pursue a second-parent adoption, a lengthy and costly process. Before approving a second parent adoption, a court can require the consent of the sperm donor, who is the other biological parent, if his identity is known. DOM. REL. LAW §111. Because the sperm donor's parental status is not automatically terminated, the same-sex couple who have raised the child may find themselves in litigation over his relationship with the child, as in *Thomas S. v. Robin Y.*, 209 A.D.2d 298, 618 N.Y.S.2d 356 (1st Dep't 1994). There, when

relations between the biological father and the lesbian couple broke down after nine years, the First Department granted the father an order of filiation.

E. When a marriage dissolves, opposite-sex spouses are protected economically and in family matters, but same-sex partners are not.

1. Maintenance and property distribution on dissolution.

New York courts recognize marriage as an "economic partnership." *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585, 498 N.Y.S.2d 743, 747 (1985). When a marriage dissolves, the law recognizes that both parties may have made substantial investments in the relationship that may not be reflected in their financial accounts. One spouse may have sacrificed a career to spend more time on the home or children, or may have turned down transfers or promotions to enable to the other spouse to advance economically.

To protect spouses who are divorcing, courts may award spousal maintenance, including where necessary to prevent a spouse from becoming a public charge. DOM. REL. LAW §236B(6). On divorce, regardless of how title to marital property is held, both spouses have ownership interests commensurate with their economic and non-economic contribution. For example, a spouse who helped the other spouse obtain a professional license may be entitled to compensation.

O'Brien v. O'Brien, 66 N.Y.2d 576, 585-87, 498 N.Y.S.2d 743, 747-49 (1985). Unmarried same-sex life partners lack these rights.

2. Post-separation custody and visitation of children.

When a same-sex couple with children splits up, unmarried same-sex partners who are not biological parents and have not done a second-parent adoption have virtually no visitation rights. The biological parent can exclude the non-biological parent, with devastating psychological effects for both the child and the non-biological former partner. In *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991), the same-sex partners, after living as a couple for two years, together "planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing." When the child was two years old, the same-sex couple ended their relationship and the non-biological mother moved out of their jointly-owned home, but continued to pay one-half of the mortgage and household expenses. The Court of Appeals nonetheless upheld the biological mother's decision to deny visitation and cut off all contact between the non-biological mother and the child. 77 N.Y.2d at 655-656, 569 N.Y.S.2d at 587-88. *See also Janis C. v. Christine T.*, 294 A.D.2d 496, 742 N.Y.S.2d 381 (2d Dep't 2002); *Multari v. Sorrell*, 287 A.D.2d 764, 731 N.Y.S.2d 238 (3d Dep't 2001); *Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dep't

1998) (all rejecting equitable estoppel as theory for granting visitation to unmarried partners who are not biological parents). The analysis is similar for custody, unless there is a showing of unfitness or extraordinary circumstances. *Cf. Culver v. Culver*, 190 A.D.2d 960, 960-61, 594 N.Y.S.2d 68, 69 (3d Dep't 1993) (erratic, nomadic biological mother not unfit; grandparents denied temporary custody).

In contrast, even in the absence of a second-parent adoption, upon a divorce, a married nonbiological parent can use equitable estoppel to seek visitation and custody of a child born before the marriage. *See Gilbert A. v. Laura A.*, 261 A.D.2d 886, 689 N.Y.S.2d 810 (4th Dep't 1999) (also applying extraordinary circumstances theory); *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 676 N.Y.S.2d 677 (2d Dep't 1998) (divorcing husband held out to world as father).

3. Domestic violence.

In 2003, the New York City Gay and Lesbian Anti-Violence Project reported that it opened 501 new domestic violence cases. National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual and Transgender Domestic Violence in 2003*, at 33, available at www.avp.org, <visited May 12, 2005>. The estimated rate of domestic violence in same-sex relationships is about the same as in opposite-sex relationships. National Coalition of Anti-Violence Programs,

Lesbian, Gay, Bisexual and Transgender Domestic Violence in 2002, at 7-9, available at www.avp.org, <visited May 12, 2005>. Yet unmarried same-sex partners have far fewer protections.

The Family Court may issue orders of protection in domestic violence cases between spouses, parent and child, and "members of the same family or household." Because "members of the same family or household" is defined as blood relatives, persons legally married, persons formerly married, or persons who have a child in common, FAM. CT. ACT §812(1), the Family Court may not issue an order of protection in same-sex relationships unless the victim has a "child in common" with the abuser. This requirement is unlikely to be met unless there is a two-parent adoption.

A same-sex domestic violence victim instead must pursue an order of protection in the criminal justice system. CRIM. PROC. LAW §530.11 This requires the same-sex domestic violence victim to satisfy a more stringent evidentiary standard than in Family Court, and to obtain the abuser's arrest. As a result, same-sex domestic violence victims "have to jump the hurdles of calling the police, asking for help, making sure they are taken seriously, filing a complaint, [and]

choosing to have their perpetrator arrested." Yet having an abuser arrested can trigger even more abuse. *State Bar Report* at 130, quoting Conference, *Revolutions Within Communities: The Fifth Annual Domestic Violence, Conference: Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121, 140 (2001).

F. In a medical crisis, married couples, but not same-sex couples, have clear rights that support their relationships.

When a partner in a couple is in a medical crisis, time is crucial and the consequences of decisions can be life-altering. Married couples have a clear set of rights and duties that are universally respected, whether or not they have documented their relationships. In the absence of marriage, same-sex couples are plunged into a web of uncertainty and potential litigation.

1. Access to partners' medical information.

New York law permits a health care provider to disclose a patient's confidential medical information only with the patient's consent. *See* PUB. HEALTH LAW §17. New York's law is more stringent than federal health privacy law, and prevails over it where the two conflict. *National Abortion Fed'n. v.*

Ashcroft, 03 Civ. 8695, 2004 U.S. Dist. LEXIS 4530 (S.D.N.Y. Mar. 19, 2004).. Because same-sex relationships do not have the same legal status as marriage, and detailed documentation may be unavailable in a medical emergency, a same-sex partner may be unable to prove that his or her interest in a patient's care is equal to that of a spouse. If health care providers insist on unavailable documentation, they may withhold important medical information from the same-sex partner based on "professional judgment" -- and may even feel compelled to withhold the information under New York law. *See* Thomas Crampton, *What Marriage Means to Gays: All That Law Allows Others,* NEW YORK TIMES, Mar. 30, 2004, p. B1 (same-sex partner denied access to ill partner's medical information despite documentation).

2. Decisionmaking powers upon a partner's incapacity.

New York State law permits a person to designate another individual to make health care decisions in the event of physical incapacity by executing a health care proxy. *See* PUB. HEALTH LAW §§2960-2979. If no health care proxy is in place and the Surrogate's Court has not appointed a guardian, a spouse has priority, followed by other legally recognized family members, PUB. HEALTH LAW §2965(ii)-(v). A close friend -- which is all that a same-sex life partner is in the absence of marriage -- comes after family members. PUB. HEALTH LAW §2965(vi).

When an adult is declared mentally incapacitated, the authority to make decisions on behalf of the incapacitated individual does not vest automatically in any individual. *See* MENTAL HYG. LAW §81.19 (listing eligibility requirements for guardian appointment). Instead, a court appoints a guardian after a hearing. *See* id. §81.11(a). Although the most important factor is the "the best interests and welfare of the incompetent," if the incapacitated person has not executed a document or otherwise identified their preference, courts generally appoint one of the incapacitated person's legally recognized family members as guardian. *See In re Application of Eichner*, 102 Misc.2d 184, 195, 423 N.Y.S.2d 580, 588 (Sup. Ct. Nassau Co. 1979) (preference for family members). Moreover, when legally recognized family members are not appropriate appointments, the court must explain its reasons for choosing someone else. *See* MENTAL HYG. LAW §81.19; *Matter of Pasner*, 215 A.D.2d 763, 627 N.Y.S.2d 966 (2d Dep't 1995).

Thus, absent the disabled same-sex partner's properly executed health care proxy or document identifying a preferred guardian, if the legally recognized family members object to the relationship, they may attempt to exclude the other same-sex partner from critical decisions. This happened to Minnesotan Karen

Thompson after her same-sex partner of four years, Sharon Kowalski, was permanently disabled in a 1983 automobile accident: Kowalski's parents barred Thompson from visiting her. It took nine years of litigation for Thompson to win guardianship and pursue a program of aggressive rehabilitation for Kowalski. Eleanor J. Bader, *The Lawyer's Bookshelf: "The Sharon Kowalski Case: Lesbian and Gay Rights on Trial"* (book review), N.Y.L.J., Sept. 5, 2003.

Even if the legally recognized family members do not object to the relationship, the partner and parent may disagree on care decisions. When a member of a married couple is incapacitated, they have the comfort of knowing that their spouse -- the life partner whom they have chosen -- will usually be the one making crucial decisions, rather than a parent or other family member. A same-sex partner rolls the dice.

G. When a member of a couple dies, married spouses, but not same-sex partners, are protected from destitution by rights to the assets and benefits of the deceased.

1. Intestate distribution.

Under the Estates, Powers, and Trusts Law, the surviving spouse of a decedent has vested rights in any intestate distribution. EST. POWERS & TRUSTS

LAW ("EPTL") §4-1.1(a). If the deceased person has no issue, then the surviving spouse receives the entire estate. *Id.* §4-1.1(a)(2). If the deceased person has issue, then the surviving spouse receives fifty thousand dollars plus one half of the remaining intestate estate. *Id.* §4-1.1(a)(1). Because same-sex couples are not permitted to marry, the New York County Surrogate's Court has held that the surviving partner in a same-sex relationship receives nothing if his or her partner dies intestate. Thus, in *In re Petri,* N.Y.L.J., Apr. 4, 1994, p. 29, the New York County Surrogate's Court excluded from inheritance a surviving same-sex partner who claimed an eleven-year relationship in which the partners "conducted [themselves] as a couple in every sense of the word."

2. Spousal right of election.

If a deceased spouse had a will, a surviving opposite-sex spouse who is excluded from its distribution generally has a statutory right of election to take the greater of $50,000 or one-third of the net estate. EPTL §5-1.1-A(a)(2). However, inheritance law provides no such protection for a surviving same-sex partner. In *In re Cooper,* 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), the Second Department held that the surviving partner in a four-year same-sex relationship was not permitted to exercise the right of election against the deceased partner's will, with the result that the lion's share of the estate went to a former same-sex

partner of the decedent. Thus, absent a written, properly drafted, executed and witnessed legal instrument, a same-sex life partner is excluded from inheritance rights.

3. Workers' Compensation Law.

Under the New York Worker's Compensation Law, if a worker dies from a covered on-the-job injury, the surviving spouse and/or minor children are entitled to weekly cash benefits equal to two-thirds of the deceased worker's average weekly wage. WORKERS COMP. LAW §16. Same-sex life partners do not have this right, according to *In re Valentine*, __ A.D.3d ___, 791 N.Y.S.2d 217 (3d Dep't 2005), in which the Third Department held that a same-sex domestic partner was not a "surviving spouse" and, therefore, was not eligible to receive death benefits. Bill Valentine was an airline employee killed in a November 2001 American Airlines plane crash shortly after taking off from John F. Kennedy Airport. Valentine and his surviving partner, Joe Lopes, had been together 21 years, owned an apartment together, jointly held bank accounts and investments, and had registered as New York City domestic partners. *Id.*; *see also* Beth Shapiro, *NY Court Rejects Workers' Comp Claim By Same-sex Partner*, 365GAY.COM, Mar. 23, 2005, available at http://www.365gay.com/newscon05/03/032305nyBens.htm

<visited May 11, 2005>. But because he was unable to marry, Lopes was deprived of the statutory death benefit, leaving him in a far more precarious financial situation than a married spouse has when a husband or wife dies in a work-related accident.

4. Disposition of partner's remains and making of anatomical gifts.

With respect to anatomical contributions, the legal spouse of the decedent is given priority, followed by other legally recognized family members and then "any other person authorized" to dispose of the body. PUB. HEALTH LAW §4301(2). These family members may also challenge a gift where the donor has not properly given written authorization. Id. at §4301(3). Similarly, in the absence of direction before death, a surviving opposite-sex spouse or the next of kin ordinarily have the right to decide on the disposition of the deceased spouse's remains. *See In re Stewart*, 159 Misc.2d 884, 887, 606 N.Y.S.2d 965, 967 (Sup. Ct. Queens Co. 1993)

This led to litigation in *Stewart.* Drew Stanton and Michael Stewart had been same-sex partners for five years when Stanton died of AIDS. Although Stanton had been alienated from his mother and brother, they seized Stanton's remains in order to hold an elaborate Orthodox Jewish funeral, including having the cantor who had presided over Stanton's bar mitzvah fly in from Florida.

Because Stanton had often told his life partner of his desire to be cremated, the court gave Stewart standing to sue to change the burial arrangements. 159 Misc.2d at 888-89, 606 N.Y.S.2d at 968-69. While the parties ultimately settled, *Stewart* raises a specter: unless same-sex couples are granted the right to marry, the surviving same-sex partner and the biological family may literally be fighting over a decaying body at great expense and emotional trauma to all involved. A surviving same-sex partner will clearly be in a worse position than a surviving opposite-sex spouse.

H. Property and occupancy rights clearly protect a married spouse, but not a same-sex partner, in such events as the other partner's death or insolvency.

The inability of same-sex couples to marry dramatically impacts upon one of the hallmarks of a loving, life partnership -- the family home. Unable to benefit from New York's tenancy in the entirety – which can only be enjoyed by married persons – a same-sex life partner is at greater risk of being forced out of the couple's home upon the death of one partner, and encounters greater burdens in determining rights of occupancy.

1. Tenancy by the entirety.

Tenancy by the entirety, a "unique form of co[-]ownership" reflecting the special status of spouses jointly holding property" is the default way that spouses take title to real property in New York. *See* WARREN'S WEED ON THE NEW YORK LAW OF REAL PROPERTY §27.04 (2004). It creates a right of survivorship: when one partner dies, the surviving partner automatically receives the deceased partner's share of the property, even if the deceased spouse left no will. Each tenant may sell, mortgage or otherwise encumber his or her rights in the property, but if that tenant dies before the other spouse, the buyer or mortgagee is left with no interest in the property. *V.R.W., Inc. v. Klein,* 68 N.Y.2d 560, 565, 510 N.Y.S.2d 848, 851 (1986). There is no equivalent means for unmarried same-sex life partners to protect the family home.

Under New York law, a couple who are not legally married cannot create a tenancy by the entirety; instead, the couple is limited to tenancy in common or joint tenancy, which are inadequate. Tenancy in common is the default form of joint ownership for unmarried persons, EPTL §6-2.2. A tenant in common can sell or encumber his or her interest in the property, *Cary v. Fisher*, 149 A.D.2d 890, 892, 541 N.Y.S.2d 138, 140 (3d Dep't 1989). And a tenant in common -- whether a same-sex life partner, the buyer of that partner's tenancy in common interest, an

intestate successor, or a foreclosing creditor -- is entitled to partition of the property, which can result in the ouster of the other same-sex life partner from the family home. Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships,* 85 MARQ. L. REV. 423, 462 (2001).

A joint tenancy, like a tenancy by the entirety, creates a right of survivorship in the surviving partner. This offers unmarried same-sex life partners more protection than a tenancy in common, but it, too, is inferior. In contrast to tenancy by the entirety, which is the default form of tenure for married couples, same-sex life partners must expressly create a joint tenancy, EPTL § 6-2.2(1); *see also* Joseph Rasch, NEW YORK LAW AND PRACTICE OF REAL PROPERTY §14.38 (1991). If they do not engage a lawyer, they are unlikely to know about this alternative. The joint tenancy is far easier to destroy than the tenancy by the entirety, since either joint tenant may demand partition. REAL PROP. LAW § 240-c(1). On sale or foreclosure of a joint tenant's interest, the joint tenancy becomes a tenancy in common, and the transferee can request a partition. This can result in the sale of the family home and the ouster of the same-sex partner.

2. Occupancy rights.

Under *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 213, 544 N.Y.S. 784, 790 (1989) the Court of Appeals held that Miguel Braschi, who lived with Leslie Blanchard in a rent-controlled apartment for eleven years as same-sex couple, could not be evicted from the apartment by the landlord on Blanchard's death. However, in order to establish these rights, Braschi had to provide documentation of the relationship, including joint checking accounts, a health care proxy and a will, as well as proof of occupancy of the apartment.

Similarly, under zoning laws, municipalities may restrict housing to single-family dwellings. WARREN'S WEED ON THE NEW YORK LAW OF REAL PROPERTY §2.02 (2004); *Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc.2d 1048, 1049, 406 N.Y.S.2d 221, 222-23 (Sup. Ct. Nassau Co. 1977), *aff'd*, 62 A.D.2d 644, 400 N.Y.S.2d 724 (2d Dep't 1977). They may not, however, limit the definition of "family" to exclude unmarried couples. *See Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 540 N.Y.S.2d 234 (1989) (zoning ordinance excluding "functional" families from definition of "family" unconstitutional under New York Due Process Clause).

In both the rent controlled apartment and single-family zoning situations, the proof of the same-sex relationship is subject to court challenges. In contrast, the members of a married opposite-sex couple have clear rights to stay in their home.

Same-sex couples are completely excluded from some occupancy rights. In *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 730 N.Y.S.2d 15 (2001), the Court of Appeals held that under the New York City Human Rights Law, the Albert Einstein College of Medicine did not discriminate when it gave priority for university-owned housing to married couples. Because they were unable to legally marry, medical students Sara Levin and Maggie Jones, a same-sex couple in a five-year relationship, were forced to live off-campus in less convenient housing. Without marriage and its clearly defined property rights, same-sex life partners and their families risk losing the roofs over their heads.

I. If a member of a couple is injured, married couples, but not same-sex couples, have clear rights to recover in tort.

A family is a cooperative, interdependent economic unit. In recognition of this, New York authorizes tort claims to compensate a victim's spouse and family, in the event of wrongful death or other harm. Unmarried same-sex life partners

pool their savings and labor just like their married opposite-sex counterparts; yet without the right to marry, their families are without recourse if a tragedy occurs.

1. Wrongful death.

A married spouse may sue to recover the pecuniary loss caused by the wrongful death of his or her partner. Pursuant to the Estates, Powers and Trusts Law, the personal representative of an estate may sue for damages on behalf of the decedent's distributees who suffered pecuniary loss as a result of the decedent's wrongful death. "Distributees" include the surviving spouse and other blood relatives, EPTL §§5-4.1(1), 1-2.5. The First Department has held that same-sex partners are not "spouses" under the wrongful death statute, *Raum v. Restaurant Assocs., Inc,* 252 A.D.2d 369, 370, 675 N.Y.S.2d 343, 343 (1st Dep't 1998), appeal dismissed, 92 N.Y.2d 946, 681 N.Y.S.2d 476 (1998), meaning that a same-sex partner is potentially exposed to severe, uncompensated financial loss if there is a wrongful death. Although a recent Nassau County Supreme Court decision allowed the same-sex life partner in a Vermont civil union to sue as a "spouse" for wrongful death, *see Langan v. St. Vincent's Hosp.*, 196 Misc.2d 440, 455, 765 N.Y.S.2d 411, 422 (Sup. Ct. Nassau Co. 2003) (appeal pending), this involved recognition of a legally recognized out-of-state spousal relationship and not

unmarried same-sex life partners. The right to marry would secure for same-sex couples this important protection for the cooperative economic effort inherent in any family.

2. Loss of consortium.

Married opposite-sex couples may sue for the loss of the right of consortium, which recognizes that sexual intimacy is an integral part of spousal relationships. *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 502, 293 N.Y.S.2d 305, 308 (1968). As the U.S. Supreme Court noted in *Lawrence v. Texas*, which held that same-sex couples have a liberty interest in private sexual activity, '"These matters [involve] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy...'" 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). Although no reported decision in New York directly addresses a same-sex partner's claim for loss of consortium, New York does not recognize a cause of action for loss of consortium if the tortious conduct occurred before the marriage, *Anderson v. Eli Lilly Co.*, 79 N.Y.2d 797, 798, 580 N.Y.S.2d 168, 169 (1991). If this loss is uncompensated, tortfeasors will be inadequately deterred from actions that can devastate families. Marriage would give a clear right to compensation to same-sex

unmarried life partners who have experienced a loss of consortium due to a tortfeasor's wrongdoing.

3. Crime Victims' Compensation Board financial awards.

The surviving opposite-sex spouse of a crime victim is entitled to financial assistance from the New York State Crime Victims' Compensation Board for out-of-pocket expenses incurred as a direct result of the crime. EXEC. LAW §§620-623. In *Secord v. Fischetti,* however, the First Department held that the term "surviving spouse" did not extend to "homosexual life partners" for this purpose. 236 A.D.2d 206, 206, 653 N.Y.S.2d 551, 552 (1st Dep't 1997). Under the law, a surviving same-sex life partner is eligible to receive victim's compensation only if he or she was principally dependent on the decedent. EXEC. LAW §624. The right to marry would eliminate the need for a detailed, fact-specific inquiry at a time when a surviving same-sex partner has already suffered significant trauma from crime.

J. Recognition of same-sex relationships legally created in other jurisdictions is no substitute for domestic New York same-sex marriages.

Although New York same-sex life partners can obtain legal recognition of their relationships in nearby jurisdictions, such as marriage in Ontario, Quebec and

possibly Massachusetts, and civil union in Vermont and Connecticut, these are not substitutes for domestic New York marriage. New York is deferential to marriages validly celebrated in other jurisdictions, recognizing them unless this would grossly violate New York's strong public policy by being "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). Nonetheless, if New York same-sex life partners are forced to legally establish their relationships elsewhere and then return to New York to live, they will lack certainty about how New York will treat the many rights that come with marriage or civil union. Thus, in *Langan v. St. Vincent's Hosp.,* 196 Misc.2d 440, 765 N.Y.S.2d 411 (Sup. Ct. Nassau Co. 2003)(appeal pending), a surviving same-sex partner in a Vermont civil union, who alleged that medical malpractice caused the wrongful death of his partner, had to litigate whether New York would recognize a Vermont civil union for wrongful death purposes. While the Nassau County Supreme Court granted recognition, same-sex couples still face case-by-case adjudication of other legal rights. In contrast, opposite-sex couples who marry in New York are fully recognized.

K. Same-sex couples cannot fully document their relationships in the absence of marriage.

Same-sex partners can protect themselves against some of the discrimination caused by unequal marriage rights. They can create wills, health care proxies, joint tenancies, domestic partnership agreements and child custody and visitation agreements. See, e.g., ADVISING LESBIAN, GAY, BISEXUAL & TRANSGENDER (LGBT) CLIENTS ON HOW TO PROTECT THEIR RELATIONSHIPS & FAMILIES (CityBar Center for Continuing Legal Education, ed., 2005).

But these arrangements can be subject to contest, in contrast to the clarity and decades of precedent that marriage provides. Even though James Krause and Brendan Daly, a same-sex couple in a 12-year relationship, had health care proxies, powers of attorney and living wills, when Daly suffered creeping paralysis, the doctors in a Westchester hospital refused to let Krause see Daly or inform Krause of Daly's medical condition for nine days. Thomas Crampton, *What Marriage Means to Gays: All That Law Allows Others*, NEW YORK TIMES, Mar. 30, 2004, p. B1. And in *In re Stewart*, 159 Misc. 2d 864, 606 N.Y.S.2d 965 (Sup. Ct. Queens Co. 1993), Drew Stanton left a will leaving everything to his life partner, Michael Stewart, and naming Stewart executor of his estate. But because Stanton left no written instructions on his funeral arrangements, Stewart had to sue for the cremation that Stanton desired.

Furthermore, many couples, due either to lack of financial resources or knowledge, or unwillingness to plan for the future, never create the documentation. In the American public at large, only 40-45% of working-age people have made a will. *See Britain Low in League Table of Leaving Inheritance to 'Good Causes,'* (April 11, 2005), available at http://www.thepressdesk.com/axa/pressrelease.php?releaseid=3185 <visited May 4, 2005>; *Most Americans Still Don't Have a Will, Says New Survey by FindLaw* (August 19, 2002) , available at http://company.findlaw.com/pr/2002/081902.will.html <visited May 4, 2005>. Fifty-seven percent have no living will, according to an ABC News/Washington Post Poll. *See Terry Schiavo Case Living Wills,* ABC NEWS: GOOD MORNING AMERICA, Mar. 20, 2005. And only five percent of opposite-sex couples marrying for the first time sign prenuptial agreements. *See* Arlene G. Dubin, PRENUPS FOR LOVERS 15 (2001); Gary Belsky, *Living by the Rules*, MONEY, May 1996, at 100, 102. The statistical rigor of these estimates varies, but it is clear that large majorities of people do not document their affairs.

For opposite-sex married couples, marriage provides an essential bundle of rights and duties when life's inevitable tragedies occur. Same-sex life partners who have failed to document their relationships may face catastrophe. In *Robin v. Cook*, N.Y.L.J., Oct. 30, 1990, p.21, at 22 (Sup. Ct. N.Y. Co.), Judy Robin claimed an oral contract pursuant to which she would provide Dora Cook with lifetime household services and, in exchange, receive an apartment and $600 a month for the rest of Cook's life. When the same-sex couple broke up after five years, Cook ceased payments and demanded that Robin leave the apartment. The court held the alleged oral contract unenforceable under the statute of frauds. If Robin and Cook had been a married opposite-sex couple, Robin could have claimed maintenance and a property distribution.

Even when unmarried same-sex life partners enter into written contracts to create some of the rights of marriage, those agreements lack the protections that pre-nuptial, post- nuptial or separation agreements have for opposite-sex couples who marry. "There is a strict surveillance of all transactions between married persons, especially separation agreements," *Christian v. Christian*, 42 N.Y.2d 63, 72, 396 N.Y.S.2d 817, 823 (1975). Pre- and post-nuptial agreements are upheld only if the support terms were "fair and reasonable at the time of the making of the

agreement," DOM. REL. LAW §236B(3)(3), and cannot relieve a spouse of the duty of support if the other spouse is in danger of becoming a "public charge." *See* GEN. OBLIG. LAW §5-311; FAM. CT. ACT §463. They may be modified, with respect to spousal support terms, if there is a substantial, unexpected change of circumstances and extreme financial hardship would result from enforcing the original terms of the agreement. DOM. REL. LAW §236B(9).

Same-sex life partners have none of these protections. They may not seek a modification of a written agreement on the basis of changed circumstances. *See, e.g., Shultz v. 400 Coop. Corp.,* 292 A.D.2d 16, 736 N.Y.S.2d 9 (1st Dep't 2001) (contracts must have been unfair at the time of execution in order to warrant modification; non-marital dispute). Nor can they avail themselves of the fairness scrutiny available to opposite-sex married spouses. *See Silver v. Starrett,* 176 Misc. 2d 511, 515, 674 N.Y.S.2d 915, 918 (Sup. Ct. N.Y. Co. 1998) (upholding lesbian couple's one-sided, non-marital "separation agreement" where no evidence of fraud, duress, or overreaching).

As the New York State Bar Association noted:

> For some of these exclusions [of same-sex couples from the rights of opposite-sex married couples], we found that same-sex couples with

> sufficient means and foresight could hire attorneys to develop private work-arounds, some relatively certain and easy, others more difficult, more problematic and more expensive. In yet other instances, no private work-arounds are possible.

State Bar Report at 3.

L. Conclusion.

Marriage is a vast legal and social safety net, and this brief's list of legal rights and obligations affected by marriage does not purport to be complete. Instead, this brief illustrates many ways that the exclusion from marriage affects same-sex couples and their children in their daily lives, especially at times of crisis. The denial of equal marriage rights can have devastating consequences. We therefore urge this court to reverse the decision of the trial court.

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Respectfully submitted,

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