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INTEREST OF *AMICUS CURIAE*

Amicus Curiae The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated several cases, and filed a number of *amicus curiae* briefs, dealing with the definition of traditional marriage and custody cases under that. The NLF has gained valuable expertise in the legal history of marriage, which it believes will assist this Court in deciding this appeal. The NLF has an interest, on behalf of its constituents and supporters, including those in New York, in arguing on behalf of the preservation of the institution of marriage. The instant case is of great interest to our constituents and supporters who are greatly concerned about maintaining the traditional understanding of marriage and family found in this nation's history.

SUMMARY OF THE ARGUMENT

This Brief expands upon one argument made by the party it supports, and makes one argument not made by the party it supports. First, your *Amicus* provides a useful analogy from chemistry to show that New York's traditional definition of marriage is different than the same-sex marriage that the Defendant-Intervenors want recognized. Second, your *Amicus* argues that because the Marriage Recognition Rule does not require the recognition of foreign same-sex

marriages, the Equal Protection Guarantee and the Sexual Orientation Non-Discrimination Act do not require the provision of benefits.

As to the first argument, the primary substantial objection to the argument based on definition is that it is tautological. However, chemistry provides a clear analogy of why this argument is not tautological. The study of chemistry has revealed that the only process in which table salt can be formed is through the union of sodium (Na) and chlorine (Cl). Even if you call a union of two sodium atoms or two chlorine atoms “salt,” as a matter of definition, it cannot be. The same is true for marriage, even if you call a union of two same-sex persons a marriage, it simply cannot be. This analogy has proven helpful to at least one court in the past, namely the United States Court of Appeals for the Ninth Circuit in *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2005), and hopefully it will prove helpful to this Court as well.

As to the second argument, *Amicus* argues that the provision of spousal benefits to opposite-sex couples married in other states, but not to same-sex couples is not a violation of New York law. There is a significant difference between the two groups in that New York has recognized opposite-sex marriages since its founding as a colony. Because of that difference, and other reasons, *Amicus* argues the Equal Protection Guarantee would not be violated. *Amicus* argues that the appropriate level of scrutiny in this case should be rational basis, a

point Defendants-Intervenors seemingly conceded below. Additionally, as the Court of Appeals has noted, the decision to change the traditional definition of marriage to include same-sex “marriages” is a decision that should be left to the New York Legislature, not to the courts or the administrative agencies.

Furthermore, the relevant question in this appeal is whether a denial of spousal benefits facially discriminates based on sexual orientation under the Sex Orientation Non-Discrimination Act (hereinafter “SONDA”), because SONDA does not require a disparate impact analysis and precedent only requires that analysis be done in certain other circumstances. In fact, that same precedent from the Court of Appeals helps illustrate that the Defendant-Intervenor’s argument does not meet the requirements of facial discrimination.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE TRIAL COURT’S RULING BECAUSE THE MARRIAGE RECOGNITION RULE DOES NOT REQUIRE RECOGNITION OF FOREIGN SAME-SEX MARRIAGES.

Appellants, Kenneth Lewis, Denise Lewis, Robert Houck, and Elaine Houck (hereinafter “Lewis”) provide a number of reasons why the Marriage Recognition Rule does not require the recognition of same-sex “marriages” from other jurisdictions. (Appellants’ Br. 25-36.) This brief will demonstrate why these “marriages” should not be recognized. Lewis notes that “[f]rom time immemorial, the opposite-sex component of marriage—that is, the union of one man and one

woman—has remained the core of its definition.” (*Id.* at 26.) Lewis also notes that same-sex marriages should not be recognized because marriage relationships from other jurisdictions are different in degree, while same-sex marriages are different in kind, and the latter cannot be considered marriage in New York absent a decision of the legislature. (*Id.* at 34-35.)

Some would dismiss Lewis’s argument and similar observations as tautological, a “definitional or semantic substitute for meaningful analysis.” Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. Rev. 1, 38; *but see* Jay Alan Sekulow and John Tuskey, *Sex and Sodomy and Apples and Oranges - Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 BYU J. Pub. L. 309 (1988). If the sole argument were that marriage must remain the union of one man and one woman for no other reason than it has always been that way, then such a dismissal might be in order. The “definition” of marriage, however, is much more than a relatively meaningless semantic distinction. A cogent analogy is found at the molecular level.

For millennia, the layman has known sodium chloride (NaCl) as common table salt, or simply salt. The study of chemistry has established that a molecule of salt is made up of the union of one atom of sodium (Na) and one atom of chlorine

(Cl).¹ Two atoms of chlorine may, nonetheless, join together and form Cl₂. Two atoms of sodium may also join together, forming Na₂. However, neither Cl₂ nor Na₂ are NaCl, nor can they ever be. At the very least, each lacks a key component to complete the union required for NaCl. It is a definitional impossibility.

Just as the union of one atom of sodium and one atom of chlorine has a very specific outcome, so the union of one man and one woman has a very specific outcome. One is a chemical formula, with very specific features and dynamics and effects on the world around it. The other is a social or relational formula, with very specific features and dynamics and effects on the world around it. One can certainly *call* Na₂ or Cl₂ “salt,” but neither will ever be, nor have the same features, dynamics, and effects as, NaCl. Likewise, one can call the union of two men or two women “marriage,” but neither will ever be, nor have the same features, dynamics, and effects as, the union of one man and one woman.

Just as the term “salt” is given to the specific molecular union NaCl, the term “marriage” is given to the specific social union of one man and one woman. Recognizing that the union of two men or two women is not marriage because it is a definitional impossibility is no different than recognizing that Na₂ or Cl₂ is not salt. That is not circular reasoning—simply a recognition that the union of two men or two women is not the same as the union of one man and one woman. The

¹ Technically, salt is an ionic compound, but it is often referred to as a molecule, and for ease of discussion here, we shall refer to it as a molecule.

reservation of the term “marriage” for the specific union of one man and one woman, therefore, is not tautological, but only employment of that timeless, basic system of verbal communication used to convey specific and exclusive meaning.

While it may be argued that there is more similarity between same-sex unions and opposite-sex unions than either Na_2 or Cl_2 and NaCl , it has been recognized through the ages, and more recently by the United States Congress, that a man and a woman each contribute and produce something unique in that particular union that cannot be duplicated by another union. *See, generally*, H.R. Rep. No. 104-664 (1996). Congress has determined that the protection and promotion of this union is in the best interest of the state. *See id.* *See also* Defense of Marriage Act, 1 U.S.C. § 7 (2006) (hereafter referred to as DOMA). Such a determination is well within the authority of the legislature to make, and well outside the authority of the judiciary to refute, absent specific criteria.

The United States Court of Appeals for the Ninth Circuit utilized this salt analogy in its recent ruling in *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2005). In that case, same-sex couples challenged the California statutory prohibition on same-sex marriage and DOMA. Although the court ultimately decided the case based on abstention and standing, it considered the definitional issues along the way. *Id.* at 680 n.18, 681. Furthermore, during the oral argument, the judges relied upon a brief filed by your *Amicus* to specifically question counsel

about the salt analogy. *Id.*, Audio File, May 05, 2006, *available at* [http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm &Seq=2](http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2) (After reaching this web site, enter the docket number, 05-56040. On the next web page, click on the link for the docket number and the audio file will play.).

Relying on the salt analogy, one of the judges made the point repeatedly that prohibiting same-sex marriage does not constitute discrimination; rather, such prohibition simply implies that definitions matter. *By definition*, same-sex unions cannot be marriages.

“[T]he word ‘marriage,’ when used to denote a legal status, refers only to the mutual relationship between a man and a woman as husband and wife, and therefore . . . same-sex ‘marriages’ are legally and factually—*i.e.*, definitionally—impossible.” *Dean v. D.C.*, 653 A.2d 307, 308 (D.C. 1995). Thus, recognizing same-sex “marriages” solemnized in other states is very different than recognizing other marriages from other states. A court does not have the authority to “alter or expand the definition of marriage” *Dean*, 653 A.2d at 362. As the Court of Appeals noted in *Hernandez v. Robles*, 855 N.E.2d 1, 5 (2006) (citing *Fearon v. Treanor*, 5 N.E.2d 815 (1936)), should altering the definition of marriage ever become necessary, that responsibility lies with the legislature. *See e.g.*, *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Dean*, 653 A.2d at 362; *Shields v. Madigan*, 783 N.Y.S.2d 270, 277 (Sup. Ct. 2004).

There is no legal justification for recognizing a relationship from a foreign jurisdiction whose very name is a contradiction in terms.

II. THIS COURT SHOULD REVERSE THE TRIAL COURT’S DECISION BECAUSE THE EQUAL PROTECTION GUARANTEE AND THE SEXUAL ORIENTATION NON-DISCRIMINATION ACT DO NOT REQUIRE THE PROVISION OF BENEFITS.

Because the Marriage Recognition Rule does not require the recognition of same-sex marriages, neither the New York Equal Protection Guarantee, N.Y. Const. art. I, § 11, nor the Sexual Orientation Non-Discrimination Act, Executive Law § 296 (1)(a) (LEXIS through the Ch. 115, 06/17/2008) (hereinafter “SONDA”), requires the State to provide spousal benefits to employees are not legally married under New York law.

Sexual orientation is specifically enumerated as a discrete category on the face of SONDA, and although it is not listed as a discrete category under the second sentence of the Equal Protection Guarantee, the Court in *Hernandez* interacted with sexual orientation as a discreet category for Equal Protection analysis purposes. *Hernandez*, 855 N.E.2d at 7 (citing *Fearon*, 5 N.E.2d at 815), Thus, because the category at issue is the same, the constitutional claim and the statutory claim stand or fall together. Ms. Rainbow implicitly acknowledged this when she argued them together in her Motion to Dismiss below. (Defendant-Intervenor’s Mem. of Law in support of Mot. to Dismiss 17.)

The Defendant-Intervenors, Peri Rainbow and Tamela Sloan (hereinafter “Rainbow”) baldly asserted below that same-sex couples who could not marry in New York, but are married in a different state are in exactly the same position as opposite-sex couples married in other states. *Id.* Thus, they argue, the provision of spousal benefits to opposite-sex couples married in other states, but not to same-sex couples is a violation of the New York Equal Protection Guarantee and SONDA. However, there is a key difference in that New York has recognized opposite-sex marriages since its founding as a colony. *Hernandez*, 855 N.E.2d at 9 (citing *Fearon*, 5 N.E.2d at 815). While New York may refuse to marry some opposite-sex couples, but then recognize marriages entered into by them in other states, it has never recognized the putative marriage of same-sex couples. Judge Graffeo of the Court of Appeals noted in his concurrence to *Hernandez* that the Legislature, in passing statutes regarding marriage and its benefits, has never considered marriage to include a same-sex “marriage” as Rainbow contemplates. *Id.* at 13 (Graffeo, J. concurring).

Furthermore, as the Court of Appeals found in *Hernandez*, the appropriate level of scrutiny is rational basis. *Id.* at 11. Ms. Rainbow seemingly concedes this is the correct level of scrutiny. (Mot. to Dismiss 17.) “We resolve this question in this case on the basis of the Supreme Court’s observation that no more than rational basis scrutiny is generally appropriate ‘where individuals in the group

affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement.”” *Hernandez*, 855 N.E.2d at 11 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 US 432, 441 (1985)). In fact, the Court explicitly stated that sexual orientation discrimination is subject only to rational basis scrutiny in the context of marriage and family relationships. *Id.* at 10-11.

The relationships being denied recognition in this case are not the traditional, opposite-sex marriages which have been recognized for centuries, but rather are a new invention. The Court of Appeals held in *Hernandez* that limiting marriage to opposite-sex couples was not unconstitutional, and recognized that it had a duty to defer to the New York Legislature as to the legal definition of marriage. *Id.* at 12. In fact, the Court noted that it “hope[d] that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can.” *Id.* If the Court of Appeals had a duty to defer to the Legislature as to the definition of marriage, and told the parties that that is where the controversy should be resolved, it would be rational for administrative officials to do so likewise.

While the state may recognize the otherwise void marriages of opposite-sex couples solemnized in other jurisdictions, those at the very least meet the legal “historical conception of marriage as a union between a man and a woman.” *Hernandez*, 855 N.E.2d at 13 (Grafteo, J., concurring). The same-sex “marriages”

that Ms. Rainbow wants recognized in New York fail that crucial test, and thus are clearly distinguishable under the Marriage Recognition Rule.

Furthermore, cases like *Levin v. Yeshiva University*, 96 N.Y.2d 484 (2001), which dealt with a sexual orientation disparate impact claim under a New York City ordinance that is not applicable here, do not help Rainbow's argument either. As the *Levin* Court noted, *id.* at 492, the disparate impact analysis had its origin in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Supreme Court analyzed an employment practice under Title VII. Although Title VII did not require a disparate impact analysis on its face, the Court inferred from the legislative history that such an analysis would be required. *Id.* at 429-30. New York City, however, chose to include a disparate impact analysis in the text of its ordinance. N.Y.C. Admin. Code § 8-107(17). Because no disparate impact analysis is required on the face of SONDA, the New York City ordinance at issue in *Levin* cannot serve as a direct analogy. Additionally, while a disparate impact analysis may be appropriate in some cases even if it is not authorized on the face of the statute, such an analysis is only appropriate where, as in *Duke Power*, the policy being challenged continues a prior discriminatory employment practice. *Griggs*, 401 U.S. at 432.

That is not the case here. Ms. Rainbow asserts that enforcement of SONDA is the only way to prevent sexual orientation discrimination; however, there could

be no significant history of sexual orientation against holders of putative same-sex marriages. Since any possible putative same-sex marriage that would serve as a ground for a claim under SONDA is of relatively recent origin, there could not have been many (if any) employees who were “discriminated” against on this basis. Same-sex “marriages” have only been valid in Canada since June 10, 2003, *Halpern v. Attorney General of Canada*, 65 O.R.3d 161 (2003),² in Massachusetts since November 18, 2003, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003),³ and in California since May 15, 2008, *In re Marriage Cases*, 43 Cal. 4th 757 (2008), which was decided after the filing of the complaint in the instant case.

In fact, rather than supporting Rainbow’s position, *Levin* provides a useful example of the weakness in Ms. Rainbow’s argument. Litigants have brought a number of challenges to facially neutral laws alleging sexual orientation discrimination before, but those challenges were rejected. *See, e.g.*, most relevantly, *Hernandez*, 855 N.Y.2d at 13. However, in *Levin*, the students did not try to allege that the facially neutral law discriminated against sexual orientation,

² *Halpern* was the first provincial case to hold that the government must issue marriage licenses to same-sex couples. On June 20, 2005, the Parliament of Canada passed the Civil Marriage Act, S.C. 2005, c. 33, legalizing same-sex marriage through Canada.

³ Those marriages may no longer be performed between New York residents—if they ever could have been—since the *Hernandez* decision. *Cote-Whitacre v. Dep’t of Pub. Health*, 844 N.E.2d 623, 631 (Mass. 2006).

but rather they relied solely on the disparate impact analysis under the New York City ordinance. 96 N.Y.2d at 491. In foregoing a claim under the New York City ordinance for facial discrimination, the students must have realized that such an argument was not likely to succeed.

Since *Levin* only stands for the proposition that its trial court failed to do a proper disparate impact analysis and since such an analysis is inapplicable in the instant case, *Levin* and similar cases cannot help Ms. Rainbow. Thus, everything stated *supra* about the failure of her argument under both the Equal Protection Guarantee and SONDA rests on solid ground.

CONCLUSION

For the foregoing reasons and for the reasons found in the Plaintiffs-Appellants' Brief this Court should reverse the judgment of the Supreme Court of Albany, New York.

Respectfully Submitted,
this 1st day of July, 2008

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CERTIFICATE OF SERVICE

I, Steven W. Fitschen, certify that I delivered two copies of the foregoing Brief *Amicus Curiae* by postage pre-paid First Class Mail on counsel of record for all parties, at the addresses indicated, July 1, 2008:

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