

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

DANIEL HERNANDEZ and NEVIN COHEN,
LAUREN ABRAMS and DONNA FREEMAN-
TWEED, MICHAEL ELSASSER and DOUGLAS
ROBINSON, MARY JO KENNEDY and JO-ANN
SHAIN, and DANIEL REYES and CURTIS
WOOLBRIGHT,

Plaintiffs,

- against -

VICTOR L. ROBLES, in his official capacity as
CITY CLERK of the City of New York,

Defendant.

Index No. 103434/2004

Hon. Doris Ling-Cohan

**MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO DEFENDANT'S
CROSS-MOTION FOR SUMMARY JUDGMENT**

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Plaintiffs Daniel Hernandez and Nevin Cohen, Lauren Abrams and Donna Freeman-Tweed, Michael Elsasser and Douglas Robinson, Mary Jo Kennedy and Jo-Ann Shain, and Daniel Reyes and Curtis Woolbright (“plaintiffs”), by their attorneys Lambda Legal Defense and Education Fund and Kramer Levin Naftalis & Frankel LLP, respectfully submit this memorandum of law in further support of their motion for summary judgment and in opposition to the cross-motion for summary judgment filed by defendant Clerk of the City of New York.

PRELIMINARY STATEMENT

Plaintiffs in this action, members of five same-sex couples, ask for recognition of their basic civil right to marry the person they love. Each couple wants to enter into the civil institution of marriage to make a profound private and public commitment to one another through marriage, to obtain the myriad legal rights and protections for themselves and their families to which marriage is the exclusive gateway, and to receive the same respect for their families that New York law provides others. Plaintiffs seek vindication of their right to marry under the New York Constitution’s Due Process and Equal Protection Clauses, which guarantee the rights of all New Yorkers, regardless of whether those rights historically have been denied to a minority or where the winds of public opinion currently may blow.

Defendant expressly concedes “that plaintiffs have raised important concerns about the current circumstances of same-sex couples and families,” yet urges that “[t]hese significant issues are properly addressed by the Legislature.” (Amended Memorandum of Law in Support of Defendant’s Cross-Motion for Summary Judgment, dated September 7, 2004 (“Def. Br.”) at 22.) The predominant theme of defendant’s brief is that the courts should shirk their responsibility to remedy the constitutional violations perpetuated by the restriction on marriage for same-sex couples and leave plaintiffs’ rights to the mercy of the Legislature, at least until the tide of public opinion turns in favor of allowing same-sex couples to marry.

Defendant's request that the Court forsake its role as the guardian of individual liberties must be rejected. Under our system of checks and balances, the Court is obliged to decide whether the Legislature has violated plaintiffs' rights of due process and equal protection, not to acquiesce in the face of legislative action or inaction. Nor does our State Constitution guarantee only those rights that are uncontroversial and blessed by public opinion polls.

Defendant can identify only two government interests in support of the marriage restriction: the State's desire (1) to adhere to a "traditional" definition of marriage that excludes same-sex couples, and (2) to remain in uniformity with the federal government and a number of other states that currently discriminate against gay people by denying legal recognition to marriages between same-sex couples. But a desire to perpetuate an ongoing history and tradition that operates to discriminate can no more justify such discrimination than deeply entrenched views on interracial marriage could save anti-miscegenation laws a generation ago. New York is governed by its own State Constitution and must live up to its obligation to guarantee the rights of all its residents, even if discrimination prevails elsewhere. Just since Massachusetts's landmark decision last year affirming the marriage rights of gay and lesbian couples under its own constitution, courts in New York, Oregon, Washington, and Canada have also recognized that withholding marriage rights from same-sex couples violates bedrock constitutional guarantees.¹

¹ See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003); *People v. West*, 4 Misc. 3d 605, 780 N.Y.S.2d 723 (N.Y. Justice Ct. Ulster Cty. 2004); *People v. Greenleaf*, 780 N.Y.S.2d 899 (Justice Ct. Ulster Cty. 2004); *Li v. Oregon*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004); *Castle v. Washington*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004); *Catholic Civil Rights League v. Hendricks*, No. 500-09-012719-027, 2004 CarswellQue 1927 (Can. Ct. App. Mar. 19, 2004) (Quebec); *Egale Canada, Inc. v. Attorney General of Canada*, 13 B.C.L.R. (4th) 1 (May 1, 2003) (British Columbia); see also *Same-Sex Marriage Ruled Legal in Yukon*, CTV NEWS, July 15, 2004, available at www.ctv.ca/servlet/ArticleNews/print/CTVNews/1089836501123_85245701/?hub=TopStories&Subhub (attached as Exhibit 12 to Affirmation of Jeffrey S. Trachtman, dated July 29, 2004 ("Trachtman Aff.")).

All the material facts of this case are undisputed; the only question is one of constitutional law requiring resolution by the Court. Defendant expressly affirms that he “does not dispute the material facts set out by plaintiffs in their motion for summary judgment” (Def. Br. at 1-2), thereby conceding the truth of all the operative facts set forth in plaintiffs’ opening brief and accompanying affidavits. In addition, defendant admits that “same-sex couples can establish committed, caring relationships and can be fine parents.” (Def. Br. at 2.) By not contesting plaintiffs’ contentions, defendant also concedes that plaintiffs’ exclusion from marriage deprives them of a vast range of statutory protections, benefits, and mutual responsibilities automatically afforded to married couples by New York law. (*See Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment*, dated July 29, 2004 (“Pl. Br.”), at 14-23.) For example, same-sex couples are denied the presumptions of parenthood afforded to married couples; equal access to health and other insurance; and irreplaceable protections when a spouse dies. Defendant also concedes the truth of plaintiffs’ averments of the profound and sometimes insurmountable economic hardships they face when trying to cobble together some of the rights that come with marriage. There is no dispute that “obtaining second-parent adoptions, wills, health care proxies, and other protections available for some same-sex domestic partners and their families is costly and time-consuming and offers far less than the protections automatically conferred with marriage.” (Pl. Br. at 22.)

Nor does defendant dispute that the State’s discriminatory marriage ban causes plaintiffs profound intangible harms. (Pl. Br. at 11-13.) Plaintiffs are denied the life transforming decision whether and whom to marry and are thereby excluded from “society’s most significant public proclamation of commitment to another person for life.” (Pl. Br. at 11.) Similarly, defendant does not contest that the State’s denial of marriage to same-sex couples imposes social stigma on them and their families, or that the marital ban assigns a second-class

status to them and their children that can be cured by nothing short of equal respect by the State for their relationships through marriage. (Pl. Br. at 23-25.)

In the final analysis, these critical undisputed facts and core principles of New York constitutional law demonstrate why the Court should deny defendant's cross-motion and grant summary judgment for plaintiffs.

ARGUMENT

I.

NEW YORK'S COURTS HAVE THE DUTY TO SAFEGUARD THE CONSTITUTIONAL RIGHTS OF ALL NEW YORKERS INDEPENDENT OF LEGISLATIVE OR MAJORITARIAN OPINION

A central theme of defendant's argument is the suggestion that plaintiffs' constitutional rights can be brushed aside because the State Legislature chooses to retain discriminatory marriage laws and there is no national consensus that this discrimination must end. But the Due Process and Equal Protection Clauses do not provide that their protections of liberty and equality extend only if "deemed best by the Legislature," or "supported by polls," or "uniform with the other states." To the contrary, the Court's obligation to protect the constitutional rights of individuals is *strongest* when majoritarian, political forces operate to deny those rights. Defendant can offer no legitimate reason for this Court to abdicate its constitutionally mandated function — particularly cherished in New York — of independent judicial review.

A. It Is the Mandate of New York's Courts to Protect Plaintiffs' Constitutional Rights

Defendant claims that plaintiffs' plea to the Court to enforce their right to marry is an improper effort to usurp the Legislature's role in regulating civil marriage. Plaintiffs seek nothing of the sort. Rather, plaintiffs look to this Court to perform its quintessential judicial

