

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

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SYLVIA SAMUELS and DIANE GALLAGHER,
HEATHER McDONNELL and CAROL SNYDER,
AMY TRIPI and JEANNE VITALE, WADE
NICHOLS and HARNG 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
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GARCIA, ELLEN DREHER and LAURA COLLINS,
JOHN WESSEL and WILLIAM O'CONNOR, and
MICHELLE CHERRY-SLACK and MONTEL
CHERRY-SLACK,

Index No. 98084

Plaintiffs-Appellants,

v.

The NEW YORK STATE DEPARTMENT OF
HEALTH and the STATE OF NEW YORK,

Defendants-Appellees.
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BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION
In Support of Defendants-Appellees

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INTEREST OF THE *AMICUS*

Amicus Curiae The National Legal Foundation (NLF) is a 501c(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 important First Amendment cases in both the federal and state courts. The NLF has gained valuable expertise in the area of First Amendment law, which it believes will assist this Court in deciding this appeal. The NLF has an interest, on behalf of its constituents and supporters, 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

Appellants claim that New York Domestic Relations Law § 12 (McKinney 2004) violates their freedom of expression under the New York Constitution, Art. I, § 8. However, Appellants support this claim with virtually no argument. Nonetheless, the marriage-as-expression theory has been briefed in other lawsuits and has been articulated in the law review literature. Specifically, the theory was briefed in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass., 2003), the Massachusetts same-sex marriage case. That brief was authored by Professor David Cruz, the creator of the theory. However, Professor Cruz has also discussed the theory in a law review article. The theory has both serious flaws and serious ramifications. As this brief will point out, there are major differences between the way the theory was articulated in the *Goodridge* brief and the way it was articulated in Professor Cruz's article. This Court cannot understand the problems with or the ramifications of the Free Expression claim based solely upon Appellants' four-paragraph argument. Nor can it do so based upon Professor Cruz's

Goodridge brief. Rather, the Court must understand the version of the theory articulated in Professor Cruz’s law review article. There, he admits the theory’s shortcomings. There he also admits that the logical outworking of the theory is that the state must either grant Free Expression protection not only to same-sex marriages, but also to polygamous and incestuous marriages; or abolish civil marriage altogether.

ARGUMENT

I. CONTRARY TO PLAINTIFF’S ASSERTION, MARRIAGE IS NOT AN EXPRESSIVE INSTITUTION.

From among the many issues raised by Appellants, this brief will address their claim that the clerks’ refusal to issue a marriage license under New York Domestic Relations Law § 12 (McKinney 2004), violates Appellants’ freedom of expression under the New York Constitution, Art. I, § 8. (Appellants’ Brief at 60-61). While Appellants’ claim that the denial of marriage licenses to same-sex couples violates their free expression rights they do virtually nothing to support that claim. In their four-paragraph argument (Section IV. and IV.A.), they merely note that the Free Speech Clause of the New York Constitution is more expansive than the First Amendment under the United States Constitution. (*Id.*) They also cite a Free Press case for the same black letter law proposition. (*Id.* (citing *O’Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528 N.Y.S.2d 1 (1988))). They also cite—out of context—one New York case and one United States Supreme Court case, as well as § 12 itself to emphasize words like “expression” or “declare.” (*Id.* at 61) Based on nothing more they conclude, *ipso facto*, that marriage is “a state-created expressive institution with unique expressive import.” (*Id.* at 60.) Thereafter, Appellants engage in an additional five-paragraph forum analysis, which necessarily relies on the conclusion that marriage is expressive conduct.

Despite the paucity of Appellants' articulation of their own argument before this Court, this legal theory does not arrive at this Court untried. It is with good cause that Appellants cite Professor David Cruz's scholarship in support of their claim (*id.* at 60-61), because he is the chief proponent—in fact, as will be shown below, the creator—of this legal theory. Indeed Professor Cruz made this very argument in an *Amicus* brief before the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass., 2003), the same-sex marriage case. (Brief of Professors of Expression [sic] and Constitutional Law, *et al.*, 2002 WL 32364782 (hereinafter “Cruz Brief.”)) Interestingly, the Supreme Judicial Court rejected the argument and, as will be explained immediately below, no court has adopted it.

A. No Court Has Ever Found Free Speech Protection For Same-Sex Marriages.

Appellants' assertion simply is not true. Marriage is not expression nor an expressive institution. As just noted, the *Goodridge* court rejected this very argument. Furthermore, *no court* has ever found an expressive right implicated by regulation of marriage—not even those that invalidated bars against same-sex marriage. Some of those courts, in addition to the trial court below, are courts of this state. *Hernandez v. Robles*, 7 Misc.3d 459, 794 N.Y.S.2d 579 (2005); *Seymour v. Holcomb*, 7 Misc.3d 530, 790 N.Y.S.2d 858 (2005); *accord. People v. Greenleaf*, 5 Misc.3d 337, 780 N.Y.S.2d 899 (2004); *People v. West*, 4 Misc.3d 605, 780 N.Y.S.2d 723 (2004). In addition to the *Goodridge* court, the other courts in other jurisdictions that have declined to find an expressive right implicated by marriage are the following: *Turner v. Safeley*, 482 U.S. 78, 99-100 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384, 388 (1978); *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967); *Smelt v. County of Orange*, 2005 WL 1429918 (C.D. Cal. June 16, 2005); *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. 2005); *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005); *Li v. State*, 110 P.3d

91 (Ore. 2005); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005); *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La., 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla., 2005); *Castle v. State*, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004); *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. 2003); *Brause v. Bureau of Vital Statistics*. No. 3AN-95-6562 CI. 1998 WL 88743 (Alas. Sup. Ct. Feb. 27, 1998), *dismissed for lack of ripeness*, 21 P.3d 357 (Alas. 2001), *Baker v. Vermont*, 17 Vt. 194, 744 A.2d 864 (1999), *Baehr v. Miike*, No. Civ. 91-394, 1996 WL 694235 at *22 (Haw. Ct. App. 1996) *rev'd as moot*, *Baehr v. Miike*, 92 Haw. 634, 994 P.2d 566 (1999)).

B. Marriage Is Not Expression Merely Because It Contains An “Expressive Element.”

As noted previously, Appellants cite two cases that purportedly demonstrate that marriage enjoys protection as expression, *Turner v. Safeley*, 482 U.S. 78 (1987); and *Douglas v. Douglas*, 132 Misc. 2d 203, 205, 503 N.Y.S.2d 530 (N.Y. Sup. Ct. 1986). However, this proves too little, since as the United States Supreme Court has stated, “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (emphasis added).¹ Merely because the courts cited by Appellants stated that marriage might have some expressional element to it does not therefore entitle marriage to Free Speech protection. Indeed, elsewhere, Professor Cruz himself has called this the “floodgate problem.” David B. Cruz, “Just Don’t Call It Marriage”: The First Amendment and Marriage as an Expressive Resource, 74 S. Cal. L. Rev. 925, 975, n.269 (2001) [hereafter Cruz Article] (quoting *Texas v. Johnson* 491 U.S. 397, 404 (1989), for the proposition that the Supreme Court

¹ This principle is surely equally true under the New York Free Speech Clause.

has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”)

C. Professor Cruz’s Law Review Article Demonstrates The Invalidity Of The Argument Presented To This Court.

As mentioned above, Professor Cruz is the main source for the marriage-as-expression theory being advanced by Appellants in the instant case. It is vitally important for this Court to recognize that Professor Cruz has proffered two contradictory versions of this theory, the one contained in his *Goodridge Amicus* brief and another designed for the academic world. In his *Goodridge* brief, Professor Cruz wrote in support of homosexual and lesbian couples who argued that allowing same-sex marriages would not create a slippery slope. (Plaintiffs-Appellants’ Brief at 40). However, when he wrote his law review article, Professor Cruz admitted that using the same legal theory he proposed in the *Goodridge* Brief—and that Appellants urge here—courts would be forced to accept polygamous and incestuous marriages, or as an alternative “get out of the marriage business entirely.” Cruz Article at 1005. It seems obvious—although it will be addressed more fully below—that courts, including this Court, would be more willing to embrace this theory if the former is true and less willing to adopt it if the latter is true.

In documenting the two different versions of this theory, this brief will show, first, that Professor Cruz’s law review article includes some statements that *undercut* the assertions he made in his *Goodridge* brief. It will show, secondly, that he made certain assertions in the article that flatly *contradict* the assertions made in his brief. For reasons that will be explained below, when choosing between these mutually exclusive assertions, this Court should find the assertions in the article more credible than the assertions in the brief. This brief will show, thirdly, that in his article, Professor Cruz acknowledged the novelty of his position, the problems with it, and the radical ramifications of it, although none of this material made it into his brief. This Court

should consider all of these matters when evaluating the bare-bones argument made in Appellants' brief.

At the outset, your *Amicus* notes that in order to document these points, this brief will use a considerable number of quotations, from both Professor Cruz's *Goodridge* brief and his article, of a length sufficient to provide context.² Furthermore, in order to understand some of the quotations used below, it is important to know that Professor Cruz addresses an issue not implicated by Appellant's argument in the instant case, namely whether the expressive content of marriage is private speech or government speech. Therefore, we here insert a short excursus on this topic.

Professor Cruz argues that "civil marriage is a means by which individual couples express themselves and constitute their identities; it is not predominately a mode of government speech." *Cruz Brief* at 18-19. For this proposition he cites his law review article. *Id.* (citing Cruz Article at 986.) It is true that *at that point in his article*, Professor Cruz makes arguments rebutting marriage as government speech (and this brief will revisit this issue below). However, Professor Cruz *elsewhere* in his article spends five pages arguing that marriage *is* governmental speech (as he admits to doing in his footnote 236). As the extensive quotations to follow will show, Professor Cruz shifts back and forth between the two claims.

1. Professor Cruz's Law Review Article Undercuts His Assertions Because It Emphasizes That Marriage Is An Institution And A Status, Not Speech.

Laying aside the private speech/public speech excursus, we turn first to those assertions in Professor Cruz's article that actually accentuate the true nature of marriage. The Appellants

² *Amicus* recognizes that unfortunately, the arguments documenting the novelty, weakness, and radicalness of Dr. Cruz's position will be somewhat overlapping with each other and with prior sections of this brief; however, in order to establish sufficient context for each argument, this is unavoidable.

argue that marriage is an “expressive institution.” Perhaps this argument is their attempt at avoiding a tension (if not a contradiction) that exists between Professor Cruz’s academic work and his *Goodridge* brief. Perhaps it is their attempt to have it both ways. We will note this tension and along the way will show that posturing marriage as an “expressive institution” does not succeed in bringing it within the protection of New York’s Free Speech Clause.

In his academic version of his theory, Professor Cruz at times appears to question whether marriage is an institution at all (note the subjunctive mood in the following quotation), yet at other times (and even simultaneously) is willing to admit that marriage is indeed an institution:

Even were it correct to view marriage as an institution (in the singular), marriage would remain a manifold institution, possessed of many different aspects; people arguing in favor of governmental recognition of same-sex marriage quite properly have directed attention to many of these aspects of marriage. Marriage is, for example, an economic institution . . .

Cruz Article at 931. Similarly, in discussing the state’s expression, Professor Cruz acknowledges that civil marriage serves “lots” of non-expressive purposes *within society*.³

Again, in a passage in which Professor Cruz admits some of the problems with his theory, he writes:

Expressive conduct is action in which people generally might engage with no expressive intent (destroying documents, for example), yet which may on occasion be engaged in for expressive purposes (burning a draft card as a war protest), in which case “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct.” Thus, the government will usually have nonexpression-related reasons to regulate expressive conduct, which typically would only inadvertently come into conflict with expressive activity. Civil marriage likewise may be regulated by government for nonexpression-related reasons, and this

³ Professor Cruz puts the word “lots” in the mouth of an imaginary interlocutor stating, “‘But civil marriage serves lots of nonexpressive purposes,’ someone might argue, ‘so why isn’t rational basis review the appropriate kind of scrutiny?’” *Id.* at 959. However, a careful reading of the Article shows that Professor Cruz himself also believes marriage serves “lots” of non-expressive purposes.

regulation (in particular, the mixed-sex requirement, but other restrictions as well) can interfere with people's ability to express love and commitment by marrying civilly.

Although the Supreme Court has recognized that the First Amendment does protect expressive conduct, it has also worried about the floodgate problem: any conduct could potentially be engaged in for expressive reasons, thus subjecting all governmental action to ideally (or at least ostensibly) demanding First Amendment scrutiny. Realistically, a court would hesitate to apply expressive conduct analysis to the mixed-sex requirement for marrying civilly unless the court were convinced that it could be distinguished from the vast majority of laws that do not “deserve” First Amendment scrutiny

Id. at 975-76. (citations omitted).

After reasserting that civil marriage is expressive, Professor Cruz continues the above analysis by admitting that:

Nevertheless, in another sense marrying civilly is unlike situations that the Court has treated as expressive conduct: burning a draft card, burning a flag, dancing in the nude, and sleeping in the park. What one does when one marries legally is not really engaging in primary “conduct” with both physical consequences and communicative consequences in the world. Rather, people who marry civilly are engaging in an abstract act, entrance into a quasi-contractual legal status.

Id. at 978.

Yet again, Professor Cruz describes civil marriage as an institution, elaborating that “[a] civil marriage is somewhat like a contract, which is a thing of value, a *res*,” *Id.* at 983. Indeed, Professor Cruz cites multiple cases, including one decided as recently as 1985 for the proposition that marriage is a three-way contract between the two spouses and the state. *Id.* at 983, n.310. Finally, citing a New York case, Professor Cruz admits that in trying to decide exactly what marriage is, one may, at bottom, have to conclude that “civil marriage is *sui generis*.” *Id.* at 965, n.218 (citing *In re Johnson*, 658 N.Y.S.2d 780, 785 (Sup. Ct. N.Y. 1997)).

Professor Cruz tries to convert the *sui generis* nature of marriage into an assertion that marriage is a unique form of *communication*. *Id.* However, *In re Johnson*, the case from which Professor Cruz obtained the “*sui generis*” language, does not support this proposition. Even a

casual reading of the case shows that *In re Johnson* was referring to the *sui generis* nature of marriage as an institution, “differing from ordinary contracts by reason of the status of the parties and the social institution created thereby in which the state had direct interests.” *Id.* at 785. *In re Johnson*, in turn, rests upon pronouncements of earlier cases. The first case is *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815 (1936), in which the New York Court of Appeals stated,

[Marriage], certainly, does differ from ordinary common-law contracts, by reason of its subject-matter and of the supervision which the State exercises over the marriage relation, which the contract *institutes*. In such respects, it is *sui generis*. While the marriage relation, in its legal aspect, has no peculiar sanctity, as a *social institution*, a due regard for its consequences and for the orderly constitution of society has caused it to be regulated by laws, in its conduct as in its dissolution. Marriage is more than a personal relation between *a man and a woman*. It is a *status* founded on contract and established by law. *It constitutes an institution involving the highest interests of society.*

Id. at 272, 5 N.E.2d at 816 (emphasis added) (internal citations omitted). The next case is *Svenson v. Svenson*, 178 N.Y. 54, 70 N.E. 120 (1904), in which New York’s highest court stated that “[m]arriage begins by contract, and results in a *status*.” *Id.* at 58, 70 N.E. 121 (emphasis added). Third, in *Wade v. Kalbfleisch*, 58 N.Y. 282, 284 (1874), the New York Court noted that at common law marriage was “more than a contract [and required] certain acts of the parties to constitute marriage, independent of and beyond the contract.” *Id.* The *Wade* Court pointed out that marriage takes on “more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.” *Id.* The Court then quoted Judge Story that marriage “appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties.” *Id.* at 284-85 (quoting Story on Con. Laws, § 108, note).

Other courts, including the Supreme Court of the United States, have said similar things regarding the institution of marriage. For example, in *Reynolds v. United States*, 98 U.S. 145,

165 (1878), the Court stated that upon marriage “society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.” Also, in a polygamy case just a few years later, the Court once again recognized the unique and extremely important nature of marriage between *one man and one woman*. The Court, in discussing why it was legitimate for Congress to enact a law in the Territory of Utah stripping the right to vote from those who would not limit marriage to one man and one woman, stated,

For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of *one man and one woman* in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Ramsey v. Murphy, 114 U.S. 15, 45 (1884) (emphasis added). Although *Ramsey* involved polygamy, as recently as 1996 Justice Scalia applied the above language to homosexuality, emphasizing that the *institution* of marriage is grounded upon the man/woman requirement as much as the one/one requirement. See *Romer v. Evans*, 517 U.S. 620, 651 (1996) (Scalia, dissenting).

All of this undercuts Professor Cruz’s assertion in his *Goodridge* brief that marriage is speech. Marriage is not speech. As Professor Cruz himself recognizes, marriage is a status, an institution, a contract, a *res*. To label marriage as expression is truly to open the floodgates.

Furthermore, and more importantly for the instant case, Professor Cruz’s scholarship also undercuts Appellants’ claim here. The critical distinctive of marriage is its one man/one woman-foundation-of-society institutional status. The expressive elements of marriage are merely incidental. As noted above, Professor Cruz has admitted that they are not analogous to “burning

a draft card, burning a flag, dancing in the nude, [or] sleeping in the park.” Cruz Article at 978. Simply abandoning the speech/institution distinction and adopting “expressive institution” as a buzzword does not alter that reality.

2. Professor Cruz’s Law Review Article Contradicts His Assertion That Marriage Is Not Government Speech.

We move now from those ways in which Professor Cruz’s article *undercuts* his *Goodridge* brief and the argument made by Appellants in the instant case, to those ways in which the article *flatly contradicts* the *Goodridge* brief. While these points may not explicitly implicate Appellants’ arguments in the instant case—we have already noted the paucity of Appellants’ argument before this Court—it is still important for this Court to be cognizant of the implications of (Professor Cruz’s academic version of) the argument offered here.

One of these items has already been mentioned. This item deals with the idea that, assuming *arguendo* that marriage is expression, it is government expression, not private expression. This is an idea that Appellants pass over in silence. Indeed, given Appellants’ intellectual debt to Professor Cruz and given his own contradictory stances, one might even say they have passed over it in deafening silence.

In the *Goodridge* brief, Professor Cruz argues that the “Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage” *id.* at 18 n.7. However, in his article, Professor Cruz more explicitly indicates that while, theoretically, states may be able to express preferences for mixed-sex marriages, to do so through a marriage licensing statute is to engage in government speech that cannot withstand Equal Protection (as opposed to First Amendment) scrutiny:

Not only is civil marriage a uniquely powerful expressive resource, but the purposes of the mixed-sex requirement are also expressive. Specifically, concern with what the institution of civil marriage—as distinguished from individual civil

marriages—might express or be capable of expressing underwrites the mixed-sex requirement throughout the United States. Thus, it is the dual expressive character of marriage that is at the root of much resistance to allowing same-sex couples to marry civilly. Although there may be other purposes that the mixed-sex requirement partially serves, however well or poorly, consideration of the mixed-sex requirement in its contemporary legal and social context reveals that government is indeed restricting access to the unique expressive resource of civil marriage in significant part on an expressive basis. Accordingly . . . the mixed-sex requirement for civil marriage must survive stringent constitutional analysis to be adjudged consistent with the First Amendment.

. . . .

At first blush it might seem that if government itself wishes to express something via its regulation of the institution of civil marriage, it could constitutionally restrict any conflicting use of that expressive resource by lesbigay [sic] couples. Thus, for example, if it were permissible for government to use civil marriage symbolically to express support for heterosupremacy, same-sex couples could be denied use of civil marriage to express a belief in the equal capacities for love and commitment of heterosexually identified and lesbigay people.

This position, however, would undermine the constitutional purposes behind recognizing and analyzing civil marriage as an expressive resource. . . . Government certainly may speak in our constitutional order, but First Amendment doctrine should guard scrupulously against the prospect of government expression—which is, after all, simply the preferred expression of some ruling majority—drowning out and ‘unfairly dominating’ citizen speech.

In brief, then, a governmental expressive purpose cannot count as compelling for purposes of overriding First Amendment constraints on regulation of a unique expressive resource such as civil marriage. My argument is not that government may never express messages of support for heterosexuality or even heterosexual superiority. The legitimacy *vel non* of government espousing such positions is—like the question of the constitutionality of governmental endorsement of white supremacy by monuments to Confederate leaders or the Confederacy—primarily a question of equal protection and equal citizenship. But with respect to First Amendment limitations, governmental symbolism or other expression ought not count as compelling, for to do so would allow a majority to justify an abridgment of speech by its own desire to express something different.

Id. at 945, 969-70 (citations omitted).

In sum, Professor Cruz’s argument in his law review article is that civil marriage is dual expression, *i.e.*, it is the speech of both the couple and of the state. Furthermore, while states

may theoretically express a preference for mixed-sex marriages, they may not do so through the vehicle of issuing marriage licenses. Thus, Professor Cruz's article doubly contradicts his brief.

First, as noted above, in his article, Professor Cruz clearly asserts that civil marriage is state speech. This is in stark contrast to the assertions in his *Goodridge* brief that marriage "is not predominately a mode of government speech," (Cruz Brief at 18) and that the Massachusetts Supreme Judicial Court "should reject the Superior Court's conclusion that the Plaintiffs seek to compel government speech" *id.* at 23.

The second contradiction occurs in that Professor Cruz writes in his *Goodridge* brief that "Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage" (Cruz Brief at 18, n. 7.) Superficially, this may not seem to be a flat contradiction of the language quoted above from his law review article. Indeed, the full quotation from the brief runs as follows: "The Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage, just as it is free to express its views that it opposes smoking, teenage drinking, or alcoholism." *Id.* This seems to comport well with the statement above, "My argument is not that government may never express messages of support for heterosexuality or even heterosexual superiority." (Cruz Article at 969.) (However, one cannot help but note the dramatic change in analogy from "white supremacy" to "smoking, teenage drinking or alcoholism.") The problem is that, while this quotation was an attempt to shift attention away from the specifics of the *Goodridge* case, Professor Cruz was, in fact, discussing the *issuance of marriage licenses* when he wrote that "Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage." *Id.* This is a contradiction of Professor Cruz's assertion in his law review article that

if it were permissible for government to use civil marriage symbolically to express support for heterosupremacy, same-sex couples could be denied use of

civil marriage to express a belief in the equal capacities for love and commitment of heterosexually identified and lesbian and gay people. This position, however, would undermine the constitutional purposes behind recognizing and analyzing civil marriage as an expressive resource

(Cruz Article at 969.) Elsewhere in the article, he writes “[c]ertainly, part of the point of the institution of civil marriage is to be expressive, to legitimize, to convey a governmental message or messages of legitimacy.” *Id.* at 984. Finally, emphasizing that, in his view, the infirmity with marriage as government speech is its violation of Equal Protection, not the First Amendment, Professor Cruz wrote,

[t]here is certainly an important argument to make that, with the mixed-sex requirement, the state is speaking in a way that perpetrates an expressive harm against lesbian and gay persons. But this would primarily be a violation of equal protection norms of equal concern and respect, not First Amendment norms governing freedom of speech.

Id. at 986-87.

The point of all of this is not to argue that Professor Cruz is correct in asserting that restricting civil marriage to mixed-sex couples is unconstitutional, nor that he is correct in his assertions about the appropriate level of constitutional scrutiny. Rather, the point is to demonstrate the contradictions between the *Goodridge* brief and the actual propositions upon which the underlying law review article is based.

Furthermore, all of this is germane to the instant litigation. Just as in his *Goodridge* brief Professor Cruz relegated the implications of these *contradictions* to the realm of silence, so here the Appellants have relegated the implications of Professor Cruz’s *agenda* to silence. Just as Professor Cruz sought to make his position more acceptable to the *Goodridge* court by contradicting his own scholarship, so here Appellants have sought to make their position acceptable to this Court by leaving both the implications and the problems of their position unarticulated.

Although Professor Cruz was not a party to the *Goodridge* litigation and although this brief is addressing arguments (or the lack thereof) made by Appellants, not by Professor Cruz, one is reminded of the situation faced by the Eleventh Circuit Court of Appeals when a litigant changed its position to suit its litigation needs. In *SunAmerica Corporation v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325 (11th Cir. 1996), a federal district court issued an injunction against use of a trademark by one of two competing users of the mark. The enjoined company filed a motion to stay the injunction in the district court pending appeal and, when that motion was denied, filed an emergency motion to stay with the Eleventh Circuit which was also denied. In support of both motions, the insurance company argued that if it complied with the injunction by changing its name, its appeal would be moot. Nonetheless, when the Eleventh Circuit denied the emergency motion, the insurance company changed its name, but proceeded with its appeal, then arguing that the appeal was not moot.

The Eleventh Circuit included harsh words in its opinion:

The vigor with which SunAmerica argued that the name change would moot this appeal is matched only by the vigor with which it now argues, having been forced to change its name, that the appeal is not moot after all. The same corporation and attorneys who unequivocally represented to the district court and this Court that a name change would be irreversible “as a matter of commercial practicality,” now just as unequivocally represent to this Court that the practical effects of the name change are, in fact, reversible. Such a sea change in factual representations prompted us to ask SunAmerica's counsel at oral argument which of their statements were false: the ones they made while seeking a stay, or the ones they made after the stay was denied.

....

Either an appeal is mooted by a particular event or it is not.

....

The type of tactics SunAmerica's counsel have employed in this case invite us to fashion a doctrine that would estop SunAmerica from asserting at this stage of the appeal the opposite of what it had asserted earlier.

Id. at 1331-32 (ultimately not estopping SunAmerica's argument but stating “[a]ll future parties and their counsel are on notice that if they make factual representations in the district court or in

this Court that denial of a stay will moot the appeal, they may be estopped from arguing after the stay is denied that the appeal is not moot.”).

By quoting this harsh language from *SunAmerica*, your *Amicus* does not intend to cast disparagement upon Professor Cruz. *Amicus* recognizes that the two situations are not completely analogous—Professor Cruz, as noted, was not a litigant nor a litigant’s attorney; he did not make mutually exclusive arguments in the same case to the same court. Furthermore, *Amicus* recognizes that the Cruz brief is not before this Court. Also, Appellants have not engaged in the contradictory writing that Professor Cruz has. However, *Amicus* does believe that, *mutatis mutandis*, the *SunAmerica* case highlights the question that presented itself to the *Goodridge* court: which argument—the one contained in Cruz’s brief or the one contained in his article—represented his true beliefs? Similarly, *Amicus* believes that this Court is faced with a similar question: should it accept Appellants’ four-paragraph argument from their brief (offered virtually in a vacuum and at the level of a bald assertion), or should it look to Professor Cruz’s more extensive argument crafted for the *Goodridge* Court or should it look to his even more extensive argument crafted for the academic community?

3. Professor Cruz’s Assertions In His Law Review Article are More Credible Than The Assertions Presented In the *Goodridge* Brief Because In His Law Review Article Professor Cruz Admits The Novelty, Weakness, And Radicalness Of His Theory.

If for no other reason than a comparison of the purported strength of the two arguments, Professor Cruz’s law review article is more credible than his brief. Other than admitting that no court has found that mixed-sex requirements violate the First Amendment, (*see* Cruz Brief at 8), Professor Cruz presents the argument in his brief as being airtight. However, in his law review article, Professor Cruz is much more honest about the novelty, the weakness, and the radical implications of his theory.

a. This Court should not accept the speech argument because its own inventor admits that it is novel.

Professor Cruz’s article was published in May, 2001. At that time, Professor Cruz could rightly call his theory “new”: “this Article articulates a new argument for why the mixed-sex requirement should be adjudged unconstitutional.” (Cruz Article at 928.) This was no idle, self-aggrandizing claim. Rather, Professor Cruz conducted a review of the literature prior to making this claim. *See id.* at 936 and n. 43. *Amicus’* own research confirms Professor Cruz’s assertion. Furthermore, in the four years since the article was published the theory has not been accepted by any court, not even courts that struck the bar against same-sex marriages. *See supra*, Section I. A.

b. This Court should not accept the speech argument because its own inventor has identified many problems with his own theory.

Professor Cruz’s article then anticipates and attempts to rebut multiple attacks on his novel theory. Several of these have to do with the heart of this brief, namely that marriage is not speech or expression, while others address Professor Cruz’s derivative arguments about whose speech marriage is and about the proper standard of review. Again, there is no hint of any possible problems in the *Goodridge* brief (nor, obviously, in the instant Appellants’ silence). The first alternative, that the theory is readily susceptible to attack, is much more credible.

Specifically, in his law review article, Professor Cruz anticipates at least five attacks on his position:

One might think that incidental infringement principles establish that the mixed-sex requirement does not even implicate the First Amendment on the ground that the requirement only incidentally infringes any expressive rights. Or someone might be tempted to argue that civil marriage ought to be treated as a governmental subsidy or benefit subject to little or no First Amendment scrutiny. Alternatively, even if one thinks that some heightened constitutional scrutiny is due the mixed-sex requirement, perhaps civil marriage should be analyzed as expressive conduct, a doctrinal approach available at least since 1968, thus

obviating the need for any new doctrinal rules. Or the proposal of this Article might be seen as superfluous if civil marriage could be properly analyzed under the Supreme Court's forum doctrines by conceiving of civil marriage as a “space” from which people may speak. Finally, the institution of civil marriage might be analyzed as a form of governmental speech under extant doctrine, perhaps rendering my approach unnecessary.

Id. at 971.

It is beyond the scope of this brief to systematically interact with Professor Cruz’s answers to each of these problems—although a few comments will be offered—since this Court can easily consult Professor Cruz’s article for itself and verify that his response to these serious objections is often nothing more than a paragraph or two, *id.* at 971-987, and since most of them have been discussed previously. Indeed, while Professor Cruz obviously intended these self-identified problems to be strawmen, they are not; Professor Cruz’s statements of the flaws in his theory are often more persuasive than the statement of his responses. *See id.* The point here is merely to note that this Court would have to reject every one of the objections to Professor Cruz’s position that he himself has identified in order to adopt his analysis.

For example, to embrace Professor Cruz’s argument, this Court would have to reject all of the following arguments: First, this Court would have to reject the argument that “the limitation on the use of [civil marriage as a] resource effected by the mixed-sex requirement might be characterized as simply an incidental infringement by a general law not targeted at speech and hence supposedly of no First Amendment consequence.” *Id.* at 971. Second, this Court would have to reject the argument that “when conduct other than speech itself is regulated, . . . the First Amendment is violated only where the government prohibits conduct precisely because of its communicative attributes.” *Id.* at 972 (quoting *City of Erie v. Pap’s*

A.M., 529 U.S. 277, 310 (2000) (Scalia, J., joined by Thomas, J., concurring in the judgment)).⁴

Third, this Court would have to reject the argument that any expressive content in civil marriage should be examined under a government subsidy analysis (or reject the view that it could pass muster under this analysis). *Id.* at 974. Fourth, this Court would have to reject the argument (perhaps implicit in the objection to the newly-minted nature of Professor Cruz’s theory) that his position is nothing more than an “unnecessary First Amendment bricolage.”⁵ *Id.* at 974.

In light of matters that Professor Cruz discusses elsewhere in his article, this fourth argument may be a very important problem indeed. Even from Professor Cruz’s perspective, all of the following problems exist within the legal landscape he would have this Court traverse: “Unfortunately, in light of the novelty of the unique expressive resource argument, the Supreme Court’s reticulation of First Amendment doctrine, and the unique nature of the institution of marriage, no ready-made doctrine is available to handle the First Amendment questions that the mixed-sex requirement raises.” *Id.* at 965-66 (citations omitted.) It is no overstatement to say Professor Cruz’s pet theory is a bricolage.

Fifth, this Court would have to reject the argument that, as either symbolic speech or expressive conduct, civil marriage is “governed directly by *United States v. O’Brien*.” *Id.* at 975. Admittedly, Professor Cruz argues that even under *O’Brien*, the mixed-sex requirement violates the free speech rights of same-sex couples (as he did in footnote 17 of the *Goodridge* brief). (Cruz Brief at 41-42 n. 17.) The point, however, is that the marriage-as-speech argument has a

⁴ Professor Cruz dismisses this as “not accepted doctrine;” *id.*, however this language was needed to obtain a plurality opinion in *Pap’s A.M.* as well as *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and comports with the holding in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

much less likely chance of producing Professor Cruz’s desired result under *O’Brien* than under strict scrutiny, and in the article he admits that its potential application is a problem. In the brief, Professor Cruz baldly asserted that the mixed-sex restriction must fall under either strict scrutiny or *O’Brien*. In his article, Professor Cruz is more forthcoming about the other side of the argument. As noted previously, he admits that

Nevertheless, in another sense marrying civilly is unlike situations that the Court has treated as expressive conduct: burning a draft card, burning a flag, dancing in the nude, and sleeping in the park. What one does when one marries legally is not really engaging in primary ‘conduct’ with both physical consequences and communicative consequences in the world. Rather, people who marry civilly are engaging in an abstract act, entrance into a quasi-contractual legal status.

(Cruz Article at 978 (citations omitted).)

Next, this Court would have to reject several arguments that actually are implicated by Appellants’ brief in the instant case, *i.e.*, this Court would have to reject the argument that, despite Professor Cruz’s attempts to bring civil marriage under the rubric of speech or expression, forum analysis should not apply, *id.* at 979-84, and alternatively, this Court would have to reject the argument that if forum analysis were to apply, civil marriage is not a nonpublic forum. *Id.* at 982-84.

Finally, this Court would have to reject the argument, addressed previously, that if civil marriage is speech at all, it is government speech. *Id.* at 984-87. In his article, but not the *Goodridge* brief, Professor Cruz admits that “[i]f civil marriage were assimilated to government speech, then the usual First Amendment neutrality rules would likely not apply.” *Id.* at 985.

⁵ Professor Cruz uses this term as employed by Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1229 (1999) (defining “bricolage” as “the assembly of something new from whatever materials the constructor discovers[s].”)

- c. This Court should not accept Professor Cruz’s speech argument because he has admitted that his radical theory would lead to either recognition of polygamous and incestuous marriages or the abolition of civil marriage.**

Thus, this court would have to believe, at a minimum, that Professor Cruz’s theory can surmount all of these problems. However, the reasons for this Court to decline to adopt Professor Cruz’s analysis go beyond the contradiction between the article and the brief, the novelty of this newly-minted pet theory, and the many self-identified problems. As mentioned above in Section I.C., the ramification of adopting Professor Cruz’s theory is that consistent application of this flawed analysis would toll the death knell for marriage in this state. In sharp contrast to the *Goodridge* Plaintiffs’ assertion in their brief and in only slightly less sharp contrast to the instant Appellants’ silence, Professor Cruz’s article is brutally honest about the ramifications of striking the mixed-sex requirement on the basis of his free speech theory.

In the Plaintiffs’ *Goodridge* brief, they wrote:

Unable to justify the exclusion of the plaintiffs from marriage on its own terms, the defendants below and its *amici* here are sure to suggest that the balance favors the status quo because, the argument goes, polygamy will inevitably follow if the plaintiffs prevail here. That suggestion is pure fear-mongering . . . The decision in this case will neither advance nor hinder any such claim.

(Plaintiff–Appellant’s Brief at 40.)

Professor Cruz, who after all supported the Plaintiffs, was not engaged in “fear-mongering,” but rather in academic honesty when he wrote in his article:

Neither may the mixed-sex requirement be justified as a dike against the floodtide of ostensibly self-evident evils such as legalized prostitution, polygamy, and incest. . . . It is true . . . that those wishing to enter plural marriages are denied the expressive resource of civil marriage, thus the dyad requirement is subject to challenge on First Amendment grounds under the theory advanced in this Article. . . . [S]ociety might have to accept polygamous civil marriages (unless government chooses to get out of the marriage business entirely): It simply is not the case that the constitutionality of denying legal recognition to polygamous unions is so clear that any contrary constitutional theory must be rejected, As for incest, my expressive resource argument would again apply and demand

the state to satisfy a high level of justification for its failure to recognize civilly incestuous marriages between people of sufficient age, which the state might or might not be able to do. Again, however, this does not establish the propriety of denying recognition to both same-sex marriages and incestuous marriages, as opposed to the possible constitutional necessity of recognizing both.

Cruz Article at 1004-05. So, far from engaging in fear-mongering about polygamy, Professor Cruz honestly acknowledged that should any court adopt his analysis, it would be forced to either allow both polygamous and incestuous marriages or get out of the marriage business altogether. Of course, these academically honest admissions are lacking from Professor Cruz's *Goodridge* brief and are part of the instant Appellants' deafening silence about the implications of their argument.

And lest there be any mistake, the total destruction of marriage is the goal of Professor Cruz's scholarship. He writes:

probably any . . . U.S. jurisdiction confronting the issue, may choose whether to abolish the mixed-sex requirement, and thus to extend civil marriage to same-sex couples, or instead to abolish civil marriage itself. . . . Similarly, both extension of civil marriage and its abolition would be consistent with the First Amendment, for neither would regulate a unique expressive resource on any ground related to the content (let alone viewpoint) of expression; rather, the resource would simply no longer exist were civil marriage abolished.

. . . .
Even the First Amendment theory of this Article supports the disestablishment of marriage [*i.e.*, abolition of civil marriage] under one interpretive approach to the Constitution. The chief constitutional vice of the mixed-sex requirement upon which I have focused is its lack of neutrality. Without powerful justification, which I have argued is also lacking here, such a breach of neutrality with respect to the expressive resource of civil marriage is impermissible under the First Amendment. Yet a more fundamental neutrality principle that some scholars take to underlie the U.S. constitutional order is that of neutrality about the good life. On this view, government may not act to promote one vision of the good at the (relative) expense of those who take a different view. Yet this is precisely what civil marriage, with or without the mixed-sex requirement, does. So long as government licenses marriage, it provides a resource to those who model their expression and their lives in governmentally approved ways. A more thoroughgoing commitment to neutrality than that embodied in current First Amendment doctrine would condemn this result as well.

Rather than package an enormous bundle of economic and legal strictures into the civil marriage package, government would be required to distribute them on a less ideological, more functional basis.

Id. at 1020-21.

In summary, in evaluating Appellants' Free Expression claim, this Court should look beyond Appellants' virtual silence. Furthermore, this Court should look beyond the version of the marriage-as-expression theory proffered by Professor Cruz to the *Goodridge* court. Rather, this Court should look at the version of the theory articulated by Professor Cruz in his law review article. It is there that he admits both the many flaws of the theory as well as its radical ramifications, including the ultimatum of recognizing polygamous and incestuous marriage or abolishing civil marriage.

CONCLUSION

For the foregoing reasons this Court should reject Appellants' argument that same-sex marriage is entitled to protection under New York Constitution, Art. I, § 8. Furthermore, for the foregoing reasons and for the reasons found in the Appellees' brief, this Court should affirm the trial court's decision.

Respectfully Submitted,
This 28th day of July 2005

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