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 SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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MISCELLANEOUS

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 Kramer Levin Naftalis & Frankel LLP and Lambda Legal Defense and Education Fund, respectfully submit this memorandum of law in support of their motion for summary judgment.

PRELIMINARY STATEMENT

Plaintiffs are five same-sex New York couples in loving, committed relationships, several of who are raising children conceived in the relationship or adopted into their home. The partners in each couple have been devoted to one another for periods ranging from 3 to 22 years and represent the rich diversity of New York. They come from an array of racial, ethnic, and religious backgrounds and include health care professionals, a computer specialist, a textile stylist, a waiter, city planners, and a director of an emergency food assistance program. Each couple wishes to enter into civil marriage, but is denied this most basic right because New York prohibits same-sex couples to marry.

There can be no dispute that marriage is among our society's most cherished and vital institutions. *See Cooper v. Morin*, 49 N.Y.2d 69, 80, 424 N.Y.S.2d 168, 175 (1979) (marriage is a "fundamental right"). In the words of the Massachusetts high court in its 2003 landmark decision affirming the right to marry that same-sex couples share with all others, "marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. . . . Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge v. Department of Public Health*, 440 Mass. 309, 322, 798 N.E.2d 941, 955 (2003) (internal citation omitted).

Marriage is also the gateway to countless tangible protections and benefits, central to the way the government and private parties identify and support family units. "The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death." *Id.* at 323, 798 N.E.2d at 955. These range from the ability to be at the bedside of and make health care decisions for an incapacitated spouse; to obtain health and other insurance for a spouse; to receive workers' compensation, retirement, and other benefits or bring a wrongful death claim when a spouse dies; to secure the protections of joint property ownership as tenants in the entirety; and to provide children in the family such protections as presumptions of legitimacy and parentage and increased economic security and stability — protections "largely inaccessible, or not as readily accessible, to nonmarital children." *Id.* at 325, 798 N.E.2d at 957. Exclusion from marriage thus denies plaintiffs and other same-sex couples and their families a vast web of social, financial, and legal benefits and relegates their families to a state-imposed second-class status.

The State's exclusion of same-sex couples from marriage violates two bedrock guarantees of the New York State Constitution, the fundamental right to marry guaranteed by the Due Process Clause, Article I, § 6,[1] and the right to equal protection, guaranteed by the Equal Protection Clause, Article I, § 11.[2] Plaintiffs bring this action against the defendant Clerk of the City of New York, the official with State-conferred authority to issue and record marriage licenses in this City. *See* New York State Domestic Relations Law ("DRL") §§ 13, 19, 20. They seek a declaration that the DRL is unconstitutional insofar as it denies marriage licenses and access to civil marriage to same-sex couples and an injunction requiring that licenses and access

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[1] The Due Process Clause provides in relevant part: "No person shall be deprived of life, liberty or property without due process of law."

[2] The Equal Protection Clause provides in relevant part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

to marriage be granted to them on the same terms and conditions available to different-sex couples. *See* First Amended Complaint, attached as Exhibit 1 to Affirmation of Jeffrey S. Trachtman ("Trachtman Aff."). Because there can be no dispute about the material facts of this case, plaintiffs now move for summary judgment that they are entitled as a matter of law to access to marriage with their chosen loved one.

The Statement of Facts below summarizes the committed bonds of love, family, and home that connect each of the plaintiff couples and that are described more fully in the accompanying affidavits of plaintiffs and their close family members. It also summarizes how civil marriage confers an irreplaceable status, and enormous tangible and intangible benefits, upon those to whom the State grants entry and how being barred from marriage causes plaintiffs and their families far-reaching harms.

As discussed in Point I of the Argument, New York's constitution and jurisprudence independently and zealously safeguard the civil rights of all New Yorkers, and the State has pioneered recognition of protected individual liberties. Point II demonstrates that among these cherished liberties protected by the guarantee of due process is the right to marry, a right that knows no exception for gay and lesbian persons. As the U.S. Supreme Court made clear in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), striking down Texas's ban on sexual intimacy between same-sex couples, "the extent of the liberty at stake," *id.* at 2473, fully encompasses gay people within the constitutional guarantee of due process. The Court emphasized that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 2484.

The historical exclusion of gay people from marriage with their chosen partners does not diminish or change the extent of their right to marry, no matter how long denied. Old fixed definitions of marriage that excluded inter-racial couples and proscribed rigid gender roles

for spouses gave way as later generations invoked overarching constitutional principles of liberty and equality. So too must traditional assumptions that marriage is an exclusively heterosexual institution give way in the face of a modern understanding that gay men and lesbians are fully embraced within these cherished constitutional protections. With recent landmark judicial decisions in Massachusetts and Canada requiring that same-sex couples be afforded their constitutional right to marry, and married same-sex couples now living within New York's borders, it can no longer be said that marriage is an exclusively heterosexual institution. Moreover, lower court decisions just weeks ago here in New York affirmed that the State may not constitutionally withhold marriage from same-sex couples. New York has already recognized through multiple legal measures that same-sex couples and their children are entitled to respect and protections for their families. These couples' fundamental right to marry is no different than the right to marry long recognized for different-sex couples. The infringement of that right cannot withstand constitutional challenge, since the State lacks even a legitimate and rational basis for it, much less the compelling government interest required where a fundamental right is at stake. (*See* Point II below.)

The State's exclusion of plaintiff same-sex couples from marriage also violates New York's guarantee of equal protection of the laws. Because the State's discrimination against same-sex couples selectively denies one group of people a fundamental right, it must be justified by a compelling government interest, a burden the State cannot meet. Heightened scrutiny is also appropriate for the independent reason that, by depriving plaintiffs of the right to marry the person each one loves solely because they are of the same sex, plaintiffs' right to marry is denied on the suspect grounds of both sexual orientation and sex. (*See* Point III below.)

Yet regardless of the level of scrutiny applied, the marriage ban fails; it cannot satisfy even rational basis review, because it does not rationally further a legitimate government

interest. The State has already conceded in court papers filed in another action challenging the marriage ban that it can advance only two purported justifications for its discriminatory denial of the right to marry to same-sex couples: first, preserving for tradition's sake the historical understanding of marriage as a union between a man and a woman and, second, maintaining uniformity with the discriminatory marriage laws that prevail at the federal level and in other states.[3] But a desire to perpetuate a history and tradition of discrimination can no more justify such discrimination than deeply entrenched views on inter-racial marriage could save anti-miscegenation laws from constitutional challenge a generation ago. Nor does this State have any legitimate interest in subverting the requirements of its constitution and the rights of its residents to discrimination that still prevails elsewhere. Rather, to satisfy the requirements of the New York Constitution, the State's marriage laws must permit same-sex couples full access to this profoundly important institution. (*See* Points IV & V below.)

STATEMENT OF FACTS

A. The Plaintiff Couples

The five plaintiff couples have each been denied marriage licenses by defendant Clerk of the City of New York. Hernandez ¶ 19; Abrams ¶ 27; Elsasser ¶ 19; Shain ¶ 17; Reyes ¶ 24.[4] But for the fact that they are same-sex couples, the plaintiff couples share the same kinds

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[3] Defendant's answer did not allege any particular basis for the marriage ban. The State, through the Attorney General, has asserted certain purported rationales in papers filed with the Supreme Court, Rockland County, in *Shields v. Madigan*, No. 1458/04, an Article 78 proceeding that seeks the right to marry for same-sex couples. *See* Mem. of Law in Support of the Answer of the N.Y. State Dep't of Health, dated May 24, 2004 (excerpts provided as Trachtman Aff., Ex. 5), at 22-29. Defendant City Clerk has apparently adopted the State's rationales, having expressly incorporated the State's answer in the Rockland County action in its own answer here. *See* Trachtman Aff., Ex. 2, at ¶ 1.

[4] References to affidavits throughout this brief use the last names of plaintiffs and the first initials and last names of their family members submitting supporting affidavits, who include Daniel Hernandez's father Alfonso Hernandez ("A. Hernandez"); Lauren Abrams's father Arnold Abrams ("A. Abrams") and Donna Freeman-Tweed's sister Jacqueline Chee-Ming ("J. Chee-Ming"); Michael Elsasser's and Douglas Robinson's sons Justin Robinson ("J. Robinson") and Zachary Robinson ("Z. Robinson"); Mary Jo Kennedy's and Jo-Ann Shain's daughter Aliya Kennedy Shain ("A. Kennedy Shain") and Mary Jo's

of bonds and family life — including, for several, parenting children together — as countless other New Yorkers who have been permitted to marry and can take for granted the myriad protections and benefits that come only with marriage. Information about the plaintiffs is briefly summarized here; the accompanying affidavits submitted by them and their children, parents, and siblings offer a more complete picture of their families.

1. **Daniel Hernandez and Nevin Cohen**

Daniel Hernandez, age 46, and Nevin Cohen, age 41, are gay men in a committed relationship of over five years. Cohen ¶ 2; Hernandez ¶¶ 2, 3. Shortly after they met in 1998, Daniel gave up his career in California and moved to New York to build a life here with Nevin. Hernandez ¶ 8. The two share a professional commitment to building environmentally sound, affordable, and vibrant urban communities. *Id.* Daniel manages urban redevelopment projects at Jonathan Rose Companies. *Id.* ¶ 5. Nevin, an environmental planner, took the lead in writing New York City's recycling law when he worked as a policy analyst for the New York City Council. Cohen ¶ 4. Recently, with Daniel's support, Nevin has founded his own environmental planning firm. *Id.* ¶¶ 4, 6.

Daniel and Nevin are close to their extended families and have introduced each other to their families' respective religious and ethnic traditions. A. Hernandez ¶ 6; Cohen ¶ 7. Together they rent their Manhattan apartment, own a home in upstate New York, have joint checking and savings accounts, and share responsibility for their expenses and one another's needs. Hernandez ¶¶ 9, 13. Nevin knows firsthand how much harder it is for same-sex couples to weather times of crisis without the protections of marriage. Before his relationship with

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sister Cathy Kennedy ("C. Kennedy"); and Curtis Woolbright's mother Karen Woolbright ("K. Woolbright"). These affidavits, along with photos of the plaintiff families, are submitted under cover of the Affirmation of Susan L. Sommer.

Daniel, Nevin lost his partner of ten years to AIDS. Because they were not married, Nevin was not given the same medical information or involved in decision-making at his partner's hospital bedside the way a spouse would be. Cohen ¶ 12. Daniel and Nevin want the respect and protections for their relationship that come only with marriage. *Id.* ¶¶ 9-14; Hernandez ¶¶ 12, 14.

2. Lauren Abrams and Donna Freeman-Tweed

Lauren Abrams, age 39, and Donna Freeman-Tweed, age 43, are lesbians in a committed relationship of six years. Abrams ¶ 2; Freeman-Tweed ¶ 2. Lauren, who grew up on Long Island, is a midwife at Mt. Sinai Hospital in Manhattan. Abrams ¶¶ 3-5. Donna, a native of the Caribbean Island of St. Kitts, moved to New York as a child to join her mother, who had come to this country seeking better life opportunities. Donna is a Physician Assistant and works at the Brooklyn College Health Clinic. Freeman-Tweed ¶¶ 3-5.

Lauren and Donna live in Brooklyn with their four-year-old son, Elijah Adé Abrams-Tweed, and their newborn son, Micah Jabari Abrams-Tweed. Lauren is the biological mother of Elijah and Micah, who were conceived through anonymous donor insemination. Abrams ¶¶ 11, 19; Freeman-Tweed ¶¶ 9, 12. Donna's second-parent adoption of Elijah was finalized in 2002, and she and Lauren have begun the process of petitioning the State for second-parent adoption of Micah. Freeman-Tweed ¶ 10; Abrams ¶ 19. Their extended families are supportive of their relationship and actively involved with Elijah and Micah. A. Abrams ¶ 7; Abrams ¶ 14.

Lauren and Donna have combined their finances and done what they can to protect the security of their family through joint bank accounts, wills, health care proxies, guardianship papers, and domestic partner registration. *Id.* ¶ 21. This has come at considerable expense, and they worry about the many ways these measures still leave them unprotected. *Id.*

¶¶ 17, 21-22. For the past six years, Lauren and Donna have built a relationship and a family based on love, commitment, and mutual respect. They long for the social recognition and rights that only marriage can afford them. *Id.* ¶ 25; Freeman-Tweed ¶ 14.

3. **Michael Elsasser and Douglas Robinson**

Michael Elsasser, age 49, and Douglas Robinson, age 52, are gay men in a committed relationship of 18 years. Elsasser ¶¶ 2-3; Robinson ¶¶ 2-3. Douglas is an Assistant Vice President and Technical Project Manager at Citibank and also served as a Member of the Board of New York City Community School District No. 2. Robinson ¶¶ 4, 6. Michael is a woven textile stylist and technician at a Manhattan-based company and vice-president of the co-op board in the building where the family lives. Elsasser ¶ 6. The two met on a stalled subway train almost 20 years ago. After dating for several years, they made a permanent commitment to each other. Robinson ¶ 7; Elsasser ¶ 9. They were among the first New Yorkers to register as domestic partners in 1993, when that first became possible. Robinson ¶ 7. In 1994, they had a union ceremony at the Riverside Church, where they exchanged rings, witnessed by family and friends. *Id.*

Michael and Douglas live in Harlem with their two sons, Justin, age 18, and Zachary, age 15. *Id.* ¶¶ 7-8. The boys refer to Michael as "Pop" and Douglas as "Dad." *Id.* ¶ 12. Douglas adopted their sons from the New York City foster care system when the boys were infants, at a time when both members of a gay couple could not adopt children together. *Id.* ¶¶ 8-11; Elsasser ¶ 10. The boys were born in disadvantaged circumstances that left them with health, psychological, and academic challenges. Robinson ¶¶ 10-11. Michael and Douglas have devoted tremendous care and attention to their children's well-being, hiring therapists and enrolling one of the boys in private schools. *Id.* ¶¶ 13-14. Justin, an avid soccer player, has overcome his early fears of abandonment and will be leaving home in the fall to attend a private

liberal arts college in upstate New York. J. Robinson ¶¶ 5, 9-10; Robinson ¶ 17-18. Zachary is succeeding in high school, with free time left over to study the drums and bike with his friends. Z. Robinson ¶ 5; Robinson ¶ 17.

Michael and Douglas have built a family unit that functions on all levels — emotionally, financially, and spiritually. Robinson ¶ 19; Elsasser ¶¶ 15, 17. They share their living expenses, have intertwined their finances, and paid for wills, health care proxies, and powers of attorney. Robinson ¶¶ 20, 22. They wish to marry to obtain the same protections and full respect and dignity for their family that married couples receive but they are currently denied. *Id.* ¶ 27; Elsasser ¶ 18. Their sons also want their family to have the same respect as others with access to marriage. J. Robinson ¶ 11; Z. Robinson ¶ 9.

4. Mary Jo Kennedy and Jo-Ann Shain

Mary Jo Kennedy, age 49, and Jo-Ann Shain, age 51, are lesbians in a committed relationship of 22 years. Kennedy ¶ 2; Shain ¶ 2. Mary Jo, a family practice physician, is the medical director of a family health center in Sunset Park, Brooklyn that provides community health care services to a largely Latino and Arab-American patient base, many of who are low income. Kennedy ¶ 4. Jo-Ann has a Master's Degree in Public Health from Columbia University and is editor of medical publications for lawyers at Lexis/Nexis Matthew Bender. Shain ¶ 3-4. They met at a public health conference in 1981, began dating, and soon realized they were meant to be together. Shain ¶ 5.

Mary Jo and Jo-Ann live in Brooklyn with their 15-year-old daughter, Aliya Kennedy Shain, who was conceived through anonymous donor insemination. *Id.* ¶¶ 6, 8; A. Kennedy Shain ¶ 14. Jo-Ann is Aliya's biological mother; Mary Jo adopted her in 1996, immediately after second-parent adoptions became legal in New York. Kennedy ¶¶ 6, 10. The family travels together, takes vacations with extended family and friends, and volunteers at a

local homeless shelter and a soup kitchen. Shain ¶ 10; A. Kennedy Shain ¶¶ 6, 12. Mary Jo and Jo-Ann have taught Aliya to be secure in herself, to think for herself, to pursue her interests, and to stand up for her beliefs. C. Kennedy ¶ 8. Indeed, Mary Jo's sister and her husband have so much respect for Mary Jo and Jo-Ann as parents that they have designated Mary Jo and Jo-Ann to care for their own child should something happen to them. *Id.* ¶ 9.

Mary Jo and Jo-Ann combined their finances when they moved in together in 1984 and make joint decisions on all important financial matters. Shain ¶ 6. They registered as domestic partners in New York City in 1993, but recognize that domestic partnership is a poor substitute for marriage, providing them with virtually none of its privileges and protections or respect for their family. Kennedy ¶¶ 16, 17. Mary Jo and Jo-Ann will celebrate their twenty-fifth anniversary in just a few years and fervently wish to do so as a married couple. Shain ¶ 15. They want to marry for their daughter's sake as well, so that she will not continue to be made to feel that her family does not count as much to the government and society. *Id.* ¶ 16. Aliya wants to be able to walk her mothers down the aisle. She too believes they deserve this as a family. A. Kennedy Shain ¶ 16.

5. Daniel Reyes and Curtis Woolbright

Daniel Reyes, age 30, and Curtis Woolbright, age 37, both gay men, have been committed to each other and living together for three years. Woolbright ¶ 2; Reyes ¶ 2. They want to take the next step in their relationship and marry. Woolbright ¶ 7; Reyes ¶ 17. Daniel is the Director of an Acute Emergency Food Assistance Program for Yorkville Common Pantry in Harlem, and Curtis is a waiter at Keen's Steakhouse and an aspiring voice-over artist. Reyes ¶ 4; Woolbright ¶ 3.

Daniel and Curtis are proud of what they have built as a couple. They share everything and support each other unequivocally. They take turns cleaning the house, cooking

meals, doing laundry, and caring for their two dogs. They also contribute equally to all of their expenses, including rent on their Harlem apartment, utilities, groceries, credit card payments, car insurance, and dog care. Reyes ¶ 9; Woolbright ¶ 4. Curtis supported them both when Daniel was temporarily unemployed. *Id.* ¶ 10. Curtis and Daniel want to obtain legal documents to cobble together some of the protections that married couples automatically receive and that can be critical in times of emergency, but they have not been able to afford to do so. *Id.* ¶ 18; Woolbright ¶ 13.

Daniel and Curtis learned about the value of commitment from their own parents. Daniel's parents supported each other throughout their marriage, including during his father's losing battle against lung cancer. Reyes ¶ 19. Curtis's parents encountered bigotry as an inter-racial couple. In 1966, in order to marry, they moved to California, the only state at that time whose courts had declared bans on inter-racial marriage unconstitutional. Their love and commitment for each other sustained them through years of discrimination and served as an anchor for their marriage of 31 years. Woolbright ¶ 8. Daniel and Curtis share the same level of commitment for each other that each of their parents shared and seek respect for their commitment through marriage. Reyes ¶¶ 11, 13; Woolbright ¶ 6.

B. Civil Marriage is a Vitally Important Institution, and Plaintiffs Suffer Serious Hardship Because of Their Exclusion from It

1. Marriage represents a profound private and public expression of emotional support and dedication to another person

As a society, we recognize that the decision whether and whom to marry is life transforming. It is a unique expression of a private bond and profound love between a couple and a life dream shared by many in our culture. It is also society's most significant public proclamation of commitment to another person for life, an expression plaintiffs are denied: "We . . . want to be able to say to each other and the community in the way that only marriage can say

just how much we are in love and committed to each other." Reyes ¶ 23.[5] With marriage comes not only legal and financial benefits, but also the supportive community of family and friends who witness and celebrate a couple's devotion to one another, at the time of their wedding and through the anniversaries that follow.[6]

The vocabulary of marriage is unparalleled in its expressive power. No other terms come close in communicating instantly a couple's commitment and the legal sanction and respect accorded their relationship. In everyday conversations with co-workers, neighbors, relatives, officials, and others, references to spouses are ubiquitous. A committed couple, particularly one parenting children, needs to be able to communicate effectively to many people the permanence of and respect due their family and relationship. That need can arise in diverse

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[5] Woolbright ¶ 7 ("Since I was a child, I knew that getting married was perhaps the most important decision a person can make in life. It is a statement, both personal and public, that you have chosen another person to share the rest of your life with through sickness and health."); *id.* ¶ 16 ("I want to tell the world, make a public announcement about the love of my life. . . ."); Hernandez ¶ 17 ("It is my dream to enter into the same bond of marriage with Nevin that my parents share and to have the same security for my family that my parents were able to provide."); Shain ¶ 16 ("I want to make the unique commitment to Mary Jo that comes only with marriage."); *see also* Z. Robinson ¶ 9 ("Dad and Pop have wanted to get married for a long time. . . . I want my parents' dream to come true.").

[6] Hernandez ¶¶ 10-11 ("In 2001, . . . Nevin and I exchanged rings as a sign of our mutual love and commitment. . . . [A]lthough the exchange was very emotional for us, we know that so long as we cannot marry the rings do not mean to our broader social and professional network and to society all that wedding rings symbolize for those who can enter into civil marriage."); *id.* ¶ 18 ("[My father's] illness has given us a sense of urgency about wanting to get married while our parents are still alive and able to join in the celebration of our marriage."); A. Hernandez ¶ 9 ("It is not right that the government is denying me the joy of seeing Daniel and Nevin married. . . . I hope that someday soon [my wife] and I and the rest of our family will join together to celebrate Daniel and Nevin's beautiful relationship at their wedding."); Cohen ¶ 15 ("[M]y parents [recently] celebrated their fifty-first wedding anniversary. It is my deep hope that one day Daniel and I will do the same."); Kennedy ¶ 14 ("After so many years of shutting me out of her life, finally my mother — who is now 72 years old — has worked through these issues with my family to reach the stage of acceptance. It would be lovely to complete the circle with my family with the celebration of my marriage to Jo-Ann."); Shain ¶ 15 ("We will celebrate our twenty-fifth anniversary in just a few years and fervently wish to do so as a married couple."); C. Kennedy ¶ 10 ("I want to be able to dance at their wedding, just as they did at mine."); K. Woolbright ¶ 11 ("I want to be able to see [Curtis and Daniel] married and to have the respect for their beautiful relationship that meant so much to me in my marriage."); A. Abrams ¶ 13 ("I want to see my daughter have the joy of a wedding with the love of her life. And I want to be there with Lauren and Donna to share in that joyous day."); J. Chee-Ming ¶ 12 ("[Donna and Lauren] deserve to get married, and I can't wait until the day when I can toast them at their wedding.").

and sometimes urgent circumstances — including with police officers, doctors, employers, neighbors, teachers, government officials, and emergency medical personnel.[7]

Plaintiffs consider their exclusion from marriage to be state-sanctioned discrimination, plain and simple, exacting a substantial toll on them and their families. "We try to explain why our government labels our family differently, but the explanation is never satisfactory. The message remains the same: our family is seen as less valuable in the eyes of the law." Elsasser ¶ 16.[8] This discrimination injures plaintiffs' children, who also understand that their families are disrespected by the government. "[I]t feels so wrong that I can have a legal relationship to each of my moms, but they can't have the legal relationship of marriage to each other." A. Kennedy Shain ¶ 14. "[I]t upsets me that our government treats my family differently." Z. Robinson ¶ 9. "It really bothers me that my family isn't treated the same by the state as other families. I think my family should get full respect from our government." J. Robinson ¶ 11.[9]

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[7] Hernandez ¶ 14 ("One of the most hurtful things about not being able to marry Nevin is that I constantly have to say 'we are partners' or 'we are living together' instead of 'we are married' . . . . I am bothered by the fact that my family, which is very supportive of my relationship with Nevin, describes my brother as 'married' while I am described as 'living with Nevin.' . . . I want the whole world to acknowledge our relationship in a way that will happen only if we are married."); Abrams ¶ 23 ("There have been occasions when Donna and Elijah visited me at work and my co-workers have mistakenly assumed that she is my nanny. I want to be able to tell them that she is my wife."); Robinson ¶ 24 ("If we could just get married and be able to say that we are married, we could have the peace of mind of knowing that we'll be protected as a family.").

[8] *Id.* ("We face discrimination so often as a result of not being able to marry that I think we unconsciously become accustomed to it. We have attempted to get around the disadvantages of unequal treatment and function as a couple and a family, but it's not easy."); Hernandez ¶ 12 ("We share the same commitment and affection that other married couples have, but are treated differently than they are by the law. This unequal treatment of our relationship makes us feel like less than full citizens.").

[9] Elsasser ¶ 16 ("We have given our children tools to handle this discrimination, but we worry about the effect it still has on them."); Shain ¶ 16 ("I want to make the unique commitment to Mary Jo that only comes with marriage. I want this for our daughter as well, so that Aliya won't be made to feel that her family doesn't count as much to the government and society.").

2. Civil marriage is a gateway to a comprehensive structure of protections, benefits, and mutual responsibilities denied to plaintiffs

Marriage provides an extensive legal structure that honors and protects a couple's relationship, helps to support the family and its children through an unparalleled array of rights and responsibilities, and privileges a married couple as a financial and legal unit. Plaintiffs' inability to marry excludes them from a vast range of statutory protections, benefits, and mutual responsibilities automatically afforded to married couples by New York law.

a. Marriage assists spouses to care for one another in challenging times

Without the legal recognition of marriage, plaintiffs cannot be secure that their relationships will be recognized during trying times. A spouse has the right to make important medical decisions for an incapacitated partner, but plaintiffs cannot walk into a hospital in an emergency, identify themselves as a patient's "spouse," and know they will be granted the automatic respect and access that title affords.[10] While legal papers like health care proxies can provide unmarried couples some measure of protection, medical emergencies do not always allow plaintiffs time to prepare. "[D]ocuments like [health care] proxies must be accessible to be effective in an emergency. Even when we carry these documents around with us, I am concerned that they may not be respected." Robinson ¶ 24. "In 1992, an emergency sent Jo-Ann to the hospital. As she lay in the hospital awaiting surgery, we rushed to fill out revised forms to

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[10] *See, e.g.,* N.Y. Public Health Law § 2965(2)(a) (affording spouse priority status, second only to court appointed guardian, to act as surrogate for his or her incapacitated spouse with respect to order not to resuscitate); N.Y. Comp. of Codes R. & Regs., tit. 14, § 27.9(b) (giving married person authority to consent to spouse's medical treatment in mental health care facility). *See also* Cohen ¶ 12 ("When [my partner] was ill and in the hospital, I was not always given the same information or asked the same decision-making questions in a way that a spouse would be."); Reyes ¶ 20 ("During my father's illness my mother had the right to make medical decisions. . . . Curtis and I currently do not have [this] protection[]."); Woolbright ¶ 10 ("I worry that our relationship will not be respected in a medical emergency and that a hospital or doctor will deny us access to visit the other or the right to make decisions in case of an emergency."); *id.* ¶ 11 ("Daniel was recently diagnosed with colon polyps . . . [and] had to undergo laser surgery. . . . I worried that I had no legal right to visit Daniel, or make emergency medical decisions.").

make sure that I could consent to treatment for her if necessary. Needless to say, that situation was very stressful and would not have occurred if we had been married." Kennedy ¶ 18.

The law grants married couples such additional protections as the right to arrange for a mentally ill spouse to be enrolled in an emergency psychiatric program, N.Y. Mental Hyg. § 9.45, to be notified of any petition made for a court to appoint a guardian for the personal needs or property management for a mentally incapacitated spouse, N.Y. Mental Hyg. Law § 81.07(d)(1)(ii), and to receive copies of the inspection reports for a nursing home where a spouse resides, N.Y. Pub. Health Law § 2896-h. Plaintiffs have none of these rights should their partners become ill or incapacitated.[11]

b. Marriage protects children raised in the family

The vast reach of marriage extends to securing the bonds between parents and children. One of the most significant hardships for plaintiffs is their exclusion from presumptions of parenthood afforded to married couples. Under state law, when a married couple elects to conceive a child through donor insemination, both spouses can ensure that at birth the child has an automatic legal parent-child relationship with each of them upon their written consent. DRL § 73. If plaintiffs were able to marry before their children were born, adoption would not even be necessary, "since married couples can obtain full parental rights automatically when they have a child." Abrams ¶ 18. Likewise, a stepparent can adopt simply on the consent of the parent spouse. DRL § 115-b(8).

[11] Even plaintiffs' intimate communications with their partners are not protected; if plaintiffs were able to marry, these communications would be shielded in legal proceedings by the spousal privilege. N.Y. C.P.L.R. 4502.

For plaintiffs, second-parent adoption — while a welcome right under New York law — is a laborious, intrusive, and expensive process. It is also a lengthy process, during which the child has no legal relationship with one parent and is at risk should something happen to the child's only legal parent.[12] Moreover, many same-sex couples, some plaintiffs among them, cannot afford the expenses of adoption.[13] The inequality in the law's treatment of the relationships between same-sex couples and their children is a source of pain for plaintiffs' children as well.

> When I was eight years old, Mommy Jo adopted me. At the time, I didn't understand the adoption or why we had to do it. I thought — Mary Jo is as much my mom as Jo-Ann, it's so unfair that they have to do this. I always loved her just as much as Jo-Ann and she loved me just as much. I remember being confused. It started to dawn on me then that my family was not treated equally.

A. Kennedy Shain ¶ 5.

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[12] Freeman-Tweed ¶ 10 ("When our son Elijah was born, I was the first person to hold him. But it would take over two years, during which Lauren and I had to submit to intrusive interviews and background checks, before I could legally adopt him and have the rights that other parents have automatically. It was upsetting to me that our family was so vulnerable during this period, and frustrating that after we had made such a conscious and deliberate decision to have a child I had less rights as a parent than someone who had become pregnant accidentally."); Abrams ¶¶ 17, 19 ("We hired an attorney and paid her over $800 to prepare wills, health care proxies and guardianship papers. After Elijah was born, we hired another attorney, whom we paid over $1,200 and began the process . . . to have Donna become Elijah's adoptive mother. . . . Now we will once more have to go through the long, costly process to have Donna adopt [Micah]."); *id.* ¶ 18 ("[W]e had to have friends write letters on our behalf . . .; we had to be finger-printed; and we had to have a New York State probation officer come into our home to decide if it was a 'suitable environment.'"); *id.* ¶ 19 (it is "very distress[ing] that officers of the state, complete strangers, will . . . have the power to deny" Donna's parental rights.); Shain ¶ 8 ("[W]e had to wait years until Mary Jo could adopt Aliya . . ., and only after considerable expense, hiring a lawyer, and enduring having our privacy invaded."); Kennedy ¶ 10 ("We also hired our own social worker to conduct a home study, which added to the cost of legal fees and other expenses we had to pay."); *id.* ¶ 11 ("There were also eight years of Aliya's life where I had no protection as her mother if something had happened to Jo-Ann, which would not have been the case if we were married when Aliya was born.").

[13] Elsasser ¶ 10 ("[W]e were not financially able to pay for me to adopt the children as well . . . . Nevertheless, because we know how important it is to protect our family, we have been saving to complete the adoption process.").

c. Marriage promotes the family's economic security

New York law provides extensive support for the economic security of the families of married couples. For example, marriage brings with it rights associated with real estate ownership, such as the ability to own property as tenants by the entirety, providing protections against creditors and allowing for the automatic descent of property to the surviving spouse without probate.[14] Plaintiff couples who rent their homes also have fewer protections because they cannot marry.[15] New York laws facilitate the transfer of other property between spouses in numerous ways as well.[16]

Marriage also imposes reciprocal responsibilities on spouses, such as the legal requirement that they provide each other with financial support or face legal redress in certain circumstances, such as if one spouse is a recipient of public assistance. N.Y. Soc. Serv. § 101. Spouses, but not unmarried couples, are permitted to take out insurance policies on one another.

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[14] *See* N.Y. Est. Powers & Trusts Law § 6-2.2(b); *Prario v. Novo*, 168 Misc. 2d 610, 611, 645 N.Y.S.2d 269, 270 (Sup. Ct. Westchester Cty. 1996); *Kozyra v. Goldstein*, 146 Misc. 2d 25, 28, 550 N.Y.S.2d 229, 231 (Sup. Ct. Suffolk Cty. 1989); Hernandez ¶ 13 ("[W]e face additional challenges in sharing property and building for a future together. We purchased a home and some land that we hope to develop in Greene County. Although we own this property together, we understand that only married couples can own property through tenancy by the entirety, which would protect our joint interest by creating an 'indestructible' right of survivorship.").

[15] Reyes ¶ 15 ("[M]y prior landlord refused to issue a rider for me to add Curtis to a lease for my apartment, because Curtis is not my legal spouse. Without the rider, Curtis had no secure legal right to possess or occupy the apartment as an authorized lessee. Curtis was concerned that he would be kicked out of the apartment if something happened to me.); Hernandez ¶ 13 ("It took over a year to add my name to the lease for our apartment, which would have happened as a matter of course if we had been married.").

[16] N.Y. Tax Law § 1115 (exempting sale of automobile by one spouse to another from sales tax); N.Y. Aband. Prop. Law § 206(1)(b) (permitting surviving spouse to bring petition for escheated land); N.Y. Aband. Prop. Law § 208(2) (allowing conveyance of escheated land to surviving spouse without consideration); N.Y. Real Prop. Tax Law § 467 (extending property tax exemptions where one spouse is 65 or older); *see also* N.Y. Gen. Oblig. Law § 3-309 (allowing conveyance or transfer of real or personal property directly between spouses without intervention of third person); N.Y. Ins. Law § 3440 (private passenger motor vehicles, for purposes of insurance, defined as owned by individual or spouses, but not by two unmarried individuals).

DRL § 52; N.Y. Ins. Law § 3205. The law even provides the ability to petition for the appointment of a committee of the estate of a jailed spouse. N.Y. Correct. Law §§ 320, 351. New York laws make it easier for married couples to own their property jointly and communally and recognize married couples as economic units. Although plaintiff couples have intertwined their finances and are committed to care for one another financially as well as emotionally, they are deprived of significant legal and economic protections for their relationships.

In addition to legal rights and obligations embodied in New York statutes, many private parties rely on the State's conferral of marriage and definition of "spouse" in providing benefits. Very significantly for New York families, and for each plaintiff couple, health insurance coverage available for spouses may be denied a same-sex partner and is invariably more costly. Though health insurance coverage is frequently available through an employee health plan for a dependent spouse, many plans will not provide coverage for same-sex partners of employees, who must then go uninsured or obtain a separate policy, with overall higher family premiums and deductibles. If a plan does provide coverage for an unmarried domestic partner, the family's health insurance costs are still greater than if they were married because, unlike spousal coverage, an employer's contribution to the premium for domestic partner coverage is deemed additional taxable income to the employee.[17] Likewise, because auto insurers do not

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[17] Reyes ¶ 14 ("[M]y previous employer denied my request to extend my health care benefits to include Curtis because we are not married. The organization refused to provide benefits to Curtis as a domestic partner. Human Resources said that Curtis would have to purchase an individual policy at the cost of $400 per month, more than we could afford. The office also told me that, even if Curtis elected to purchase the policy, coverage was not guaranteed for non-married couples until the board approved it. As a result, Curtis had no insurance coverage for at least six months [during which time he] hurt his knee. . . ."); Cohen ¶ 10 ("Daniel and I have had tremendous difficulty getting me covered on his insurance plan because his insurance company will not cover non-marital partners."); Shain ¶ 14 ("Our health insurance is also more expensive than it would be if we were married. Because Mary Jo and I cannot marry, if I were to join her employer's health plan — which extends benefits to domestic partners — I would be required to pay taxes on my portion of the premium. As a result, I have health insurance through my own employer, which is more expensive than if I could obtain coverage as

recognize commitments other than marriage, for same-sex couples, owning a car or insuring both partners can be prohibitively costly.[18] Additional marital and family benefits offered by car rental agencies, health clubs, and other businesses are denied same-sex couples.[19] The many added costs faced by same-sex couples like plaintiffs stretches their families' finances and leaves them and their children with less. "Again and again, we have had to spend money that we could be saving for [our children's] education in order to try to make up for what we lose because we cannot marry." Robinson ¶ 23.

d. Marriage provides irreplaceable protections when a spouse dies

The far-reaching protections that come with marriage are perhaps felt most strongly when a spouse dies. If one spouse dies without a will, the survivor has an automatic right at least to a partial distribution of the deceased's estate and to act as voluntary administrator of the estate. N.Y. Est. Powers & Trusts Law § 4-1.1; N.Y. Surr. Ct. Proc. Act § 1303. A surviving spouse is also given the right to remain in the marital home for forty days after the death of the spouse and to receive reasonable sustenance out of the estate. N.Y. Real Prop. Law

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a spouse under Mary Jo's plan. We have to pay more in deductibles as well because we have two separate policies instead of a single family policy."); Abrams ¶ 22 ("I have added Donna to my health insurance, but while a married couple would be allowed to pay additional premiums using pre-tax dollars, this additional amount is deducted from my paycheck on a post-tax basis."); Robinson ¶ 21 ("[B]ecause we are not married, I must pay added income taxes for the value of Michael's [health insurance] coverage, money I would not have to pay if we were married.").

[18] Robinson ¶ 21 ("Our automobile insurance provider . . . refused to recognize us either as domestic partners or spouses for purposes of coverage and premium, requiring us to pay more for auto insurance than if we were married. As a result of this added expense, we ultimately got rid of the car."); Reyes ¶ 16 (Auto insurance company "refused to add Curtis to my insurance as a spouse. . . .The premium would have increased from $2,200 to $5,200 a year to add Curtis to the policy. . . . I remain the only insured driver in our home as a result, so Curtis cannot drive our truck.").

[19] Robinson ¶ 21 ("Health clubs have refused to issue joint memberships to us, because we are not married. As a result, we cannot afford to belong to health clubs."); Cohen ¶ 10 ("Car rental agencies and other businesses often offer special spousal discounts or considerations that Daniel and I are ineligible for because we are unable to marry."). *See also* N.Y. Ins. Law § 4216(f) (allowing employee to include spouse in group life insurance coverage); N.Y. Ins. Law § 3220 (allowing insurer to provide for payment of life insurance benefit to insured's spouse).

§ 204. Marriage protects a spouse's right to other property belonging to the couple as well. *See* N.Y. Est. Powers & Trusts Law § 5-3.1 (surviving spouse entitled to personal property of deceased that is not deemed part of estate, including automobiles valued at less than $15,000 and intimate possessions such as clothing, pets, and photographs). "Married couples are automatically protected if they are faced with tragedy" (Woolbright ¶ 15); plaintiffs have none of these safeguards.[20]

Though same-sex partners can seek some measure of security through wills, planning still does not protect against many hardships for unmarried couples following the death of a partner, such as potential loss of the family home due to the tax burdens of inheritance.[21] Wills also cannot confer other rights afforded only to surviving spouses under New York law. If a spouse dies while at an eligible job or as a result of a workplace accident, the surviving spouse

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[20] If a relationship ends in divorce, New York law and courts provide a structure and forum for effecting the separation. Family courts make determinations about custody, visitation, and support in the best interests of children of the marriage. DRL §§ 240. Courts also assist couples in dividing their property, DRL § 234, and making determinations about alimony and maintenance payments and equitable disposition of marital property, DRL § 236. Legal dissolution of a marriage automatically revokes any disposition made by will to a former spouse. N.Y. Est. Powers & Trusts Law § 5-1.3 (2002). Thus, just as the State supports the married couple's parenting and sharing of property, it also provides structure and support if the couple later divorces and must divide parenting responsibilities and property. Same-sex couples are denied this assistance.

[21] Abrams ¶ 22 ("My Last Will and Testament names Donna as the sole beneficiary, but Donna would have to pay inheritance taxes on the value of my assets, including our co-op apartment which I had bought before we met, if I died. This is of great concern to me as a parent because Donna would be forced to support our family with less money than she would if we had been married, and she and our children might not be able to afford to remain in our home."); Kennedy ¶ 18 ("[I]f something did happen to Jo-Ann, I am not protected from New York's inheritance taxes that spouses do not have to pay."); Hernandez ¶ 13 ("We both have wills that name each other as the primary beneficiary, but we know that if we were married we would have additional legal protections for our intended sharing of property, protections that married couples have automatically."); Woolbright ¶ 13 ("Even if we could afford these papers, we know they don't guarantee us protections in all the circumstances a marriage would."); *see* N.Y. Tax Law § 952 (citing I.R.C. § 2011) & I.R.C. § 2056 (together, reducing New York estate tax imposed where property passes from decedent to his or her surviving spouse).

is entitled to a workers' compensation benefit.[22] A spouse, but not a domestic partner, may bring an action to recover damages as a result of a wrongful death.[23] A host of additional protections for surviving spouses are likewise unavailable to plaintiffs and other same-sex couples.[24]

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[22] N.Y. Civ. Serv. Law § 154-b; N.Y. Workers' Comp. Law § 16; N.Y. Workers' Comp. Law § 33 (mandating payment of workers' compensation benefits by employer to surviving spouse); N.Y. Workers' Comp. Law § 305(4)(b) (providing workers' compensation to a spouse in the event of the death of a civil defense volunteer); N.Y. Workers' Comp. Law §§ 15(4), 16 (entitlement to death or disability benefits owed as workers' compensation).

[23] *See* N.Y. Est. Powers & Trusts Law § 5-4.4(a); *Langan v. St. Vincent's Hosp.*, 196 Misc. 2d 440, 443, 765 N.Y.S.2d 411, 413 (Sup. Ct. Nassau Cty. 2003) (those who are not legal spouses cannot recover under wrongful death statute, even if they are domestic partners). *See also Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 509, 293 N.Y.S.2d 305, 313 (1968) (spouse may bring action for loss of consortium).

[24] *See, e.g.*, N.Y. Soc. Serv. Law § 169 (surviving spouse of veteran eligible for veteran assistance); N.Y. Vol. Fire. Ben. Law §§ 7, 18 (payment of accrued and death benefits to surviving spouse); N.Y. Retire. & Soc. Sec. Law § 78(h) (surviving spouse to receive supplemental retirement allowances); N.Y. Retire. & Soc. Sec. Law § 162 (surviving spouse eligible for supplemental pensions); N.Y. Exec. Law § 227-a (death benefits for surviving spouse of a member of division of state police); N.Y. Est. Powers & Trusts Law § 5-1.1(a) (right of election to surviving spouse under executed will); N.Y. Gen. Mun. Law § 146 (surviving spouse may contest devise or bequest for more than one-half of testator's estate); N.Y. Gen. Mun. Law § 163 (surviving spouse's ownership and control rights over deceased spouse's cemetery lot); N.Y. Ins. Law § 3221 (conversion privilege to surviving spouse as to group or blanket accident and health insurance coverage); N.Y. Surr. Ct. Proc. Act § 1001(1) (right to administer the estate of deceased spouse who dies intestate); N.Y. Vol. Amb. Work. Ben. Law § 18 (payments to spouses of certain state employees killed in performance of duty). *See also Darcy v. Presbyterian Hosp.*, 202 N.Y. 259 (1911) (spouse has right to claim body of deceased for burial); *Fromm v. Fromm*, 280 A.D. 1022, 1023, 117 N.Y.S.2d 81, 82 (3d Dep't 1952) (right to possess body and make funeral arrangements for spouse); N.Y. Pub. Health § 4301(2) (authority to permit organ donation in absence of designation by deceased spouse); N.Y. County Law § 677 (rights to apply directly for copy of deceased spouse's autopsy report in event that death was caused by unlawful means, and to allow healthcare providers to release confidential medical information about deceased); N.Y. C.P.L.R. 4504(c) (surviving spouse may waive privilege between physician and deceased patient); N.Y. Pub. Health Law § 4174 (entitling survivor to copy of death certificate of deceased spouse); *Beller v. City of N.Y.*, 269 A.D. 642, 643, 58 N.Y.S.2d 112, 113 (1st Dep't 1945) (consent of surviving spouse required for autopsy of deceased spouse).

e. Domestic partnership registration, legal documents, and other ways same-sex couples currently cobble together protections for their families are no substitute for the rights automatically afforded through marriage

Several of the plaintiff couples have registered as domestic partners under New York City law because it currently is the only legal recognition of their relationship offered to them here by the government.[25] However, plaintiffs need not be lawyers to understand that "the benefits and protections provided by a New York City domestic partnership are relatively minimal compared to a civil marriage." Cohen ¶ 13. Those benefits are essentially limited to visitation rights with domestic partners in city facilities, health benefits and bereavement and child care leave for City employees, and eligibility to qualify as a family member for purposes of New York City-owned or -operated housing. N.Y.C. Admin. Code § 3-244(a)-(f). Importantly, domestic partnership also does not confer on the relationship the dignity of marriage.[26]

As discussed above, 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.[27] Significantly, not all couples can afford the

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[25] Abrams ¶ 21; Kennedy ¶ 16; Elsasser ¶ 17. While plaintiffs could consider marrying in Canada and then seeking respect for their marriages here in New York, they do not want to have to leave the state where they live, work, rear their children, and pay taxes in search of the right to marry. Cohen ¶ 13; Abrams ¶ 25; Woolbright ¶ 16.

[26] Elsasser ¶ 17 ("We have registered as domestic partners in New York City, but this carries very limited benefits for our family."); Kennedy ¶ 17 ("[B]eing registered domestic partners had little meaning, legal or cultural, compared to being married . . . [and] is a very poor substitute for marriage, providing us with virtually none of its privileges and protections or respect for our family."); Robinson ¶ 27 ("[D]omestic partnership registration do[es] not provide us with the rights and protections of marriage, or with the dignity it confers on a relationship.").

[27] Elsasser ¶ 17 ("[L]egal protection documents, such as powers of attorney, health care proxies and wills . . . are inadequate substitutes for the full recognition of rights and responsibilities that married couples receive in New York and will not protect us in many circumstances."); Cohen ¶ 11 ("Although we have tried to address these problems as best we can using wills and health care proxies, it is impossible to cover every possible eventuality that could

thousands of dollars it can cost to hire lawyers to prepare legal documents to obtain even these protections.

> We are a hard working middle-class minority couple without the financial means to hire lawyers and counselors to create a patchwork of legal protections for ourselves like proxies, powers of attorney and wills. We are struggling to pay our bills, contribute to our community and succeed in a competitive working environment. We need the protections and benefits of marriage that are available to all different-sex couples, rich and poor.

Woolbright ¶¶ 14-15.[28]

3. Denial of full rights to civil marriage confers a second-class status on plaintiffs' families

Plaintiffs understandably recognize that the denial of their right to marry assigns a second-class status to them and their children. In the words of Michael Elsasser:

> As long as we cannot marry, we are not full citizens. We are not equal. Domestic partnership, commitment ceremonies, and legal protection documents are not enough. We are still assigned the status of second-class citizens, for practical purposes and as a matter of basic dignity. Without the right to marriage itself, we are denied full respect and dignity for our families.

Elsasser ¶ 18.[29] Many plaintiffs and their families, a number of who come from inter-racial backgrounds or are inter-racial couples themselves, see a link between the State's denial to them

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occur."); Shain ¶ 12-13 ("When we travel, we bring all of the legal paperwork that we have in place including our health care proxies and second parent adoption papers. In the event of an emergency, these papers are necessary to establish our relationship, which would not be required if we were married. . . . Even though Mary Jo and I have done all that we can to legally protect our family, those protections do not compare to the many state benefits we would have if we were married.").

[28] Reyes ¶ 18 ("[W]e do not have the several thousand dollars we would need to pay [to obtain documents to protect us, though] [w]ithout those documents, we know that the law in many ways treats us as strangers and that we are at risk in times of crisis."); Shain ¶ 13 ("Not being able to marry also costs us more because we must pay to have these life planning documents prepared."); Robinson ¶ 23 ("We spent about $1,500 to obtain these documents, which we felt were necessary to protect our family.").

[29] Hernandez ¶ 16 ("[W]e want to be able to have any child we raise . . . know that his or her family and parents are not 'second rate' in the eyes of the law."); Cohen ¶ 12 ("[S]ociety reserves its highest form of respect for relationships that are solemnized by marriage. Without marriage, I will never be

of the right to marry and the now rejected practice of denying inter-racial couples the same right. Yet while the U.S. Supreme Court declared anti-miscegenation laws unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967), "almost 40 years later, [we are still] facing official state discrimination against [our] own relationship[s]." Woolbright ¶ 9. Karen Woolbright, mother of plaintiff Curtis Woolbright, understands from her own experience a generation ago what this means for her son:

> My son . . . and his beloved partner, Daniel Reyes, should have the right to get married for the same reasons I should have had the right to marry my husband, Curtis Woolbright Sr., in the early 1960's. My husband's home state Texas, and many other states at the time, restricted us from getting married, because he was black and I am white. There was no reason to exclude us from marriage other than fear and prejudice. . . .
>
> I cannot express how important it was to get married. As a married couple, we received protections and respect for our family that were still withheld in many parts of the country to inter-racial couples. . . .[G]etting married also affected my self-esteem. Looking back I can say that the first day I referred to Curt as my husband validated my relationship and my feelings for him.

K. Woolbright ¶¶ 3, 9.[30]

For plaintiffs, domestic partnership, civil union, or some other measure short of access to full civil marriage would perpetuate, not remedy, the hurtful discrimination against their families. "Simply in name alone, the government tells us that civil unions and domestic

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certain that my relationship with Daniel will receive the respect it deserves."); Abrams ¶ 23 ("Not being able to get married makes me feel that society does not respect my relationship with Donna."); Shain ¶ 16 ("Nothing short of marriage can bring equality to my family."); Woolbright ¶ 9 ("I am a second-class person under New York law, because the government has decided that same-sex couples don't deserve the same respect and protection.").

[30] A. Kennedy Shain ¶ 15 ("The ban on inter-racial marriage was ridiculous. We see that now without question. We will look back on this and think the same thing — that it's ridiculous that my parents can't get married."); J. Chee-Ming ¶ 10 ("As a woman of color, I think about what it must have been like to be prohibited from marrying the person of your choice just because of the color of your skin, and I feel so sad that our government continues to throw up obstacles before people who want to marry just because of old, discriminatory ways of thinking."); A. Hernandez ¶ 8 ("These laws remind me of the same ugly discrimination that I saw firsthand growing up in segregated Texas, where I, as a Mexican-American, was not allowed to eat in certain restaurants or have the same jobs as other Texans.").

partnerships are different and less valuable." Reyes ¶ 17. "Even if it provided us all the same rights, a second-class recognition of my relationship with Nevin would continue to dishonor the life we have built with one another as . . . something less than other couples' shared lives." Hernandez ¶ 15.[31] Being barred access to civil marriage denies plaintiffs something that to them is irreplaceable.

ARGUMENT

The facts set out above establish beyond possibility of material dispute that plaintiffs are serious, committed couples, devoted to building lives together as families, whose relationships are no different than those of married couples, and that plaintiffs suffer serious tangible and intangible burdens under the law and in society by being excluded from civil marriage. Since the material facts are not in dispute and, as plaintiffs demonstrate below, this exclusion violates the New York State Constitution, plaintiffs are entitled to summary judgment in this action. *See* N.Y. C.P.L.R. 3212(b); *Marinas of the Future, Inc. v. City of N.Y.*, 87 A.D.2d 270, 450 N.Y.S.2d 839 (1st Dep't 1982) (summary judgment granted where there were no triable issues of fact and question of law was only issue in case).

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[31] Abrams ¶ 25 ("A 'domestic partnership' or 'civil union' does not make us 'married,' and we believe that is what we should and deserve to be in the very best sense of the word. The depth of our relationship and commitment to one another is worthy of that term. We don't feel there can be equality with some separate term or legal arrangement that is called anything other than marriage."); Reyes ¶ 17 ("Curtis and I wanted to have a commitment ceremony, but we decided against it because it just feels fake to us. We don't want a 'pretend' wedding . . . . Civil unions do not receive the same level of respect that marriages receive."); Shain ¶ 16 ("My relationship should be treated with the same dignity and respect that marriage symbolizes."); Cohen ¶ 13 ("I want to marry Daniel, not to settle for some inferior half-measure."); Hernandez ¶ 14 ("Because we are not allowed to marry one another, Nevin and I again and again are made to feel that our relationship is less valued than other people's and that we are less worthy of obtaining the rights and assuming the responsibilities the law provides others in society."); *id.* ¶ 14 ("I want my relationship with Nevin to be addressed, considered and treated just the same as any other married couple's relationship, not as some second class union.").

I.

NEW YORK'S CONSTITUTION ZEALOUSLY AND INDEPENDENTLY SAFEGUARDS THE CIVIL RIGHTS OF ALL NEW YORKERS

New York's courts have long construed the civil rights of its citizens broadly, to provide robust protection of the liberties held dear under the State Constitution, often beyond the protections provided by the federal constitution or those of other states. This tradition of vigorous and independent adjudication is not just a prerogative — it is a duty imposed on New York State courts. In view of its distinctive history and traditions, New York has been particularly protective of a range of personal autonomy rights relating to the liberty and equality interests at stake in this action.

This case calls on the Court to declare unconstitutional under the New York State Constitution the legislature's restriction of marriage to different-sex couples. Where state law violates bedrock rights of liberty and equal protection, it is the role of the courts to enforce the rights guaranteed to every person by the State Constitution, even if that requires a declaration that a legislative act is unconstitutional. *See In re Jacobs*, 98 N.Y. 98, 110 (1885) ("it is for the courts to scrutinize" an act of the legislature that "interferes with . . . personal liberty"). The New York Court of Appeals reiterated this vital judicial obligation just weeks ago in *People v. LaValle*, No. 71, 2004 WL 1402516, at *16 (N.Y. June 24, 2004), declaring that a provision of the Criminal Procedure Law violated the State guarantee of due process: "The Court . . . plays a crucial and necessary function in our system of checks and balances. It is the responsibility of the judiciary to safeguard the rights afforded under our State Constitution." *Id.*

The protections of the New York Constitution have been held to extend beyond those found in the federal constitution, which sets the *floor*, but not the ceiling, for the rights of the individual. *See id.* at *17 ("'[O]n innumerable occasions this [C]ourt has given . . . [the]

State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution."') (quoting *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 159, 408 N.Y.S.2d 39, 43 (1978)); *People v. Kohl*, 72 N.Y.2d 191, 197, 532 N.Y.S.2d 45, 48 (1988) (State Constitution may "provide greater protection than the due process floor set by the Supreme Court"); *see also Cooper v. Morin*, 49 N.Y.2d 69, 79, 424 N.Y.S.2d 168, 174 (1979); Judith S. Kaye, *Dual Constitutionalism in Practice and Principal*, 61 St. John's L. Rev. 399, 405 (1987).

In determining the scope of a particular State constitutional right, New York Courts consider a wide range of factors — both interpretive (*e.g.*, differences in State and federal constitutional language; history of the adoption of particular provisions) and non-interpretive (*e.g.*, "judicial perception of sound policy, justice and fundamental fairness," based on the history and traditions of the State and "any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right"). *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303, 508 N.Y.S.2d 907, 911 (1986). In its leading case on dual constitutionalism, *People v. Scott*, 79 N.Y.2d 474, 583 N.Y.S.2d 920 (1992), the Court of Appeals made clear that it retained the flexibility to wield any or all of these tools to determine the appropriate level of protection for New York's citizenry, declining "to adopt any rigid method of analysis." *Id.* at 490, 583 N.Y.S.2d at 930.

The tradition of independent judicial inquiry under New York's separate constitution dates back to early Court of Appeals decisions interpreting the Due Process Clause found in Article I, § 6, which, notwithstanding its resemblance to its federal counterpart, has acquired greater breadth in New York. In the mid-nineteenth century, the New York judiciary emerged as a pioneer in independently advancing and protecting individual liberties, most notably by developing and expanding the doctrine of substantive due process. Peter J. Galie,

Ordered Liberty: A Constitutional History of New York 80 (1996); *see Wynehamer v. New York*, 13 N.Y. 378, 420 (1856) (adopting doctrine of substantive due process); *In re Jacobs*, 98 N.Y. 98, 106 (1885) (articulating broad liberty interests conferred under due process guarantee).

The history of New York's Equal Protection Clause jurisprudence also shows a heightened concern for protecting the rights of New York citizens through independent constitutional analysis.[32] While the New York and federal equal protection guarantees have been read to provide "equally broad coverage," *Brown v. State*, 776 N.Y.S.2d 643, 646 (3d Dep't 2004), *see also In re Esler v. Walters,* 56 N.Y.2d 306, 313-14, 452 N.Y.S.2d 333, 337 (1982), New York requires an *independent* State constitutional analysis of equal protection claims. *See, e.g., People v. Kern*, 75 N.Y.2d 638, 653-57, 555 N.Y.S.2d 647, 655-58 (1990) (finding racially discriminatory peremptory challenges by the defense to violate the State and federal equal protection guarantees even though *Batson v. Kentucky*, 476 U.S. 79 (1986) expressly declined to

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[32] The legislative history of the clause's adoption suggests a distinctively New York concern with protecting individual rights. The 1938 Constitutional Convention that adopted the State Equal Protection Clause contained in Article I, § 11, recognized that the federal Equal Protection Clause had up to that point been narrowly construed, requiring a more robust State provision to protect the rights of minorities. The New York State Constitutional Convention Committee observed that the "Fourteenth and Fifteenth Amendments to the Federal Constitution . . . have . . . been narrowly construed and limited to a restricted field." Sub-Committee on Bill of Rights and General Welfare of the New York Constitutional Convention Committee, *Problems Relating to Bill of Rights and General Welfare* 222 (1938) (excerpts provided as Trachtman Aff., Ex. 8). The Committee further noted that the prevailing construction of the Civil War Amendments would "permit statutes compelling separate accommodations in public conveyances, segregation in public schools . . . or forbidding marriage between Negroes and whites." *Id.* at 223. Thus, only by enacting a separate state prohibition on discrimination could New York proscribe "practices by the State itself or any subdivision thereof which have been held not to be violative of the Federal provision." *Id.* The Convention understood that it was writing a constitution in the face of new challenges to democratic government posed by such issues as the disproportionate economic impact of the Great Depression on African-Americans and the onset of Nazi persecution of Jews in Europe: "In the 18th and 19th centuries, . . . [the essential problem of government] was how to establish the will of the majority in representative government. In the world of today, the problem is how to protect the integrity and civil liberties of minority races and groups. The humane solution of that problem is now the supreme test of democratic principles, the test indeed, of civilized government." II Revised Record of the [1938] Constitutional Convention of New York, at 1066 (remarks of Robert F. Wagner) (Trachtman Aff., Ex. 8). The U.S. Supreme Court's own Fourteenth Amendment jurisprudence has since evolved to embody many of these values as well.

reach the issue); *Brown*, 776 N.Y.S.2d at 646-47 (despite common breadth of coverage, adverse decision on federal equal protection claim does not preclude subsequent adjudication and independent analysis of state claim).

As discussed below, New York's robust doctrine of independent constitutional adjudication has propelled the State to a leading role in the recognition of modern constitutional civil rights.

II.

THE MARRIAGE BAN VIOLATES PLAINTIFFS' DUE PROCESS RIGHTS UNDER THE NEW YORK CONSTITUTION BY DENYING THEM, WITHOUT A COMPELLING JUSTIFICATION, THE FUNDAMENTAL RIGHT TO MARRY THE PERSON OF THEIR CHOICE

The right to marry — and the concomitant right to choose *whom* to marry — has long been recognized under both the New York and United States Constitutions as "fundamental" and protected by the guarantee of due process. There is no exception to this fundamental right that would exclude plaintiffs from the right to marry the person of their choice simply because they are of the same sex as their committed partners. In court papers defending the marriage exclusion, the State has suggested that the fundamental right to marry by definition applies only to male-female couples. Trachtman Aff., Ex. 5 at 36. This contention cannot withstand constitutional challenge. Discriminatory assumptions about marriage based on race and gender once widely held and ingrained in law have given way as subsequent generations have come to a deeper appreciation of the liberty and equality principles at the foundation of our constitutional order. The fundamental right to marry, which is part of the liberty we all possess, knows no exception for gay and lesbian New Yorkers. Since the State does not and cannot allege a compelling government interest in excluding same-sex couples from marriage, as is necessary to justify infringement of a fundamental right, the ban must fall.

A. New York Courts Have Been Particularly Protective of the Right to Privacy and Related Rights Bearing on the Dignity and Autonomy of the Individual

New York's unique history as a social and cultural mecca, and its historical acceptance of diversity, inform the State's modern jurisprudence of individual liberties, which has broadly recognized civil rights in a variety of settings. *See, e.g., Scott*, 79 N.Y.2d at 488, 583 N.Y.S.2d at 929 (finding broader expectation of privacy from search and seizure than had been found under federal constitution and rejecting idea that "law abiding persons should have nothing to hide on their property," because this argument "presupposes the ideal of a conforming society, a concept which seems foreign to New York's tradition of tolerance of the unconventional"); *People ex rel Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 558, 510 N.Y.S.2d 844, 847 (1986) (State Constitution provides greater protection for freedom of expression than does First Amendment in light of State's history of tolerance for diverse and controversial expression); *P.J. Video*, 68 N.Y.2d at 301, 309, 508 N.Y.S.2d at 910, 915-16 (State Constitution imposes more exacting standards for issuance of search warrants than does Fourth Amendment, particularly in obscenity cases, in view of State's "cultural and historical position as a leader in the educational, scientific and artistic life of our country" and "recognition that New York is a State where freedom of expression and experimentation has not only been tolerated, but encouraged").

As part of the guarantee of liberty, New York's constitution affords every citizen of this State a fundamental "right to privacy," described by the Court of Appeals as an autonomy right that "involves freedom of choice, the broad, general right to make decisions concerning oneself and to conduct oneself in accordance with those decisions free of governmental restraint or interference." *Doe v. Coughlin*, 71 N.Y.2d 48, 52, 523 N.Y.S.2d 782, 785 (1987). So cherished is this right that the Court of Appeals has described it as "'the most comprehensive of

rights and the right most valued by civilized men.'" *People v. Onofre*, 51 N.Y.2d 476, 485-86, 434 N.Y.S.2d 947, 949 (1980) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

Given both the range of broadly recognized rights and the flexibility of New York's evolving jurisprudence, it is not surprising that the State right to privacy has been found to protect New Yorkers in a variety of contexts. *See Hope v. Perales*, 83 N.Y.2d 563, 575, 611 N.Y.S.2d 811, 814 (1994) (right to reproductive freedom); *Rivers v. Katz*, 67 N.Y.2d 585, 493, 504 N.Y.S.2d 74, 78 (1986) (right to refuse medical treatment); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548, 498 N.Y.S.2d 128, 130 (1985) (right of unrelated adults to live together as family); *Cooper v. Morin*, 489 N.Y.2d 69, 81, 424 N.Y.S.2d 168, 175 (1979) (pretrial detainees' right to "contact visits" to maintain family relationships).

B. The Choice Whether and Whom to Marry Has Been Consistently Recognized by New York Courts as a Fundamental Constitutional Right

It is beyond dispute that marriage is a fundamental right central among those shielded by the right to privacy. "Among the decisions protected by the right to privacy, are those relating to marriage," *Doe*, 71 N.Y.2d at 52, 523 N.Y.S.2d at 785. *See Onofre*, 51 N.Y.2d at 486, 434 N.Y.S.2d at 950 ("'[A]mong the decisions that an individual may make without unjustified government interference' are personal decisions relating to marriage.") (citation omitted); *People v. Shepard*, 50 N.Y.2d 640, 644, 431 N.Y.S.2d 363, 365 (1980) (noting courts' willingness "to strike down State legislation which invaded the 'zone of privacy' surrounding the marriage relationship") (citation omitted); *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 501, 730 N.Y.S.2d 15, 25 (2001) (Smith, J., concurring) ("[M]arriage is a fundamental constitutional right."); *Mary of Oakknoll v. Coughlin*, 101 A.D.2d 931, 932, 475 N.Y.S.2d 644, 645 (3d Dep't 1984) ("[T]he right to marry is one of fundamental dimension."); *Cherry v. Koch*, 129 Misc. 2d

346, 359, 491 N.Y.S.2d 934, 945 (Sup. Ct. Kings Cty. 1985) ("Marriage is a fundamental right where freedom of personal choice is protected to a heightened degree."); *Berger v. Adornato*, 76 Misc. 2d 122, 123, 350 N.Y.S.2d 520, 522 (Sup. Ct. Onondaga Cty. 1973) (marriage is "'one of the basic civil rights'") (citation omitted). Citing the U. S. Supreme Court's description of the federally protected fundamental right to marry, a New York court recognized that:

> [Marriage] is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

People v. De Stefano, 121 Misc. 2d 113, 121, 467 N.Y.S.2d 506, 513 (Sup. Ct. Suffolk Cty. 1983) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

In describing the fundamental right to marry, the Court of Appeals has placed special emphasis on one's free choice of a marital partner. The court has described the constitutionally protected right to privacy in the context of marriage as "relating to the decision of *whom* one will marry." *Crosby v. State, Workers Comp. Bd.*, 57 N.Y.2d 305, 312, 456 N.Y.S.2d 680, 683 (1982) (emphasis added). The role of courts as guardians of this right has been similarly characterized as preventing the State "from interfering with an individual's decision about *whom* to marry." *Shepard*, 50 N.Y.2d at 644, 431 N.Y.S.2d at 365 (emphasis added). The Court of Appeals' emphasis on spousal choice as critical to the fundamental right to marry is consistent with landmark marriage decisions of both recent and older vintage from the highest courts of other states. *See, e.g., Goodridge v. Department of Public Health*, 440 Mass. 309, 327-28, 798 N.E.2d 941, 958 (2003) ("the right to marry means little if it does not include the right to marry the person of one's choice"); *Perez v. Sharp*, 32 Cal. 2d 711, 715, 198 P.2d 17,

19 (1948) ("[T]he right to marry is the right to join in marriage with the person of one's choice.") (striking down California's anti-miscegenation law).

In support of its many pronouncements underscoring the fundamental right to make decisions about marriage, the Court of Appeals has looked to the U.S. Supreme Court's hallmark decision concerning the fundamental right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967). *See Doe*, 71 N.Y.2d at 52-53, 523 N.Y.S.2d at 539 (citing *Loving*); *Crosby*, 57 N.Y.2d at 312, 456 N.Y.S.2d at 683 (same); *Shepard*, 50 N.Y.2d at 644, 431 N.Y.S.2d at 365 (same). In *Loving*, the Supreme Court struck down Virginia's statute criminalizing interracial marriage. The Court explained that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.'" 388 U.S. at 12 (citation omitted). Emphasizing that the choice of *whom* to marry is at the heart of this fundamental right, the Court held that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the state." *Id.*

"Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions . . . confirm that the right to marry is of fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Subsequent to *Loving*, the Supreme Court again twice struck down restrictions on disfavored classes of persons from exercising their fundamental right to marry. In *Zablocki*, a "'critical examination' of the state interests advanced" led the Court to strike down a law that excluded from marriage persons who were derelict in paying child support obligations. *Id.* at 383 (citation omitted). Later, the Court likewise invalidated prison regulations that strictly limited the rights of convicted criminals to marry, finding that the restrictions were not sufficiently related to the stated penalogical

objectives. *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). The Court stressed the important attributes of marriage, including the facilitation of "emotional support," "public commitment," and "personal dedication," as well as marriage's unique status as "a precondition to the receipt of government benefits . . . , property rights . . . , and other, less tangible benefits" such as "legitimization of children born out of wedlock." *Id.* at 96.

These cases teach that beyond matters such as minimum age, consanguinity, and pre-existing marital status, government may not intrude on the choice of marriage partners. One may marry whom one loves, period. One may do so from prison, *id.* at 96; despite failing the children of a previous marriage, *Zablocki,* 434 U.S. at 384; or across any ethnic or racial divide, *Loving*, 388 U.S. at 12.

The well-established and expansive fundamental right to marry under federal law sets only the "floor" for New York's even more robust constitutional tradition of vigorous enforcement of the privacy and related liberty rights of its citizens. Marriage — and in particular, the freedom to choose whom to marry — is a profound fundamental right that belongs to every person in this State, gay and lesbian individuals included.

C. Same-Sex Couples Cannot Be Excluded Categorically From the Right to Marry Through Invocation of a Supposedly Fixed "Historical" Definition of Marriage

While it is beyond dispute that marriage and marital choice are long-established, core fundamental rights, the State has suggested that *by definition* marriage does not extend to same-sex couples, based on the long history of limiting marriage to the union of a man and a woman. Trachtman Aff., Ex. 5 at 33-37. This view improperly seeks to foreclose constitutional analysis by rote reliance on historical exclusion. Where important liberty interests are at stake, "history and tradition are the starting point but not in all cases the ending point" of the analysis. *Lawrence*, 123 S. Ct. at 2480 (citation omitted). The institution of marriage is comprised of legal

rules and social practices that have evolved dramatically over the course of history, often with judicial intervention to uphold fundamental rights that take supremacy over traditions no matter how deeply embedded. That gay and lesbian New Yorkers have the same vital interest as all others in protection and respect for their families through marriage is especially plain in light of the State's growing recognition of the rights and needs of these families.

1. There is no exception to the fundamental right to marry the person of one's choice that would exclude gay and lesbian New Yorkers

Article I, § 6 of the New York Constitution explicitly provides that "*[n]o person* shall be deprived" of protected liberty. The extent of the liberty at stake does not shrink based on the type of individual making a claim to that liberty. There is nothing to support the premise that individuals in same-sex relationships are distinguishable from those in different-sex relationships with regard to their birthright to liberty, their freedom of personal development, and the highly personal nature of their desire to spend the rest of their lives in a committed relationship with one beloved person to the exclusion of all others.

The central question in this case is whether the fundamental right to marry the adult of one's choice includes those who are the of the same sex as their chosen partners. It should not be misframed as whether there is a fundamental right to a "new" institution of "same-sex marriage." The liberty interest at stake cannot be narrowed to comprise the very exclusion that is being challenged. *See Goodridge*, 440 Mass. at 348, 798 N.E.2d at 972-73 (Greaney, J., concurring) ("To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question . . . ."); *Halpern v. Attorney General of Canada,* 172 O.A.C. 276 ¶ 71 (2003) ("[A]n argument that marriage is heterosexual because it 'just is' amounts to circular reasoning. It sidesteps the entire [] analysis.") (holding that

exclusion of same-sex couple from marriage violates Canadian Charter of Rights and Freedoms) (Trachtman Aff., Ex. 9); *Baehr v. Lewin*, 74 Haw. 530, 565, 852 P.2d 44, 61 (1993) (argument that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman" deemed "circular and unpersuasive").[33]

In prior cases, New York courts have analyzed the liberty interest at issue in terms that recognize and embrace the broader principles at stake. The Court of Appeals in *People v. Onofre*, 51 NY.2d 476, 434 N.Y.S.2d 947 (1980), holding unconstitutional New York's consensual sodomy prohibition, did not define the nature of the claim with such specificity as to obscure the real right at stake, for example as a claimed "fundamental right" to engage in non-marital "oral sodomy in an automobile parked on" a city street. *Id.* at 484, 434 N.Y.S.2d at 948. Instead, the court's review of the constitutional deprivation correctly focused on the individual's broader liberty interest, a "fundamental right of personal decision" extending to non-marital sexual intimacy. *Id.* at 486, 434 N.Y.2d at 950. Likewise, in *Cooper v. Morin*, striking down a prohibition on contact visits for pretrial detainees, the court did not dismiss the interest at stake as some claimed "fundamental right" of accused felons to receive social visits while incarcerated. The court instead recognized that "the fundamental right to marriage and family life" that all share applies to pretrial detainees and requires the government to allow contact visits with family members. 49 N.Y.2d at 80, 424 N.Y.S.2d at 175.

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[33] Some courts evaluating claims to marriage for same-sex couples elsewhere have made the mistake of narrowing the right to marry from the broad liberty-based right to a crabbed identity-based right to "same-sex marriage." *See, e.g., Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. 1995) ("same-sex marriage is not a 'fundamental right' . . . because that kind of relationship is not 'deeply rooted in this Nation's history and tradition'"); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at * 7 (N.J. Super. Nov. 5, 2003) ("we cannot say that same-sex marriage is 'deeply rooted in this Nation's history and tradition'") (citation omitted).

Notably, in *Onofre*, the Court of Appeals was decades ahead of the U.S. Supreme Court in recognizing the fundamental liberty interest at stake in private consensual sexual activity. Not until 23 years later, in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), did the Supreme Court join New York in recognizing that the liberty to enter into intimate relationships with another is protected by the federal constitution.[34] Last year in *Lawrence*, the Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that the Texas prohibition on sexual relations between same-sex partners violates the federal constitution's guarantee of liberty under the federal due process clause. In 1986, in *Bowers*, a gay litigant who had been arrested in his home for engaging in consensual sex with a male partner asked the U.S. Supreme Court to hold Georgia's sodomy prohibition an unconstitutional violation of the federal right to privacy. The Georgia law applied to conduct between different- and same-sex partners alike. Fixating on the claimant's sexual orientation, the *Bowers* Court recast a case presented as one about the fundamental right to engage in private, consensual intimate sexual conduct into a case about a narrowly framed "fundamental right to engage in homosexual sodomy." 478 U.S. at 191. So recast, the Court rejected as "facetious" the claim that such a right is "deeply rooted in this Nation's history and tradition." *Id.* at 194.

In overturning *Bowers* twenty years later, the *Lawrence* Court recognized that fundamental liberties do not vary based on the sexual orientation of the citizen seeking to exercise them. The Court observed that *Bowers*' narrow recasting of the issue before it "discloses the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 123

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[34] Although *Onofre* relied on federal constitutional grounds, following the Supreme Court's conflicting decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the New York courts construed *Onofre* to delineate independent *state* constitutional principles. *See Scott,* 79 N.Y.2d at 487, 583 N.Y.S.2d at 927 (discussing *Onofre* as one of the cases "vindicating a broader privacy right" under New York State law).

S. Ct. at 2478. Rather, the "liberty protected by the Constitution allows homosexual persons" the right all share to make choices about our "personal bond[s]" with another. *Id.* [35]

There is no constitutional exception to these protections for gay men and lesbians. As the Supreme Court explained, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 2482. Significantly, the Supreme Court emphasized that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." *Id.* Thus, in an analysis of fundamental rights, the focus is on the right all share, rooted in the liberty all possess.

Nor do historical assumptions that have confined marriage to heterosexual couples negate the liberty interest shared by same-sex and different-sex couples alike in the right to enter into marriage with their chosen partners. Though specific past traditions may be one touchstone for constitutional decision-making in New York, it is by no means the *sine qua non*. *Lawrence* demonstrates that constitutional rights and liberties must be defined by reference to bedrock principles of liberty itself, not merely by reference to the history of a long-standing, yet unconstitutional, exclusion from liberty:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

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[35] *Lawrence* did not reach whether excluding same-sex couples from marriage violates the federal constitution, and plaintiffs do not assert such claims here. Yet the import of *Lawrence* is unmistakable: fundamental constitutional rights guaranteed to all may not be construed or "defined" so narrowly as to exclude gay people from the scope of their protections.

Id. at 2484. This principle, applied to the exclusion of same-sex couples from the fundamental right to marry, compelled the *Goodridge* court to recognize that "history must yield to a more fully developed understanding of the invidious quality of the discrimination." 440 Mass. at 328, 798 N.E.2d at 958. In view of the deepening understandings of liberty and equality rights that have informed the evolution of the marriage institution, described below, and New York's distinctive constitution and attitudes, this Court should reach the same conclusion.

2. Traditional definitions of who may marry that historically barred interracial marriages are now understood to be unconstitutional

The legacy of challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based even on longstanding and deeply held beliefs about appropriate marital partners. First enacted in colonial days,[36] anti-miscegenation laws were still common into the 1960's and upheld in case after case based on unbending tradition rooted in perceived "natural" law. For example, the Indiana Supreme Court relied on the "undeniable fact" that the "'distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold.'" *State v. Gibson*, 36 Ind. 389 (1871). According to the Indiana court, the laws requiring separation of the races derive not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.'" *Id.* (quoting *Philadelphia & West Chester R.R. Co. v. Miles,* 2 Am. L. Rev. 358 (Pa. Sup. Ct. 1867)); s*ee also Scott v. State*, 39 Ga. 321 (1869) ("moral or social equality between the different races . . . does not in fact exist, and never can").

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[36] John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 35-36 (2d ed. 1988).

Long into the twentieth century, the sheer weight of cases accepting the constitutionality of bans on interracial marriage was deemed justification in itself to perpetuate these discriminatory laws. *See, e.g., Jones v. Lorenzen*, 441 P.2d 986, 989 (Okla. 1965) (upholding Oklahoma law since "great weight of authority holds such statutes constitutional"); *Jackson v. City & County of Denver*, 124 P.2d 240, 241 (Colo. 1942) ("[i]t has generally been held that such acts are impregnable to the [constitutional] attack here made."); *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. 1955) ("With only one exception," — the *Perez* decision, discussed below — anti-miscegenation statutes "have been upheld in an unbroken line of decisions in every State in which it has been charged that they violate" constitutional guarantees), *judgment vacated*, 350 U.S. 891 (1955), *adhered to on remand*, 90 S.E.2d 849 (1956).

Not until 1948 did any court reject the reigning doctrine that laws limiting marriage to partners of the same race reflected natural law impervious to constitutional challenge. That year the California Supreme Court held in *Perez v. Sharp*, 32 Cal. 2d 711,198 P.2d 17 (1948), that the state's anti-miscegenation law — which prohibited marriages of "white persons" to "Negroes, Mongolians, members of the Malay race, or mulattoes," *id.* at 712, 198 P.2d at 18 — violated rights of due process and equal protection. The *Perez* decision was controversial and courageous. Today it is recognized as clearly correct.

The *Perez* majority acknowledged that anti-miscegenation laws were based on the age-old "assumed" view that such marriages were "unnatural." *Id.* at 720, 198 P.2d at 22. But rather than accept this label unthinkingly, the court fulfilled its responsibility to ensure that, no matter how strongly tradition or public sentiment might support such laws, legislation infringing the fundamental right to marry "must be based upon more than prejudice." *Id.* at 715, 198 P.2d at 19. The majority rejected the notion that the legislature's authority to regulate the institution of marriage conferred unchecked power to define who may marry and who may not. *See, e.g.,*

id. at 738, 745, 198 P.2d at 33, 37, 42 (Schenk, J., dissenting). The majority understood as well that the long duration of a wrong cannot justify its perpetuation. *Id.* at 726, 198 P.2d at 26. Nor, the majority understood, had the Constitution changed; rather, its mandates had become more clearly recognized. *Id.* at 736, 198 P.2d at 19-21, 32 (Carter, J., concurring) ("the statutes now before us never were constitutional").

Two decades after the groundbreaking *Perez* decision, the United States Supreme Court in *Loving* declared that Virginia's anti-miscegenation statute violated the fundamental right to marry and the guarantee of equal protection. The trial court in *Loving*, even as late as the 1960's, had rejected the rights of adults to choose their marital partners based on out-moded assumptions that now are recognized as illegitimate grounds for government action:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Loving, 388 U.S. at 2 (quoting trial judge's opinion). Like the *Perez* majority, the Supreme Court was not deterred by the deep historical roots of anti-miscegenation laws, *id.* at 7, 10; their continued prevalence, *id.* at 6 n.5; or continued popular opposition to interracial marriage. Instead, the Court held that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* at 12.

3. Out-moded legal definitions of the role played by gender in the institution of marriage also have given way in more modern times

The supposedly fixed "definition" of marriage has evolved in other ways as well. For centuries, marriage was a patriarchal arrangement under which a husband essentially owned his wife as property. Today it is understood as a voluntary union of two legal equals. "As the

common law grew out of ancient statutes, decrees, and customs of that time, so the modern law of domestic relations is shaped and determined in the light of new conditions and the customs and policies of modern life." *People ex rel. Delaney v. Mt. St. Joseph's Acad.*, 198 A.D. 75, 78, 189 N.Y.S. 775, 776-77 (4th Dep't 1921).

Prior to the nineteenth century, marriage in New York, as elsewhere here and abroad, was synonymous with the long-standing common law legal regime know as "coverture":

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a feme-covert.

1 W. Blackstone, *Commentaries*, Book 1, Ch. 15, at 442-43; *see Briggs v. Mitchell,* 60 Barb. 288 (Sup. Ct. N.Y. Cty. 1864) (marriage effects "suspension of legal existence of woman").

Beginning in the mid-1800s, New York, like many states, began the more than century-long process of altering the age-old marital relationship by dismantling the entrenched tradition of coverture and evolving in its stead a legal marriage structure premised on full equality between the sexes. This ranged from permitting married women to retain legal rights to their property and earnings, "a clear innovation upon the marital rights of the husband at common law," *Gage v. Dauchy*, 34 N.Y. 293, 296 (1866), to eliminating the husband's unilateral "property interest" in his wife's body, *Oppenheim v. Kridel*, 236 N.Y. 156, 161 (1923) (rejecting view "that [a husband] had a property interest in [his wife's] body and a right to the personal enjoyment of his wife" as "archaic").

The abolition of common law marriage by the New York legislature in 1933 was another step in the evolution of marriage towards spousal equality. *See* 1933 N.Y. Laws Ch. 606; Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 Colum. L. Rev.

957, 996-97 (2000) ("The doctrine of common law marriage, . . . premised as it was on socio-legal conventions of female dependency, began to appear out of sync with changing female roles."); *cf. Medical Bus. Assocs., Inc. v. Steiner*, 183 A.D.2d 86, 91-92, 588 N.Y.S.2d 890, 893 (2d Dep't 1992) (rejecting "traditional common-law rule, whereby the husband was solely responsible for his family's necessities, [as] 'an anachronism that no longer fits contemporary society.' . . . [T]he common law [must] adapt to reflect the strides that women have taken towards economic independence, and to acknowledge that in today's society, marriage is a 'partnership, with neither spouse necessarily dependent financially on the other'.") (citation omitted).

Into the 1980's, at least one particularly egregious vestige of the archaic "definition" of marriage remained intact in this State. New York's statutory "marital exemption" to the crime of rape, dating back to pre-Colonial England,[37] exempted a husband from prosecution for rape committed against a wife with whom he cohabited. The Court of Appeals ultimately exercised its constitutional role to declare the discrimination underlying the marital rape exception unacceptable under contemporary conceptions of marriage and constitutional rights:

> We find that there is no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny. We therefore declare the marital exemption for rape in the New York statute to be unconstitutional.

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[37] First codified in New York in 1881, *see* Penal Code, 1881, title X, ch. II, § 278, the marital exemption's origins are "traceable to a statement made by the 17th century English jurist Lord Hale, who wrote: '[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'" *People v. Liberta*, 64 N.Y.2d 152, 162, 485 N.Y.S.2d 207, 212 (1984) (quoting 1 Hale, History of Pleas of the Crown, p. 629); *see also People v. Meli*, 193 N.Y.S. 365, 366 (Sup. Ct. Chautauqua Cty. 1922).

People v. Liberta, 64 N.Y.2d 152, 163, 485 N.Y.S.2d 207, 213 (1984). The Court of Appeals recognized that, in striking down the marital exemption, it was upsetting a long history and tradition. But it also recognized, like Justice Holmes, that history cannot save a rule of law that no longer has a rational basis in the modern world:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Id. at 167, 485 N.Y.S.2d at 215 (quoting Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897)).[38]

In contemporary times, case after case has reiterated that gender-based roles may no longer define the institution of marriage. This legal change has mirrored a steady evolution in the social institution of marriage itself that belies the concept of a static "historical" definition. Marriage as it is understood today is both a partnership of two loving equals who choose to commit themselves to each other and a state institution designed to promote stability for the couple and their children. The relationships of plaintiffs, and of thousands of other similarly situated same-sex couples across New York State, properly fit within this definition of marriage in every way, as courts here and in other jurisdictions are now coming to recognize.

4. Growing legal recognition of the fundamental interest lesbian and gay couples share in the right to marry has meant that civil marriage no longer is exclusively a heterosexual institution

Just as courts finally looked beyond the status quo and prejudices that had defied judicial review for so long in the contexts of anti-miscegenation laws and gender roles embedded

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[38] In 1966, New York changed another important aspect of marriage through the enactment of the Divorce Reform Law, permitting for the first time "non-fault" divorce in the State. *See* New York Laws, 1966, ch. 254. New York's earlier divorce law had severely limited the circumstances under which the parties to a marriage could terminate their union. *Palmer v. Palmer*, 1 Paige's Ch. 276 (N.Y. Ch. 1828) ("[I]t would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it.").

in marriage law, so too are courts now beginning to acknowledge their obligation to safeguard the constitutional marriage rights of gay and lesbian adults on the same basis as all others. While marriage between same-sex couples is currently available in only a few jurisdictions, it can no longer be said that there is but one universal legal definition of marriage that unquestioningly excludes gay and lesbian unions. Already courts elsewhere in this country and abroad, as well as here in New York, have come to see the injustice in perpetuating a definition of marriage that imposes unconstitutional harms on gay and lesbian couples and their families.

The Massachusetts Supreme Judicial Court's landmark 2003 decision in *Goodridge* has for the first time brought full marriage rights to same-sex couples in a U.S. state. The Massachusetts Court recognized that the fundamental right to marry the person of one's choice, guaranteed to all, cannot be read to exclude same-sex couples simply because by long tradition they were denied access to that right: "We are mindful that our decision marks a change in the history of our marriage law. . . . Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. 'Our obligation is to define the liberty of all . . . .'" *Goodridge,* 440 Mass. at 312, 798 N.E.2d at 948 (quoting *Lawrence*, 123 S. Ct. at 2480).

Just weeks ago, in striking affirmation that New York's current marriage scheme is unconstitutional despite the State's long sanction of discrimination in marriage, two different New Paltz Justice Courts dismissed prosecutions against the town's mayor and two clergypersons who had solemnized marriages of same-sex couples unable to obtain marriage licenses. Both courts held that New York's denial of marriage licenses to these couples is unconstitutional and that officiants therefore could not be criminally charged under DRL 17 for solemnizing their marriages without licenses. *See People v. West*, No. 04030054, 2004 WL 1433528, at *2 (Justice Court Ulster Cty. June 10, 2004) (notwithstanding "the historical,

cultural and religious opposition to same-sex marriage, . . . none of the reasons stated in opposition . . . is paramount to [constitutional] equal protection guarantees"); *People v. Greenleaf & Sangrey*, slip op. at 3 (Justice Court Ulster Cty. July 13, 2004) ("Tradition does not justify unconstitutional treatment.") (Trachtman Aff., Ex. 6).

In the past year, courts in Canada likewise recognized the right to marry for same-sex couples under the Canadian constitutional charter, resulting in access to marriage for same-sex couples in four Canadian provinces thus far.[39] Thousands of same-sex couples have legally wed across our nation's border there, including New York residents who have returned home to this State lawfully married.[40] Implementation of the 2003 *Goodridge* decision this past spring has similarly resulted in thousands of marriages, including some by Massachusetts residents who subsequently have moved or will move to New York.[41] The New York State Attorney General

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[39] *See Halpern v. Attorney General of Canada*, 172 O.A.C. 276 (2003) (Ontario) (Trachtman Aff., Ex. 9); *Catholic Civil Rights League v. Hendricks*, No. 500-09-012719-027 (Can. Ct. App. March 19, 2004) (Quebec) (Trachtman Aff., Ex. 10); *Egale Canada, Inc. v. Attorney General of Canada*, 2003 B.C.L.R. (4th) 1 (2003) (British Columbia) (Trachtman Aff., Ex. 11); *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 (Trachtman Aff., Ex. 12).

In the Netherlands and Belgium, civil marriage has been legislatively conferred for same-sex partners. *See Same-Sex Marriages*, Ministry of Justice, Netherlands, *available at* http://www.justitie.nl/english//Themes/family_law/same-sex_marriages.asp?ComponentID=34250&SourcePageID=34258 (Trachtman Aff., Ex. 13); *Belgium Passes Gay Marriage Law*, Agence France-Presse, January 30, 2003 (Trachtman Aff., Ex. 14); Chambre des Représentants de Belgique, "Ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil," 5e Session de la 50e Législature, Doc 50 2165/003 (Jan. 30, 2003), *available at* http://www.dekamer.be/FLWB/pdf/50/2165/50K2165003.pdf (foreign language text of Belgium code provision granting right to marry to same-sex couples) (Trachtman Aff., Ex. 15).

[40] *See, e.g.*, Erin Texeira, *Insurance Coverage; A Victory in Insurance for Gay Couples*, NEWSDAY Newsday, July 19, 2004, at A.08 (Trachtman Aff., Ex. 16).

[41] In recent months local officials in California, New York, Oregon, New Mexico, and New Jersey have also recognized the unconstitutionality of discrimination in marriage and have conferred marriage licenses or solemnization on same-sex couples. *See People v. West*, No. 04030054, 2004 WL 1433528, at *2 (Justice Court Ulster Cty. June 10, 2004) (marriages solemnized by mayor of New Paltz, New York); Thomas Crampton, *Issuing Licenses, Quietly, To Couples in Asbury Park*, N.Y. TIMES, Mar. 10, 2004, at B5 (New Jersey) (Trachtman Aff., Ex. 17); Evelyn Nieves, *Calif. Judge Won't Halt Gay Nuptials; New*

has affirmed that these marriages, valid where contracted, must be legally respected in this State under principles of comity. *See* Trachtman Aff., Ex. 4 at 26. As a result, a growing number of same-sex couples whose marriages are acknowledged and respected in this State now live within New York's borders. No longer can marriage be said to be an institution fundamentally of and for only different-sex couples.

5. Recognition that the right to choice in marriage applies to same-sex couples is consistent with New York's commitment to protect and respect same-sex relationships

Recognition that the right to choice in marriage applies to all couples, gay and lesbian included, is consistent not only with the evolving definition and purposes of marriage, but also with New York's evolving history of respect for and protection of same-sex relationships. The 2000 United States Census identified 46,490 households of same-sex partners in New York State, with over 34% of the lesbian couples and 21% of the gay couples raising children in the home.[42] Through its courts, legislature, executive branch, and local governments, New York has acknowledged in a variety of settings that the State's thousands of same-sex couples fit the definition of "family;" that they can and do provide a loving and stable home for their biological or adoptive children; and that they can and should benefit from rights accorded to married couples. New York public policy recognizing these realities makes plain that the fundamental right to marry must be accorded full respect for same-sex couples.

Mexico County Briefly Follows San Francisco's Lead, WASH. POST, Feb. 21, 2004, at A1 (California and New Mexico) (Trachtman Aff., Ex. 18); *Gay Weddings Halted, but Marriages Stand*, WASH. POST, Apr. 21, 2004, at A11 (Oregon) (Trachtman Aff., Ex. 19).

[42] Tavia Simmons and Martin O'Connell, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000 2, 9 (2003) (Trachtman Aff., Ex. 20). If anything, these figures no doubt under-represent the numbers of same-sex households in New York, given that some lesbian and gay couples have been reluctant to self-report as such in the census. M.V. Lee Badgett & Marc A. Rogers, THE INSTITUTE FOR GAY AND LESBIAN STRATEGIC STUDIES, LEFT OUT OF THE COUNT: MISSING SAME-SEX COUPLES IN CENSUS 2000, at 1, available at http://wwww.iglss.org/ (last visited July 26, 2004) (Trachtman Aff., Ex. 21).

In its landmark decision in *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1989), the Court of Appeals held that same-sex "lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence" qualify as "family members" for purposes of the state rent control law. *Id.* at 211-13, 544 N.Y.S.2d at 789-90. Eschewing reliance on "fictitious legal distinctions or genetic history," *id.* at 211, 544 N.Y.S.2d at 788-89, the court held that the definition of family "should find its foundation in the reality of family life." *Id.* at 211, 544 N.Y.S.2d at 789. Among the factors the court found persuasive were that the same-sex couple in that case "regarded one another, and were regarded by friends and family, *as spouses*." *Id.* (emphasis added). The First Department has extended the reasoning of *Braschi* to protect same-sex partners in rent-stabilized apartments, *see East 10th Street Assocs. v. Estate of Goldstein*, 154 A.D.2d 142, 145, 522 N.Y.S.2d 257, 258 (1st Dep't 1990), and to reject a taxpayer challenge to New York City's Domestic Partnership Law, N.Y.C. Admin. Code § 3-240 *et seq.*, *see Slattery v. City of New York*, 266 A.D.2d 24, 25, 697 N.Y.S.2d 603, 605 (1st Dep't 1999).

In *Stewart v. Schwartz Brothers-Jeffer Mem. Chapel, Inc.*, 159 Misc. 2d 884, 606 N.Y.S.2d 965 (Sup. Ct. Queens Cty. 1993), the court departed from the general rule that only a surviving spouse or next of kin may determine disposition of a deceased's remains absent testamentary directives to the contrary. Taking note of the "close, spousal-like relationship" of the plaintiff and the deceased, the court held that to deny the plaintiff standing to assert his partner's final wishes "merely because the Plaintiff does not fit neatly into the legal definition of a spouse or next of kin" would "illustrate a callous disregard of [their] relationship." *Id.* at 888,

606 N.Y.S.2d at 968. More recently, in *Langan v. St. Vincent's Hosp.*, 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct. Nassau Cty. 2003), the court allowed the surviving member of a same-sex couple who had entered into a civil union in Vermont to sue for wrongful death. The court noted that "[t]he evidence offered establishes that [the plaintiff and the deceased] *lived together as spouses* from shortly after they met in 1985 until the year 2000, when they took the first opportunity to secure legal recognition of their union in the State of Vermont, and were joined legally as lawful spouses." *Id.* at 442-43, 765 N.Y.S.2d at 413 (emphasis added).

As the State Attorney General has recognized, "the New York Legislature has enacted numerous provisions barring discrimination and enhancing penalties for crimes involving animus on the basis of sexual orientation." Trachtman Aff., Ex. 4 at 19.[43] New York City has prohibited sexual orientation discrimination under its Human Rights Ordinance since 1986. N.Y.C. Admin. Code § 8-101. Numerous municipalities, New York City included, have established domestic partnership registries to accord some protections (although far fewer than would flow from access to civil marriage) to same-sex couples.[44] The Governor and the legislature also have issued multiple measures treating surviving partners of gay victims of the

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[43] *See* Sexual Orientation Non-Discrimination Act ("SONDA"), 2002 Sess. Laws of N.Y. Ch. 2 (2002) (prohibiting discrimination on basis of sexual orientation in employment, education, and housing accommodations); Hate Crimes Act of 2000, N.Y. Penal Law § 485.05 (1)(a), Part 4, Title Y (New York's hate crimes law includes sexual orientation); *Langan*, 196 Misc. 2d at, 446, 765 N.Y.S.2d at 416 ("[W]hile other jurisdictions were enacting mini-DOMAs [Defense of Marriage Acts], New York State amended Civil Rights Law § 40-c regarding equal protection to prohibit discrimination on the basis of sexual orientation.").

[44] *See, e.g.*, N.Y.C. Admin. Code § 3-241 (2000); City of Rochester Admin. Code 47B-1 (2000) (available at http://gcp.esub.net/cgibin/om_isapi.dll?clientID=105896&infobase=rochestr.info&softpage=Browse_Frame_Pg42).

September 11, 2001 World Trade Center attacks as surviving spouses.[45] More recently, the State has extended certain benefits to same-sex partners more generally.[46]

New York supports parenting by lesbians and gay men, and the State has conceded as much: "[same-sex couples] and their families are entitled to dignity and respect, . . . children raised in those families can thrive, and . . . same-sex couples can be as committed, stable, loving and nurturing as opposite sex couples." Trachtman Aff., Ex. 3 at 1. It has long been recognized that a gay or lesbian sexual orientation does not bear on fitness to parent children. *See Guinan v. Guinan*, 102 A.D.2d 963, 964, 477 N.Y.S.2d 830, 831 (3d Dep't 1984). New York approves adoptions by lesbians and gay men, plaintiffs in this case among them. *See* Robinson Aff. ¶¶ 10, 11; Kennedy Aff. ¶ 11; Freeman-Tweed Aff. ¶ 10; 18 N.Y.C.R.R. 421.16(h)(2) ("Applicants [to adopt] shall not be rejected solely on the basis of homosexuality"); *In re Adoption of Carolyn B.*, 6 A.D.3d 67, 68, 774 N.Y.S.2d 227, 228 (4th Dep't 2004) (same-sex couples may adopt jointly); *In re Adoptions of Anonymous*, 209 A.D.2d 960, 960, 622 N.Y.S.2d 160, 161 (4th Dep't 1994) ("an application for adoption may not be precluded solely on the basis of homosexuality," and "[i]n the context of child custody cases, . . . a parent's sexual orientation . . . is not determinative"). New York also permits gay and lesbian adults to serve as foster parents. *See, e.g., In re Adoption of Jessica N. and Another, Infants*, 202 A.D.2d 320, 609

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[45] *See* Executive Order No. 113.30, 9 N.Y.C.R.R. § 5.113.30 (Oct. 10, 2001) (surviving gay partners entitled to same benefits as spouses from state's Crime Victims Board); September 11th Victims and Families Relief Act, 2002 Sess. Laws of N.Y. Ch. 73, § 1 (2002) (legislative intent section specifies that domestic partners should be eligible for September 11 Federal Fund awards); S7685/A11307, 2002 Sess. Law of N.Y. Ch. 467 (amending State's workers' compensation law to provide same-sex domestic partners of September 11 victims same death benefits provided to spouses); S7792/A11812, 2002 Sess. Law of N.Y. Ch. 176 (same-sex domestic partners of September 11 victims and their children eligible for state's World Trade Center memorial scholarship program).

[46] *See, e.g.*, S5590/A5342, 2003 Sess. Law News of N.Y. Ch. 679 (enabling same-sex domestic partners of credit union members to become members as well and have full access to banking services); 9 N.Y.C. R.R. §§ 525.1, 525.2 (2004) (extending equal eligibility to Crime Victims Board benefit to all domestic partners of crime victims, not just September 11 victims).

N.Y.S.2d 209 (1st Dep't 1994) (lesbian foster mother permitted to adopt in best interests of foster child).

In re Jacob, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995), allowed the life partner of a child's biological parent to adopt under the DRL. The court authorized this "second parent adoption" under DRL § 117, which allows a spouse to adopt as a stepparent without requiring the biological parent to terminate parental rights. In so doing, the court found that such adoptions would facilitate the best interest of children, invoking many of the social, financial, and emotional factors automatically available to protect children through their parents' marriage:

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

Id. at 658-59, 636 N.Y.S.2d at 718 (internal citations omitted).

As already well-recognized in many areas of New York law and policy, families of gay men and lesbians are entitled to respect and legal protections from the government. For gay and lesbian New Yorkers, their relationships and families are every bit as meaningful and important as family life is to married heterosexuals. The State's due process guarantee does not protect the fundamental right to enter into marriage for some while denying it to others. This liberty is important and protected for all New Yorkers, same-sex couples included.

D. Strict Scrutiny Applies to the State's Deprivation of Plaintiffs' Fundamental Right to Marry the Person They Love

Where, as here, legislation impinges on a fundamental right, New York courts must apply strict scrutiny to the challenged law. To override the individual's fundamental right, the State must demonstrate by clear and convincing evidence a government interest that is "compelling" and "narrowly tailored." *Rivers v. Katz*, 67 N.Y.2d 485, 495-97, 504 N.Y.S.2d 74, 80-81 (1986). As discussed in Point IV below, the governmental objectives that have been asserted by the State for the marriage exclusion cannot satisfy even rational basis review, much less the strict scrutiny required for deprivation of plaintiffs' fundamental constitutional right. The marriage ban therefore violates the Due Process Clause, Art. I, § 6 of the State Constitution.

III.

DENYING PLAINTIFFS THE RIGHT TO MARRY ALSO VIOLATES THE STATE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION UNDER THE HEIGHTENED SCRUTINY APPLIED TO UNEQUAL DEPRIVATIONS OF FUNDAMENTAL RIGHTS AND TO DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND SEX

The State's exclusion of plaintiffs from the institution of civil marriage also offends the New York State Constitution's Equal Protection Clause, Art. I, § 11, which provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." New York's equal protection guarantee "imposes a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment." *Brown v. State*, 89 N.Y.2d 172, 190, 652 N.Y.S.2d 223, 234 (1996). Here, the State denies each plaintiff the right to marry solely because that plaintiff is of the same sex as the person he or she loves and seeks to wed.

Because of the fundamental nature of the right at stake, the State can justify the marriage ban only by demonstrating a compelling state interest served through narrowly tailored

means. Heightened scrutiny is also appropriate for the independent reason that plaintiffs' right to marry is denied on the suspect basis of sexual orientation. In addition, because the marriage ban further discriminates on the basis of sex, it cannot stand unless it is substantially related to an important government interest. The State cannot possibly justify its discriminatory denial of marriage under these heightened standards of review. The State's marriage discrimination thus violates the Equal Protection Clause.[47]

A. The Fundamental Right at Stake Requires the State to Demonstrate a Compelling Interest in Denying Plaintiffs the Right to Marry That Can Be Served By No More Narrowly Tailored Means

New York's marriage laws violate New York's Equal Protection Clause by denying to one class of people a fundamental right protected under the Due Process Clause, the right to marry the person one chooses. It is not surprising that both of these constitutional pillars are impinged here, since in "matters implicating marriage, family life, and the upbringing of children," the constitutional concepts of due process and equal protection "frequently overlap." *Goodridge*, 440 Mass. at 320, 798 N.E.2d at 953.

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[47] No New York appellate court has considered whether denying the right to marry to same-sex couples violates the equal protection clause. While two decisions of the First and Second Departments — *Raum v. Restaurant Assocs., Inc.*, 252 A.D.2d 369, 675 N.Y.S.2d 343 (1st Dep't 1998), and *In re Estate of Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993) — have interpreted the term "spouse" to exclude same-sex partners, the Attorney General rightly notes that these cases "are of limited utility here, because the surviving same-sex partners in those cases did not claim any statutory right to marry under the DRL." Trachtman Aff., Ex. 4 at 14. The issue in those cases was whether the term "spouse" in the wrongful death statute and EPTL, respectively, should be read to include same-sex partners. While the *Raum* majority opinion contains no direct constitutional analysis, the dissent notes that denying homosexual life partners the right to sue for wrongful death "would amount to an invidious distinction between homosexuals and heterosexuals, which could not survive rational-basis review" under the federal and state Equal Protection Clauses. *Raum*, 252 A.D.2d at 373, 675 N.Y.S.2d at 346 (Rosenberger, J., dissenting). *Cooper*, which is not controlling in this Department, cut off any meaningful equal protection analysis by relying on the conclusory definitional argument of marriage as a union of a man and a woman, as well as the now overruled logic of *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See Cooper*, 187 A.D.2d at 133-34, 592 N.Y.S.2d at 800. Aside from being inapposite here, these decisions were rendered before more recent legal and cultural recognition of the constitutional rights of same-sex couples to the benefits of marriage. *See, e.g., Goodridge*, 440 Mass. 309, 798 N.E.2d 941 (2003); *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999) (denying marriage rights to same sex couples violates Vermont Constitution).

Where a statutory classification treats different groups of people disparately in their ability to exercise a fundamental right, New York courts must apply strict scrutiny to the challenged law to insure its compliance with equal protection. *See Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 332, 384 N.Y.S.2d 82, 87 (1976). "Under strict scrutiny, a State statute will withstand an equal protection challenge only when the State can show that the law 'furthers a compelling state interest by the least restrictive means practically available.'" *Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 431, 730 N.Y.S.2d 1, 11 (2001) (quoting *Bernal v. Fainter*, 467 U.S. 216, 227 (1984)). Since the State's discrimination cannot survive even rational basis review (*see* Point IV below), it follows that it cannot satisfy strict scrutiny.

B. The State's Denial of Marriage to Plaintiffs Violates Equal Protection Because It Discriminates on the Basis of Sexual Orientation

The State's exclusion of plaintiff gay and lesbian New Yorkers from civil marriage also violates New York's equal protection guarantee because it discriminates on the basis of sexual orientation. Plaintiffs are denied the right to marry the person they love and with whom they share their lives and have formed families, not because their relationships differ in character or impor*tance from those of heterosexuals, but because as gay men and lesbians they are of the same sex as their chosen partners. Exclusion from the institution of marriage has enormous impact on plaintiffs' lives, denying them respect and recognition for their most central relationships; myriad legal, financial, and social protections; and the most secure foundation for rearing their children. *See* pp. 11-25, above. "Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage *is* the constitutional infirmity . . ." *Opinions of the Justices to the Senate*, 440 Mass. 1201, 1209, 802 N.E.2d 565, 571 (2004) ("*Goodridge II*") (holding that enactment of civil unions in Massachusetts would not cure constitutional infirmities of marriage statute as applied to same-sex couples).

The marriage law's exclusion of gay and lesbian people from the freedom to marry the person of their choice, and from the crucial tangible and intangible benefits that come only with marriage, gives rise to a distinct constitutional violation that does not depend on a finding that a fundamental liberty is at stake. This discrimination lacks any sufficient and legitimate justification. Though under any level of review this discrimination cannot stand, heightened scrutiny is warranted because the marital exclusion classifies on the basis of sexual orientation.

Classifications on certain bases have been deemed "suspect" by New York and federal courts, thus warranting heightened protection under generally applicable principles of equal protection. "Suspect classes include, *inter alia*, classifications based upon race, alienage and ancestry." *Poggi v. City of New York*, 109 A.D.2d 265, 273 n.8, 491 N.Y.S.2d 331, 337 n.8 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 794, 501 N.Y.S.2d 324 (1986). When the government draws exclusionary lines to discriminate on the basis of a suspect classification, heightened judicial scrutiny is required under equal protection analysis. *See, e.g., Alevy*, 39 N.Y.2d at 332, 384 N.Y.S.2d at 87.

The New York Court of Appeals and the U.S. Supreme Court have looked to several factors to determine whether classifications of a particular group should be deemed suspect and therefore subjected to heightened judicial scrutiny. These include: 1) whether the group historically has been subjected to purposeful discrimination; 2) whether the trait used to define the class (e.g., sexual orientation) is unrelated to the ability to perform and participate in society; and 3) whether the group cannot sufficiently protect itself through the political process. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *Aliessa*, 96 N.Y.2d at 431, 730 N.Y.S.2d at 11-12 (classifications aimed at "'discrete and insular minorities' [that] can be

shut out of the political process" must be the subject of "a more searching inquiry") (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

The Court of Appeals has expressly reserved the question whether to accord heightened state constitutional scrutiny to classifications based on sexual orientation. *See Under 21 v. City of New York*, 65 N.Y.2d 344, 364, 492 N.Y.S.2d 522, 531 (1985). Nevertheless, consistent with New York's broader respect for individual rights and liberties under its independent constitutional tradition, the First Department has suggested that such discrimination warrants heightened scrutiny. In *Under 21 v. City of New York*, 108 A.D.2d 250, 257, 488 N.Y.S.2d 669, 675 (1st Dep't), *modified on other grounds*, 65 N.Y.2d 344, 492 N.Y.S.2d 522 (1985), the First Department upheld the Mayor of New York City's authority to mandate that City contractors not discriminate on the basis of sexual orientation. The First Department relied on Justice Brennan's opinion in *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014-15 (1985) (dissenting from denial of *certiorari*), which applied the factors outlined above to discrimination on the basis of sexual orientation: gay people "constitute a significant and insular minority of this country's population" that has been the object of considerable "opprobrium" and rendered them "particularly powerless to pursue their rights in the political arena." They have been the target of "historic[] . . . hostility" based on "deep-seated prejudice rather than . . . rationality." And the discrimination against them has often "infringe[d] various fundamental constitutional rights, such as the right[] to privacy. . . ." *Under 21,* 108 A.D.2d at 257, 488 N.Y.S.2d at 675 (quoting *Rowland*, 470 U.S. at 1014-15). The Court of Appeals reversed the Appellate Division on the limited ground that the Mayor had exceeded his political authority. *Under 21*, 65 N.Y.2d at 368, 492 N.Y.S.2d at 534. No longer required to reach the question, the

court reserved judgment on whether "some level of 'heightened scrutiny' would be applied to governmental discrimination based on sexual orientation." *Id.* at 364, 492 N.Y.S.2d at 531.[48]

Discrimination based on sexual orientation meets the indicia of suspect classification, and legislated discrimination against gay people therefore should be subjected to heightened scrutiny.[49] First, there can be no dispute that gay people historically and today have been the target of discrimination. This was explicitly recognized by the New York legislature in its recent passage of SONDA:

> The legislature . . . finds that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.

2002 N.Y. Sess. Laws Ch. 2, § 1. *See also Lawrence*, 123 S. Ct. at 2474 ("for centuries there have been powerful voices to condemn homosexual conduct as immoral."); *In re Thom*, 33 N.Y.2d 609, 615-16, 347 N.Y.S.2d 571, 576 (1973) (reversing denial of corporate legal status to Lambda Legal on equal protection grounds and noting that gays and lesbians "are minorities subject to varied discriminations and in need of legal services").

Second, as described above, New York through a number of policies prohibiting discrimination against gay people in employment, parenting, public accommodations, and other

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[48] The U. S. Supreme Court has not considered whether sexual orientation constitutes a suspect classification under the federal constitution. While some federal appellate courts denied heightened scrutiny to statutory classifications based on sexual orientation in reliance on *Bowers*, reasoning that homosexuality could not give rise to suspect classification if gay people could be criminally prosecuted for their sexual conduct, *see, e.g., Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), with *Bowers* now overruled and declared "not correct when it was decided," *Lawrence*, 123 S. Ct. at 2484, courts must consider anew whether sexual orientation is a suspect classification.

[49] For a more detailed analysis of the factors that warrant heightened judicial scrutiny for sexual orientation classifications, *see* Brief of *Amicus Curiae* National Lesbian and Gay Law Association, et al. in Support of Petitioners, filed in *Lawrence*, available at 2003 WL 152347.

contexts, has resoundingly rejected the view that sexual orientation has any correlation with the ability to perform in society or is in itself a basis for differential treatment. *See* Point II.C.5, above; *see also Lawrence*, 123 S. Ct. at 2482 (criminalizing sexual conduct of gay people is an unconstitutional "invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

Finally, gay men and lesbians are a minority group facing significant obstacles in achieving protection from discrimination through the political process. "Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland*, 470 U.S. at 1014 (Brennan, J.). Although gay people have been granted some legislative protections from discrimination in New York after long years of effort,[50] they continue to face significant disadvantages in the political process, calling for heightened equal protection scrutiny by the courts. Indeed, classifications based on race and sex have been held to require heightened scrutiny, notwithstanding far more comprehensive enactments of federal and state protections against discrimination on those bases than have been adopted to protect gay people. *See Frontiero v. Richardson*, 411 U.S. 677, 685-88 (1973). If anything, such measures constitute acknowledgement of a history of purposeful discrimination. *Id.* at 687-88 (citing anti-discrimination legislation in support of conclusion that classifications based on sex merit heightened scrutiny).

Classifications that discriminate on the basis of sexual orientation, like the marriage restriction at issue in this case, thus warrant heightened judicial scrutiny. *See Under*

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[50] For example, SONDA did not pass until 2002, taking 31 years to gather sufficient votes for enactment after its initial introduction in 1971. *See* Philip M. Berkowitz and Devjani Mishra, *Sexual Orientation Non-Discrimination Act, N.Y.L.J.*, Jan. 9, 2003, at 5 (Trachtman Aff., Ex. 22).

21, 108 A.D.2d at 257, 488 N.Y.S.2d at 675. The State cannot possibly satisfy its burden under any level of heightened scrutiny, since its exclusion of plaintiffs from the institution of marriage cannot survive even rational basis review. (*See* Point IV).

C. The State's Denial of Marriage to Plaintiffs Violates Equal Protection Because It Discriminates on the Basis of Sex

The State's marriage laws classify not only on the basis of sexual orientation, but on the basis of sex as well. New York denies marriage licenses to partners otherwise eligible to marry solely based on their sex. A woman seeking to marry another woman is denied a license by the State, while a man seeking to marry the same woman would face no legal impediment.[51] To illustrate, because both she and her partner are women, plaintiff Mary Jo Kennedy is denied a license to marry Jo-Ann Shain, while a man would be permitted to obtain a license to marry Jo-Ann. As a result, whether a given individual otherwise eligible to marry is legally entitled to obtain a license turns entirely on that individual's sex. A statutory scheme that classifies, as here, on the basis of sex, "violates equal protection unless the classification is substantially related to the achievement of an important governmental objective." *Liberta*, 64 N.Y.2d at 168, 485 N.Y.S.2d at 215; *see also People v. Santorelli*, 80 N.Y.2d 875, 876, 587 N.Y.S.2d 601, 602 (1992).

For purposes of equal protection analysis, it is irrelevant that both women and men are denied licenses to marry same-sex partners. Equal protection applies "whether the statute discriminates against males or against females." *Liberta*, 64 N.Y.2d at 168, 485 N.Y.S.2d at 216 (citations omitted). For example, the State Constitution's guarantee of equal protection is violated by the exercise of peremptory challenges against jurors on the basis of sex, regardless of

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[51] As explained by one court, "if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious." *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

whether those challenges are exercised to strike men or women from a jury. *People v. Blunt*, 162 A.D.2d 86, 561 N.Y.S.2d 90 (2d Dep't 1990) (striking women); *People v. Allen*, 199 A.D.2d 781, 605 N.Y.S.2d 503 (3d Dep't 1993) (striking men). Here, the State Constitution's guarantee of equal protection is violated by the denial of licenses to marry on the basis of sex, regardless whether those denials prohibit men or women from marrying.

In the context of marriage, the United States Supreme Court squarely rejected in *Loving* the argument that bans on interracial marriage did not classify on the basis of race because they applied uniformly to different races. The Court's reasoning applies as well to the State's bar on marriage by same-sex couples. The State of Virginia had argued "that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race." 388 U.S. at 8. Yet the Court "reject[ed] the notion that the mere 'equal application' of a statute containing [discriminatory] classifications is enough to remove the classifications from the [constitutional] proscription of all invidious . . . discriminations." *Id.* Instead, the Court held that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race [where the] statutes proscribe generally accepted conduct if engaged in by members of different races." *Id.* at 11. *See also Bob Jones Univ. v. United States,* 461 U.S. 574, 605 (1983) (rejecting contention that because ban on interracial dating applies to all races it is not a form of discrimination); *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964) (striking down criminal statute prohibiting unmarried interracial couples from occupying same room at night, and explaining that statute "treats the interracial couple made up of a white person and a Negro differently that it does any other couple"); *Perez*, 32 Cal. 2d at 716, 725, 198 P.2d at 20, 25 ("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is

the right of individuals, not of racial groups. . . . A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them interchangeable as trains.").

Insistence on a male-female couple as the only appropriate configuration for marriage must be seen as premised on now discarded and constitutionally impermissible stereotypes about the supposed differences between men and women and their respective "proper" roles in marriage and society. In a now infamous opinion, Supreme Court Justice Bradley emphasized the "natural and proper" differences between men and women as a basis for denying women the right to practice law:

> Man is, or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. Illinois, 83 U.S. (16 Wall) 130, 141 (1872) (Bradley, J., concurring).

These discredited notions of innate polar differences between men and women mandating woman's place in the home as submissive wife and mother and man's as her husband and protector are now held to be an illegitimate basis for lawmaking. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (admitting only females to state nursing school discriminated on the basis of sex and was premised on "archaic and stereotypic notions" about the "roles and abilities of males and females"); *Orr v. Orr*, 440 U.S. 268, 269, 283 (1979) (state's "preference for an allocation of family responsibilities under which the wife plays a dependent role" is invalid justification for gender classification in alimony statute, "carr[ying] with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975)

(dismissing "old notions" of male and female roles in supporting a family as justification for gender classification); *Santorelli*, 80 N.Y.2d at 881, 587 N.Y.S.2d at 605 (Titone, J., concurring) ("One of the most important purposes to be served by the Equal Protection Clause is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government.").

The assumption that the appropriate romantic and marital partner for a woman can be only a man, and for a man only a woman, is a stereotype that simply does not hold true for gay and lesbian individuals, including plaintiffs here. Equal protection is "concern[ed] with rights of individuals, not groups . . . . At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (citations omitted). Just as the *Loving* Court rebuffed Virginia's efforts to reinforce racial stereotypes through marriage requirements, the Court should not here permit gender stereotypes to govern our marriage laws.

Courts from other jurisdictions hearing constitutional challenges to bans on marriage between persons of the same sex have recognized the sex discrimination implicit in the marriage ban and have applied heightened scrutiny. *See Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (Hawaii law that "denie[d] same-sex couples access to the marital status and its concomitant rights and benefits" constitutes "regulation of access to the status of married persons, on the basis of the applicants' sex"); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) ("[T]he court would find that the specific prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny applied generally to such classifications."). *Cf. Li v. Oregon*, No.

0403-03057, slip op. at 9 (4th Cir., Multnomah Cty. Apr. 20, 2004) (Oregon's marriage laws "impermissibly classify on the basis of gender") (Trachtman Aff., Ex. 7).

Here too, the marriage law's classification of marital rights according to the sex of the intended spouse should be subject to the stricter standard of review applicable to sex-based classifications. Because the marriage ban cannot satisfy even rational review (*see* Point IV), the State certainly cannot "bear the burden of showing both the existence of an important objective and the substantial relationship between the discrimination in the statute and that objective" under heightened scrutiny. *Liberta*, 64 N.Y.2d at 168, 485 N.Y.S.2d at 215 (considering limitation of forcible rape prohibition only to males); s*ee In re Jessie C.*, 164 A.D.2d 731, 733, 565 N.Y.S.2d 941, 942 (4th Dep't 1991) (government must demonstrate "an 'exceedingly persuasive' justification for the classification"); *see also Santorelli*, 80 N.Y.2d at 876, 587 N.Y.S.2d at 602.

In sum, plaintiffs are denied the vitally central tangible and intangible benefits of marriage for their families solely because they are of the same sex as their chosen loved one. The State thus deprives them of a constitutionally protected fundamental right and impermissibly discriminates on the basis of sexual orientation and sex. Exclusion from marriage imposes on them and their families a second-class status, depriving them of participation in a cherished institution that touches "nearly every aspect of life and death." *Goodridge*, 440 Mass. at 323, 788 N.E.2d at 955. New York's equal protection guarantee prohibits this unequal treatment under the law.

IV.

THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE LACKS EVEN A LEGITIMATE AND RATIONAL BASIS THAT CAN SUSTAIN IT AGAINST CONSTITUTIONAL CHALLENGE

The State has conceded in court papers that it can advance only two purported justifications for its discriminatory denial of the right to marry to same-sex couples. First, the State has asserted that it could have a legitimate interest in "preserving [the] historic legal and cultural understanding of marriage" as a union of a man and a woman. Trachtman Aff., Ex. 5 at 26. Second, the State has argued that its discriminatory marriage scheme comports with that of the federal government and "the express laws of 40 other states" and that this uniformity, in itself, could be a rational basis to perpetuate the denial of marriage to same-sex couples here. *Id.* at 23. Neither of these purported government interests constitutes even a legitimate and rational basis to deny the freedom to marry to same-sex couples in violation of the Due Process and Equal Protection Clauses of the New York State Constitution.

A. Rational Review Requires That Legislative Discrimination at Minimum Bear a Rational Relationship to a Legitimate Legislative End

Regardless of the level of constitutional scrutiny applied, the ban on marriage by same-sex couples, like any government enactment, certainly fails if it does not "rationally further some legitimate, articulated state purpose." *Doe v. Coughlin*, 71 N.Y.2d 48, 56, 523 N.Y.S.2d 782, 788 (1987) (quotations omitted). "[C]onventional and venerable" principles require that legislative discrimination must, at a minimum, "bear a rational relationship to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 633, 635 (1996). The classification must be both "reasonable" and "based upon some ground of difference that rationally explains the different treatment." *Liberta*, 64 N.Y.2d at 163, 485 N.Y.S.2d at 213; *see also Onofre*, 51 N.Y.2d at 491-92, 434 N.Y.S.2d at 953. Thus, unless the challenged difference in treatment at minimum both (1) has a legitimate purpose, and (2) rationally furthers that

purpose, it cannot survive as a matter of due process and equal protection. *See id.* at 492 n.6, 434 N.Y.S.2d at 943 n.6 (though sodomy statute infringed fundamental right to privacy, rather than apply strict scrutiny court reasoned that "we do not need to measure the statute by that test inasmuch as it fails to satisfy even the more lenient rational basis standard").

Rational review, though deferential, is not a mere rubber-stamp of legislative action. Both the New York Court of Appeals and the U.S. Supreme Court have expressed a more searching skepticism of government justifications that operate to deny rights to a group of people, particularly where those justifications reflect traditional attitudes disadvantaging or disapproving of that group. The courts have then not hesitated to reject such justifications as illegitimate.

Thus, the Court of Appeals in *Liberta* rejected as a basis for the marital rape exemption the traditional view, enforced in law over hundreds of years, that once married a woman is required to submit to her husband. 64 N.Y.2d at 164, 495 N.Y.S.2d at 213-14. The court held that rationales for government measures based on "archaic notions" and "traditional justifications [that] no longer have any validity" are an illegitimate basis for lawmaking. *Id.* And in striking down New York's sodomy law under rational basis review in *Onofre*, the court stressed that "disapproval by a majority of the populace . . . may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy." 51 N.Y.2d at 490, 434 N.Y.S.2d at 942.

The U.S. Supreme Court has more recently elaborated on the same principle. In *Romer*, the Court struck down Amendment 2 to the Colorado Constitution, which prohibited all state and local governmental action "designed to protect . . . gays and lesbians." 517 U.S. at 620. Holding that the Amendment did not satisfy even rational basis review, the Court determined that the only interest served by the Amendment's sexual orientation classification was an interest

in "disadvantaging the group burdened by the law." *Id.* at 633. And this, the Court held, was not a "legitimate purpose or . . . objective." *Id.* at 635.

Lawrence similarly confirmed the impermissibility of government objectives grounded in negative traditional beliefs about a particular group.[52] Justice Kennedy's opinion for the Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." 123 S. Ct. at 2480. But the Court concluded that such disapproval gives rise to "no legitimate state interest." *Id.* at 2482. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (citing *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). Justice O'Connor likewise explained in her concurring opinion:

> We have consistently held [] that some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

123 S. Ct. at 2485 (O'Connor, J., concurring) (citation omitted); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). Moreover, as Justice O'Connor observed, courts "have been most likely to apply rational basis review to hold a law unconstitutional under the Equal

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[52] As here, to find the challenged law unconstitutional, the *Lawrence* Court did not need to apply the heightened scrutiny warranted for the infringement of liberty that the Court found, given that the Texas sodomy prohibition was not supported by even a "legitimate" state interest. 123 S. Ct. at 2484.

Protection Clause where, as here, the challenged legislation inhibits personal relationships." 123 S. Ct. at 2485.

New York and Supreme Court authorities also illustrate that even if there were a *conceivable* legitimate purpose (other than moral disapproval) to support the State's restriction of marriage to different-sex couples, that would not be enough to sustain the discrimination challenged here — the denial of access to same-sex couples would also have to be rationally and logically *linked* to serving that purpose. And, as Justice O'Connor explained, an especially "searching" review of the fit between the purported justification and the legislated classification is required when illegitimate state interests also motivate the law, or where the law inhibits personal relationships. In *Onofre*, having identified illegitimate "archaic notions" underlying the sodomy prohibition, the court rejected other purported justifications that were not in themselves illegitimate but were instead not rationally *related* to the challenged restriction. Even if the State's asserted interests in "protecting and nurturing the institution of marriage" and the rights of married people were assumed to be "legitimate matters of public concern," rational review still required at minimum a "rational relationship between those objectives and the proscription" of the sodomy law. 51 N.Y.2d at 492-93, 434 N.Y.S.2d at 953. The court held that "no showing has been made as to how, or even that, the statute banning consensual sodomy between persons not married to each other preserves or fosters marriage." *Id.*

In *McMinn v. Oyster Bay*, 66 N.Y.2d 544, 547, 498 N.Y.S.2d 128, 129 (1985), the Court of Appeals likewise did not end its review of a zoning ordinance that restricted "single-family" housing to any number of persons either related by blood, marriage or adoption, or to two unrelated persons age 62 or older, once a conceivable government interest could be articulated. While the court accepted that "the desire to preserve the character of the traditional

single family neighborhood" could constitute a "legitimate governmental objective," it nevertheless found that the ordinance violated the Equal Protection Clause because

> a municipality may not seek to achieve [this purpose] by enacting a zoning ordinance that "limit[s] the definition of family to exclude a household which in every but a biological sense is a single family." . . . [I]f a household is "the functional and factual equivalent of a natural family," the ordinance may not exclude it from a single-family neighborhood and still serve a valid purpose. This ordinance, by limiting occupancy of single-family homes to persons related by blood, marriage or adoption or to only two unrelated persons of a certain age, excludes many households who pose no threat to the goal of preserving the character of the traditional single-family neighborhood . . . and thus fails the rational relationship test.

Id. at 550, 498 N.Y.S.2d at 131 (citations omitted). *See also Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (state requirement that home for mentally disabled must obtain special use permit when other group residences were not so required was not rationally related to purported government objective, as evidenced by the over- and under-inclusivity of the requirement).

In each of these cases, in applying rational review the courts did not merely rubber-stamp the government classification but instead examined more closely whether the state purposes were legitimate or drawn to burden the rights of a vulnerable group, and whether facially valid state interests were rationally furthered by the classification. The courts' review was especially searching given that the classifications at issue impinged on personal relationships. This Court must similarly provide searching, meaningful review of the alleged grounds for the exclusion of same-sex couples from marriage to determine if the legislative purposes asserted for it are legitimate and bear a rational relationship to the ban.

B. The Suggestion That a Discriminatory "Traditional Understanding of Marriage" Should Remain the Law Because It Has Been the Law Does Not Amount To a Legitimate Government Interest

The State asserts that it has an interest in preserving the traditional understanding of marriage as a union of a man and a woman. But historical tradition, without some grounding in a legitimate government purpose, cannot in itself justify this deprivation.

First, as discussed above at pages 34-39, blind acceptance of the "definition" of marriage as limited to people of different sexes improperly cuts off constitutional analysis before it begins. Justifying the classification — the exclusion of same-sex couples from marriage — by asserting that doing so advances a state interest in limiting marriage to heterosexual couples makes the classification and its purported objective one and the same. The asserted justification merely restates a claimed desire by the State to restrict marriage to heterosexual couples. It is no "independent" justification at all, but an illegitimate "classification of persons undertaken for its own sake." *Romer*, 517 U.S. at 635.

To argue that a definition may itself justify depriving citizens of important rights simply because it is long-standing is no different than asserting that a law should remain the law merely because it has always been the law. This is a tautology, not a legitimate government purpose, and if accepted would foreclose courts from remedying any ingrained discrimination. As the United States Supreme Court recently observed, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 123 S. Ct. at 2484; *see also Goodridge*, 440 Mass. at 328, 798 N.E.2d at 958 ("[H]istory must yield to a more fully developed understanding of the invidious quality of discrimination."); *Foss v. City of Rochester*, 65 N.Y.2d 247, 260, 491 N.Y.S.2d 128, 135 (1985) ("Perpetuation of the status quo is not a legitimate end of government, however, if the status quo has been judicially found wanting.").

Second, to the extent the State's asserted interest in preserving the "traditional" institution of marriage is grounded in lingering majoritarian moral sentiment disapproving of homosexuality, it amounts to an illegitimate basis for discrimination against gay and lesbian people. *Cf. Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting) ("'[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."). Mere moral disapproval cannot serve as a legitimate state purpose sufficient to deny plaintiffs civil marriage. *See* pp. 65-66, above. "[W]here 'public sensibilities' constitute the justification for a gender-based classification, the fundamental question is whether the particular 'sensibility' to be protected is, in fact, a reflection of archaic prejudice or a manifestation of a *legitimate* government objective." *Santorelli*, 80 N.Y.2d at 881, 587 N.Y.S.2d at 605 (Titone, J., concurring) (emphasis added).

A government interest in excluding gay and lesbian couples from marriage is particularly dubious in light of the history of New York's respect for gay and lesbian relationships. As the Attorney General has conceded, "New York law has recognized the legitimacy of committed same-sex relationships in numerous ways, thereby drawing into question the State's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners." Trachtman Aff., Ex. 4 at 19. Decades of judicial decisions, laws, and ordinances (described at pp. 47-52 above), reflect a growing consensus in New York that same-sex relationships are entitled to respect and protection in a wide variety of contexts. Those measures recognize that same-sex couples should be treated as spouses in many settings; that gay people can and do make good parents; and that the "traditional" definition of the heterosexual "nuclear family" is no longer the only model of family life worthy of respect in New York. Particularly in light of this judicial respect for same-sex relationships in New York, the State cannot plausibly allege that preservation of the traditional definition of marriage as a union of a

man and a woman in itself is a legitimate state purpose sufficient to deny same-sex couples the right to marry.

As part of its "tradition" argument, the State has asserted that "New York judicial decisions have consistently recognized the significance of the tradition of heterosexual marriage as a social institution in which procreation occurs." Trachtman Aff., Ex. 5 at 25. If the State is thereby suggesting that promotion of procreation is an independent justification, this additional ground also fails because there is no rational connection between the purported state interest and the discriminatory line drawn by the marriage ban. The State may legitimately wish to permit and encourage couples who procreate to assume the responsibilities and attain the protections and stability that come with marriage, but that interest is served fully *by allowing such couples to marry*, whether they are of the same or different sexes. *Excluding* same-sex couples from marriage does nothing to further this state interest.

The discrimination challenged here is so dramatically under- and over-inclusive that it cannot be seen as rationally related to any state interest in fostering marriage as an institution in which procreation occurs. Many same-sex couples *do* have children together, employing the same assisted means of reproduction used by many heterosexual couples. *See, e.g.*, Abrams ¶¶ 11, 19; Shain ¶ 8. Any State interest in having procreation (or child-rearing) occur within marriage is thus actually hindered, not served, by preventing same-sex couples from marrying. Conversely, there is no exclusion from marriage for heterosexual couples who are unwilling, or unable, to procreate.[53] Accordingly, the interest in promoting procreation can

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[53] While the DRL declares voidable a marriage in which either party "[i]s incapable of entering into the married state from physical cause," DRL § 7(3), the Attorney General concedes that "[t]his provision [] has long been construed to refer to physical incapacity to consummate marriage, not incapacity to bear children." Trachtman Aff., Ex. 4 at 17 & 7 n.2 (citing *Lapides v. Lapides*, 254 N.Y. 73, 80 (1930) (inability to bear children not grounds for annulment)). *See also Wendel v. Wendel*, 30 A.D. 447, 449, 52 N.Y.S. 72, 74 (2d Dep't 1898) (incapacity to conceive not bar to marriage). Any other reading would exclude the sterile and the elderly from marrying — restrictions that would obviously offend

rationally be seen neither as the linchpin of the institution of marriage nor as a rational reason to exclude only same-sex couples from that institution.

As the *Goodridge* court explained in rejecting this purported rationale, "While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage." 440 Mass. at 332, 798 N.E.2d at 961; *see also Baker v. State*, 170 Vt. 194, 217, 744 A.2d 864, 881 (1999) ("It is [] undisputed that many different-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. Therefore, if the purpose of the statutory exclusion of same-sex couples is to 'further [] the link between procreation and child rearing," it is significantly underinclusive.'").[54]

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constitutional rights. Justice Scalia explicitly acknowledged in his *Lawrence* dissent that "encouragement of procreation" could not "possibly" be a justification for denying gay couples marriage, "since the sterile and the elderly are allowed to marry." *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting).

[54] Any suggestion that banning same-sex couples from marrying somehow serves the State's interest in advancing the welfare of children — an offensive argument that we do not understand the State or defendant to be advancing — would be deeply irrational. First, it cannot be seriously asserted that barring same-sex couples from marriage in any way advances the interests of children raised by married *heterosexual* parents or would cause the children being raised by plaintiffs and other same-sex couples somehow no longer to have same-sex parents. Second, *In re Jacob* and other New York authorities fostering and protecting the bonds between gay parents and their children (*see* above at __-__) make clear New York's enlightened view that gay people are no different from anyone else in their ability themselves to be fit parents. To recognize same-sex couples as appropriate parents but deny them the right to marry and provide additional protection and security for their children hardly promotes the welfare of children — to the contrary, it gratuitously harms them. In short, banning same-sex couples with children from marrying is *antithetical* to the welfare of those children. *See Goodridge*, 440 Mass. at 335, 798 N.E.2d at 963 ("[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."); *Baker*, 170 Vt. at 194, 744 A.2d at 882 ("If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against.").

C. The Suggestion That Discrimination May Be Perpetuated Under the New York State Constitution Merely Because the Federal Government and Other States Engage in Similar Discrimination Is Illegitimate and Contrary to the State's Tradition of Independent Constitutional Adjudication

The State's second suggested "purpose" for prohibiting plaintiffs from marrying — its purported interest in maintaining uniformity with the federal government and other states that have affirmatively banned marriage by same-sex couples — is equally unavailing. The State does not explain *why* uniformity is desirable, it simply asserts that discrimination elsewhere justifies discrimination in New York, a suggestion particularly at odds with a State that takes pride in independently setting a high standard for the civil rights of it citizens.

This cannot be a legitimate basis for denying important rights. Our system of dual constitutionalism is premised on the notion that differences in the level of protection provided between the State and federal constitutions — and among the states — are inevitable and frequently desirable. As Chief Judge Kaye observed, "Dual sovereignty has in fact proved itself not a weakness but a strength of our system of government. States, . . . by recognizing greater safeguards as a matter of State law can serve as 'laboratories' for national law. . . ." *See Scott*, 79 N.Y.2d at 505-06, 583 N.Y.S.2d at 940 (Kaye, J., concurring) (citation omitted).

The Court of Appeals has rejected the idea that the desire for uniformity trumps the independent obligation to construe New York's own constitution to determine the level of protection to be accorded to New York's citizens. Even in areas like search and seizure law, where the court has indicated some preference for consistent federal and state policies, the court has held that "the practical need for uniformity can seldom be a decisive factor" in light of the paramount need to protect constitutional rights. *P.J. Video*, 68 N.Y.2d at 304, 508 N.Y.S.2d at 912. The court has also stressed that the rights of individuals may not yield to institutional concerns such as efficiency or conservation of resources. *See Rivers v. Katz*, 67 N.Y.2d 485,

493-94, 504 N.Y.S.2d 74, 78-79 (1986) (right to refuse medical treatment can be outweighed only by need to protect patient and others, not more generalized institutional goals). Consistent with both the fundamental premise of dual constitutionalism and New York's traditional focus on the rights of the individual, the purported desire for uniformity cannot preclude plaintiffs' right to marry under *this* State's constitution.

Nor can the interest in "uniformity" be defended as a means of avoiding inter-state conflicts. As the Massachusetts high court explained in rejecting such an argument:

> [W]e would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere. We do not resolve, nor would we attempt to, the consequences of our holding in other jurisdictions . . . [U]nder our Federal system of dual sovereignty, and subject to the minimum requirements of the Fourteenth Amendment to the United States Constitution, "each State is free to address difficult issues of individual liberty in the manner its own Constitution demands."

Goodridge II, 440 Mass. at 1209, 802 N.E.2d at 571 (quoting *Goodridge,* 440 Mass. at 341, 798 N.E.2d at 941).

Indeed, an elaborate body of comity law already exists nationwide to deal with inconsistency in state laws regarding marriage. This law developed because inter-state differences with respect to marriage have always existed. *See, e.g., Van Voorhis v. Brintnall*, 86 N.Y. 18, 25-27 (1881) (describing widespread application of comity principles to address differences in marriage laws among states and nations). Until the Supreme Court's 1967 *Loving* decision, the states were divided with respect to anti-miscegenation laws. *See Loving,* 388 U.S. at 6 n.5 (1967). Even today, there is a lack of uniformity between New York's marriage laws and those of a number of other states. For example, New York permits first cousins to marry

while many other states do not,[55] has age of consent rules for marriage that vary from other jurisdictions,[56] and does not confer common law marriage while some other states do.[57] Familiar tools of comity and choice of law doctrine, not the deprivation of the constitutional rights of a minority, offer the answer to any purported concern about uniformity with other states.

The State's "interest" in uniformity between the DRL and other states' marriage laws or federal law is groundless and thus not a legitimate basis for denying plaintiffs their constitutional right to marry. No rational basis or even legitimate purpose exists to exclude same-sex couples from voluntary participation in a basic civic institution that uniquely promotes commitment, stability, and mutual support. Permitting plaintiffs to marry would confer innumerable tangible and intangible benefits for them and their children while harming no one else. As the New York Court of Appeals has recognized, "the only legitimate purpose for governmental infringement on the rights of the individual is to prevent harm to others." *Scott*, 79 N.Y.2d at 489, 583 N.Y.S.2d at 929 (citing *Bowers*, 478 U.S. at 199, 203-06, 211-13 (Blackmun, J., dissenting)). No such purpose exists here.

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[55] *Compare* DRL § 5 (permitting marriage between first cousins) *with, e.g.,* N.H. Rev. Stat. Ann. § 457:2 (banning outright); Ind. Code Ann. § 31-11-1-2 (allowing if both parties are over 65 years of age).

[56] *Compare* DRL §§ 23, 15(2) (marriage permitted at 16 with parental consent and at 18 without) *with, e.g.,* Neb. Rev. Stat. §§ 42-102, 42-105 (marriage permitted at 17 with parental consent and at 19 without); Miss. Code Ann. § 93-1-5(d) (with parental consent, females permitted to marry at 15, males at 17).

[57] *See, e.g., Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292, 434 N.Y.S.2d 155, 157 (1980) (New York residents with Georgia common law marriage).

V.

THE PROPER REMEDY FOR THE VIOLATION OF PLAINTIFFS' CONSTITUTIONAL RIGHTS IS JUDICIAL CONSTRUCTION OF THE DRL TO PERMIT SAME-SEX COUPLES TO MARRY AND ORDERING THAT THEY BE GRANTED FULL MARRIAGE RIGHTS

As demonstrated above, the marriage provisions of the DRL, as applied to deny same-sex couples the right to marry, violate the Due Process and Equal Protection Clauses of the New York State Constitution. The Court should remedy this constitutional infirmity by construing the DRL's marriage provisions in a gender-neutral manner, thereby allowing plaintiffs and other similarly situated couples to participate fully in the institution of marriage.

When a statute runs afoul of the State Constitution, a court is faced with two possible remedies. The court may strike the statute in its entirety or it may construe it in a way to pass constitutional muster. *See Liberta*, 64 N.Y.2d at 170, 485 N.Y.S.2d at 218 ("When a statute is constitutionally defective . . . a court may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formally excluded); *see also Califano v. Westcott*, 443 U.S. 76, 89-90 (1979) ("Where a statute is defective because of underinclusion, . . . 'there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion'") (citing *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J. concurring)). In choosing between these two options, the "court's task is to discern what course the Legislature would have chosen to follow if it had foreseen [the court's] conclusions as to underinclusiveness." *Liberta*, 64 N.Y.2d at 171, 485 N.Y.S.2d at 218.

There is no doubt that the Legislature, had it understood that same-sex couples must constitutionally be included under the marriage framework of the DRL, would not have

rejected the entire marriage statutory scheme. Nor do plaintiffs advocate striking down the marriage provisions of the DRL. Indeed, such a remedy would be antithetical to the relief plaintiffs *do* seek: access to the vitally important institution of marriage. *See Goodridge*, 440 Mass. at 342, 798 N.E.2d at 969 ("Here no one argues that striking down the marriage laws is an appropriate form of relief. . . . We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.").

Rather than striking down the marriage provisions of the DRL, the appropriate remedy here is instead to construe them to permit marriage for same-sex couples. The remedy ordered in *Liberta* is particularly instructive. There, the Court of Appeals determined that New York's forcible rape statute violated equal protection because it applied to males who forcibly raped females, but exempted females from criminal liability for forcible rape of males. 64 N.Y.2d at 170, 485 N.Y.S.2d at 217. In assessing whether or not to strike down the law, the Court of Appeals looked to "the importance of the statute, the significance of the exemption within the over-all statutory scheme, and the effects of striking down the statute." *Id.* at 172, 485 N.Y.S.2d at 218. Noting that forcible rape statutes were of "utmost importance" and that declaring "such statutes a nullity would have a disastrous effect on the public interest and safety," the Court determined that the appropriate course of action was to "eliminate the exemptions" and "thereby preserve the statutes." *Id.* at 172, 485 N.Y.S.2d at 218-19. The Court thus construed the statute in a gender-neutral fashion, striking the gender exception and interpreting the law to apply to all persons. *Id.*[58]

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[58] *See also Califano*, 443 U.S. at 89-90 (to cure unconstitutional under-inclusiveness of statute providing welfare benefits to families where father, but not mother, was unemployed, Supreme Court ordered term "father" replaced by gender-neutral term "parent"; alternative, denying welfare benefits to all, "would impose hardship on beneficiaries whom Congress plainly meant to protect"); *In re Lisa M. UU v. Dominick*, 78 A.D.2d 711, 711, 432 N.Y.S.2d 411, 412 (3d Dep't 1980) (to avoid equal protection violation, court "read [section 514 of the Family Court Act] in a gender-neutral manner authorizing the court to impose the obligation of paying for the confinement expenses of the mother of the child upon

Finally, the Court should reject any argument that a legislative scheme short of marriage, such as civil unions, would cure the constitutional infirmity. The Massachusetts Supreme Judicial Court flatly rejected such a proposal, and this Court should do the same. "The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." *Goodridge II*, 440 Mass. at 1207, 802 N.E.2d at 570 (holding that the enactment of civil unions in Massachusetts would not cure constitutional infirmities of marriage statute as applied to same-sex couples). "The history of our nation has demonstrated that separate is seldom, if ever, equal." *Id.* at 1206, 802 N.E.2d at 569. *See also Lawrence*, 123 S. Ct. at 2487 ("A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with the Equal Protection Clause") (O'Connor, J., concurring) (quotations omitted); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("separate but equal" segregation violates equal protection); Abrams ¶ 25 ("We don't feel there can be equality with some separate term or legal arrangement that is called anything other than marriage.").

The Court is well within its power to construe the DRL's marriage provisions in a gender-neutral fashion to require the State to treat plaintiffs no differently than other couples with respect to marriage access. This remedy, and an injunction ordering that full marriage rights be accorded same-sex couples, offer the only proper means to cure the denial to plaintiffs of this most vital of liberty interests.

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either the mother or father or both as the court, in its discretion, may deem proper"); *Goodell v. Goodell*, 77 A.D.2d 684, 685, 429 N.Y.S.2d 789, 791-92 (3d Dep't 1980) (reading DRL § 236 in gender-neutral manner to include "wife" as well as "husband" to "preserve its constitutionality"); *Childs v. Childs*, 69 A.D.2d 406, 418-19, 419 N.Y.S.2d 533, 540-41 (2d Dep't 1979) (DRL provisions deemed to use term "spouse" rather than "wife," thereby authorizing award of counsel fees to either spouse on gender-neutral, needs-basis).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their motion for summary judgment be granted and that the Court (1) declare that plaintiffs are constitutionally entitled to treatment equal to the treatment of different-sex couples regarding the issuance of marriage licenses and access to civil marriage, and (2) enjoin defendant to grant marriage licenses to plaintiffs and otherwise grant them full rights to civil marriage and the rights that flow from it.

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