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# New York Supreme Court

## Appellate Division—First Department

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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-Respondents,*

— against —

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

*Defendant-Appellant.*

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### **BRIEF OF *AMICI CURIAE***

**PARENTS, FAMILIES & FRIENDS OF LESBIANS AND GAYS, INC.,  
FAMILY PRIDE COALITION, HUMAN RIGHTS CAMPAIGN,  
HUMAN RIGHTS CAMPAIGN FOUNDATION, AND  
THE NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT  
IN SUPPORT OF PLAINTIFFS-RESPONDENTS**

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

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TWEED, MICHAEL ELSASSER and DOUGLAS :  
ROBINSON, MARY JO KENNEDY and :  
JO-ANN SHAIN, and DANIEL REYES and :  
CURTIS WOOLBRIGHT, :  
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Plaintiffs-Respondents, :  
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-against- : New York County  
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VICTOR L. ROBLES, in his official capacity as :  
CITY CLERK of the City of New York, :  
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Defendant-Appellant. :  
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**BRIEF OF *AMICI CURIAE***  
**PARENTS, FAMILIES & FRIENDS OF LESBIANS AND GAYS, INC.,**  
**FAMILY PRIDE COALITION, HUMAN RIGHTS CAMPAIGN,**  
**HUMAN RIGHTS CAMPAIGN FOUNDATION, AND**  
**THE NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT**

Parents, Families & Friends of Lesbians and Gays, Inc., Family Pride  
Coalition, Human Rights Campaign, Human Rights Campaign Foundation, and  
The New York City Gay & Lesbian Anti-Violence Project submit this brief as  
*amici curiae* in support of Plaintiffs-Respondents, and urge the affirmance of the

judgment entered below.

**STATEMENT OF INTEREST OF *AMICI CURIAE***

As organizations that believe in full equality for all people, *amici curiae* have dedicated their efforts to eradicating the vestiges of invidious discrimination against New Yorkers based on sexual orientation. In the view of *amici curiae*, New York State's failure to recognize marriages between partners of the same sex is in obvious tension with the goal of full equality that they—and this State's Constitution—espouse. In light of the history of discrimination suffered by members of the gay community in this State, *amici curiae* believe that the denial of marriage rights to Plaintiffs-Respondents must be subjected to a searching judicial inquiry that carefully scrutinizes the legitimacy of the State's actions.

The following is a brief description of the *amici*:

**Parents, Families & Friends of Lesbians & Gays, Inc. (“PFLAG”)** is a national, nonprofit family organization, founded in New York in 1973 by heterosexual mothers and fathers, with a grassroots network of over 200,000 members and supporters (including approximately 22,500 New Yorkers). Although PFLAG's members and supporters are predominantly heterosexual, PFLAG promotes the health and well-being of gay, lesbian, bisexual, and transgender persons, their families, and their friends through support, education, and advocacy to promote true, full civil rights for all Americans.

PFLAG is joined on the brief by the New York City-based PFLAG chapter **PFLAG NYC**.

**Family Pride Coalition** is the only national not-for-profit organization exclusively dedicated to securing equality for lesbian, gay, bisexual, and transgender (“LGBT”) parents and their families. The 26-year-old organization is a membership-based coalition of more than 180 local parenting groups and over 10,000 individual members across the country. Family Pride Coalition seeks to advance the well-being of LGBT parents and their families by enhancing their sense of belonging and security, and by advocating for their full protection under the law.

**Human Rights Campaign (“HRC”)**, the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where gay, lesbian, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits, and responsibilities. HRC has over 650,000 members, including over 40,000 in the State of New York.

**Human Rights Campaign Foundation** provides the most comprehensive and up-to-date resource for and about lesbian, gay, bisexual, and transgender families. It



provides legal and policy information about family law, including marriage and relationship recognition, as well as public education in those areas.

**The New York City Gay & Lesbian Anti-Violence Project** was founded in 1980. The Project serves lesbian, gay, transgender, bisexual, and HIV-positive victims of violence, and others affected by violence. The Project serves the larger community through efforts to educate the public about violence directed at or within our communities and to reform government policies and practices affecting the lesbian, gay, transgender, bisexual, and HIV-positive community, and other survivors of violence.

## **PRELIMINARY STATEMENT**

This brief submitted by *amici curiae*, who are gay and lesbian community organizations active in New York State, will not repeat all of the various legal arguments for affirming the lower court's recognition of marriage rights for all New Yorkers regardless of sexual orientation. Those arguments, which *amici curiae* support, are fully addressed in the briefs of Plaintiffs-Respondents and others.<sup>1</sup>

Rather, *amici curiae* wish to provide the Court with historical and contemporary context crucial to a considered judgment on the questions presented in this case. New York has long had a significant community of lesbians and gay men who contribute to the vitality of life in this State. Regrettably, however, that community has faced—and continues to face—arbitrary and invidious discrimination, and even violence, on the basis of sexual orientation. Indeed, state and local government officials have unfortunately been participants in the bleak history of discrimination against gay New Yorkers.

Although in recent years societal attitudes and state-sanctioned treatment of lesbians and gay men have evolved in increasingly positive ways, the lesbian and

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<sup>1</sup> Substantial contributions to this brief were made by the following law students employed as summer associates by Debevoise & Plimpton LLP: Ari Bassin, Peter M. Friedman, Holning Lau, and Kristen Tranetzki.

gay community continues to experience significant barriers to equal citizenship due in large part to the legacy of anti-gay discrimination. *Amici curiae* believe that this history of discrimination and continued bias should inform the level of scrutiny this Court gives to the State's refusal to recognize marriage rights regardless of sexual orientation. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

Under well-settled principles of equal protection doctrine, state action that discriminates against lesbians and gay men should be subjected to heightened scrutiny. In particular, the evidence of the countless ways in which the financial, emotional, and physical well-being of lesbians and gay men have been affected by targeted invidious discrimination renders New York State's refusal to sanction marriage for same-sex couples particularly suspect and calls for a searching judicial inquiry into the legitimacy of the State's actions.

## ARGUMENT

### **I. Courts Apply Heightened Scrutiny to Government Actions That Rely on Suspect Classifications.**

Pursuant to the equal protection provisions in both the federal and New York State Constitutions,<sup>2</sup> a legislature's classifications are generally upheld so long as there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see also D'Amico v. Crosson*, 93 N.Y.2d 29, 31-32 (1999). However, that deferential standard does not apply where a group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness" such that the majoritarian political process proves unreliable in protecting their interests in equal treatment. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation marks omitted). Instead, in such circumstances principles of equal protection demand that governmental action be subjected to heightened scrutiny. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531, 533 (1996) ("The State must show at least that the challenged classification serves important governmental objectives and

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<sup>2</sup> The Fourteenth Amendment to the United States Constitution provides, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The New York State Constitution's equal protection provision reads, "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. Const. art. I, § 14.

that the discriminatory means employed are substantially related to the achievement of those objectives.”) (internal quotation marks omitted); *Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 332-34, 336 (1976) (explaining New York’s heightened standard of review for State-law classifications).

Courts have looked to two key elements that trigger such scrutiny: First, whether there is a lack of relationship between the characteristic underlying a governmental classification and the abilities of people with that characteristic to function as members of civil society; and second, whether there is a history of invidious discrimination against the group based on that characteristic. *See Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (classifications based on illegitimacy are subject to heightened scrutiny because the characteristic “bears no relation to the individual’s ability to participate in and contribute to society”); *Murgia*, 427 U.S. at 313 (concluding that the elderly are not a suspect class because they “have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities”) (internal quotation marks omitted); *see also People v. Rambersed*, 170 Misc. 2d 923, 931 (N.Y. Sup. Ct. Bronx Cty. 1996) (taking notice of “a long and painful history of purposeful unequal treatment” in finding a violation of New York State’s equal protection guarantee for Italian Americans).

Both of these elements are easily satisfied with respect to the trait of sexual orientation. In addition, to the extent that courts have identified other persuasive factors that weigh in favor of deeming a classification suspect, including that the class has a diminished ability to succeed in the majoritarian political process and that the trait defining the class may be immutable, those factors also point to considering discrimination based on sexual orientation as inherently suspect.

## **II. New York Courts May Treat Sexual Orientation as a Suspect Classification.**

At the outset, it should be noted that the New York Court of Appeals has not determined whether government classifications based on sexual orientation are suspect.<sup>3</sup> *See Under 21, Catholic Home Bureau for Dependent Children v. City of*

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<sup>3</sup> Nor is there meaningful federal precedent refusing to recognize sexual orientation as a suspect class. The Supreme Court did not decide this issue in *Romer v. Evans*, 517 U.S. 620 (1996), a case involving an equal protection challenge to a law discriminating on the ground of sexual orientation. In *Romer*, the Supreme Court struck down an amendment to the Colorado Constitution that discriminated against gay men and lesbians, holding that there was no rational relationship between the disparity of treatment and some legitimate governmental purpose. Because the amendment failed the lowest level of review applied to government actions, the Supreme Court did not reach the question whether classifications on the basis of sexual orientation should be subjected to heightened scrutiny. Although some federal courts of appeals have declined to treat sexual orientation as a suspect classification, those opinions largely rely on the now-overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), or its progeny. *See, e.g., Lofton v. Secretary of the Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11<sup>th</sup> Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005) (citing *Bowers*' progeny to support finding that sexual orientation is not a suspect classification); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6<sup>th</sup> Cir. 1997) (holding that under *Bowers* and its progeny, gay men and lesbians do not constitute a suspect class because the conduct that defined them as gay men and lesbians could constitutionally be criminalized); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9<sup>th</sup> Cir. 1990) (citing *Bowers* and holding that gay men and

*New York*, 65 N.Y.2d 344, 364 (1985) (“[The court] need not decide now whether some level of ‘heightened scrutiny’ would be applied to governmental discrimination based on sexual orientation.”). Twenty years ago, however, this Court suggested that heightened scrutiny for sexual orientation classifications would be warranted, *Under 21*, 108 A.D.2d 250, 257-58 (1st Dep’t 1985), *modified*, 65 N.Y.2d 344 (1985), and that view is no less persuasive today.

Several doctrines of state constitutional interpretation inform this Court’s consideration of this important issue. First, New York State’s equal protection provision is at least as broad as that of the Fourteenth Amendment to the United States Constitution. *See Golden v. Clark*, 76 N.Y.2d 618, 624 (1990) (“[O]ur State Constitution’s equal protection guarantee is as broad in its coverage as that of the Fourteenth Amendment.”); *Under 21*, 65 N.Y.2d at 360 n.6 (“[W]e need only analyze the equal protection issue under the framework of the 14th Amendment.”). Moreover, state courts generally construe state constitutional counterparts of federal constitutional provisions to guarantee their citizens protections that the federal courts may not yet have recognized, *Oregon v. Hass*, 420 U.S. 714, 719

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lesbians do not constitute a suspect class because homosexual conduct could be constitutionally proscribed); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989) (same); *Woodward v. United States*, 871 F.2d 1068, 1074-76 (Fed. Cir. 1989) (same); *Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (same).

(1975); *Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cty. v. Nyquist*, 83 A.D.2d 217, 256 (2d Dep’t 1981) (Weinstein, J., concurring), *modified*, 57 N.Y.2d 27 (1982), *appeal dismissed by* 459 U.S. 1138 (1983), or even have rejected. *Brown v. State*, 9 A.D.3d 23, 27 (3d Dep’t 2004) (concluding that even though the federal and state equal protection provisions are “ordinarily” co-extensive, “an adverse federal court decision on an equal protection claim under the U.S. Constitution does not preclude litigation for the first time of a state equal protection claim in state courts”).

Indeed, despite the fact that the Supreme Court has yet to consider whether classifications based on sexual orientation are suspect, courts in the states of Oregon and Washington have recognized sexual orientation as a suspect classification. *See Tanner v. Oregon Health Sci. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998) (recognizing sexual orientation as a suspect classification), *rev. denied*, 944 P.2d 129 (Or. 1999); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004) (same).

Second, New York courts are required to exercise their independent judgment in determining the scope and effects of the guarantees of fundamental rights set forth in the New York State Constitution. *People v. Alvarez*, 70 N.Y.2d 375, 378 (1987). Even if there exists a federal constitutional provision parallel to a state provision, a New York court must undertake a “noninterpretive” analysis,



proceeding from “a judicial perception of sound policy, justice and fundamental fairness,” because the State constitutional provision’s presence in the document signifies its special meaning to the People of New York. *Id.* at 378-79 (citing *People v. P.J. Video*, 68 N.Y.2d 296, 303 (1986)). Thus, New York courts have explicitly endorsed a “sliding scale” that operates between strict scrutiny and rational basis review when evaluating the interests at stake in an equal protection challenge. *Alevy*, 39 N.Y.2d at 334; *Montgomery v. Daniels*, 38 N.Y.2d 41, 61 (1975); *Nyquist*, 83 A.D.2d at 238-39 (“In this State, equal protection analysis is not bound to a formula that contains two extremes but no middle.”). This sliding scale is more flexible than a so-called “tiered-review” system often prevalent in the federal courts’ equal protection analysis and allows this Court to conduct an independent, contextualized review of the factors relevant to determining existence of a suspect class. *Alevy*, 39 N.Y.2d at 333-34 (criticizing “inflexibility” of traditional equal protection approaches and announcing court’s readiness to “adopt middle ground tests in situations where such review is warranted”).

In keeping with this more flexible approach to determining the appropriate standard of review, New York’s jurisprudence has been increasingly sensitive to the invidious discrimination against lesbians and gay men still enforced by the laws of this State. The Court of Appeals held in 1980 that criminalization of sodomy was unconstitutional, *People v. Onofre*, 51 N.Y.2d 476, 492 (1980)

(holding that sodomy statute violated both the right to privacy and to equal protection under the U.S. Constitution), while the United States Supreme Court did not reach a similar conclusion until 23 years later. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the criminalization of consensual same-sex sodomy violates the Due Process Clause of the Fourteenth Amendment). Similarly, the Court of Appeals has recognized family units that include same-sex partners. *In re Jacob*, 86 N.Y.2d 651, 668-69 (1995) (allowing second-parent adoption by a biological parent's same-sex partner); *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 213-14 (1989) (granting a gay man the right to serve as his deceased partner's spouse for the purpose of tenant succession under rent-control laws).

The state legislature and the New York City Council have recently acted in harmony with the New York courts' evolving recognition of the unfairness of discrimination on the basis of sexual orientation by protecting the civil rights of lesbians and gay men. *See* N.Y. Civ. Rights Law § 40-c (1965) (amended 2002 to include sexual orientation) ("No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability . . . be subjected to any discrimination in his or her civil rights, or to any harassment . . . in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state."); New York City Admin. Code § 8-101 (2004) (creating city agency with power to eliminate and prevent

discrimination on the basis of actual or perceived differences, including those based on sexual orientation); Sexual Orientation Non-Discrimination Act, 2002 N.Y. Laws ch.2, § 1 (including sexual orientation as a protected category against which discrimination is prohibited in state human rights law, civil rights law, and education law).

This legislative and judicial history demonstrates that there exists a firm foundation, as a matter of New York’s equal protection jurisprudence, for subjecting the denial of marriage rights to same-sex couples to heightened scrutiny.

### **III. The Lack of a Relationship Between Sexual Orientation and Ability Justifies Application of Heightened Scrutiny.**

When a personal characteristic is unrelated to an individual’s ability to perform in or contribute to society, a law that classifies on the basis of such a characteristic is unlikely to be related to the achievement of any legitimate state interest. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985). Such laws are more likely to “reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.” *Id.* at 440. In *Cleburne*, the Court noted that discrimination based upon “negative attitudes,” “fear,” or “irrational prejudice,” violates the equal protection clause of the Fourteenth Amendment. *Id.* at 448, 450 (applying “rational basis scrutiny” to invalidate state action discriminating against developmentally disabled group).

Sometimes laws may “reflect outmoded notions of the relative capabilities” of those who possess such characteristics. *Id.* at 441. The equal protection principles applied to gender-based classifications, for instance, mandate that state actors “controlling gates to opportunity . . . may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females.”

*Virginia*, 518 U.S. at 541 (internal quotation marks omitted); *see also J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 139 n.11 (1994) (“The Equal Protection Clause . . . acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.”).

In those circumstances, the obvious lack of a relationship between the characteristic on which a law turns and an individual’s abilities raises the concern that the governmental classification is not the result of “legislative rationality in pursuit of some legitimate objective,” but rather a reflection of “deep-seated prejudice.” *Plyler/v. Doe*, 457 U.S. 202, 218 n.14 (1982). Unless the individuals affected by the law have a distinguishing characteristic relevant to the interests the state has the authority to implement, courts will be more willing to scrutinize legislative choices closely as to whether, how, and to what extent those interests should be pursued. *Cleburne*, 473 U.S. at 441-42. Suspect classes have typically

been “subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” *Murgia*, 427 U.S. at 313.

At the same time, when a characteristic affects a person’s general ability or capacities (even if the same characteristic may give rise to unfounded discrimination), heightened scrutiny has generally not been accorded. For example, in *Cleburne*, the Court did not extend heightened scrutiny to classifications based on mental retardation primarily because “it is undeniable . . . that those who are mentally retarded have a reduced ability to cope with and function in the everyday world.” 473 U.S. at 442. As a result, mental retardation may provide the State with legitimate reasons to classify in various areas (for example, in special education laws or in vocational rehabilitation laws), and thus, the Court declined to subject all laws classifying on the basis of mental retardation to heightened judicial scrutiny. *Id.* at 443-45. By sharp contrast, gender typically bears no relationship to one’s ability to contribute to civil society, and classifications based on gender have accordingly been subjected to heightened scrutiny. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[W]hat differentiates sex from such non-suspect statuses as intelligence and physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”).

Most people now accept that an individual's intelligence or physical abilities will affect that individual's ability or capacity to perform certain activities or contribute to society. It is also an accepted proposition, at least at this point in our country's history, that race, gender, and religion do not correlate with an individual's ability or capacity to perform in or contribute to society. Most people would also assume that an individual's *heterosexuality*, like that individual's race or gender, does not correlate with that individual's ability or capacity to perform in or contribute to society. Similarly, an individual's *homosexuality* or *bisexuality* does not correlate with that individual's ability or capacity to perform a range of societal activities. *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, *J.*, concurring) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society.") (internal quotation marks omitted). Notably, medical opinion has shifted dramatically over the last generation to recognize that same-sex sexual orientation is not a pathology or "abnormal."<sup>4</sup>

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<sup>4</sup> The American Psychological Association and the American Psychiatric Association have affirmed for over three decades that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." American Psychiatric Association, *Resolution of the American Psychiatric Association* (Dec. 15, 1973), reprinted in 131 Am. J. Psychiatry 497 (1974); American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975).

Lesbians and gay men have actively contributed to virtually all aspects of American society and culture, and they demonstrate the same range of abilities as do heterosexual people: some are intellectually gifted; some are physically strong; some are mentally or physically disabled, but most are some variation of average. The constant factor is that an individual's sexual orientation is not the determinative element in any of these abilities. The very fact that they often have been forced by discrimination to hide their sexual orientation simply demonstrates that, when judged independently of that characteristic, lesbians and gay men have been indistinguishable from other members of society.

Furthermore, scientific research has consistently shown that the children of gay parents are no different from other children with respect to their development, *i.e.*, in terms of their self-esteem, psychological well-being, cognitive functioning, and social adjustment.<sup>5</sup> The courts and legislature of New York have increasingly accepted the view that an individual's sexual orientation bears no relation to his or her ability to build loving relationships, create families, or adopt children. For example, the New York legislature has determined that lesbians and gay men may adopt children, *see* 18 N.Y.C.R.R. 421.16(h)(2) (2005), and New York courts have

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<sup>5</sup> *See, e.g.*, Judith Stacy and Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 161 (2001) (surveying the research).

determined that a biological parent's gay or lesbian life partner may become a second parent through adoption. *In re Jacob*, 86 N.Y.2d at 668-69. New York courts have also concluded that familial bonds emerge from the "dedication, caring, and self-sacrifice" of the individuals in the relationship, regardless of their sexual orientation. *Braschi*, 74 N.Y.2d at 211 (concluding that the term "family" as used in non-eviction provision of rent-control laws includes unmarried lifetime partners of tenants "whose relationship is long term and characterized by an emotional and financial commitment and interdependence").

Given that sexual orientation is not related to an individual's ability to perform and participate in societal activities, governmental discrimination against lesbians and gay men on the basis of sexual orientation plainly satisfies the first element necessary to trigger heightened judicial scrutiny.

#### **IV. The History of Discrimination Against Lesbians and Gay Men Requires Application of Heightened Scrutiny.**

There are some characteristics that are generally unrelated to ability and yet may not merit heightened scrutiny—for example, one's status of being a baseball fan or an opera lover. While a court could invalidate legislative actions based on such classifications if it found that they lack any *rational* relationship to a legitimate governmental purpose, a court would not subject these classifications to heightened scrutiny without a history of intentional, invidious discrimination



against the group possessing the characteristic *because of* the characteristic. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Cleburne*, 473 U.S. at 443; *Plyler*, 457 U.S. at 217 n.14.

For example, in *United States v. Virginia*, the Supreme Court explained that the Court’s “skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history”—in particular to the Nation’s “long and unfortunate history of sex discrimination.” 518 U.S. at 531 (quoting *Frontiero*, 411 U.S. at 684); *see also Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (discussing the long history of discrimination against women in the workforce). In *Frontiero*, the plurality opinion reviewed at length the “gross, stereotyped distinctions between the sexes” and blatant discrimination against women that existed throughout much of the nineteenth century, observing that while “the position of women in America has improved markedly in recent decades . . . women still face pervasive, although at times more subtle, discrimination.” 411 U.S. at 685-86 (footnotes omitted).

By contrast, when the Supreme Court concluded in *Murgia* that classifications based on age do not warrant heightened scrutiny, the Court’s primary explanation was that elderly individuals “have not experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” 427 U.S.

at 313; *see also Cleburne*, 473 U.S. at 443. When faced with the claim that state actions involving “nuclear” families (comprising parents, children, and siblings) should receive heightened scrutiny, the Court gave the argument short shrift, in large part because of the lack of any history of discrimination or antipathy against nuclear families. *Lyng*, 477 U.S. at 638; *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987).

It cannot reasonably be disputed that lesbians and gay men have suffered the type of longstanding, invidious discrimination that merits the rare application of heightened scrutiny to state actions making classifications based on sexual orientation.<sup>6</sup> Indeed, the historical evidence of this discrimination is overwhelming.

**A. Lesbians and Gay Men Have Suffered a Long History of Intentional, State-Sanctioned Discrimination.**

Discrimination and hostility targeted at lesbians and gay men has flourished throughout history in both the public and private realms of our society. In the

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<sup>6</sup> *See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (observing that “homosexuals have suffered a history of discrimination”); *Ben Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) (same); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (reviewing FBI’s history of sexual-orientation discrimination in hiring); *Under 21*, 108 A.D.2d at 257 (observing that lesbians and gay men are “the object of pernicious and sustained hostility” that seems to reflect “deep seated prejudice rather than rationality”; *see also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (“[H]omosexuals have historically been the object of pernicious and sustained hostility . . .”).

nineteenth century, homosexuality was often condemned by religious beliefs and labeled a disease by the medical profession. The intimate sexual conduct of gay men was criminalized under sodomy laws, which were not declared unconstitutional by the Supreme Court of the United States until 2003, in *Lawrence v. Texas*, 539 U.S. 558 (2003). Throughout the twentieth century, the severe stigma that attached to homosexuality led to official government oppression of gay and lesbian citizens. As a result of this officially sanctioned discrimination, lesbians and gay men were stymied from revealing or expressing their sexual orientation, or even gathering together in public establishments. They were denied the full citizenship rights of association and speech, employment, housing, parenting rights, and other civil liberties. *Id.* at 575 (observing that state condemnation of homosexuality “subject[ed] homosexual persons to discrimination both in the public and private spheres”).

Because of its long-established and visible gay community, New York has served as a focal point in the history of both anti-gay discrimination and the gay-rights movement that arose to fight that discrimination. Given the vibrancy of New York’s gay community, extending equal protection of the laws to lesbians and gay men is all the more significant and meaningful to the people of this State.

## 1. Pre-World War I Through the 1920s.

Toward the end of the late nineteenth century, discrimination against lesbians and gay men became increasingly prevalent in New York, fueled by citizen “reform” groups and laws used to target the congregation, public expression, and even private activities of the gay community.

### (a) “Reform” Societies.

In the 1870s, members of New York City’s Victorian middle class organized a host of anti-vice and social-purity societies to combat the City’s “corrupting” influences. Although nominally private, these organizations acted in close consort with public authorities and wielded enormous power and influence in the community. As part of this effort to police working-class life more generally, the City’s emerging gay culture came under the watch of such groups.

For example, the Society for the Suppression of Vice, established in 1872, alerted police throughout the 1890s to the so-called “degenerate affairs” transpiring at Paresis Hall, a center of gay life. William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 23 (1999) [hereinafter Eskridge, *Gaylaw*]; George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940*, at 138, 141 (1994) [hereinafter Chauncey, *Gay New York*]; see also Brief of Professors of History George Chauncey, *et al.* as *Amici Curiae* in Support of Petitioners at 13, *Lawrence v. Texas*, 539 U.S. 558 (2003)

(No. 02-102) [hereinafter *Lawrence* Historians' Brief]. For his part, Anthony Comstock, the founder and leader of the organization, viciously denounced homosexuality, proclaiming: "These inverters are not fit to live with the rest of mankind. They ought to have branded in their foreheads the word 'Unclean,' and as the lepers of old, they ought to cry 'Unclean! Unclean!' as they go about, and . . . the penalty for their crime . . . ought to be imprisonment for life." Eskridge, *Gaylaw*, *supra*, at 24.

**(b) Sodomy Statutes.**

The persecution of gays and lesbians was fully supported by state and local officials. An array of statutes facilitated those efforts. Since colonial times, New York State had criminalized sodomy. *Id.* app. A1 at 334 (listing the following sodomy statutes: The Duke of York's Law, Mar. 1, 1665; 1787 N.Y. Laws ch. 21; and 1886 N.Y. Laws ch. 31, § 303). Although New York State did little to enforce these statutes prior to the Civil War, sodomy prosecutions became increasingly common after the 1880s. *Id.* at 19-20, 25; Chauncey, *Gay New York*, *supra*, at 140. This increase in prosecutions reflected an intensified anxiety among New York's elites, law-enforcement agencies, and social reformers about same-sex intimacy. Chauncey, *Gay New York*, *supra*, at 140.

**(c) Anti-Cross-Dressing and Anti-Vagrancy Statutes.**

In addition to statutes criminalizing the private activities of gay men, New York also used its regulatory arsenal to target and prohibit the public expression of homosexuality, and deny citizens the right to be openly and visibly gay. One such law was New York's 1845 statute prohibiting cross-dressing. As originally enacted, the New York statute made it a crime to assemble "disguised" in public places; the State subsequently amended the law in 1876 to allow "masquerade or fancy dress ball[s]" if police permission was obtained. Eskridge, *Gaylaw, supra*, at 27 (citing 1845 N.Y. Laws ch 3, § 6, amended by 1876 N.Y. Laws ch. 1 (codified at 1881 N.Y. Code Crim. Proc. § 887[7])).

Also important were New York's public-decency laws. In 1900, New York State expanded the definition of illegal "vagrant" in its Criminal Procedure Code to include "[e]very male person who lives wholly or in part on the earnings of prostitution, or who in any public place solicits for immoral purposes." *Id.* at 29 (citing 1900 N.Y. Laws ch. 281 (recodified in 1910 N.Y. Laws ch. 382)).

Although the primary purpose of the statute was to provide a legal basis for apprehending pimps who lived on earnings from prostitution, it also provided police with a pretext for targeting lesbians and gay men. Eskridge, *Gaylaw, supra*, at 29. Indeed, the State legislature enacted the amended statute following the

conclusion of a legislative inquiry into the “fairies” and “degenerates” who were said to frequent the state’s dance halls and hotels. *Id.*

**(d) Disorderly Conduct Laws.**

The most powerful regulatory device for policing the public and private lives of lesbians and gay men in New York prior to World War I, however, proved to be an 1882 law that authorized magistrates to punish “disorderly conduct” as a criminal offense. Eskridge, *Gaylaw*, *supra*, at 30. Sometime before 1915, the New York Police Department created an arrest category for “degenerates” apprehended under this statute. Between 1915 and 1920, the annual number of defendants detained for “disorderly conduct-degeneracy” expanded from ninety-six to 756. *Id.*

After a local court overturned the 1882 statute as inconsistent with due process, the State, in 1923, re-enacted a disorderly conduct provision specifically targeted at the regulation of same-sex intimacy. The new law, applicable only in New York City, made it a crime for “[a]ny person who, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned . . . [to] [f]requent[] or loiter[] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness.” *Id.* (citing 1923 N.Y. Laws, Ch. 642); *People v. Lopez*, 7 N.Y.2d 825 (1959) (applying the statute to loitering by gay men); *People v. Liebenthal*, 5 N.Y.2d 876 (1959) (same). Because the New

York City police applied the statute almost exclusively to men they deemed “degenerate,” “[t]he criminalization of male homosexual conduct implicit in the wording of the law was made explicit . . .” Chauncey, *Gay New York, supra*, at 172. Between 1923 and 1966, when Mayor John Lindsay finally ordered the police to stop using entrapment by plainclothes officers to arrest gay men, more than 50,000 men in New York City were arrested on this spurious charge. George Chauncey, *Why Marriage? The History Shaping Today’s Debate Over Gay Equality* 10 (2004) [hereinafter Chauncey, *Why Marriage?*]; George Chauncey, *A Gay World, Vibrant and Forgotten*, N.Y Times, June 26, 1994, at E17.

## **2. World War I and the Great Depression.**

The 1923 disorderly conduct provision reflected the fierce determination among New York’s moral-reform societies and government officials to suppress all forms of gay and lesbian visibility during and immediately following World War I.

### **(a) Driving Gay and Lesbian Visibility Out of the Public Sphere.**

World War I increased the scale and visibility of gay life in New York City. The military mobilization and more general societal dislocation caused by the war led to the influx of hundreds of thousands of people to New York, including gay men and lesbians. Removed from the constraints of families, many of these new



arrivals elected to remain in New York—and particularly New York City, which was a major port of embarkation for soldiers—after the war. Chauncey, *Gay New York, supra*, at 141-45.

Troubled by the increase in the visible gay population, New York's anti-vice leagues began to focus on homosexuality for the first time as a major social problem, distinct from their other reform efforts. The Committee of Fourteen, an anti-vice league, devoted unprecedented resources to placing gay meeting establishments under sustained surveillance. *Id.* at 145-47. The Society for the Suppression of Vice was even more vigilant: along with the police, the Society participated in the arrest of two hundred men on charges of degenerate disorderly conduct in 1920 and 1921 alone. *Id.* at 146.

Restrictions on gay life intensified with the onset of the Great Depression in 1929. Across the nation, the devastating unemployment and radical political agitation of the Depression era disrupted traditional gender roles within families. The discomfort many men felt about changes in gender roles manifested itself in hostility toward homosexuality. Chauncey, *Why Marriage?, supra*, at 16. In New York, the backlash was particularly severe. While before the Depression, the policing of gay life was generally spearheaded by private anti-vice societies, during the 1930s the State itself took a leading role by launching a massive campaign to exclude gay men and lesbians from all realms of the public sphere.

John Loughery, *The Other Side of Silence: Men's Lives and Gay Identities: A Twentieth-Century History* 58 (1998) [hereinafter Loughery, *The Other Side of Silence*]; Chauncey, *Gay New York*, *supra*, at 331; Lawrence Historians' Brief, *supra*, at 14.

New York authorities aimed to curtail representations of lesbians and gay men, and even discussions of sexual orientation, in the popular media. The government first targeted New York City's theatres. On February 9, 1927, the police raided two Broadway productions: *The Captive*, a French play that dealt with lesbian relationships; and *Sex*, a campy play written by and starring Mae West. Chauncey, *Gay New York*, *supra*, at 311-13; Eskridge, *Gaylaw*, *supra*, at 47-48. Two months after the raids, the State passed the so-called padlock bill, which amended the public obscenity code to prohibit any play from "depicting or dealing with the subject of sex degeneracy, or sex perversion," in essence, forbidding the portrayal or discussion of homosexuality in any theatrical production. Chauncey, *Gay New York*, *supra*, at 313, 352. This law remained in force until 1967. Byrne Fone, *Homophobia: A History* 380 (2000) [hereinafter Fone, *Homophobia*].

Not content with removing homosexuality from the stage, government officials sought to purge the subject from literature. The United States Customs Service suppressed importation of several popular novels that favorably depicted

same-sex intimacy. And when the federal government's censorship efforts were found not to be strict enough, state and local officials acted to fill the gap. In 1929, New York City police seized 800 copies of Radclyffe Hall's lesbian romance, *The Well of Loneliness*, and charged the book's distributors with violating New York's criminal obscenity law. Eskridge, *Gaylaw*, *supra*, at 47. The Magistrate's Court of New York denied the distributors' motion to dismiss the charges. The court observed:

The book can have no moral value since it seeks to justify the right of a pervert to prey upon normal members of a community and to uphold such relationships as noble and lofty. . . .

The theme of the novel is not only anti-social and offensive to public morals and decency, but the method in which it is developed, in its highly emotional way attracting and focusing attention upon perverted ideals and unnatural vices and seeking to justify and idealize them, is strongly calculated to corrupt and debase those members of the community who would be susceptible to its immoral influence.

*People v. Friede*, 133 Misc. 611, 613 (N.Y. Mag. Ct. 1929).

Although the court's ruling was eventually reversed by an appellate panel, the State did not abandon its efforts to suppress expression by lesbians and gay men through censorship. For example, the State subsequently attempted (though again unsuccessfully) to ban the sale of André Gide's, *If It Die*, a book that dealt

with same-sex intimacy. *People v. Gotham Book Mart*, 158 Misc. 240 (N.Y. Mag. Ct. 1936); Eskridge, *Gaylaw*, *supra*, at 47-48.

Due to a Supreme Court decision exempting movies from First Amendment protection, *Mut. Film Corp. v. Indus. Comm'n*, 236 U.S. 230 (1915), *overruled by Joseph Bustyn Inc. v. Wilson*, 343 U.S. 495, 502 (1952), New York State's efforts to discourage the treatment of homosexuality in films met with greater success. The State's film licensing law, adopted in 1921, banned "obscene, indecent, immoral" and "sacrilegious" movies. Applying this statute, New York's censors brutally edited Alla Nazimova's *Salome* (1927), a film with an all-gay cast, and denied a license to the original version of *Mädchen in Uniform* (1931), a movie depicting lesbian relationships. Eskridge, *Gaylaw*, *supra*, at 48. Nationally, Hollywood's infamous Production Code, adopted in the 1930s, followed suit and prohibited films from including lesbian or gay male characters, discussing gay themes, or even implying the existence of homosexuality. *Id.*; Chauncey, *Why Marriage?*, *supra*, at 5-6; *Lawrence* Historians' Brief, *supra*, at 15.

### **3. World War II and Its Aftermath.**

World War II once again took men from their families and offered unprecedented opportunities to women. In the period after the war, the government sought to reestablish traditional family structures and gender norms. The State's post-war anti-gay campaign was aimed not only at continuing to drive

lesbians and gay men from the public sphere, but also at more vigorously exposing and punishing private same-sex intimacy. Eskridge, *Gaylaw, supra*, at 58-60; Chauncey, *Gay New York, supra*, at 360.

**(a) Homosexuality-Related “Crimes” and Their Social Consequences.**

During the postwar period, being gay—whether publicly or privately—became increasingly dangerous as the government utilized more aggressive and invasive techniques than those used in the pre-war era for enforcing disorderly conduct, public decency, and sodomy statutes to penalize a wide range of homosexual activity. These tactics included spying (by, for example, peering into bedroom windows), undercover operations, stakeouts of places frequented by lesbians and gay men, and police raids. Eskridge, *Gaylaw, supra*, at 63-64.

Lesbians and gay men arrested on these spurious charges often faced dire consequences. In addition to fines and jail time, arrestees were sometimes forcibly institutionalized, fired from their jobs, deported if they were not citizens, or discharged from the armed services. *Id.* at 43. Such consequences flowed in large part from a widely held belief that being gay was tantamount to being unstable and even disloyal to our country. See Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* 338-39 (1999) [hereinafter Terry, *An American Obsession*].

**(b) Lesbians and Gay Men are Purged from Government Service.**

During the McCarthy era, anticommunist crusaders considered gay government employees, or “sexual perverts” as they were viewed, to be as much of a threat to America as Communists. Fone, *Homophobia, supra*, at 390-91. As one prominent politician declared in April 1950, “sexual perverts who have infiltrated our government in recent years . . . [are] . . . perhaps as dangerous as the actual communists.” *Id.* Stereotyped as loose-lipped, narcissistic “blabbermouths,” gay government workers were popularly considered easy targets for foreign agents attempting to get confidential information. Terry, *An American Obsession, supra*, at 337. This view of gay government workers as easily corruptible was reflected in one politician’s proclamation in July 1950: “You can’t hardly separate homosexuals from subversives . . . . [A] man of low morality is a menace in the government, whatever he is, and they are all tied up together. . . . There should be no people of that type working in any position in the government.” *Id.* at 341.

Some Congressmen and journalists adopted the term “homintern” (a wordplay on “Comintern” or the Communist International) to describe the organized homosexuality feared to be insidiously infecting the far-reaching corners of the federal government. Fone, *Homophobia, supra*, at 391-92 (quoting one writer who stated, “[t]hey have their leaders, unabashed, who are proud queens

who revel in their realm”); Terry, *An American Obsession*, *supra*, at 329 (“[Homosexuals] belong to a sinister, mysterious and efficient international. Welded together by the identity of their forbidden desires, of their strange, sad needs, habits, dangers, not to mention their fatuous vocabulary, members of this international constitute a worldwide conspiracy against society.” (quoting from Congressional Record, May 1, 1952)); Chauncey, *Why Marriage?*, *supra*, at 19.

In an effort to eviscerate lesbians and gay men from federal employment, the FBI and other agencies conducted widespread surveillance of workers suspected of homosexuality. See John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970*, at 46-47 (2d ed. 1983) [hereinafter D’Emilio, *Sexual Politics*]. The FBI, which was responsible for supplying the Civil Service Commission with background information on federal personnel, compiled information on and created lists of individuals arrested for sodomy, patronizing gay bars, and engaging in other suspected homosexual conduct. *Id.*; Eskridge, *Gaylaw*, *supra*, at 69. As a result of these efforts, between 1947 and 1950, the Civil Service Commission denied government employment to 1,700 applicants because they had “a record of homosexuality or other sex perversion.” Eskridge, *Gaylaw*, *supra*, at 69.

Despite those efforts, in May 1950, New York’s governor, Thomas E. Dewey, accused the Truman Administration of tolerating the employment of sex

offenders in the federal government. D’Emilio, *Sexual Politics*, *supra*, at 41. The “sex offenders” at issue were lesbians and gay men. *Id.* The United States Senate subsequently authorized an investigation into the government’s alleged employment of gay workers “and other moral perverts.” *Id.* at 42. As a result of this investigation, the Senate published a report concluding that “the presence of a sex pervert in a Government agency . . . tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices.” *Id.* at 4 (quoting Subcomm. on Investigations, Comm. on Expenditures in Executive Dep’ts, 81<sup>st</sup> Cong., Employment of Homosexuals and Other Sex Perverts in Government, S. Doc. No. 81-241, at 3-5 (1950)). The report also declared that most homosexuals possess a “lack of emotional stability” and a “weakness of their moral fibre” and thus pose a threat to national security. Fone, *Homophobia*, *supra*, at 391.

In 1953, shortly after his election, President Eisenhower issued an executive order banning gay and lesbian workers from government employment, both in civil service and the military. Chauncey, *Why Marriage?*, *supra*, at 6. The order also required companies with government contracts to identify and dismiss homosexual employees. *Id.* The FBI engaged in widespread surveillance to enforce this order. *Lawrence Historians’ Brief*, *supra*, at 17.



These various government actions resulted in many gay and lesbian workers losing their federal employment. In fact, the State Department fired more lesbians and gay men than suspected communists during the McCarthy era. Chauncey, *Why Marriage?*, *supra*, at 6. President Eisenhower's ban on gay workers in the federal government remained in effect until 1975. *Id.* at 6-7. Discrimination in federal hiring on the basis of sexual orientation was not explicitly prohibited until the 1990s. *Id.* at 7.

Notably, New York followed the federal government's lead in targeting lesbians and gay men in public service. Even through the 1960s, the New York City civil service commission retained discretion to exclude lesbians and gay men from city jobs by refusing to hire "an admitted homosexual, when the acts are frequent and recent," for a variety of positions such as corrections officer. D'Emilio, *Sexual Politics*, *supra*, at 208. Private employers, too, were emboldened by the federal government's position and engaged in overt discrimination on the basis of sexual orientation. Whereas those with government contracts were required by Eisenhower's Executive Order to identify and fire gay employees, other private industries adopted this policy as well. *Lawrence Historians' Brief*, *supra*, at 17 (citing David Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, *Wash. History*, Fall/Winter 1994-95, at 45, 53).

**(c) Immigration and Naturalization.**

Despite numerous challenges in the courts, United States immigration laws permitted authorities to deny a person the right to immigrate to the United States on account of sexual orientation until 1990. Dating back to 1891, federal immigration laws included broad and vaguely worded exclusions that were used as a pretext for denying entry to gay immigrants. *See Eskridge, Gaylaw, supra*, at 35 (citing Act of March 3, 1891 §1, 26 Stat. 1084, which excluded “persons suffering from a loathsome or a dangerous contagious disease” and “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude”). The Immigration Act of 1917 added an exclusion for persons who suffered from “constitutional psychopathic inferiority,” which was used by the immigration authorities as an additional tool to prevent gays from immigrating into the country. *See Eskridge, Gaylaw, supra*, at 35-36 (citing Immigration Act, ch. 29, § 3, 39 Stat. 874, 875 (1917) (current version at 8 U.S.C. § 1182 (1988))). In 1967, the Supreme Court found in *Boutilier v. INS*, 387 U.S. 118, 120-21 (1967), that by passing the Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952), *amended by* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (current version at 8 U.S.C. § 1182(a)(4) (1988)), which added yet another exclusion for those with “psychopathic personality,” Congress had clearly intended to exclude gay men and women from

immigrating. *See also* Eskridge, *Gaylaw*, *supra*, at 132; William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609, 609-10 (1990). It was not until 1990 that Congress finally repealed this exclusion. Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. Rev. 1139, 1195 (1993); Eskridge, *Gaylaw*, *supra*, at 134.

**(d) State Regulatory Agencies and Anti-Gay Discrimination.**

In the years following World War II, discrimination against lesbians and gay men also continued in the exercise of state regulatory authority. In New York, harassment by police and Liquor Authority officials at gay meeting places, common during the Depression, escalated during the postwar years. *See* Chauncey, *Gay New York*, *supra*, at 342. As in prior years, undercover police investigators frequented gay bars with the goal of entrapping gay men and charging them with solicitation. *See id.* at 343. Police also conducted raids in which they humiliated the bars' patrons through sexual threats and made random arrests and detentions. Eskridge, *Gaylaw*, *supra*, at 80. These arrests resulted in fines or jail terms for the individual arrested and severe consequences for the bar, including a Liquor Authority investigation involving a warning and possible license revocation or suspension. Chauncey, *Gay New York*, *supra*, at 343. In

1952, the Court of Appeals held that the Liquor Authority had the power to revoke the liquor license of establishments that became regular meeting places of lesbians and gay men. *See Lynch's Builders Rest. v. O'Connell*, 303 N.Y. 408 (1952) (per curiam). By virtue of these enforcement mechanisms, New York effectively prohibited licensed premises from serving liquor to gay patrons. Eskridge, *Gaylaw, supra*, at 78.

Frustration at these repeated acts of harassment culminated in the Stonewall riots of June 1969. Like most gay bars, The Stonewall Inn, located in Greenwich Village, was raided approximately once a month. During such raids, police would typically check patrons' identification, issue insults, arrest several individuals, and shut the bar down for the night. Loughery, *The Other Side of Silence, supra*, at 314. A police raid in the early hours of June 28, 1969, ignited a confrontation between police and bar patrons that spilled into the surrounding streets and continued with varying intensity over the next few nights. *Id.* at 315. Although the specific event that triggered the riot is not known for certain, some have reported that the crowd turned on the police after a cross-dressing lesbian was struck in the head by a police officer. *Id.* at 316. By the time the chaos ended near daybreak, five police officers were injured, thirteen individuals from the Stonewall Inn were jailed, and an unknown number of people had been beaten by police. *Id.* at 317. Over the next few days and nights, demonstrators flocked to the streets

surrounding the Stonewall Inn and clashed with police. *Id.* at 318. Despite the significance of the event, the *New York Times* waited several days before publishing a short article with the headline, “Four Policemen Hurt in Village Raid,” while the *Daily News* ran a sarcastic piece titled, “Homo Nest Raided, Queen Bees Stinging Mad.” *Id.* at 319.

Although the Stonewall riots have achieved near-mythic status and are credited with launching the modern gay rights movement, the riots did little immediately to transform the day-to-day lives of lesbians and gay men in New York, who continued to suffer officially sanctioned violations of their civil rights on the basis of sexual orientation, as well as prejudice and harassment in many corners of society.

#### **4. Ongoing Effects of Historic Discrimination.**

Notwithstanding an increasing acceptance of homosexuality in recent decades, sexual-orientation discrimination continues to affect many aspects of the lives of gay men and women. In 2001, a national survey found that three-quarters (74%) of lesbians, gay men, and bisexuals report having experienced prejudice and discrimination based on their sexual orientation, including 23% who have experienced “a lot” of discrimination. The Henry J. Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays, and Bisexuals in*

*America and the Public's Views on Issues and Policies Related to Sexual Orientation*, at 3 (2001)<sup>7</sup> [hereinafter Kaiser Report].

The New York State legislature itself recognized this sordid record of continuing discrimination when it enacted the Sexual Orientation Non-Discrimination Act (SONDA) three years ago:

The legislature further 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. Laws ch. 2, § 1. Despite the progress exemplified by this legislative effort to recognize the effects of sexual orientation discrimination, such discrimination continues to injure and stigmatize lesbians and gay men in New York and nationwide.

**(a) Hate Crimes.**

According to the 2003 Report of the Coalition of Anti-Violence Programs (“AVP”), there were 648 incidents of anti-lesbian, gay, bisexual, and transgender violence reported in New York State in 2003, a 26% increase over the previous

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<sup>7</sup> Available at: <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13874>.

year. See National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2003*, at 57 (2004).<sup>8</sup> Astonishingly, this number includes nine suspected anti-gay murders. *Id.* at 58. In its 2003 report, AVP reported a 22% increase in the incidence of anti-gay assaults with weapons. *Id.*

Nearly three quarters of lesbians, gays, and bisexuals say they have been the target of verbal abuse, including slurs or name-calling, as a result of their sexual orientation. Kaiser Report, *supra*, at 3. Around one third report having been the target of physical violence against their person or property because their attacker believed they were gay or lesbian. *Id.* at 4.

Perhaps even more alarmingly, those who complain of sexual-orientation-related bias crimes are sometimes treated with hostility. In 2001, AVP reported that, of 756 bias incidents reported to local police in the previous year, 12 percent of victims reported being verbally or physically abused by police officers when the incident was reported. See Empire State Pride Agenda Foundation, *State of the State Report 2001*, at 15 (2001)<sup>9</sup> [hereinafter Empire State Pride 2001 Report].

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<sup>8</sup> Available at: [http://www.avp.org/publications/reports/2003NCAVP\\_HV\\_Report.pdf](http://www.avp.org/publications/reports/2003NCAVP_HV_Report.pdf).

<sup>9</sup> Available at: <http://www.Prideagenda.org/stateofstate/2001/sos2001.pdf>.

**(b) Adoption and Child Custody.**

Throughout the United States, gay men and women are discriminated against in adoption and child custody proceedings. As recently as 2004, the Eleventh Circuit upheld a Florida law prohibiting lesbians and gay men from adopting. *See Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F. 3d 804 (11th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 285 (Jan. 10, 2005). Four other states (Michigan, Mississippi, New Hampshire and Utah) explicitly forbid gay couples from adopting, and several other states (including Connecticut, North Dakota, Missouri, Tennessee, and Virginia) explicitly allow adoption officials to consider the sexual orientation of the prospective parents. *See Eskridge, Gaylaw, supra*, at 212 & app. B3; Human Rights Campaign Foundation, *Adoption Laws: State by State*, at <http://www.hrc.org> (last visited Aug. 1, 2005).

In addition, several states continue to uphold a strong presumption against child custody for gay parents. *See Eskridge, Gaylaw, supra*, at 212 & app. B3 (noting anti-gay child custody rules in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, Utah, Virginia and Wyoming); *see, e.g., D.H. v. H.H.*, 830 So. 2d 21, 22-23 (Ala. 2002); *id.* at 26 (Moore, *C.J.*, concurring) (mother’s lesbian relationship “alone is sufficient justification for denying [her] custody of . . . her own children” regardless of whether the father physically abused the child); *Ward v. Ward*, 742



So. 2d 250, 251-55 (Fla. Dist. Ct. App. 1st Dist. 1996) (granting custody to father because child's mother was a lesbian, despite the fact that the father had been found guilty of murdering his first wife), *withdrawn*, No. 95-4184, 1997 Fla. App. LEXIS 15182 (Fla. Dist. Ct. App. Aug. 1, 1997) (withdrawing decision below due to death of father); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (granting grandmother custody of child in mother's custody because the mother was a lesbian).

**(c) Lesbian and Gay Youth.**

Sexual orientation discrimination also reaches lesbian and gay youth, who face intolerance, harassment, and even assault in schools around the country. A 2003 study revealed that 90% of lesbian and gay youth reported that they either frequently or often hear homophobic remarks in school. See Joseph G. Kosciw, *The 2003 National School Climate Survey: The School-Related Experiences of Our Nation's Lesbian, Gay, Bisexual and Transgender Youth*, at 5 (2004) [hereinafter National School Climate Survey]. Almost 20% of students reported hearing homophobic remarks from faculty or school staff. *Id.* at 6. Eighty-four percent of students experienced verbal harassment because of their sexual orientation, while over a third were physically assaulted as a result of their sexual orientation. *Id.* at 14-15. Similarly, in an earlier study of 500 New York City youth, 40% of respondents reported that they had experienced a violent physical

attack. See J. Hunter, *Violence Against Lesbian and Gay Male Youth*, 5 J. Interpers. Violence 295-300 (1990).

One of the examples of this pervasive hostility include an openly gay student who brought suit in 1996 against his school administrators for failing to protect him after he reported repeated assaults and severe harassment. *Nabozny v. Podlesny*, 92 F.3d 446, 451-52 (7th Cir. 1996). Notably, upon reporting the incidents to the school principal, the student was told that “if he was going to be so openly gay, he should expect such behavior from his fellow students.” *Id.* at 451 (internal quotation marks omitted). In another chilling example of cruelty, in 1999 a teenage student was beaten to the point of unconsciousness after founding the Gay-Straight Alliance at his high school. Evelyn Nieves, *Attacks on a Gay Teen-Ager Prompt Outrage and Soul-Searching*, N.Y. Times, Feb. 19, 1999, at A14.

The effects of school-based discrimination and fears for safety are reflected in the aspirations of lesbian and gay youth for advanced education. When compared to a national sample of high school students, twice as many lesbian and gay students indicated that they did not plan to pursue any secondary education. See National School Climate Survey, *supra*, at 23. These diminished aspirations were correlated to incidents of harassment relating to sexual orientation. *Id.*

**(d) Workplace Discrimination.**

Lesbians and gay men are also subject to substantial discrimination—both overt and covert—in the area of employment.

Pursuant to the 2002 enactment of New York's Sexual Orientation Non-Discrimination Act, lesbians and gay men have only recently become eligible to register workplace discrimination complaints with the State government. Nationwide, in states with a longer history of such laws, a government study of state-kept statistics shows that thousands of complaints of sexual orientation employment discrimination are made annually in the twelve states keeping such records. *See* United States General Accounting Office, *Sexual-Orientation Based Employment Discrimination: States' Experience with Statutory Prohibitions*, GAO-02-878R, (July 9, 2002). A study of the effects of sexual orientation discrimination on wages showed that gay male workers earn 11–27% less than heterosexual male workers with the same occupation, education, and experience. *See* M. Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 Indus. & Lab. Rel. Rev. 726, 726-39 (1995).

The results of a 2001 New York-specific survey reveal substantial workplace discrimination in New York State: 54% of respondents had experienced discrimination based on their sexual orientation in employment matters in the previous five years. *See* Empire State Pride Agenda, *Anti-Gay/Lesbian*

*Discrimination in New York State* 1 (2001). The survey results indicate that 8% of respondents believed they were fired because of their sexual orientation, 27% reported being verbally harassed, and 7% reported being physically harassed. *Id.* at 2. In addition, 43% of survey respondents indicated that they feel they must conceal their sexual orientation on the job.<sup>10</sup> *Id.*

**(e) The Pressure to Hide and Its Political Impact.**

Societal pressure to hide one's sexual orientation is itself a form of discrimination, creating shame, increasing stress, and adversely affecting one's physical and mental health.<sup>11</sup> See S.W. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 *Health Psychology* 243 (1996); Gregory M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-Group Contact, and Heterosexuals' Attitudes Toward Lesbian and Gay Men, in Out in Force: Sexual Orientation and the Military* 211-12 (Gregory M. Herek et

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<sup>10</sup> The survey also found that 49% of respondents faced discrimination in public accommodations, including stores, hotels, and doctors' offices, and 68% of gay New Yorkers conceal their sexual orientation in public to avoid discriminatory treatment. Empire State Pride Agenda, *Anti-Gay/Lesbian Discrimination in New York State* 1 (2001).

<sup>11</sup> This pressure to conceal one's sexual orientation has been analogized to pressures placed on Jews in the early twentieth century to pass as gentiles in order to increase their employment opportunities, and on African Americans to pass as white in order to avoid discrimination. See Marc A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 *Stan. L. & Pol'y Rev.* 37, 46 (2001). See generally Randal Kennedy, *Racial Passing*, 62 *Ohio St. L.J.* 1145, 1186-87 (2001) (discussing modern day "passing").

al. eds., 1996); Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 811-36 (2002).<sup>12</sup> The effects of self-concealment result in a significant negative impact on the political voice of gay citizens as a group. Concealment has impeded the gay community's ability to build coalitions and to achieve political goals in the legislative sphere. See Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 93-94, 97 (1991); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. Rev. 915, 970-73 (1989); see also Kenji Yoshino, *Suspect Symbols*, 96 Colum. L. Rev. 1753, 1807-08 (1996) ("[S]traights who support gays . . . risk being cast as gay themselves, and are deterred from expressing pro-gay sympathies.").

This historical background of invidious discrimination against lesbians and gay men in New York State—which continues today to harm the well-being and quality of life of gay New Yorkers—compellingly establishes that classifications on the basis of sexual orientation satisfy the second requirement for the application of heightened scrutiny.

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<sup>12</sup> See also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 212 (1988) (noting the shame and self-hatred present in many closeted gay men and lesbians); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237, 274 (1996) ("[T]his socially imposed pressure to 'pass' is itself a form of discrimination. Indeed, constantly keeping secret an important part of one's identity can create shame, undermine self-respect and increase stress levels.").

**V. Although They Are Neither Necessary Nor Sufficient, Additional Factors Enhance the Justification for Heightened Scrutiny.**

**A. Immutability Enhances the Justification for Heightened Scrutiny.**

Neither the Supreme Court nor the New York Court of Appeals has ever held that a class must possess immutable traits in order to be deemed suspect. *Watkins*, 875 F.2d at 725 (Norris, *J.*, concurring) (“The Supreme Court has never held that only classes with immutable traits can be deemed suspect.”); *Cleburne*, 473 U.S. at 442 n.10 (casting doubt on immutability’s relevance to suspect classes); *Murgia*, 427 U.S. at 313 (defining “suspect class” without mentioning immutability); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (listing “traditional indicia of suspectness” and omitting immutability). Although immutability of a trait is not necessary for a classification based on that trait to be deemed suspect, advocates and courts have invoked immutability to buttress the appropriateness of suspect classes. The immutability argument rose to prominence through women’s rights advocacy. Historically, “natural” differences between men and women were used to justify discrimination against women. Advocates of sex equality “flipped the meaning of biology” by arguing that, precisely because sex is immutable, “using it to justify inferior treatment [is] all the more invidious and unfair.” Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights*

*Cases*, 9 J.L. & Pol’y 397, 402-03 (2001); *see also* Donald Braman, *Of Race and Immutability*, 46 UCLA L. Rev. 1375, 1453 (1999).

The Supreme Court adopted this immutability rationale in *Frontiero* when it concluded that sex classifications are “inherently suspect.” 411 U.S. at 682. While the key factor for the Court was the Nation’s “long and unfortunate history of sex discrimination,” the Court added that “since sex, like race and national origin, is an immutable characteristic . . . the imposition of special disabilities . . . because of . . . sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’” *Id.* at 684, 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

#### **B. Sexual Orientation and Immutability.**

Over the years, courts have defined immutability loosely, suggesting that an “immutable” trait is not necessarily one that is impossible to change or to mask. *See Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (noting that having an “element of voluntariness” does not preclude a class from deserving heightened scrutiny); *Watkins*, 875 F.2d at 726 (Norris, *J.*, concurring) (“It is clear that by ‘immutability’ the Court has never meant strict immutability.”); *Tanner*, 971 P.2d at 446 (finding that sexual orientation is a suspect class and noting that “immutability—in the sense of inability to alter or change—is not necessary”). Indeed, the Supreme Court has described alienage, illegitimacy, national origin, gender, and race all as

being immutable, *see Parham v. Hughes*, 441 U.S. 347, 351 (1979), although aliens can be naturalized; illegitimate status can be changed; people can mask their national origins by changing their names; individuals can undergo sex changes; and individuals can even alter their racial appearances through medical means. In effect, courts have treated a trait as immutable so long as changing that trait would involve great difficulty. *See Watkins*, 875 F.2d at 726 (Norris, *J.*, concurring) (“The Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.”); *see also* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L. J. 1063, 1073-74 (1980) (criticizing strict definitions of immutability).

All of the major scientific associations have concluded that measures to convert gays and lesbians to heterosexuality are not only futile, but also unhealthy and potentially abusive. Several psychological and social work organizations<sup>13</sup> submitted an amicus brief in *Lawrence v. Texas* in which they addressed “conversion” therapies and noted that no scientifically adequate research shows that interventions aimed at changing sexual orientation are effective or safe:

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<sup>13</sup> The American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Texas Chapter of the National Association of Social Workers



[T]here is reason to believe such efforts can be harmful to the psychological well-being of those who attempt them. Clinical observations and self-reports indicate that many individuals who unsuccessfully attempt to change their sexual orientation undergo considerable distress. . . .

Accordingly, the mainstream view in the mental health professions is that the most appropriate response of a therapist treating an individual who is troubled about his or her homosexual feelings is to help that person cope with social prejudices against homosexuality and lead a happy and satisfying life as a lesbian or gay man.

Brief of Amici Curiae American Psychological Association et al. at 13-15, *Lawrence v. Texas*, 539 U.S. 558 (2003).

Several national entities, including the American Psychological Association, American Psychiatric Association, National Association of Social Workers, American Academy of Pediatrics, and American Counseling Association have adopted policy statements cautioning the profession and the public about treatments that purport to change sexual orientation.<sup>14</sup> For example, the American Psychiatric Association’s policy statement warns that “[t]he potential risks of ‘reparative therapy’ are great, including depression, anxiety and self-destructive behavior.” Meanwhile, the American Academy of Pediatrics’ website states that “[t]herapy directed specifically at changing sexual orientation is contraindicated,

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<sup>14</sup> The policy statements are reproduced on the website of the American Psychological Association at <http://www.apa.org/pi/lgbc/publications/justthefacts.html> (last visited August 1, 2005).

since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation.”

Considering the trauma suffered by individuals who attempt to alter their sexual orientation, it would be repugnant to suggest that conversion—if it were even possible—is the only means through which a gay person could avoid civil disabilities imposed by society on account of sexual orientation.

**C. Diminished Political Power Enhances the Justification for Heightened Scrutiny.**

Neither the United States Supreme Court nor any New York court has squarely held that diminished political power of a group is required to invoke heightened scrutiny with respect to classifications affecting that group. Indeed, the Supreme Court did not discuss political powerlessness when it applied heightened scrutiny to classifications based on race, ethnicity, illegitimacy, or gender.<sup>15</sup> However, the Supreme Court has discussed diminished political power as a factor that may be relevant to labeling a classification as suspect. *See Cleburne*, 473 U.S. at 445 (noting that the substantial body of legislation responsive to the needs of the

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<sup>15</sup> In *United States v. Virginia*, the Court’s observation that women were denied the right to vote for over a century was made in the context of describing the Nation’s “long and unfortunate history of sex discrimination.” 518 U.S. at 531 (internal citation omitted). Similarly, in *Frontiero*, the plurality discussed the under-representation of women in the political arena, but did so as an example of the “pervasive, although at times more subtle discrimination” against women.” 411 U.S. at 686.

mentally disabled undermined their claim of being politically powerless); *Plyler*, 457 U.S. at 216 n.14 (listing “political powerlessness” as one of several possible indicia of suspectness); *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (noting that aliens deserve heightened scrutiny because “aliens—pending their eligibility for citizenship—have no direct voice in the political processes.”); *Rodriguez*, 411 U.S. at 28 (listing “political powerlessness” as one of several possible indicia of suspectness). At least one New York court has examined diminished political power as an indication of suspectness. *See People v. Fox*, 175 Misc. 2d 333, 337 (N.Y. Cty. Ct. 1997) (examining “political powerlessness” as one indicia of suspectness).

#### **D. Homosexuality and Diminished Political Power.**

Lesbians and gay men have historically been excluded as effective participants in the political system and they continue to face systematic impairments to political power. As Justices Brennan and Marshall observed, “[b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, member of this group are particularly powerless to pursue their rights openly in the political arena.” *Rowland*, 470 U.S. at 1014 (Brennan, *J.*, dissenting from denial of *certiorari*; joined by Marshall, *J.*). Although gay men and women have become more visible politically since those observations in *Rowland*, they still face significant political obstacles. Presently,

only three of the 230 New York state legislators are openly gay or lesbian (approximately 1.3 percent). See Victory Fund, *Out Officials*, available at <http://victoryinstitute.org/index.php?sort=electstate&search=NY> (accessed July 15, 2005). Moreover, all three of those legislators represent only one county—New York County. *Id.* At the federal level, there are only three openly gay or lesbian members of Congress—all of whom are in the House of Representatives. Sarah Wildman, *Better Luck Next Time*, *Advocate*, Nov. 23, 2004, at 32 (discussing Congress's composition after the 2004 election). There has never been an openly gay member of the United States Senate. *Id.*

The political power of gay citizens has been, and continues to be, profoundly affected by the fact that many gay people have historically kept their sexual orientation concealed as the result of persistent discrimination and social stigmatization. Political organizers have faced the problem that they “somehow . . . must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may involve.” Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 731 (1985); see also Yoshino, *Suspect Symbols*, *supra*, at 1807-08 (“[S]traights who support gays . . . risk being cast as gay themselves, and are deterred from expressing pro-gay sympathies.”).

Oddly, the passage of anti-discrimination laws in recent years has led some courts to suggest that classifications based on sexual orientation do not warrant heightened scrutiny. *See, e.g., Ben-Shalom*, 881 F.2d at 466; *see also High Tech Gays*, 895 F.2d at 574; *accord Romer*, 517 U.S. at 637-39 (Scalia, *J.*, dissenting). Yet, this limited political success has spawned a political backlash in the form of focused campaigns to “wage war” against gay citizens’ efforts to establish legal rights and social acceptance. Richard Lacayo, *The New Gay Struggle*, *Time*, Oct. 26, 1998, at 32. Furthermore, if growing political power precludes suspect status, then women and African Americans would not have merited suspect status (or would have outgrown it by now), because both groups had already begun to make significant strides in the political arena at the time heightened scrutiny was applied to race and sex-based classifications.

Similarly, the existence of antidiscrimination laws protecting gay individuals does not prove that lesbians and gay men are politically powerful; nor does it prove that sexual orientation should not be a suspect class. The Supreme Court deemed sex a suspect class in the 1973 case of *Frontiero v. Richardson*—after Congress passed Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and other laws prohibiting sex discrimination. 411 U.S. at 687-88. Similarly, the fact that New York’s antidiscrimination laws protect lesbians and gay men does not

undermine sexual orientation as a suspect classification; race and sex are also covered by those laws. *See* N.Y. Exec. Law §§ 296, 296-a (2004).

In sum, similar to women and racial minorities, lesbians and gay men contend with significant obstacles to effective political representation arising out of a history of invidious discrimination, providing additional support for the application of heightened judicial scrutiny to classifications on the basis of sexual orientation.

#### **VI. Governmental Actions That Classify on the Basis of Sexual Orientation Warrant Heightened Scrutiny.**

Application of the conceptual framework of established equal protection jurisprudence conclusively demonstrates that governmental classifications based on sexual orientation warrant heightened scrutiny. Sexual orientation is a characteristic unrelated to ability to perform and participate in society, and there exists a long and undeniable history of purposeful discrimination against lesbians and gay men based on their sexual orientation. Consequently, the trait of sexual orientation satisfies the elements meriting heightened scrutiny. In addition, the features of immutability and diminished political power are also present, providing further compelling justification for subjecting New York's same-sex marriage restriction—a governmental action that classifies on the basis of sexual orientation—to heightened judicial scrutiny.

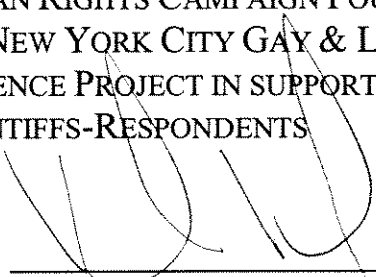
## CONCLUSION

Because the State's actions simply cannot withstand the heightened scrutiny that should properly be applied to the refusal to grant same-sex marriage licenses, *amici curiae* support affirmance of the judgment below.

Dated: New York, New York  
August 5, 2005

Respectfully Submitted,

AMICI CURIAE PARENTS, FAMILIES & FRIENDS OF  
LESBIANS AND GAYS, INC., FAMILY PRIDE  
COALITION, HUMAN RIGHTS CAMPAIGN,  
HUMAN RIGHTS CAMPAIGN FOUNDATION, AND  
THE NEW YORK CITY GAY & LESBIAN ANTI-  
VIOLENCE PROJECT IN SUPPORT OF  
PLAINTIFFS-RESPONDENTS



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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

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-against- : New York County  
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VICTOR L. ROBLES, in his official capacity as :  
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**PRINTING SPECIFICATIONS STATEMENT**

1. The following statement is made in accordance with First Department Rule 600.10 (amended 2003).
2. *Typeface and Type Size.* The brief of *Amici Curiae* was prepared in the processing system Microsoft Word 2000, with proportionally spaced Times New Roman typeface, 14 point size (12 point size footnotes).
3. *Page Length and Word Count.* The body of the brief is 58 pages, and has a word count of 12,762 as calculated by the processing system.