New York County Clerk's
Index No. 103434/2004

To be argued by:
Susan L. Sommer

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

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.

BRIEF OF PLAINTIFFS-RESPONDENTS

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Plaintiffs-respondents ("plaintiffs") respectfully submit this brief in opposition to the appeal by defendant-appellant Clerk of the City of New York ("defendant").

PRELIMINARY STATEMENT

Plaintiffs, members of five committed same-sex couples, seek to exercise their basic civil right to marry the one person they love. Each couple wants to enter into the civil institution of marriage to make a profound private and public commitment to one another through marriage, to obtain the myriad legal rights and protections for themselves and their families to which marriage is the exclusive gateway, and to receive the same respect for their families that New York law provides others. Plaintiffs seek vindication of their right to marry under the New York Constitution's Due Process and Equal Protection Clauses (Article I, §§ 6, 11), which guarantee the rights of all New Yorkers, regardless of whether those rights historically have been denied to a minority.

Drawing on lessons from the history of anti-miscegenation laws in this country, the court below understood that the cases declaring those laws unconstitutional "demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners." (Record on Appeal ("R") at 9.) The court recognized that the fundamental right to choose to marry the person one

loves applies to gay and lesbian adults no differently than to other New Yorkers. It correctly concluded that no legitimate purpose is served by depriving same-sex couples and their children of the protections, security, and respect that come with civil marriage. Fulfilling its constitutional duty to remedy this deprivation, the court ruled that plaintiffs and other same-sex couples are entitled to full access to civil marriage, and that no separate — and necessarily unequal — substitute could suffice. R61-63.

On appeal, defendant places principal reliance on an outdated case that followed "the Book of Genesis" to deny same-sex couples their federal civil right to marry. *See Baker v. Nelson*, 291 Minn. 310, 312, 191 N.W.2d 185, 186 (1971), *appeal dismissed*, 409 U.S. 810 (1972); Appellant's Brief ("Br.") at 13-22. Defendant resorts to the same discredited argument long asserted in defense of anti-miscegenation laws — that because "from time immemorial" the institution of marriage was constitutionally defined "in accordance with established tradition and culture"[1] to exclude some from its shelter, it is *ipso facto* constitutional for that definition to remain in place. In the context of anti-miscegenation laws, this rationale perpetuated ingrained historical and religious disapproval of the "mixing of the races." Here, it perpetuates outmoded assumptions about the necessity to

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[1] *Naim v. Naim*, 87 S.E.2d 749, 756 (Va.) (upholding Virginia's anti-miscegenation law) *judgment vacated*, 350 U.S. 891 (1955), *adhered to on remand*, 90 S.E. 2d (1956); *compare* Br. at 29-36.

adhere to fixed gender roles of husbands and wives in marriage. Yet marriage as it is understood today — one of society's most esteemed institutions, built on and sheltering the mutual commitment, interdependence, and intimacy of two loving partners — fully fits the families plaintiff couples have made together.

Defendant fails to identify any legitimate government purpose that is rationally furthered by barring same-sex couples from marriage, articulating only reasons for permitting different-sex couples to marry. Since these purposes are neither served by the exclusion nor undermined by permitting same-sex couples to wed, they are insufficient as a matter of law to justify under any standard of review the harm suffered by plaintiffs' families from denial of the right to marry. The trial court decision reached the only constitutional result and should be affirmed.

COUNTERSTATEMENT OF FACTS

The partners in the five plaintiff couples have been devoted to one another for periods ranging from four to twenty-three years and represent the rich diversity of New York. They come from many 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. They work, take care of their families, pay taxes, and volunteer in their communities like thousands of their neighbors. R421-27.[2]

As couples, plaintiffs are committed to each other financially, emotionally, and spiritually, just as are different-sex married couples. Several couples are raising children together. They have supported each other in lean times, comforted each other through family tragedies, rented and purchased homes together, planned for retirement together, and otherwise intertwined their lives in all the ways that married couples do. *Id.*

For example, Daniel Hernandez gave up his career in California and moved to New York to build a life here with Nevin Cohen. Both share a professional commitment to developing environmentally sound and affordable urban communities, and Nevin, with Daniel's support, now runs his own environmental planning firm. R421-22. They celebrate their different ethnic and religious traditions with one another's families; it is the hope of Daniel's father, who suffered a heart attack several years ago, that he will be able to celebrate at the wedding of Daniel to his beloved Nevin. R454, 459-61.

Likewise, Daniel Reyes and Curtis Woolbright support each other emotionally and financially in good and challenging times. When Daniel was

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[2] We respectfully refer the Court to the Affirmation of Susan L. Sommer, dated July 29, 2004 (R418-41), which summarizes undisputed facts relevant to plaintiffs' motion for summary judgment, and to the detailed affidavits of plaintiffs and their family members (R442-570).

temporarily unemployed, Curtis supported them both on his earnings as a waiter. R426-27. Curtis's own parents, an interracial couple, were barred from marrying in many parts of the country when they fell in love in the 1960's. In order to marry, they finally moved in 1966 to California, the only state whose courts had by then rejected the reigning view that anti-miscegenation laws were constitutional. R1-2, 569. Curtis's mother understands from her own experience what it means for her son to be denied a generation later the right to choose his loved one in marriage: "The government should not deny rights to a certain group because others are uncomfortable with extending those rights to that group. If that were our country's legal system, I would never [have] had the right to marry my husband. I sincerely hope we don't repeat mistakes from our past." R569-70.

Like many married couples, plaintiffs are parents or hope to be in the future. Michael Elsasser and Douglas Robinson together raised two boys adopted as infants from the New York City foster care system, devoting tremendous care and resources to help their sons overcome psychological and health challenges and grow into thriving, successful teenagers. R423-24. Their sons see that their parents "are devoted to each other in the same way . . . married people are," yet the government treats their family differently. R519.

Mary Jo Kennedy and Jo-Ann Shain have together raised a happy, well-adjusted teenage daughter, Aliya, who longs to see her parents marry. In

Aliya's words, "We deserve this as a family." R425-26; 542. Lauren Abrams and Donna Freeman-Tweed are the devoted parents of two small sons, and their extended families are actively involved in the boys' lives. R422-23. The children of these couples were conceived through anonymous donor insemination. The couples have gone to considerable effort and expense for the non-biological parent of their children to enter into second-parent adoptions and to make up for at least some of the other legal protections automatically available to the families of married couples. R466-70, 525-28.

Plaintiffs face all the challenges and difficulties that confront families in New York, but they do so without the myriad protections and benefits — both tangible and intangible — bestowed upon married couples. The court below found that "[d]efendant does not dispute that plaintiffs and their children suffer serious burdens by being excluded from civil marriage." R17.

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. R427-37. The court below listed just some examples of the myriad, undisputed disadvantages suffered by plaintiffs from denial of the protections that flow from marriage:

> [P]laintiff couples may not own property by the entireties; file joint state income tax returns; obtain health

> insurance through a partner's coverage; obtain joint liability or homeowner's insurance; collect from a partner's pension benefits; have one partner of the two-women couples be the legal parent of the other partner's artificially inseminated child, without the expense of an adoption proceeding; invoke the spousal evidentiary privilege; recover damages for an injury to, or the wrongful death of, a partner; have the right to make important medical decisions for a partner in emergencies; inherit from a deceased partner's intestate estate; or determine a partner's funeral and burial arrangements.

R17.

The trial court emphasized that plaintiffs are also denied "[o]ne of the most important benefits of marriage[,] . . . the securing of the bonds between parents and children and the protection of children raised in the family." The court explained that "[f]or example, the children of parents in same-sex relationships are not necessarily covered by the statutory duty of support." R19. The court also found that "[i]n addition to legal rights and obligations embodied in New York statutes, many private entities, such as employers, rely on the State's conferral of marriage and the resulting status of spouse in providing benefits" like health insurance. *Id.*

Plaintiffs have attempted, where possible, to approximate some of the protections of marriage using contractual substitutes like wills and powers of attorney. *E.g.*, R498, 534, 556. Legislatures and courts have provided limited, piecemeal relief as well. R437-39. But such steps neither replicate the vast range

of rights and protections that come automatically with civil marriage nor eliminate the hurtful stigma of exclusion from it. To invoke a statute providing hospital visitation rights and hope that it will be honored is neither the practical nor symbolic equivalent of being able to declare in an emergency "this is my spouse." *Id.*; R528.

Recognizing from the undisputed facts that the denial of the right to marry consigns plaintiffs and their families to a second-class status, the trial court found that "plaintiff couples and their children suffer numerous intangible burdens as the result of being relegated to a caste-determined status that is different from that of families in which the adult couple has been allowed to marry." R20. In the words of plaintiff 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.

R498. Being barred from civil marriage denies plaintiffs something irreplaceable. R439-41.

Defendant did not contest any of these facts, conceding the severe legal, economic, and emotional burdens suffered by same-sex couples because they cannot marry. R16 n.9. Ruling on cross-motions for summary judgment, the court

below found that the exclusion from civil marriage harmed plaintiffs without adequate justification and therefore violated their rights to due process and equal protection under the New York Constitution. R40-48. The court further held that the only appropriate remedy is to read the marriage provisions of the Domestic Relations Law ("DRL") to be gender neutral, permitting plaintiffs to marry. R57-64, 68. Defendant appealed.

ARGUMENT

I.

DENYING PLAINTIFFS THE RIGHT TO MARRY VIOLATES THE STATE CONSTITUTION'S GUARANTEE OF DUE PROCESS

The court below correctly concluded that New York's prohibition on marriage to a loved one if that person is of the same sex infringes plaintiffs' protected liberty interests and fundamental right to marry under Article I, § 6 of the State Constitution.[3] R24-55. The right to marry — and the concomitant right to choose whom to marry without government interference — has long been recognized under both the New York and United States Constitutions as "fundamental" and protected by the guarantee of due process. Plaintiffs are entitled to this liberty equally with all other New Yorkers. There is no exception

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

that denies them the right to marry the person of their choice simply because that person is of the same sex. Since defendant does not and cannot demonstrate a "compelling" and "narrowly tailored" government interest in excluding same-sex couples from marriage, as is necessary to justify infringement of a fundamental right, the prohibition must fall. *Rivers v. Katz*, 67 N.Y.2d 485, 495-97 (1986).

A. Plaintiffs Are Entitled to Exercise the Choice of Whether and Whom to Marry, Which Has Been Consistently Recognized as a Fundamental Constitutional Right

Safeguarding fundamental privacy interests in decisions about matters as intimate as the choice of one's marital partner is essential to the ordered liberty our constitutional traditions protect. The State may not, without overriding need, regiment and limit this deeply personal and important part of its citizens' lives. Much more is required to deny fundamental individual interests in this arena than invocation of past practice or majority preference. Being forced into an unmarried life would represent an intolerable and fundamental deprivation for the great majority of individuals. It is equally so for gay and lesbian New Yorkers. Also repugnant should be any notion that the State knows best and may dictate whom one may or may not marry when that decision imposes no harm to another person. "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our

constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). The "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize," *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), or "to coerce uniformity," *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

The protections of personal liberty under New York's due process guarantee are at their zenith in matters of family life and personal relationships. *See, e.g., Cooper v. Morin*, 49 N.Y.2d 69, 80-82 (1979) (pretrial detainees had right to contact visits to maintain family); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 550 (1985) (zoning ordinance prohibiting household composed of unrelated people who nonetheless formed "functional" family violated due process).

The decision below correctly recognized that "[t]he protections of the New York Constitution extend beyond those found in the Federal Constitution, which sets the floor, but not the ceiling, for the rights of the individual." R28-29. Thus, while federal due process decisions are relevant to establish the baseline of constitutional protections, "on innumerable occasions" New York courts have 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." *People v. LaValle*, 3 N.Y.3d 88, 129 (2004) (quotations omitted); R27.[4]

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 "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 (1987). It includes "the interest in independence in making certain kinds of important decisions." *Crosby v. State, Workers Comp. Bd.*, 57 N.Y.2d 305, 311 (1982) (citations omitted). The right to privacy shelters, for example, autonomy in choices about procreation, *Hope v. Perales*, 83 N.Y.2d 563, 557 (1994); forming and sustaining family relationships, *McMinn*, 66 N.Y.2d at 548; and childrearing, *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 468 (1953).

It is beyond dispute that the exercise of personal choice in marriage is a fundamental right central among those shielded by the right to privacy. *See* R25-33. "'[A]mong the decisions that an individual may make without unjustified government interference' are personal decisions relating to marriage." *People v.*

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[4] The tradition of independent judicial inquiry under New York's Constitution dates back to early decisions interpreting the Due Process Clause, which has repeatedly been held to provide broader protection of personal liberties than the federal version. *See In re Jacobs*, 98 N.Y. 98, 106 (1885) (articulating broad liberty interests conferred under due process guarantee); *Wynehamer v. State*, 13 N.Y. 378, 420 (1856) (adopting doctrine of substantive due process).

Onofre, 51 N.Y.2d 476, 486 (1980) (citation omitted). *Accord Doe*, 71 N.Y.2d at 52; *see also Cooper*, 49 N.Y.2d at 80 (marriage is "fundamental right").

Marriage has long been recognized as among our society's most cherished and vital institutions, constituting both "a deeply personal commitment to another" and a "highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge v. Department of Public Health*, 440 Mass. 309, 322, 798 N.E.2d 941, 954 (2003). In an oft-cited passage, the U.S. Supreme Court explained why marriage is sheltered from government interference as a fundamental, deeply personal liberty interest:

> [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.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

The Supreme Court in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), upholding the right of a prison inmate to marry, again stressed as the essential attributes of marriage the facilitation of "emotional support," "public commitment," and "personal dedication," as well as its 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." *See also DeJesus v. DeJesus*, 90 N.Y.2d 643, 648 (1997) (marriage is a "partnership"); *Diemer v. Diemer*, 8 N.Y.2d 206, 210 (1960) (sexual intimacy is part of "essential structure of a marriage").

Appreciating that the right to marry would be hollow if the government dictated one's marriage partner, courts have placed special emphasis on protection of one's free choice of a spouse. The Court of Appeals has made clear that the right to privacy encompasses "the decision of *whom* one will marry." *Crosby*, 57 N.Y.2d at 312 (emphasis added). *See also People v. Shepard*, 50 N.Y.2d 640, 644 (1980) (State is prevented "from interfering with an individual's decision about *whom* to marry") (emphasis added). This emphasis on autonomy in spousal choice as critical to the fundamental right to marry is consistent with landmark marriage decisions of both recent and older vintage. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Goodridge*, 440 Mass. at 327-28, 798 N.E.2d at 958 (decision "whom to marry is among life's momentous acts of self-definition. . . . 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, 725, 198 P.2d 17, 25 (1948) (affirming right to choose marriage with one person who is "irreplaceable").

The core of the liberty interest in marital choice — the freedom to fall in love, form a family, and shelter that bond — is universal and does not hinge on

the sex of one's chosen partner. Indeed, the suggestion that the liberty to marry is protected only if individuals adhere to distinct, gendered roles of husbands and wives ignores more than 150 years of legal and social history eliminating sex-based roles in marriage. *See* R51-55.[5] At our country's founding, marriage was a patriarchal arrangement in which a husband essentially owned his wife as property under the doctrine of coverture. But entrenched gender roles assumed to be "the law of the Creator," *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring), relegating women to the home and legally privileging their husbands, were ultimately seen as antithetical to women's liberty and "'an anachronism that no longer fits contemporary society.'" *Medical Bus. Assocs., Inc. v. Steiner*, 183 A.D.2d 86, 91-92 (2d Dep't 1992); *see also People v. Liberta*, 64 N.Y.2d 152, 164 (1984) (traditional views subordinating wives to their husbands "have long been rejected in this State").

Nor, as the courts have made abundantly clear, is the function of heterosexual procreation and childbearing the social or legal foundation of protections for autonomy in marriage. *See Lapides v. Lapides*, 254 N.Y. 73, 80 (1930) ("inability to bear children" does not justify annulment under DRL); *Wendel v. Wendel*, 30 A.D. 447, 449 (2d Dep't 1898) (capacity to "indulge[] . . .

[5] For more detailed history of the evolution of gender roles in marriage, *see Amici Curiae* Brief of Women's Organizations in support of plaintiffs ("Women's Org. Br."), and *Amici Curiae* Brief of Professors of History and Family in support of plaintiffs.

the passions," not to procreate, is foundation of marriage); *Zagarow v. Zagarow*, 105 Misc. 2d 1054, 1057 (Sup. Ct. Suffolk Cty. 1980) ("Unlike marital sexual relations, which are, per se, part of the essential structure of marriage, the parties are free to decide when and if and how often they will have children."). Shared intimacy and mutual support, not the procreative function, is at the core of the fundamental right to marry.[6]

Plaintiffs' relationships, like those of thousands of other gay and lesbian New York couples, are founded on love, personal commitment, and mutual support, sharing all the hallmarks of relationships that are sanctioned with marriage. *See Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 211-13 (1989) (definition of family "should find its foundation in the reality of family life" and includes "same-sex life partners"); *East 10th St. Assocs. v. Estate of Goldstein*, 154 A.D.2d 142, 143 (1st Dep't 1990) (noting interdependence and "devotion" of same-sex life partners recognized as "spouse[s]" by extended family). As the lower court found, "[d]efendant does not dispute that plaintiffs are serious, committed couples, devoted to building lives together as families, whose relationships are no different from those of married couples." R16. In being denied one of life's most

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[6] *Mirizio v. Mirizio*, 242 N.Y. 74 (1926), relied on by defendant, is not to the contrary. The issue presented in *Mirizio* was whether refusal to have sexual relations qualified as matrimonial desertion. Later decisions of the Court of Appeals reinforced that *Mirizio* stands for the proposition that sexual intimacy (not procreation) is part of the "essential structure of marriage." *Diemer*, 8 N.Y.2d at 210.

"momentous acts of self-definition" — the freedom to marry and shelter a family with the person one loves — plaintiffs are denied a right every bit as meaningful to them and their families as to heterosexual New Yorkers who are free to exercise it.

B. Plaintiffs' Right to Autonomy in Marriage Cannot Be Diminished By Mischaracterizing What They Seek as a "New" Right to "Same-Sex Marriage"

In the face of overwhelming authority identifying the right to choose whom one marries as central to personal liberty, defendant resorts to semantics to claim that this fundamental right can be denied to gay and lesbian New Yorkers, like plaintiffs, whose chosen partners are of the same sex. When plaintiffs seek *that* kind of liberty, defendant asserts, they are really seeking "same-sex marriage," *not* marriage itself. Citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), defendant disparagingly characterizes plaintiffs' claim as one for a "new" and distinct right, not access to a right "deeply rooted" in our "history and tradition" or "implicit in the concept of ordered liberty."[7]

But plaintiffs no more seek a "new" fundamental right to "same-sex marriage" than the interracial couple in *Loving* sought a "new" fundamental right

[7] Defendant also suggests that because the legislature has plenary power to regulate such restrictions on marital choice as age and degree of consanguinity — where the government may establish compelling justifications absent here — it follows that it has unchecked authority to deny same-sex couples access to marriage. Br. 28. The "plenary power" to regulate marriage no more permits the legislature to violate the constitutional rights to liberty and equal protection of those in same-sex relationships than it authorized the legislature to deny the freedom to marry to those in interracial relationships. *See Stevens v. United States*, 146 F.2d 120, 123 (10th Cir. 1944) (upholding anti-miscegenation law based on general power to regulate marriage).

to "interracial marriage." The liberty at stake in both cases — the right of every adult to choose whom to marry — *is* deeply rooted in history and tradition, even though the legal institution of marriage has evolved considerably over time. The core of the fundamental right to marry, which has remained constant, is found in its purpose to provide shelter and stability for two committed people and the family they form. Plaintiffs should not be excluded from exercise of this right with their chosen life partners simply because historically marriage was not thought to apply to the relationships forged between people of the same sex.

Appreciating that plaintiffs simply invoke the same core liberty enjoyed by other New Yorkers, the lower court held: "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 relationship of plaintiffs fit within this definition of marriage." R66. The lower court rightly rejected defendant's faulty reasoning (R30-55); this Court should as well.

In 1967, when the Supreme Court held in *Loving* that an interracial couple was entitled to exercise the fundamental right to marry, there was no shared understanding of marriage in America that encompassed interracial couples. Anti-miscegenation laws had been in place since colonial days, remained common into the 1960's, were supported by overwhelming public opinion and had been upheld

in "case after case based on tradition rooted in perceived 'natural law'" purportedly dictated "'by the Creator himself.'" R9-10, 869-74.[8] Long into the twentieth century, the sheer weight of a nearly unbroken line of cases accepting the constitutionality of bans on interracial marriage was deemed sufficient justification to perpetuate these discriminatory laws. *See, e.g., Jones v. Lorenzen*, 441 P.2d 986, 989 (Okla. 1965) (upholding anti-miscegenation law since "great weight of authority holds such statutes constitutional").[9] Yet the *Loving* Court understood that the liberty at stake was the fundamental freedom of choice in who one marries — deeply rooted in history and guaranteed to all — not some new "right to interracial marriage" unknown in our legal tradition. *See* R49.

Defendant and some *amici* would like to dismiss *Loving* and the legacy of anti-miscegenation laws limiting spousal choice as concerning solely discrimination based on race, which is forbidden under the federal equal protection guarantee. But *Loving* expressly declared its holding was independently based on due process, not just equal protection, because the law's racial restriction limited

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[8] For a detailed account of the history of anti-miscegenation laws and their downfall in this nation, *see Amici Curiae* Brief of New York County Lawyers Association, *et al.*, in support of plaintiffs.

[9] Defendant follows a similar tack in citing adverse cases dating to *Baker v. Nelson* to suggest that this Court should be persuaded by others' failure to acknowledge the constitutional injury suffered by same-sex couples. But that some courts have applied the same faulty reasoning defendant now urges does not make that reasoning correct or justify perpetuating discrimination under New York law.

the exercise of the fundamental right to marry, a right shared by "*all* the State's citizens." *Loving*, 388 U.S. at 12 (emphasis added).

Later, in *Zablocki v. Redhail,* 434 U.S. 374 (1978), calling *Loving* its "leading decision" on "the right to marry," the Court reiterated that "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all* individuals." *Id.* at 383-84 (emphasis added). In striking a law prohibiting a divorced parent from remarrying if in arrears on child support, *Zablocki* analyzed the father's protected right to marry, not a claimed "right to remarry while failing the children of an earlier marriage." Moreover, the father's liberty interest was protected even though there was no firmly rooted western tradition to permit easy access to divorce or remarriage. *See, e.g.,* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1501-10, 1533-34 (2000). These cases demonstrate that in an analysis of fundamental rights, the focus is on the right all share, rooted in the liberty all possess.

As the lower court recognized, defendant's analysis improperly mis-frames the liberty interest at issue so as to embody the very exclusion being challenged (R48) — thus repeating an error condemned by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). The *Lawrence* Court held that Texas's

prohibition of sodomy between same-sex partners violated the liberty interest of gay men and lesbians in autonomy from government interference in decisions about their personal intimate relationships. *Id.* at 567. *Lawrence* explicitly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and rejected its methodology. The *Bowers* Court had recast the right at stake narrowly as a claimed "fundamental right" of "homosexual sodomy," 478 U.S. at 191, and then rejected as "facetious" the idea that such a right is "deeply rooted in this Nation's history and tradition." *Id.* at 194. *Bowers*' constricted framing of the issue "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. Properly conceived, the issue in *Lawrence*, *Bowers*, and here is whether the government may seek to control "the most intimate and personal choices a person may make in a lifetime . . . [choices] central to the liberty protected" by substantive due process. *Id.* at 574 (quotations omitted).[10]

Even before *Lawrence*, the Court of Appeals recognized in *Onofre*, the landmark challenge to New York's prohibition on sodomy between unmarried

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[10] To be sure, *Lawrence* did not present or determine whether excluding same-sex couples from marriage violates the federal constitution or can be justified. Yet the import of *Lawrence* in defining the relevant liberty interest is unmistakable: fundamental liberties are guaranteed to all and may not be "defined" in group-based terms to exclude a class of people from their shelter. Moreover, this Court should reject the argument of defendant and some *amici* that because past Supreme Court marriage decisions involved different-sex partners, they apply exclusively to heterosexuals. This claim is no different than saying that because pre-*Loving* precedents on the right to marry involved same-race couples, the Court had purposefully "defined" the right to marry to apply only to them.

partners, that the issue was not whether there exists a "fundamental right" to engage in non-marital "oral sodomy in an automobile parked on a street," but rather whether the "fundamental right of personal decision" shields such consensual intimacy. 51 N.Y.2d at 484, 486.

Defendant compounds his error by invoking history and tradition as a limitation on *who* may exercise a fundamental right once that right has been identified as part of the guarantee of liberty. "'History and tradition are the starting point but not in all cases the ending point'" of a due process analysis. *Lawrence*, 539 U.S. at 572 (citation omitted). While past and current history and tradition are regularly consulted in the process of determining *what* substantive liberties are sheltered as fundamental rights by due process, they do not dictate *who* may exercise a right once that right is accorded protection. A fundamental right is discerned from the profound significance of a decision in the personal and private life of the individual — here the choice to enter into the intimate commitment of marriage with a loved one — not by *who* may seek to exercise that right.

This critical distinction is central to the basic due process guarantee of equal justice and liberty for all. *See id.* at 575 ("[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, and a decision on the latter point advances both interests."); *Onofre*, 51 N.Y.2d at 487 (right "to make decisions"

about intimate sexual conduct could not be "limited to married couples" but must apply to unmarried persons as well). The Due Process Clause does not distinguish among classes of people, extending the Constitution's shield to the highly personal associations and choices of some adults, but not protecting the very same associations and choices for others. Rather, these profound liberties are protected for all New Yorkers.

Many landmark cases of the Supreme Court and Court of Appeals confirm that due process protects liberty interests rooted in history and shared by all, and not just the liberty interests of those who historically were allowed to exercise them. Though there is no long history of tolerance for non-marital sexual relations or of homosexuality, the Supreme Court in *Lawrence* explicitly overruled *Bowers* and sheltered gay and lesbian intimate relationships as it had the relationships of other Americans. 539 U.S. at 571. Pointing to the line of substantive due process decisions beginning with *Griswold* that guard the universal right to make deeply personal choices about intimate relationships and family matters, *Lawrence* held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right." *Id.* at 574. The Court thus rejected the notion that the substantive due process rights it already had identified could be restricted based on traditional assumptions about who should be permitted their

protection. *See also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (right of access to contraceptives "must be the same for the unmarried and the married alike," despite absence of historical protection of sexual conduct of unmarried persons).

Likewise, *Turner*, affirming the right of prison inmates to marry, could not have been decided as it was if plaintiffs had to demonstrate a history and tradition of allowing incarcerated persons to wed, rather than the existence of a more fundamental right to marry. *See also Cooper*, 49 N.Y.2d at 80 ("fundamental right to marriage and family life" applied to pretrial detainees). Nor would the Court of Appeals have affirmed in *In re Raquel Marie X.*, 76 N.Y.2d 387 (1990), the due process right of an unwed father to veto adoption of his newborn if the longstanding historical view that "unwed fathers had no legally recognized interest" in a parental relationship with their child had held sway. *Id.* at 397. *See also Stanley v. Illinois*, 405 U.S. 645 (1972) (State could not rely on its statutory definition of "parent," though rooted in common law and legal tradition, to exclude unmarried father and deny him fundamental rights guaranteed other parents).

That civil marriage historically was celebrated only by male-female couples is not determinative. The steady evolution in the social institution of marriage belies the concept of an immutable, binding definition locked in history and tradition. Attributes once thought to be the "essence" of marriage — including

deeply entrenched gender roles that made the wife little more than the property of the husband — are now viewed as archaic if not repugnant.

Marriage in modern times is premised not on sex roles or a procreative requirement but on legal equality, mutual commitment and intimacy, and economic interdependence. As understood today, the core attributes of marriage fit same-sex couples no differently than others. The court below rightly explained: "Marriage is no more limited by the historical exclusion of same-sex marriage than it was limited by the exclusion of interracial marriage, the legal doctrine of coverture . . . , the pre-1967 restrictions on remarriage following divorce in New York . . . , longstanding restrictions on divorce, or the 'marital exemption' to the crime of rape." R51-52.

Furthermore, while marriage between same-sex couples is currently available in a small (though growing) number of jurisdictions — Massachusetts, Canada, Spain, Belgium, and the Netherlands — it can no longer be said that there is but one universal legal definition of marriage that unquestioningly excludes gay and lesbian unions. The court below joined those of other states in recognizing that the devoted relationships of gay and lesbian individuals have all the attributes

essential to marriage and the injustice of denying these individuals the vital right to enter into marriage with their loved one.[11]

Respect for individual liberty and self-determination, not rote adherence to longstanding yet unconstitutional tradition, must guide due process analysis:

> 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.

Lawrence, 539 U.S. at 578-79.

Individuals in same-sex relationships share the same birthright to liberty as all other New Yorkers. The government may not deny them the liberty to marry the one person they love and to shelter with marriage the families that together they build.

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[11] *See Goodridge*, 440 Mass. 309, 798 N.E. 2d 941; *In re Coordination Proceeding*, No. 4365, 2005 WL 583129 (Cal. Super. Mar. 14, 2005); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004); *Castle v. Washington*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004); *Brause v. Bureau Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Ala. Super. Feb. 27, 1998). *See also Halpern v. Attorney General of Canada,* 172 O.A.C. 276 (2003)(Ontario); *Egale Can., Inc. v. Attorney General of Can.*, 2003 B.C.L.R. (4th) 1 (2003); *Catholic Civil Rights League v. Hendricks*, No. 500-09-012719-027 (Can. Ct. App. March 19, 2004) (Quebec) (R263-366).

II.

DENYING PLAINTIFFS THE RIGHT TO MARRY ALSO VIOLATES THE STATE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION

The court below correctly held that exclusion of plaintiffs from the institution of civil marriage offends the New York 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." The law's discriminatory classification cannot be justified under the most minimal scrutiny let alone applicable heightened standards of review.

New York's equal protection jurisprudence, like its due process jurisprudence, also shows a heightened concern for protecting individual rights through independent constitutional analysis. While the New York and federal equal protection guarantees have been read to provide "equally broad coverage," *Brown v. State*, 9 A.D. 3d 23, 26 (3d Dep't 2004), as the court below rightly recognized (R22 n.22), New York requires an *independent* State constitutional analysis. "Despite an identity of text and history, the Court of Appeals on occasion has concluded that greater rights should be accorded under the equal protection clause of the State Constitution." Judith S. Kaye, *Dual Constitutionalism In Practice and Principle*, 61 St. John's L. Rev. 399, 416 n.60 (1987). *See also People v. Kern*, 75 N.Y.2d 638, 653-57 (1990) (finding racially discriminatory

peremptory challenges by defense to violate State and federal equal protection guarantees even though *Batson v. Kentucky*, 476 U.S. 79 (1986), expressly declined to reach issue); *Brown*, 9 A.D.3d at 27 (despite common breadth of coverage, adverse decision on federal equal protection claim does not preclude subsequent adjudication and independent analysis of state claim); *In re Tanya P.*, Feb. 28, 1995 N.Y.L.J. 26, col. 6 (Sup. Ct. N.Y. Cty.) (discrimination based on pregnancy constitutes sex discrimination triggering intermediate scrutiny under State equal protection guarantee despite contrary holding of U.S. Supreme Court applying federal doctrine).

The decision below is fully consistent with New York's robust doctrine of independent constitutional adjudication, which has propelled the State to a leading role in modern constitutional jurisprudence.

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

By denying to one class of people the fundamental right to marry the person each would choose, New York's marriage laws violate not only the Due Process Clause but also New York's equal protection guarantee. As discussed above, it is unsurprising that both these constitutional pillars are undercut 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. Where a statutory classification denies to one group the ability to exercise a fundamental right granted others, courts must apply strict scrutiny and ensure the classification drawn by the law is narrowly tailored to serve a compelling government interest. *See Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 332 (1976). The defendant does not attempt to meet this exacting standard, and therefore plaintiffs must prevail.

B. The State's Denial of Marital Choice to Plaintiffs Discriminates on the Basis of Sexual Orientation

The State's exclusion of gay and lesbian New Yorkers from civil marriage "indisputably" discriminates against plaintiffs on the basis of sexual orientation, as the trial court found. R50. Though under any level of review this discrimination cannot stand (*see* Point III, below), heightened scrutiny is warranted because the marriage laws classify on the basis of sexual orientation, a classification that should be recognized as "suspect."

Courts look to several factors to determine whether classifications of a particular group are "so seldom relevant to the achievement of any legitimate state interest . . . [that they] are deemed to reflect . . . a view that those in the burdened class are not as worthy or deserving as others." *Cleburne v. Cleburne Liv. Ctr.*, 473 U.S. 432, 440 (1985). If so, the classification should be considered inherently

suspect and subject to heightened judicial scrutiny. Though there is no rigid test to meet this standard, relevant criteria include whether: (1) the group historically has been subjected to purposeful discrimination; (2) the trait used to define the class is unrelated to the ability to perform and participate in society; or (3) the group cannot sufficiently protect itself through the political process. *See id.* at 440-41; *Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 431 (2001).[12]

Defendant does not dispute that gay people have long experienced purposeful discrimination, or that sexual orientation is unrelated to one's ability to perform and participate in society. These concessions alone are sufficient to support the conclusion that sexual orientation meets the definition of a "suspect classification."

Incredibly, some *amici* claim that there is no "longstanding and widespread" history of discrimination against gay people. (Brief of Proposed Intervenors-Appellants ("Proposed Intervenors' Br.") at 6.) This assertion flies in the face of basic common knowledge. It is also contradicted by, for example, the Supreme Court's recent statement in *Lawrence* that "for centuries there have been powerful voices to condemn homosexual conduct as immoral" and that "state-sponsored condemnation" has led to "discrimination both in the public and in the

[12] For more detailed analysis of the factors warranting heightened scrutiny for sexual orientation classification, *see Amici Curiae* Brief of Parents, Family & Friends of Lesbians and Gays, *et al.* in support of plaintiffs.

private spheres." 539 U.S. at 571, 575. It is also contrary to the New York legislature's conclusion in enacting the 2002 Sexual Orientation Non-Discrimination Act that "many residents of this state have encountered prejudice on account of their sexual orientation" which "has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering." 2002 N.Y. Sess. Laws Ch. 2, § 1.[13]

The sole basis on which defendant argues that sexual orientation does not warrant heightened scrutiny is the third factor, political powerlessness. Defendant reasons that "in recent years, all branches of government in New York have been addressing the difficulties gay people face." Br. 41. But while gay people have been granted some protections from discrimination from some

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[13] Other *amici* make the implausible claim that the marriage restriction does not classify on the basis of sexual orientation at all, since heterosexuals and gay people alike are barred from marrying a person of the same sex, and there is no record that the legislature had the subjective purpose of discriminating against gay people. *See Amicus Curiae* Brief of the New York State Catholic Conference in support of defendant at 27-34. Limiting marriage to different-sex couples obviously bars gay, but not heterosexual, people from marrying their chosen spouses. *See, e.g., Lawrence*, 539 U.S. at 583 (prohibition on sodomy between partners of same sex "discriminate[s] against homosexual persons") (O'Connor, J., concurring). Because the DRL, as construed by all parties and the court below, embodies an explicit classification excluding same-sex couples, intentional discrimination is established without the need for any inquiry into the legislature's subjective intent. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 642 (1993) (no inquiry into legislative purpose necessary when classification appears on face of statute); *accord Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272-74 (1979). *Washington v. Davis*, 426 U.S. 229 (1976), cited by *amici*, is consistent with this rule; it requires extrinsic evidence of purposeful discrimination only where a law challenged on equal protection grounds is facially *neutral* — which New York's marriage law is not. *See id.* at 241-42. Moreover, even if the marriage exclusion could be viewed as facially neutral with respect to sexual orientation, purposeful discrimination may be inferred from a "law nondiscriminatory on its face [but] grossly discriminatory in its operation." *See M.L.B. v. S.L.J.*, 519 U.S. 102, 126 (1996).

quarters in New York after long years of effort, they continue to face significant disadvantages in the political process. Notably, classifications based on race and sex still receive heightened scrutiny, notwithstanding the far more comprehensive legislation enacted to protect racial minorities and women. *See Frontiero v. Richardson*, 411 U.S. 677, 685-88 (1973). Such measures acknowledge rather than end a history of purposeful discrimination. *Id.* at 687-88 (citing anti-discrimination legislation to support conclusion that classifications based on sex merit heightened scrutiny).

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 (1985). Nevertheless, consistent with New York's broader respect for individual rights and liberties under its independent constitutional tradition, this Court has suggested that such discrimination warrants heightened scrutiny. *See Under 21 v. City of New York*, 108 A.D.2d 250, 257 (1st Dep't), *modified on other grounds*, 65 N.Y.2d 344 (1985). The Court should find that heightened scrutiny is appropriate in this case.[14]

[14] The cases defendant cites declining to recognize sexual orientation as a suspect classification have their grounding in the now-overruled *Bowers* decision and its progeny, and the discredited reasoning that because gay people could be criminally prosecuted for their sexual intimacy, it would be incongruous to deem them members of a suspect class. This Court should

C. The State's Denial of Marital Choice to Plaintiffs Discriminates on the Basis of Sex

The State's marriage laws also classify on the basis of sex by denying marriage licenses to couples otherwise eligible to marry based on the sex of the partners.[15] Simply put, if plaintiff Mary Jo Kennedy were male instead of female, she would be given a license to marry Jo-Ann Shain. The sex classification could not be starker. This sex-based statutory scheme "violates equal protection unless the classification is substantially related to the achievement of an important governmental objective." *Liberta*, 64 N.Y.2d at 168.[16]

Defendant contends that because men and women alike are barred from marrying a person of the same sex under the DRL, the State does not discriminate on the basis of sex. Br. 37. That, as a man, Daniel Hernandez cannot marry Nevin Cohen is *additional* discrimination, not proof of equality. As the court below correctly observed, "the equal application of a statute to two groups, does not necessarily insulate that statute from attack on equal protection grounds." R55. The same argument was likewise rebuffed in *Loving*: "[W]e reject the notion

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follow its reasoning in *Under 21* and the strong considerations justifying application of heightened scrutiny.

[15] Having found an equal protection violation based on sexual orientation, the court below concluded that it "need not decide" whether the ban is an impermissible sex-based classification. R55-56.

[16] *See* Women's Orgs. Br. for analysis of the marriage ban's sex discrimination.

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." 388 U.S. at 8. 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. Like the restriction in *Loving*, the marriage ban here is facially discriminatory because it restricts a person's marital choice solely based on sex.

Moreover, while the restriction should fall on the basis of its facial sex classification, insistence on a male-female couple as the only appropriate configuration for marriage is a form of gender stereotyping that is impermissible under our constitutional law. Stereotypes about the supposed differences between men and women and their respective "proper" roles in marriage and society are an illegitimate basis for lawmaking even if the majority of persons would follow a traditional gender path. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (denying men admission to state nursing school reflected "archaic and stereotypic notions" about "roles and abilities of males and females"); *People v. Santorelli*, 80 N.Y.2d 875, 881 (1992) (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.").

Numerous jurists have recognized the sex discrimination inherent in restricting the right to marry on the basis of one's sex and have applied heightened scrutiny. *See Baehr v. Lewin*, 74 Haw. 530, 533, 852 P.2d 44, 60 (Haw. 1993) (prohibiting same-sex couples to marry constitutes "regulation of access to the status of married persons, on the basis of the applicants' sex"); *Brause*, 1998 WL 88743, at *6; *Li v. Oregon*, No. 0403-03057, 2004 WL 1258167, at *6 (4th Cir., Multnomah Cty. Apr. 20, 2004) (Oregon's marriage laws "impermissibly classify on the basis of gender"), *rev'd on other grounds*, 338 Or. 376, 110 P.3d 91 (2005); *Goodridge*, 440 Mass. at 345-46, 798 N.E.2d at 971 (Greaney, J., concurring) (marriage laws "create a statutory classification based on the sex of the two people who wish to marry. . . [A]n individual's choice of marital partner is constrained because of his or her own sex."); *Baker v. Vermont*, 170 Vt. 194, 253, 744 A.2d 864, 905 (1999) (Johnson, J., concurring in part) ("an individual's right to marry a person of the same sex is prohibited solely on the basis of sex"). Here too, the DRL's classification of marital rights according to sex should be subject to the stricter standard of review applicable to sex-based classifications, a standard that the government cannot satisfy.

D. *Baker v. Nelson* Has No Bearing On Plaintiffs' Claim Under New York's Equal Protection Guarantee

Inviting this Court to abdicate its duty independently to assess plaintiffs' equal protection claim under the New York Constitution, defendant contends that this *State* constitutional claim is somehow foreclosed by the U.S. Supreme Court's 33 year-old dismissal for want of a substantial *federal* question in *Baker v. Nelson*, 409 U.S. 810 (1972).

First and foremost, *Baker* is not binding here because it involved solely whether Minnesota's exclusion of same-sex couples from marriage violated the federal constitution, and had nothing to do with the only claims at issue now — concerning violation of the New York State Constitution. In adjudicating such claims, New York courts are "not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States." *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557 (1986) (quoting *People v. Barber*, 289 N.Y. 378, 384 (1943)). To the contrary, "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." *Brown*, 9 A.D.3d at 27 (federal court dismissal of federal equal protection claims did not collaterally estop same plaintiffs from asserting State equal protection claims against same defendants).

It is one thing to say — as the Court of Appeals did in *Under 21*, 65 N.Y.2d at 360 n.6 — that a State equal protection claim may be analyzed "under the framework of the 14th Amendment" with respect to basic issues such as the "state action" requirement. But that does not mean that a result reached by a federal court under that "framework" is *binding* on the State court, much less that it obviates the need to conduct the independent analysis required for all State constitutional claims. Thus *Baker* is in no way controlling on plaintiffs' claims in this case.

Moreover, the Supreme Court's summary dismissal in *Baker* cannot at this point properly be seen as binding authority in *any* case, even one brought under the federal equal protection guarantee. While defendant is correct that summary dismissals operate as federal precedent, they "have considerably less precedential value than a decision on the merits" (*Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979)); their binding effect can extend no farther than "the precise issues presented and necessarily decided" (*Mandel v. Bradley*, 432 U.S. 173, 175 (1977) (citation omitted)); and they need not be followed when subsequent "'doctrinal developments indicate otherwise'" (*Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (citation omitted)).

Baker has been stripped of any binding effect in *any* court by substantial "doctrinal developments" since 1973, including *Romer v. Evans*, 517

U.S. 620 (1996), and *Lawrence*, post-*Baker* landmarks in equal protection and due process jurisprudence regarding claims of discrimination against gay people, as well as the Court's determination that heightened scrutiny applies to gender-based classifications, *see United States v. Virginia*, 518 U.S. 515, 533 (1996). As the *Lawrence* dissenters noted: "Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." 588 U.S. at 604 (Scalia, J., dissenting).[17] A claim to the right to marry for same-sex couples would certainly present a "substantial federal question."

Based in significant part on these doctrinal developments, the New York Attorney General as well as two federal courts have all concluded that *Baker* does not control the question whether laws excluding same-sex couples from marriage raise a substantial federal equal protection claim. *See* A.G. Op., R191, 194 (*Baker* "no longer carries any precedential value" in the wake of developments in constitutional law); *see also Smelt v. County of Orange*, 374 F. Supp. 2d 861, 2005 WL 1429918, *8 (C.D. Cal. 2005) ("'[I]t is not reasonable to conclude the questions presented in the *Baker* jurisdictional statement would still be viewed by

[17] The *Lawrence* majority's statement that its decision "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," 539 U.S. at 578, does not reaffirm *Baker*'s vitality, as defendant urges. Br. 18. To the contrary, the quoted language signals that the issue of marriage rights for same-sex couples remains to be decided under federal standards.

the Supreme Court as "'unsubstantial.'") (citation omitted); *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wa. 2004) ("*Baker* is not binding precedent"). This Court similarly should reject defendant's effort to hide behind obsolete federal "authority" to avoid adjudication of these weighty state law claims.[18]

III.

THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE SERVES NO LEGITIMATE GOVERNMENT INTEREST AND LACKS EVEN A RATIONAL BASIS

Defendant has now abandoned the two principal justifications for the marriage discrimination that were asserted — and rejected — below: fostering the traditional institution of marriage and avoiding issues that might arise from a refusal by other jurisdictions to respect the validity of New York marriages of same-sex couples. The trial court correctly found that neither of these purported interests serves a legitimate government purpose or provides a rational basis to deny marriage to same-sex partners. R40-48. Shifting tactics, defendant now relies on heterosexual procreation as the purported rationale for the ban, citing "the state's longstanding legitimate interest in attempting to ensure that children born as the result of opposite-sex unions are raised by both their parents." Br. 45. This

[18] For the continuing vitality of *Baker*, defendant cites *In re Cooper*, 187 A.D.2d 128 (2d Dep't 1993), and *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005). But *Cooper* was decided in 1993, before both *Romer* and *Lawrence*, and *Wilson* simply erred in relying on Supreme Court cases holding that lower courts must follow a *full opinion*, as opposed to a summary dismissal, until the Supreme Court *expressly* overrules its prior decision.

asserted government interest also does not justify prohibiting same-sex couples from marrying and thus the marriage ban fails even rational basis review.

A. Rational Review Requires That Legislative Classifications Bear a Rational Relationship to a Legitimate Legislative End

Even if the lowest level of constitutional scrutiny applied here, the ban on marriage by same-sex couples fails because it does not at least "rationally further some legitimate, articulated state purpose." *Doe*, 71 N.Y.2d at 48 (quotations and citation omitted). "[C]onventional and venerable" principles require that legislative classifications must, at minimum, "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633, 635. 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 Liberta*, 64 N.Y.2d at 163; *see also Onofre*, 51 N.Y.2d at 491-92.

Rational review, though deferential, is not a mere rubber-stamp of legislative action. In keeping with our constitutional tradition to safeguard from undue government interference the autonomy to make decisions in matters of personal and family life, the courts' review of the fit between legislative purpose and classification is especially searching where laws, as here, "inhibit[] personal relationships." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). A

justification that is not logically furthered by the legislative classification or fails to explain why one group but not another was singled out fails rational review. *See, e.g., Cleburne*, 473 U.S. at 446 (equal protection will not permit "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). Moreover, justifications that reflect disapproval of a minority or negative stereotypes about a group are illegitimate and cannot sustain a legislative classification. *See, e.g., Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 448, 449; *Onofre*, 41 N.Y.2d at 490-92. The marriage restriction, impinging as it does on one of our society's most cherished personal relationships, must be subject to meaningful review and invalidated if it cannot be found rationally to further a legitimate government end.

B. Defendant's Sole Claimed Justification — Promoting Procreation and Childrearing By Two Parents Within Marriage — Is Not Rationally Related to the Challenged Classification

Defendant urges that promotion of marriage as a setting for procreation and childrearing provides a rational basis for the marriage ban. But the State's categorical ban on marriage for same-sex couples is so egregiously under- and over-inclusive that it cannot be considered rationally related to this purpose. It is not enough that the government has a legitimate purpose to *support* civil marriage for *different-sex* couples. To sustain the line drawn here, the government must have a legitimate reason to *deny* marriage to *same-sex* couples — many of

who are parenting children and need the protections of marriage for their families every bit as much as heterosexual couples do. The government thus needlessly inhibits the important "personal relationships" of its gay and lesbian citizens by irrationally depriving them of access to an institution vital to sheltering and sustaining their families.

The State allows and promotes marriage for different-sex couples who have not, cannot, or have no intention of having children. It is well-settled that marriage is not conditioned on the capacity or intention to procreate. *See, e.g., Griswold*, 381 U.S. 479; *Lapides*, 254 N.Y. at 80; *Zagarow*, 105 Misc. 2d at 1057. As the *Lawrence* dissenters observed, "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*, 539 U.S. at 605 (Scalia, J., dissenting).

Moreover, many gay couples, including plaintiffs, do have children together. 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.[19] New York's laws and policies also

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[19] Tavia Simmons and Martin O'Connell, *U.S. Census Bureau, Married-Couple And Unmarried Partner Households: 2000* 2, 9 (2003) (R405-08). These figures no doubt under-represent the numbers of same-sex households in New York, given that some lesbian and gay couples were reluctant to self-report as such in the census. M.V. Lee Badgett & Marc A. Rogers,

firmly respect gay men and lesbians as parents. *See, e.g., In re Jacob*, 86 N.Y.2d 851 (1995) (second-parent adoption by gay or lesbian parent serves best interests of children); *In re Adoption of Carolyn B.*, 6 A.D.3d 67, 68 (4th Dep't 2004) (same-sex couples may adopt jointly); *In re Adoptions of Anonymous*, 209 A.D.2d 960, 960 (4th Dep't 1994) (parent's sexual orientation "is not determinative" in child custody cases); *In re Adoption of Jessica N.*, 202 A.D.2d 320 (1st Dep't 1994) (lesbian foster mother permitted to adopt in best interests of foster child); 18 N.Y.C.R.R. 421.16(h)(2) ("Applicants [to adopt] shall not be rejected solely on the basis of homosexuality").

Significantly, defendant specifically disavows that a rational relationship exists between excluding gay couples from marriage and promoting the welfare of children, asserting instead: "Defendant does not of course suggest in any way that children being raised by . . . same-sex parents are being brought up in a less beneficial environment than children being raised by married parents." Br. 44.[20]

The Institute for Gay and Lesbian Strategic Studies, Left Out of the Count: Missing Same-sex Couples in Census 2000, at 1 (R410-12).

[20] Certain *amici* make the irrational and offensive argument that denying marriage to same-sex couples serves the State's interest in advancing the welfare of children. As more fully described in the *Amici Curiae* Brief of the American Psychological Association and other leading professional social science organizations in support of plaintiffs ("APA Br.") at 32-47, empirical research has consistently shown that lesbian and gay parents do not differ from heterosexuals in their parenting skills, and their children do not show any deficits compared to children raised by heterosexual parents. Other *amici*'s arguments to the contrary are based on distortions of social

In fact, any supposed interest in linking marriage with procreation and child rearing is actually *hindered* by the marriage ban, which forces same-sex couples to rear their children without the security and protections that come with marriage. *See* R44; *Baker*, 170 Vt. at 219, 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."). Indisputably, "the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws." *Goodridge*, 440 Mass. at 335, 798 N.E.2d at 963.

The procreation rationale is thus so disconnected from the particular discrimination it is offered to justify that it is "impossible to credit." *Romer*, 517 U.S. at 635. Implicitly recognizing that no rational purpose is actually *furthered* by a classification denying marriage to same-sex couples, defendant argues that rational basis review does not require any such connection between the articulated State purpose and the challenged classification. Rather, defendant asserts the only issue is "whether the *recognition* of same-sex marriage would *further* the identified

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science and impermissible gender stereotypes. The *Goodridge* majority explicitly rejected these same arguments, distilled by dissenting Justice Cordy in that case and repeated by *amici* here, as irrational. *Goodridge*, 440 Mass. at 339 n.30, 798 N.E.2d at 966 n.30. *See also Baker,* 170 Vt. at 222, 744 A.2d at 884-85. *Amici's* claim to a government interest, not avowed by the government itself, in barring same-sex couples from marriage to protect the State's children should likewise be rejected.

legitimate governmental interest" in encouraging heterosexuals who procreate to marry. Br. 47 (emphasis added).

Defendant's proposed standard is simply not the law. Rather, legislative discrimination can survive rational review only where "the *classification itself* is rationally related to a legitimate governmental interest." *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973) (emphasis added). New York and Supreme Court authorities illustrate that the government must have more than a legitimate purpose to *support* marriage for different-sex couples; it must also have a legitimate purpose to *deny* marriage to same-sex couples. The denial of access to marriage for these couples must itself be rationally and logically linked to serving a legitimate State purpose.

Thus, in *Onofre*, purported justifications very similar to those raised in defense of New York's marriage restriction were rejected by the court because, though not illegitimate in themselves, they were not rationally related to the challenged restriction. While the State's asserted interests in "protecting and nurturing the institution of marriage" and the rights of married people were concededly legitimate, 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. 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*, 66 N.Y.2d at 547, the court likewise did not end its review of a zoning ordinance that restricted "single-family" housing to any number of legally related adults or to two unrelated elder people 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 equal protection because:

> a municipality may not seek to achieve [this purpose] by . . . limiting 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 . . . 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 (quotations omitted). *See also Cleburne*, 473 U.S. at 447-48 (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 objectives, as evidenced by over- and under-inclusivity of requirement); *Long Island Lighting Co. v. Assessor of Brookhaven*, 154 A.D.2d

188, 195 (4th Dep't 1990) (finding no basis "on which to conclude that a rational relationship exists between the Legislature's laudable goal" and challenged classification).[21]

As these cases demonstrate, to satisfy rational review here the government must have a legitimate and rational reason not just for *including* different-sex couples in access to marriage, but also for *excluding* same-sex ones. It is not enough that the State may legitimately wish to permit and encourage heterosexual couples who procreate to assume the responsibilities and attain the protections and stability that come with marriage. The salient equal protection question is whether *barring* same-sex couples from marrying (even though many are or will be parents) *furthers* this interest. Unsurprisingly, defendant nowhere explains how allowing same-sex couples to marry would in any way deter heterosexuals from marital procreation or frustrate any other legitimate state interest.[22] Absent such a link, the stated purpose of promoting procreation by

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[21] Defendant and certain *amici* advocate a radical departure from this settled jurisprudence based on an inapposite case applying *sui generis* Indiana law, *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. 2005). Unlike New York and federal jurisprudence, Indiana's does not require a rational connection between a classification and government interest. Instead, Indiana courts will uphold legislative classifications so long as they are "based upon substantial distinctions with reference to the subject matter." *Id.* at 22 (quotations omitted). Indiana's standard is both unique and uniquely toothless — it has never been the basis for finding a legislative classification facially invalid. *Id.* at 22.

[22] A group of *amici* rely on specious authority to suggest that allowing same-sex couples to marry would somehow cause heterosexuals to bear children out of wedlock, asserting that such a trend has emerged in Scandinavian countries that have extended marriage or other forms of

heterosexuals within marriage cannot be invoked to justify the marriage ban. The New York Constitution does not permit the State to use this arbitrary rationale to deny plaintiffs access to the quintessentially important personal relationship of marriage.

C. The Trial Court Properly Rejected the Justifications Now Abandoned by Defendant

Though defendant has abandoned fostering the "traditional institution of marriage" as an interest justifying the marriage restriction, some *amici* still press it is a legitimate government end. The trial court rejected this purported rationale, recognizing, as the *Lawrence* dissenters also acknowledged, that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." R41 (citing *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting)). The trial court concluded that "[b]oth the New York Court of Appeals and the United States Supreme Court have made clear that the State

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relationship protection to same-sex couples. Proposed Intervenors' Br. 24. But the source on which *amici* rely has been roundly criticized for its failure to show any causal link between recent protections for same-sex unions and a rise in non-marital heterosexual cohabitation that has occurred over a longer period and can be traced to other powerful social factors. *See* M.V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage? Evidence from Scandinavia and the Netherlands*, at 5 (July 2004) (available at R1315-33) ("Overall, there is no evidence that giving partnership rights to same-sex couples had any impact on heterosexual marriage in Scandinavian countries and the Netherlands."); APA Br. at 31 n.58.

may not deny rights to a group of people based on no more than traditional attitudes or disapproval of that group." R40.[23]

The lower court followed settled equal protection doctrine rejecting as an illegitimate basis of lawmaking government justifications premised on disapproval of a minority or on archaic stereotypes no matter how traditionally entrenched. Thus, the Court of Appeals in *Liberta* rejected as a basis for the marital rape exemption the anachronistic view that, once married, a woman is required to submit to her husband. 64 N.Y.2d at 164. The court held that rationales for government measures based on "archaic notions" and "traditional justifications [that] no longer have any validity" are illegitimate bases for lawmaking. *Id.* And in striking down New York's sodomy law because it could not satisfy even rational basis review, *Onofre*, 51 N.Y.2d at 492 n.6, 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." *Id.* at 490.

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[23] Certain *amici* claim that plaintiffs' view of marriage is "individual centered," but that the "purpose" of traditional marriage is "society-centered." Proposed Intervenors' Br. 43-44. Gay and lesbian couples need access to civil marriage to serve the same personal *and* societal interests marriage furthers for heterosexuals. Plaintiffs seek marriage to express their love and commitment to one another, but also for the myriad protections for their families to which civil marriage is the exclusive gateway and that benefit not only them but also society at large. This includes legally enforceable commitments of mutual support and interdependence that in turn make marital partners less dependent on the state fisc. *See, e.g.*, N.Y. Soc. Serv. § 101 (obligation to provide financial support to spouse receiving public assistance).

The U.S. Supreme Court applied the same principle in *Romer*, striking down an amendment to the Colorado Constitution that prohibited all state and local governmental action designed to protect gay people. 517 U.S. at 620. The Court determined that the only interest served by the amendment was in "disadvantaging the group burdened by the law," *id.* at 633, which the Court held was not a "legitimate purpose or . . . objective." *Id.* at 635. *Lawrence* similarly confirmed that negative traditional beliefs about a particular group give rise to "no legitimate state interest" to justify discrimination against that group. 539 U.S. at 578. Justice O'Connor explained in her concurrence:

> 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.

Id. at 580 (O'Connor, J., concurring) (citation omitted).

Denying marriage to same-sex couples based on no more than a tradition of doing so not only embodies "moral disapproval of same sex couples" — an illegitimate purpose for lawmaking — it also cuts off constitutional analysis before it even begins. "[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Goodridge*, 440 Mass. at 332 n.23, 798 N.E.2d at 961 n.23; R51. It is

no different than asserting that a law should remain the law merely because it has always been that way. The asserted justification merely restates the government's wish to restrict marriage to heterosexual couples, and is no "independent and legitimate legislative end" in itself. *Romer*, 517 U.S. at 633. Rather, it is a tautology, not a legitimate government purpose, and if accepted would foreclose courts from remedying any ingrained discrimination. The trial court recognized that "[r]ote reliance on historical exclusion as a justification improperly forecloses constitutional analysis and would have served to justify slavery, anti-miscegenation laws and segregation." R66.

Defendant also has wisely abandoned the rationale offered below and soundly rejected by the trial court (R44-48), that denying marriage rights to same-sex couples is justified by the State's desire to ensure consistency with federal law and the laws of other states that deny these rights as well. As the court below observed, "[a]t its root, defendant's second argument is that the State may excuse its own deprivation of plaintiffs' constitutional rights on the basis of discrimination countenanced by other States and the Federal government. But this simply cannot be a legitimate ground for denying a liberty interest as important as marriage." R44. Noting "the reality . . . that significant numbers of couples in New York have formed same-sex families, and numerous couples will continue to do so, whether they are allowed to marry or not," the court correctly found that "[i]t would be

'irrational and perverse' to deny such New York resident couples and their children the protections of marriage that they would enjoy under the laws of New York, on the ground that they will not have those protections under the laws of the other States, or under those of the United States." R46 (citation omitted).[24]

Denying access to civil marriage does not rationally further any legitimate government purpose. This serious infringement on plaintiffs' rights thus violates the Due Process and Equal Protection Clauses of the New York Constitution.

IV.

THE ONLY CONSTITUTIONAL REMEDY IS JUDICIAL CONSTRUCTION OF THE DRL TO GRANT SAME-SEX COUPLES FULL MARRIAGE RIGHTS

Defendant makes the untenable claim that even if plaintiffs' right to marry is held to be violated under the State constitutional guarantees of due process or equal protection, some remedy short of full and equal access to civil marriage for same-sex couples nonetheless could constitutionally suffice. Making

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[24] This logic was bolstered by the court's additional observation that "an elaborate body of comity law already exists nationwide to deal with inconsistency in State laws regarding marriage." *Id.* Indeed, under New York's own comity principles the State recognizes marriages validly entered in other jurisdictions even if unavailable in New York, and therefore the marriages of many same-sex couples living in the State are already given legal respect here. R195-97. New York City recently affirmed that it accords the same legal treatment to these couples' marriages as to marriages of heterosexuals (*see* April 6, 2005 letter from Office of the Mayor available at http://www.prideagenda.org/pdfs/NYC%20Letter%20Recognizing%20Same-Sex%20Marriage.pdf), and defendant acknowledges the Mayor's support for allowing same-sex couples to marry in New York (Br. 45).

vague claims of "complexities" (Br. 53) that will result if the Court orders the only remedy that could correct the wrong inflicted on plaintiffs — full marriage rights — defendant suggests that the courts should leave the matter in the hands of the legislature, with leeway to fashion some lesser, second-class status for same-sex couples.

In fact, it is a simple matter legally to provide plaintiffs with equal marriage rights, and there is no substitute for doing so. What defendant proposes is at odds not only with venerable remedial practices in this State, but also with the very essence of the courts' duty to safeguard constitutional rights from "the vicissitudes of political controversy" and "the reach of majorities and officials." *Barnette*, 319 U.S. at 638.[25] Where state law violates bedrock rights of liberty and equal protection, it is the *courts'* obligation to enforce the rights guaranteed to every person by the Constitution. *See LaValle*, 3 N.Y.3d at 128; R29-30.

Courts are vested under long-standing remedial principles with the power to order an under- or over-inclusive statute construed in a manner to remedy the constitutional defect. *See, e.g., Liberta*, 64 N.Y.2d at 170.[26] Thus, in *Liberta*,

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[25] For a more detailed analysis of why full marriage rights is the only remedy that can make plaintiffs whole, *see Amicus Curiae* Brief of Asian American Legal Defense and Education Fund *et al.*, in support of plaintiffs.

[26] A court's other alternative is to strike the offending statute. In choosing between these 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.

the court cured the defect by ordering that a discriminatory law be read in gender-neutral terms. The trial court here applied the same remedy, ordering that gendered terms in the DRL like "husband" and "wife" be construed in a gender-neutral manner. R64. This simple remedy is entirely appropriate to cure the constitutional infirmity.

Defendant in essence recycles the same argument made below — and rejected as "irrational and perverse" (R46) — in asserting that the court should stay its hand and let the legislature fashion some remedy short of full and equal marriage rights because of possible "complexities" arising from other jurisdictions' non-recognition of the marriages of New York same-sex couples. But, as the lower court recognized, rights guaranteed under the New York Constitution must be available "to their fullest extent" regardless of whether they "may not be acknowledged elsewhere." R47; (quoting *In re Opinions of the Justices to the Senate ("Goodridge II")*, 440 Mass. 1201, 1207, 802 N.E.2d 565, 570 (2004)).

Permitting the legislature to relegate same-sex couples to a legislative arrangement like civil union or domestic partnership, short of the esteemed institution of marriage, would unfairly perpetuate an inferior status for same-sex

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As the trial court observed, "it is utterly inconceivable . . . that the Legislature would have rejected the entire marriage statutory scheme." R63. Nor do plaintiffs advocate striking down the marriage provisions of the DRL. Indeed, "such a remedy would be antithetical to the relief plaintiffs actually seek: access to the vitally important institution of marriage." *Id.*

relationships.[27] Plaintiffs and their families well understand this. As Daniel Hernandez affirmed: "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." R448. In the words of plaintiff Lauren Abrams:

> 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.

R470-71. *See also* R439-41.

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 enactment of civil unions in Massachusetts would not cure constitutional infirmities of denying marriage to same-sex couples). "The history

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[27] Defendant puts misplaced reliance on *Baker v. Vermont*, which led to civil union rights for same-sex couples. *Baker* was decided under the Vermont Constitution's unique Common Benefits Clause, which was held to require extension only of "common benefits and protections" to same-sex couples. In contrast, for the reasons held by the court below and discussed in this brief, New York's guarantees of due process and equal protection require that plaintiffs be afforded full and identical rights to marriage exercised by other New Yorkers.

of our nation has demonstrated that separate is seldom, if ever, equal." *Id.* at 1206, 802 N.E.2d at 569. *See also Lawrence*, 539 U.S. at 584 ("A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with the Equal Protection Clause") (O'Connor, J., concurring) (quotations omitted). The only constitutional remedy to marriage discrimination is an order granting plaintiffs their full right to marry.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court affirm the order below granting their motion for summary judgment and denying defendant's cross-motion for summary judgment.

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