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Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Appellants,

—against—

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

Defendant-Respondent.

(*Caption continued on inside cover*)

AMICI CURIAE BRIEF OF WOMEN'S ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants,

—against—

THE NEW YORK STATE DEPARTMENT OF HEALTH
and THE STATE OF NEW YORK,

Defendants-Respondents.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **Women's Bar Association of the State of New York** (WBASNY) is a statewide organization of attorneys comprised of sixteen chapters with more than 3,200 members throughout the State of New York. Members include jurists, academics, and practicing attorneys who work in every area of the law, including constitutional and civil rights, family and matrimonial law, and children's rights.

WBASNY has appeared as *amicus curiae* before the Court of Appeals in numerous cases, including *Hartog v. Hartog*, 85 N.Y.2d 36, 647 N.E.2d 749, 623 N.Y.S.2d 537 (1995), *Thoreson v. Penthouse International, Ltd.*, 80 N.Y.2d 490, 606 N.E.2d 1369, 591 N.Y.S.2d 978 (1992), and *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983), and before the Appellate Division Courts as well, including *Bedford Gardens Co. v. Ausch*, 251 A.D.2d 276, 674 N.Y.S.2d 57 (2d Dep't 1998). Most recently, WBASNY, along with the other signatories to this brief, appeared as *amicus curiae* in these cases in support of marriage for same-sex couples in the First and Third Departments.

Since its formation in 1980, WBASNY has been dedicated to the advancement of equal rights for, and the eradication of discrimination against, women. In this regard, WBASNY seeks to contribute to the improvement and

reform of the law in New York. WBASNY's perspective is derived from the experiences of a membership that spans a broad cross-section of the diverse cultures in this State and, respectfully, would be of special assistance to this Court in hearing this appeal.

The purpose of the **National Organization for Women-New York State** (NOW-NY) is to take action to bring women into full participation in the mainstream of American society, exercising all privileges and responsibilities thereof in truly equal partnership with men.

All couples, lesbian and gay and heterosexual, deserve the legal protections afforded by marriage. New York's marriage laws deprive countless couples and their families of these protections. Currently, same-sex couples are likely to pay higher taxes than married couples. They receive no Social Security survivor benefits upon the death of a partner, and are denied healthcare, disability, military, and other benefits afforded to heterosexual couples.

The children of same-sex couples are also penalized by these laws. In the United States, more than one million children are currently being raised by same-sex couples. Many of these parents are unable to assume full legal parenting rights and responsibilities (or can do so only after considerable legal effort), and in most states, there is no law guaranteeing a noncustodial biological or adoptive parent's visitation rights or requiring child support. Without the ability to establish

a legal relationship to both parents, these children are left without protections such as Social Security survivor benefits.

The gender discrimination implicit in laws prohibiting same-sex couples from marrying raises questions directly within the expertise of NOW-NY. Women cannot achieve true equality unless all women, lesbian or heterosexual, are free of discrimination in any form.

The mission of the **Pace Women's Justice Center** is to eradicate domestic violence, and to protect women, children, and the elderly. The Center's goal is to give those who support battered women, the elderly, women with low income, victims of sexual assault, and children the education and legal tools they need to stop violence against women, seek economic justice, empower the underrepresented, and save lives.

It is consistent with this mission for the Pace Women's Justice Center to join as an *amicus* on a brief which supports the rights of lesbians and gay men to be free from discrimination and from outmoded gender stereotypes.

PRELIMINARY STATEMENT

The state law denying same-sex couples the right to marry fails to pass muster under the New York Constitution for the reasons discussed in New York Supreme Court Justice Doris Ling-Cohan's February 4, 2005 memorandum and decision, Judge David Saxe's dissent from the December 8, 2005 decision of the Appellate Division, First Department and the other briefs in support of the right of same-sex couples to marry that have been submitted to this Court. The purpose of this brief, however, is not to reiterate what is said elsewhere, but to focus specifically on one particular reason to reverse the decisions of the First and Third Appellate Divisions: the law constitutes gender-based discrimination that cannot withstand judicial scrutiny under the equal protection clause of the New York Constitution.

A law prohibiting same-sex couples from marrying constitutes gender-based discrimination in two distinct ways. First, it deprives the members of one sex of rights available to the other. Thus, a woman is deprived, solely because she is a woman, of a right that is granted to men – the right to marry a woman. A man is deprived, solely because he is a man, of a right that is granted to women – the right to marry a man. Second, the prohibition constitutes discriminatory gender stereotyping – a state effort to mandate adherence to gender stereotypes about

appropriate behaviors for men and women by denying rights to those who do not conform to those stereotypes.

Neither form of gender discrimination can be justified under controlling constitutional standards. Restricting the right of marriage to opposite-sex couples cannot survive the heightened scrutiny applied to all gender-based classifications under the equal protection clause; that is, the Defendants-Respondents cannot prove that the restriction is substantially related to any important governmental interest.

Nor do the arguments offered by the Defendants-Respondents and their supporters lead to any different conclusion. The Defendants-Respondents contend, for example, that the prohibition is not gender discrimination because it burdens both genders equally. But that precise argument has been rejected in the context of other forms of discrimination, and it should fare no better here. The Defendants-Respondents contend that the prohibition serves the state's interest in ensuring that children of opposite-sex couples are raised by two parents. But while this interest may be served by *granting* the right to marry to opposite-sex couples, the Defendants-Respondents nowhere explain how it is served by *restricting* this right to opposite-sex couples. And finally, the Appellate courts below held in part that the prohibition is necessary to protect society's "traditional" understanding of

marriage. But that argument has failed elsewhere as a justification for state-sponsored discrimination, and should likewise fail here.

What is really at issue here is not a desire to protect children or to foster procreation. Defendants-Respondents do not suggest that same-sex couples are less capable of caring for and raising children, and there is no claim that banning such couples from marrying encourages better parenting by opposite-sex couples. The prohibition is, instead, based on the same type of deep-seated prejudices once used to justify legal restrictions that we now view as abhorrent: for example that interracial marriage was unnatural; that women were unfit to practice law; and that husbands were free to rape their wives. Statutes giving those traditions the force of law were struck down. The same should happen here.

ARGUMENT

As noted at the outset, the exclusion of same-sex couples from the right to marry fails for two separate but interrelated reasons. First, it constitutes classic, facial gender-based discrimination in violation of the equal protection clause of the New York Constitution. Second, it constitutes gender stereotype discrimination in violation of the equal protection clause of the New York Constitution.

A gender-based classification is one that treats men and women differently on the basis of their gender. *See, e.g., Reed v. Reed*, 404 U.S. 71, 75

(1971).[1] The most familiar type of gender-based classification is one that withholds from women certain rights or benefits that are granted to men (or vice versa), solely on the basis of gender. *Id.* So, for example, a law that gives a father, solely because he is a man, preference over a mother in seeking to administer a deceased child's estate constitutes a gender-based classification. *Id.* So, too, does a law that exempts women from criminal liability for forcible rape solely because they are women. *People v. Liberta*, 64 N.Y.2d 152, 167-68, 474 N.E.2d 567, 575-76, 485 N.Y.S.2d 207, 215-16 (1984). In each instance, the statute provides that "different treatment be accorded to [men and women] on the basis of their sex" and thus "establishes a classification subject to scrutiny under the Equal Protection Clause." *Reed*, 404 U.S. at 75.

Such statutes are subject to heightened judicial scrutiny. That is, a statute that relies on gender to determine who may receive certain rights or benefits violates equal protection unless the state provides an "exceedingly persuasive" justification for the differential treatment – by showing, at a minimum, that "the discriminatory means employed are substantially related to the achievement of [important governmental] objectives." *United States v. Virginia*, 518 U.S. 515,

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[1] Although New York requires an independent analysis of state equal protection claims, *People v. Kern*, 75 N.Y.2d 638, 653-57, 554 N.E.2d 1235, 1243-45, 555 N.Y.S.2d 647, 655-57 (1990), reference to federal constitutional jurisprudence is appropriate "because [the] State Constitution's equal protection guarantee is as broad in its coverage as that of the Fourteenth Amendment." *Golden v. Clark*, 76 N.Y.2d 618, 624, 564 N.E.2d 611, 614, 563 N.Y.S.2d 1, 4 (1990).

533 (1996) (internal quotations omitted); *Liberta*, 64 N.Y.2d at 168, 474 N.E.2d at 576, 485 N.Y.S.2d at 216. The question, in other words, is not whether the state's objective is furthered by granting rights to one group, but whether that objective is furthered by *denying* those rights to another group. *Virginia*, 518 U.S. at 533 (issue is whether the "discriminatory means employed" advance the alleged objectives); *Liberta*, 64 N.Y.2d at 168, 474 N.E.2d at 576, 485 N.Y.S.2d at 216 (same).

Courts also recognize another form of gender discrimination known as "gender stereotyping" – a less familiar but equally invidious type of gender discrimination. This is a form of gender discrimination in which the state grants rights or benefits to people who behave as their gender is "expected" to behave, and denies them to people who do not. In doing so, the state announces its preference for men and women who conform to those expectations, and reinforces adherence to those expectations. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

Gender stereotyping is perhaps most familiar in the employment context, where women perceived as insufficiently feminine or men perceived as inappropriately effeminate may suffer harassment or be denied opportunities. In the landmark case of *Price Waterhouse v. Hopkins*, for example, a woman was passed over for partnership largely because she was perceived as too masculine:

she was "macho"; she used profanity; she did not walk "femininely" or wear make-up – all attributes that would have been fine if she were a man. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). The Supreme Court held that to the extent the partnership decision was based on the employee's failure to conform to gender stereotypes, it constituted gender discrimination: "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. This type of gender stereotyping is inappropriate, the Court explained, because

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Id. at 251 (internal quotations and citation omitted).[2]

Gender stereotyping is not, of course, always as obvious as this; it is not limited merely to issues of appearance (women who do not wear dresses) or social skills (men who do not discuss sports). Often the assumptions at work are so subtle, so closely tied to the way people typically behave, that they can appear

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[2] *Price Waterhouse v. Hopkins* involved Title VII of the Civil Rights Act of 1964 rather than constitutional equal protection guarantees; its recognition of gender stereotyping as a form of gender discrimination, however, applies equally to both. *See, e.g., Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 118-19, 130 (2d Cir. 2004) (relying on *Hopkins* in federal equal protection case for principle that gender stereotyping is a form of sex discrimination).

almost immutable. But the fact that an assumption is frequently true in practice does not render it true in all cases. It may be, for example, that the mother will more commonly stay home with small children, or that the husband is more commonly the primary breadwinner. And we know that men regularly choose to spend their lives with women, and women regularly choose to spend their lives with men. But laws that accord benefits based on these assumptions are still subject to scrutiny. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (rejecting presumption that wife will be financially dependent on husband); *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 180, 350 N.Y.S.2d 285, 287 (Fam. Ct. 1973) (rejecting presumption, in the context of custodial disputes, that mothers are "better suited to care for young children than fathers").

Like all gender-based classifications, classifications based on gender stereotypes are subject to heightened scrutiny – with the added caveat that where the state objective underlying a gender classification is itself based on a gender stereotype, that objective typically does not satisfy the "exceedingly persuasive" governmental objective test. *Virginia*, 518 U.S. at 533. *See People v. Whidden*, 51 N.Y.2d 457, 461, 415 N.E.2d 927, 928, 434 N.Y.S.2d 936, 938 (1980) (an objective "grounded in long-standing stereotypical notions of the differences between the sexes [] simply cannot serve as a legitimate rationale for a [law]"); *Hogan*, 458 U.S. at 726 (rejecting "traditional, often inaccurate, assumptions about

the proper roles of men and women" as proper bases for state policies). This also defeats the state's efforts to establish the requisite "substantial relationship." *Hogan*, 458 U.S. at 725-26 (noting that the "purpose of requiring that close relationship is to assure that the validity of a classification" is determined without reliance on gender stereotypes).

As a result, a finding that a law is premised on traditional gender stereotypes is almost invariably fatal. Thus, the Supreme Court has struck down an alimony statute that "announc[ed] the State's preference for an allocation of family responsibilities under which the wife plays a dependent role" and sought to "reinforce[] ... that model among the State's citizens," *Orr v. Orr*, 440 U.S. 268, 279 (1979); invalidated a state policy excluding males from a public nursing program because it "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job" rather than to accomplish any legitimate state objective, *Hogan*, 458 U.S. at 729; and rejected a military academy admissions policy that "rel[ied] on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. As these cases and others illustrate, courts must scrutinize classifications based on sex by engaging in

> reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.

Hogan, 458 U.S. at 726.

The same is true under New York state law. New York courts have vigorously rejected laws that are based on, and seek to perpetuate, gender stereotypes. For example, the Court of Appeals has held that a statute exempting females from criminal liability for rape violated equal protection, expressly rejecting the argument that female victims are uniquely victimized in a way that male victims are not: an "'archaic and overbroad generalization' ... which is evidently grounded in long-standing stereotypical notions of the differences between the sexes, simply cannot serve as a legitimate rationale" for such a distinction. *Liberta*, 64 N.Y.2d at 169, 474 N.E.2d at 577, 485 N.Y.S.2d at 217 (quoting *Whidden*, 51 N.Y.2d at 461, 415 N.E.2d at 928, 434 N.Y.S.2d at 938). And courts in this state have been particularly vigilant in rejecting gender stereotypes as bases for laws governing the family. With respect to support payments, for example, courts have cautioned against relying on "encrusted" stereotypes about the roles of men and women in a marriage – observing that such stereotypes are "now a relic of the past," and that "sexual generalization in the law of support is the quintessence of unconstitutionality." *Bauer v. Bauer*, 55 A.D.2d 895, 898, 390 N.Y.S.2d 209, 212 (2d Dep't 1977); *Roth v. Roth*, 98 Misc. 2d 618, 622, 414 N.Y.S.2d 485, 487-88 (Fam. Ct. 1979). Similarly, in requiring a gender-neutral application of the "best interests of the child" test for determining custody, courts have affirmed the need to "reduc[e] invidious gender classifications and

stereotyping of either sex." *Linda R. v. Richard E.*, 162 A.D.2d 48, 53, 561 N.Y.S.2d 29, 32 (2d Dep't 1990) ("[T]he role of gender in making custody determinations . . . finds no place in our current law."); *Fountain v. Fountain*, 83 A.D.2d 694, 694, 442 N.Y.S.2d 604, 605 (3d Dep't 1981) (rejecting "presumption of 'maternal superiority'" in custody cases as "outdated").

Judged by these standards, it is plain that a law prohibiting same-sex couples from marrying cannot stand. As set forth below, the prohibition constitutes gender discrimination – both classic gender-based discrimination and gender stereotype discrimination – unconnected to any important governmental objective.

I. THE STATE LAW PROHIBITING SAME-SEX COUPLES FROM MARRYING IS GENDER-BASED DISCRIMINATION THAT DOES NOT WITHSTAND SCRUTINY.

New York's refusal to grant marriage licenses to same-sex couples is discrimination on the basis of gender. Under New York law, a man has the right to marry plaintiff Lauren Abrams. But plaintiff Donna Freeman-Tweed is denied that right solely because she is a woman. The state thus treats her differently from a similarly situated man (that is, a man who wishes to marry Ms. Abrams), solely on the basis of Ms. Freeman-Tweed's gender. This is classic gender-based discrimination. *See, e.g.*, *Reed*, 404 U.S. at 75; *see also, e.g.*, *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (law restricting marriage to opposite-sex couples, "on its

face and as applied, regulates [marriage] on the basis of the applicants' sex"); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Feb. 27, 1998) (same).

Both the First and Third Department Appellate Divisions avoid this result, and the requisite judicial scrutiny that follows, by relying in part on a so-called "equal application" argument. But this "equal application" argument has long been rejected as a basis for avoiding judicial scrutiny. In *Loving v. Virginia*, the Supreme Court was faced with statutes prohibiting, for example, a white man from marrying a black woman solely on the grounds that he was white – thus depriving him of a right to which similarly situated black men were entitled. *Loving v. Virginia*, 388 U.S. 1 (1967). The state argued that the statutes, "despite their reliance on racial classifications, [did] not constitute an invidious discrimination based upon race," because they barred whites and blacks equally from entering interracial marriages. *Id.* at 8. The Supreme Court rejected this argument:

> [W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations ....

Id. To the contrary, the Court found that the statutes were premised entirely on racial classifications – no matter how "equally" the statutes were ultimately applied:

> There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.

Id. at 11. That is exactly the case here. New York's marriage laws, in prohibiting same-sex couples from marrying, "rest solely upon distinctions drawn according to [gender]" and "proscribe generally accepted conduct if engaged in by members of [the same gender]." *Id.*

Indeed, the Supreme Court has consistently rejected "equal application" arguments suggesting that laws may be *based* on race or gender without ultimately being *biased* against a particular race or gender.[3] Thus, in *Califano v. Westcott*, the Court overturned a statute that provided aid to families where the father was unemployed, but not where the mother was unemployed. *Califano v. Westcott*, 443 U.S. 76 (1979). The state conceded that the statute was gender-based but contended that it was not "gender-biased," because each benefits decision "necessarily affects, to an equal degree, one man, one woman, and one or more children." *Id.* at 84. Just as in *Loving*, the Court rejected this argument:

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[3] Of particular relevance here, the Supreme Court has rejected arguments that such "equally applied" laws discriminate only against a particular *activity* (here, the marriage of same-sex partners), not a particular group. *Compare Pace v. Alabama*, 106 U.S. 583, 585 (1883) (upholding a law imposing harsher punishments on interracial couples committing adultery than non-interracial couples, and explaining that the law was directed against the *act* of interracial adultery rather than a particular race), *with McLaughlin v. Florida*, 379 U.S. 184, 188 (1964) (rejecting *Pace*).

> The Secretary's argument, at bottom, turns on the fact that the impact of the gender qualification is felt by family units rather than individuals. But this Court has not hesitated to strike down gender classifications that result in benefits being granted or denied to family units on the basis of the sex of the qualifying parent.

Id.; *see also Califano v. Goldfarb*, 430 U.S. 199, 209 (1977) (holding that a statute providing different survivor's benefits to men and women "discriminates against one particular category of family – that in which the female spouse is a wage earner covered by social security").

Indeed, the Supreme Court has repeatedly struck down facial classifications that equally burdened different groups without requiring a showing of invidious intent. *See, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 188, 190-91 (1964) (invalidating statute prohibiting interracial cohabitation and considering invidious intent only in context of applicable scrutiny); *Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 605 (1983) (holding that a university's restrictions on interracial dating were discriminatory though applied equally to all races and based on sincere religious beliefs); *see also, e.g.*, *Perez v. Sharp*, 198 P.2d 17, 20 (Cal. 1948) ("The decisive question ... is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups.").[4]

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[4] Because New York's marriage laws rely on "distinctions drawn according to [gender]," efforts to cast them as "facially neutral" (and thus subject to a disparate impact analysis requiring a showing of discriminatory intent) are misguided. (*See* Brief of the New York

Justice Catterson's concurrence in the First Department's decision argues that prohibiting same-sex marriage is not discriminatory because it is a facially neutral law applied equally to all people, stating in part "[h]omosexuals *may* marry persons of the *opposite* sex, and heterosexuals may *not* marry persons of the *same* sex." *Hernandez v. Robles* 805 N.Y.S.2d 354, 371, 26 A.D.3d 98, 118 (1st Dep't 2005) (Catterson, J., concurring). However, as the Court's analysis in *Loving*, and Justice Saxe's dissent from the First Department decision make clear, the essence of the right of one person to marry encompasses the right to marry someone of one's own choosing. (*see Hernandez*, 805 N.Y.S.2d at 380, 26 A.D.3d at 130 (Saxe, J., dissenting), *citing Loving* 388 U.S. at 12). The Court in *Loving* did not recognize some new, fundamental right to an interracial marriage, but instead enforced the right to choose one's spouse. Similarly, Plaintiffs-Appellants here seek the same access to the constitutionally protected right to choose one's spouse.

The First and Third Departments seek to limit *Loving* and its progeny by claiming that the "equal application" argument fails only where the classification is motivated by an invidious intent. But this is incorrect.[5] The

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State Catholic Conference as *Amicus Curiae* in Support of Defendant-Appellant ("Catholic Conference Brief") at 31-41.

[5] Moreover, although a discriminatory intent may not have been explicitly invoked when the DRL was enacted, Judge Saxe noted in his dissent in *Hernandez* that the discriminatory

Court's analysis in *Loving* makes clear that the motive underlying the classification (a desire to maintain white supremacy) was relevant not to the question whether the statutes imposed classifications in the first place, but to the level of judicial scrutiny to be applied to those classifications.

Nor is the result any different because the prohibition constitutes sexual orientation discrimination. No one disputes that denying same-sex couples the right to marry constitutes discrimination on the basis of sexual orientation. But arguing that it is *only* sexual orientation discrimination is like arguing that *Loving* involved only "racial orientation" discrimination. If the Defendants-Respondents were correct, the anti-miscegenation statutes at issue in *Loving* classified not on the basis of race, but on "racial preferences": that is, Richard Loving's desire to marry someone who was not white. The Supreme Court recognized the statute as a classification based on race. *Loving*, 388 U.S. at 11. The same analysis applies here.

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intent of New York's marriage statutes were imbued in the assumptions underlying these statues, even if these assumptions were not stated expressly:

> The discriminatory impetus for the distinction made by the [marriage] statutes, by which heterosexual couples were viewed as entitled to a benefit from which homosexual couples were excluded, was at the time of enactment so deeply embedded as to be taken for granted by the Legislature. There was no need for an express statement that the Legislature intended to discriminate against homosexuals, or same-sex couples; that intent was implicit. *Hernandez*, 805 N.Y.S.2d at 386, 26 A.D.3d at 138 (Saxe, J., dissenting).

Separately, Defendants-Respondents further seek to distinguish the *Loving* Court's rejection of the "equal application" defense because that case involved issues of racial stereotypes, as opposed to gender stereotypes. While analogies to the particularly insidious racial discrimination experienced by racial minorities in the United States are not exact, as Justice Saxe acknowledged in his dissent, "the legal reasoning of [decisions dismantling race discrimination] is appropriately considered, even if not directly applicable, [when courts review] statutes [that] create other types of discriminatory classifications." *Hernandez*, 805 N.Y.S.2d at 381, n.3, 26 A.D.3d at 131. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-41 (1994) (drawing upon authority on race discrimination); *People v. Blunt*, 561 N.Y.S.2d 90, 93, 162 A.D.2d 86, 90 (2d Dept't 1990) ("There is no basis in common sense or logic to adopt any other rationale [of equal protection] because the discriminatory use of preemptory challenges is based on gender rather than race."); *see also* Brief of Plaintiffs-Appellants for Hernandez v. Robles (hereinafter, "Brief of Plaintiffs-Appellants") at 74-75.

Because New York's marriage law relies on gender to determine which individuals are granted certain rights and benefits, it violates equal protection unless Defendants-Respondents can demonstrate that the differential treatment is "substantially related to the achievement of an important governmental objective." *Liberta*, 64 N.Y.2d at 168, 474 N.E.2d at 576, 485 N.Y.S.2d at 216;

Virginia, 518 U.S. at 533. Proponents of the prohibition offer three objectives allegedly served by this classification: first, the state's interest in fostering heterosexual procreation within marriage and protecting the children of opposite-sex couples; second, the state's interest in preserving traditional views of marriage; and third, the state's interest in promoting consistency with other jurisdictions. None of these objectives suffices.

As to the first alleged interest, Defendants-Respondents argue that the state has an interest "in attempting to ensure that children born as a result of opposite-sex unions are raised by both their parents." (City of New York Respondent's Brief to the Court of Appeals, hereinafter "Respondent's Brief") at 59; *id.* at 58 (arguing marriage exists "with the result and for the purpose of begetting offspring"). It may be the case that granting opposite-sex couples the right to marry furthers this interest. What Defendants-Respondents utterly fail to explain, however, is how *restricting* the right to marry to opposite-sex couples furthers – or bears any relationship at all to – this interest.[6] The Defendants-Respondents do not claim, for example, that granting marriage licenses to same-

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[6] The question is *not* "whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does." Catholic Conference Brief at 62 (quoting *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005)). But rather, as already noted, the question is whether *excluding* same-sex couples from marriage promotes those interests. *Virginia*, 518 U.S. at 533 (issue is whether the "*discriminatory means employed* are substantially related to those objectives") (emphasis added); *Liberta*, 64 N.Y.2d at 168, 474 N.E.2d at 576 (same).

sex couples will prevent traditional married couples from bearing children, or that procreation is a necessary ingredient of traditional marriage. Marriages take place everyday between people who do not intend to, or cannot, have children. To dismiss these marriages as rare exceptions simply does not reflect reality – and it further suggests that these people, who lack either the ability or the desire to procreate, are taking part in an institution that is not meant for them.

Procreation is not exclusive to opposite-sex marriages: unmarried persons, whether gay or straight, may bring children into the world, and New York law permits both single persons and unmarried same-sex couples to adopt children. *See, e.g.*, 18 N.Y.C.R.R. 421.16(d) & (h)(2) (McKinney 2005); *In re Adoption of Carolyn B.*, 6 A.D.3d 67, 69-68, 774 N.Y.S.2d 227, 229 (4th Dep't 2004). However, Defendants-Appellants argue that the right to marry should be limited to opposite-sex couples because "[o]pposite-sex couples may reproduce inadvertently or without medical intervention; although reproductive technology and adoption laws now enable same-sex couples to have children, they can do so only after some planning." State of New York and Department of Health and Attorney General as Intervenor Brief (hereinafter, "AG Brief") at 38.[7] This argument fails to satisfy

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[7] Opposing Amici also support this proposition noting that supporting opposite-sex marriage "encourages opposite-sex couples who . . . are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e., a child, to procreate responsibly." Catholic Conference Brief at 57.

even rational review, much less the heightened scrutiny that applies to sex-discrimination, given how grossly-over and under-inclusive it is. Excluding same-sex couples from marriage does not have any relationship to convincing heterosexuals to procreate and rear children within marriage. Moreover, to support this reasoning, the government must somehow have an interest in denying the protections of marriage to same sex-couples — even though many of them who are parenting children need the protections for their families every bit as much as heterosexual couples do. And drawing such a distinction would inherently privilege children conceived through heterosexual intercourse at the expense of those conceived through other means, and is thereby contrary to New York law. *See In re Jacob*, 86 N.Y.2d 651, 664, 668, 660 N.E.2d 397, 402, 405, 636 N.Y.S.2d 716, 721, 724 (1995) (noting that it would be discriminatory to make "unwarranted, detrimental distinctions between 'nonmarital children' . . . and those children whose parents are married" and further stating that "New York has not adopted a policy disfavoring adoption by either single persons or homosexuals.")

Nor do the Defendants-Respondents fare better in asserting the state's desire to "ensure that children born as the result of opposite-sex unions are raised by both their parents." Respondent's Brief at 59; AG Brief at 32-34. No one takes issue with a state interest in encouraging "long-term relationships" in order to provide stability and support for children. But the notion that the state should

desire to confer the benefits of such relationships only on the children of opposite-sex parents – and not on the children of same-sex parents – defies logic. Indeed, to the extent the state is interested in protecting children and encouraging parents to "establish long-term relationships," barring same-sex couples from marrying directly undermines that objective. Many same-sex couples (like many of the plaintiffs in this case) have children. Denying them the right of marriage actually "undermine[s] the State's interest in providing optimal environments for child-rearing, in that children of those families are then not afforded the same legal, financial and health benefits that children of married couples receive." *Hernandez v. Robles*, 7 Misc. 3d 459, 483, 794 N.Y.S.2d 579, 599 (Sup. Ct. N.Y. County 2005); *cf. In re Jacob*, 86 N.Y.2d at 667, 660 N.E.2d at 405, 636 N.Y.S.2d at 724 (warning that denying children of same-sex couples the "opportunity of having their two de facto parents become their legal parents" would not only be "unjust" but also "might raise constitutional concerns"). Such children must also grow up with the knowledge that their government deems their families less valuable, and less deserving of legal rights, than the families of their friends.

As to the second purported objective, Opposing *Amici* set forth an argument that even the Defendants-Respondents have largely abandoned: that prohibiting same-sex couples from marrying is necessary to preserve "the traditional institution of marriage." Catholic Conference Brief at 49. This is not

an important or "exceedingly persuasive" governmental interest, at least not as conceived by Opposing *Amici*, nor is it substantially related to the law barring same-sex couples from marrying.

Among other things, this argument is circular: it means that same-sex couples should not be allowed to marry because they have never been allowed to marry. What this argument ignores, however, is that "civil marriage is wholly a creature of the state," and the state cannot "point to its own past discriminatory practices in order to evade the constitutional prohibition of sex discrimination." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 214 (1994). Indeed, this type of appeal to historic prejudice under the guise of "tradition" has been repeatedly rejected as justification for similar state action in the past – including bans on women practicing law, bans on consensual sodomy, and bans on interracial marriage.[8] Moreover, what is considered "traditional" changes over time. So do society's views of marriage and family, and of the appropriate roles for different races and

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[8] *Compare, e.g.*, *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (relying on "the civil law, as well as nature herself," to establish that women had no right to careers), *with Frontiero*, 411 U.S. at 685 (criticizing *Bradwell* for burdening the law with "gross, stereotyped distinctions between the sexes"); *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral ... shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."), *with id.* at 578-79 (striking state anti-sodomy law); *and Loving*, 388 U.S. at 3 (trial court reasoned that the geographical separation of the races meant they were not intended to mix), *with id.* at 12 (rejecting anti-miscegenation statute).

genders. At one time, for example, it was earnestly believed that marriage (and indeed society) would be destroyed if whites were allowed to marry blacks, if men could be prosecuted for raping their wives, or if women were allowed to work outside the home. *See, e.g., Naim v. Naim*, 87 S.E.2d 749, 755 (1955) (describing interracial marriage as "harmful to good citizenship"), *vacated*, 350 U.S. 891 (1955); *Liberta*, 64 N.Y.2d at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214 (rejecting argument "that elimination of the marital [rape] exemption would disrupt marriages"); *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (noting the threat to the "family institution" posed by women pursuing careers, and citing as support "the law of the Creator"). And, indeed, one could argue that the institution of marriage has not survived – but only if one defines marriage exclusively as between two people of the same race, in which the woman stays at home and can be legally brutalized by her husband.

Defendants-Respondents also cannot demonstrate that denying same-sex couples the right to marry is "substantially related" to protecting "traditional" marriage, even if that were an important governmental interest. The average "traditional," opposite-sex marriage will suffer no harm should same-sex couples be permitted to marry – just as overturning the ban on interracial marriage caused no damage to the average "white" marriage. *Cf. People v. Onofre*, 51 N.Y.2d 476, 490, 415 N.E.2d 936, 941, 434 N.Y.S.2d 947, 952 (1980) (finding no support "for

the statement that a prohibition against consensual sodomy will promote or protect the institution of marriage, venerable and worthy as is that estate").

In all of this, it is critical to distinguish between the state's desire to preserve the traditional institution of marriage and its desire to preserve traditional assumptions about gender roles. No one disputes that marriage, as an institution, is valuable to society. But in every major case addressing the importance of marriage, it is marriage itself, with all its attendant virtues, that the courts deem valuable – not the fact that it is exclusive to heterosexual couples. That is, it is the institution of marriage that the courts praise: marriage as a stabilizing force, marriage as a sanctuary, marriage as a key to the "the orderly pursuit of happiness." *Loving*, 388 U.S. at 12; *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (marriage is "a right of privacy older than the Bill of Rights .... 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"); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (the right to marry is "of fundamental importance for all individuals"). None of these things depends on marriage being limited to opposite-sex couples, and none is exclusive to such couples.

Finally, any purported interest in promoting consistency with other jurisdictions can be disposed of quickly.[9] There is no authority to support the argument that New York's constitution must be read in conformity with other jurisdictions. Indeed, the law is to the contrary. *See, e.g.*, *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 304, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912 (1986) ("When weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor.").

II. THE STATE LAW PROHIBITING SAME-SEX COUPLES FROM MARRYING IS GENDER STEREOTYPE DISCRIMINATION THAT DOES NOT WITHSTAND JUDICIAL SCRUTINY.

Beyond all this, the state law denying same-sex couples the right to marry also violates equal protection for a separate reason: it constitutes impermissible gender stereotype discrimination.

A law denying same-sex couples the right to marry unquestionably "announc[es] the State's preference" with respect to how men and women should behave, and "perpetuate[s] [a] stereotyped view of" gender roles. *Orr*, 440 U.S. at 279; *Hogan*, 458 U.S. at 729. The prohibition is premised on the expectation that a man will choose to spend his life with a woman, because that is what men are supposed to do. A woman, in turn, is expected to choose to spend her life with a

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[9] The City has abandoned on appeal its assertion that the marriage prohibition serves a state interest in jurisdictional consistency; the State Defendants do however, continue to raise this issue. AG Brief at 40-43.

man, because that is what women are supposed to do. As long as men and women behave as they are expected to behave – that is, as long as they choose a person the state deems appropriate for their gender – the state permits them to marry the person of their choice. But men and women who do not conform to these stereotypes are deprived of that right.[10]

This is the very definition of impermissible gender stereotype discrimination, and cannot withstand the heightened scrutiny applicable to gender-based classifications for the reasons already discussed. A desire to preserve "traditional" views of marriage, to confer on the children of opposite-sex couples (but not of same-sex couples) the benefits of stable parental relationships, and to ensure consistency with other state laws are not "important" state objectives, at least not as presented by Defendants-Respondents and their supporters. Nor is the exclusion of same-sex couples from marriage – which amounts to state action to enforce gender stereotypes – "substantially related" to these objectives.

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[10] The exclusion is also based on the assumption, once commonplace, that a marriage must be made up of two opposing and complementary forces – one masculine (decisionmaker and provider) and one feminine ("center of home and family life"). *Hoyt v. Florida*, 368 U.S. 57, 62 (1961). The law has long recognized, however, that not every marriage conforms to this model and that marriages can no longer be defined by specific gender roles. *See, e.g.*, *Frontiero*, 411 U.S. at 688-89 (rejecting presumption that "wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives"); *Watts*, 77 Misc. 2d at 184, 350 N.Y.S.2d at 290 (rejecting "[a]rbitrary assumptions about which spouse is better suited to care for young children").

Even apart from all this, the law barring same-sex couples from marrying fails equal protection for the additional reason that the law itself (and the alleged governmental interests underlying it) is rooted in traditional assumptions about appropriate behaviors for men and women. This renders both the alleged state interest and the alleged relationship suspect, as set forth above. *See, e.g.*, *Virginia*, 518 U.S. at 533 (state objective "must not rely on overbroad generalizations about the different ... preferences of males and females"); *Hogan*, 458 U.S. at 725-26 ("The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of [stereotypes]."). As the Court of Appeals has explained:

> [A]n archaic and overbroad generalization which is evidently grounded in long-standing stereotypical notions of the differences between the sexes, simply cannot serve as a legitimate rationale for a [law].

Whidden, 51 N.Y.2d at 461, 415 N.E.2d at 928, 434 N.Y.S.2d at 938 (internal quotations and citations omitted); *Liberta*, 64 N.Y.2d at 169, 474 N.E.2d at 577, 485 N.Y.S.2d at 217.

Here, Defendants-Respondents and Opposing *Amici* have relied primarily on the suggestion that marriage is primarily the province of opposite-sex married couples who procreate and the desire to preserve traditional views of marriage – both objectives rooted almost entirely in "traditional ... assumptions

about the proper roles of men and women." *Hogan*, 458 U.S. at 726.[11] These objectives "simply cannot serve as a legitimate rationale" for this law. *Whidden*, 51 N.Y.2d at 461, 415 N.E.2d at 928, 434 N.Y.S.2d at 938. Indeed, and as already discussed, New York courts have consistently and forcefully rejected classifications based on assumptions about the "appropriate" ways for men and women to behave. It should and must follow that New York's marriage statute be similarly free of stereotypes.

The Court of Appeals has stated that the law "should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life." *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211, 543 N.E.2d 49, 53, 544 N.Y.S.2d 784, 788-89 (1989) (finding same-sex partner to have demonstrated a likelihood of success on the issue of whether he was a "family member" entitled to protection from eviction upon the death of his partner). So it is with the families in these cases – Daniel Hernandez and Nevin Cohen, Donna Freeman-Tweed and Lauren Abrams and their two young sons, as well as Sylvia

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[11] The Catholic Conference argues, for example, that the state has an interest in ensuring "dual-gender parenting." Catholic Conference Brief at 50-51; *See also Hernandez*, 805 N.Y.S.2d at 374, 26 A.D.3d at 122 (Catterson, J., concurring). Putting aside that the exclusion of same-sex couples from marriage does not further this interest in any way (since the state already permits such couples to bear, adopt, and raise children), this argument is rooted in the assumption that parents must conform to gender-defined roles, with one parent acting as a "masculine" role model, and the other acting as a "feminine" role model, and is form of gender-stereotyping that has been held unconstitutional. *See Califano v. Westcott* 443 U.S. at 76, 88-89 (gender classifications of this type are "part of the 'baggage of sexual stereotypes.'")

Samuels and Diane Gallagher, Amy Tripi and Jeanne Vitale and their young daughter, and the thirteen other couples petitioning the court in these appeals. The reality of their family lives is that they have found loving, stable, and complex relationships with members of their own gender. The Court must give credence to its own judicial mandate to free itself of stereotypical notions and thus to recognize these couples as legally deserving of the right to marry.[12]

What is really at issue here is whether the state can dictate, based on little more than prejudice, which of its citizens may enter into marriage – the most profound civil relationship that a state offers its citizens, an institution "essential to the orderly pursuit of happiness." *Loving*, 388 U.S. at 12. The City says that the state should be permitted to enshrine in the law its own assumptions about how men and women should behave, and with what partners these men and women should choose to share their lives. But the law is to the contrary. The courts of

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[12] The assertion that this Court is bound by the decision of the Minnesota court in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), which held that laws prohibiting same-sex couples from marrying did not violate federal equal protection, is incorrect. As an initial matter, *Baker* was decided prior to the development of the "heightened scrutiny" standard for gender classifications. *Cf. Frontiero*, 411 U.S. at 682. In making this argument, the City also ignores critical language in the Supreme Court case on which it principally relies: that lower federal courts should assume "that if the [Supreme] Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (emphasis added). Here, of course, doctrinal developments do indicate otherwise – most dramatically in *Lawrence v. Texas*, 539 U.S. 558 (2003), a decision that "dismantle[d] 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." *Id.* at 604 (Scalia, J., dissenting).

this state and this country have spent decades working to keep "public sensibilities grounded in prejudice and unexamined stereotypes [from becoming] enshrined as part of the official policy of government." *People v. Santorelli*, 80 N.Y.2d 875, 881, 600 N.E.2d 232, 236, 587 N.Y.S.2d 601, 605 (1992). This Court should not now countenance an effort to undo this progress, nor should it join the ranks of past courts whose efforts to protect state-sponsored discrimination are now considered jurisprudential missteps.

CONCLUSION

For the foregoing reasons, as well as those stated in the Briefs for Plaintiffs-Appellants, this Court should reverse the decisions of the Appellate Divisions of the First and Third Departments and find the Domestic Relations Law unconstitutional.

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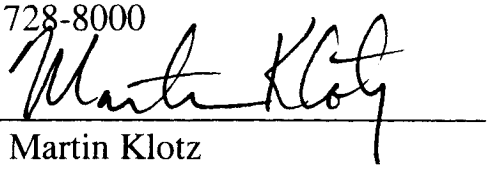
By: 
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