To Be Argued By:
SUSAN L. SOMMER
Time Requested: 30 Minutes

New York County Clerk's Index No. 103434/04

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.

BRIEF FOR PLAINTIFFS-APPELLANTS

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
Telephone: (212) 809-8585
Facsimile: (212) 809-0055

KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

Attorneys for Plaintiffs-Appellants

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STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain this appeal and review the questions presented because the Order of the Appellate Division finally determined a proceeding "where there is directly involved the construction of the constitution of the state." C.P.L.R. § 5601(b)(1). *See* Questions Presented below at 5-6.

PRELIMINARY STATEMENT

Plaintiffs-Appellants ("plaintiffs") are members of five New York same-sex couples. For themselves, for each other, and for their children, plaintiffs seek access to one of our society's most vital institutions, civil marriage. They want what countless New Yorkers simply take for granted: the freedom to marry the one person each loves and to shelter and protect through marriage the families they have built together.

This appeal is about far more than abstract legal principles. At heart it concerns real New York families who share the same commitment and day-to-day journey together through life that married couples do. These ten plaintiffs and thousands of other lesbian and gay New Yorkers like them are our neighbors, our co-workers, our siblings, and our daughters and sons. Yet because the one irreplaceable person each is drawn to marry is not of a different sex they are relegated to a second-class status. They are labeled "unmarriageable," and, as a result, they and their children are denied countless legal protections and intangible and dignitary benefits. Denying plaintiffs the freedom to marry violates bedrock guarantees of due process and equal protection under Article I, §§ 6 and 11 of our State's Constitution, which provide independent and vigorous protections for the rights of *all* New Yorkers.

This Court has recognized that the choice to marry another individual is among the most intimate of personal decisions and a vital part of freedom preserved from government interference. For most people, the State does not intrude on the distinctly personal choice of a marriage partner beyond such matters as age, consanguinity, and marital status. Each New Yorker is free to choose wisely or poorly, without regard to whether the marriage has the stamp of public approval, *unless* he or she would marry a partner of the same sex.

It can be difficult for anyone with unfettered access to this pervasive social institution to step back and appreciate what it means for one's dignity, security, social standing, and family to be entirely excluded from it. Plaintiffs have submitted substantial evidence providing a picture of life under this exclusion. Defendant-respondent, the Clerk of the City of New York ("defendant"), concedes that "plaintiffs are serious, committed couples, devoted to building lives together as families, whose relationships are no different from those of married couples" (Record on Appeal ("R") at 16), and defendant "does not dispute that plaintiffs and their children suffer serious burdens by being excluded from civil marriage" (R17). As summarized by Justice Saxe in his Appellate Division dissent in this case, "denial of the[] rights and benefits [of marriage] to our State's homosexual residents is contrary to the basic principles underlying our constitution, our legal

system and our concepts of liberty and justice, and perpetuates a deeply ingrained form of legalized discrimination." R62A.

Yet defendant and the Appellate Division majority maintain that our State Constitution nonetheless permits the government to deny lesbian and gay New Yorkers the liberty and equality to be included among those who can marry. Their reason boils down to the claim that marriage is a male-female institution at its essence and that this definition is so ingrained as to be uniquely beyond constitutional reach. But the historical exclusion of gay people from marriage with their chosen partners does not diminish or change the extent of their right to marry, nor excuse its continued denial today. Past convictions about the "essence" of marriage that had been used to justify enforcing rigid gender roles for husbands and wives and excluding interracial couples gave way as later generations invoked overarching constitutional principles of liberty and equality. So too must traditional convictions that marriage is an immutably heterosexual institution give way in the face of a modern understanding that lesbians and gay men are fully embraced within these cherished constitutional protections. After all, "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights to people once ignored or excluded." *United States v. Virginia ("VMI")*, 518 U.S. 515, 557 (1996).

The Court already has determined that the right to marry is fundamental and hence can be infringed only to further a compelling government purpose. The effort of the majority below to strip the right sought here of its fundamental nature by calling it a novel right of "*same-sex marriage*" must fail or New York's guarantee of liberty will mean little. Fundamental rights are not defined by who historically has been permitted to exercise them, but rather by the centrality of the liberty interest involved for all. To deny the fundamentality of the right to marry here is to marginalize one class of citizens and debase their intimate lives for no legitimate reason.

Even without labeling the right at stake as fundamental, however, the State's exclusion of plaintiffs from this central legal institution violates New York's guarantee of equal protection of the laws. Restricting marriage to different-sex couples draws a line that discriminates against plaintiffs because of their sexual orientation and sex. Such classifications demand close scrutiny because legislation on these grounds so often reflects stereotypes or embodies the view that one group is unworthy of rights accorded those traditionally favored by the State.

Yet regardless of the level of scrutiny applied, the marriage ban fails because no legitimate government purpose is even rationally furthered by excluding plaintiff couples, their children, and thousands of New Yorkers like them from the shelter of marriage. The "government need" claimed by the

majority below and defendant — to encourage procreation and the rearing of children by heterosexuals within marriage — is not at all advanced by penalizing plaintiffs and *their* children.

The Court should decline the invitation to leave plaintiffs and their families waiting for a day when the legislature, finally motivated to overcome historical prejudice and indifference, may redress the injustice of barring these couples from entry into one of society's most esteemed institutions. In the words of the dissent, "[i]t is time to acknowledge that the limitations being imposed on lesbians and gay men here violate the constitution's promise." R96A. Calls for an "incremental approach" that mollifies those who prefer to perpetuate rather than end discrimination presumes that the birthright of these New Yorkers to liberty and equality is subject to a timetable of the majority's making. The Court should not forsake its role as the guardian of individual liberties. It should not forsake these families.

QUESTIONS PRESENTED

1. Whether excluding individuals in same-sex couples from the fundamental right to enter into civil marriage with a person of one's choice violates the guarantee of due process under Article I, § 6 of the New York Constitution?

The Appellate Division majority answered this question in the negative and ruled that the motion court erred in concluding that due process

requires permitting individuals in same-sex couples to exercise their fundamental right to marry the person of their choice. R13A, 22A-24A, 88.

2. Whether prohibiting individuals from entering into civil marriage with a partner of the same sex violates the guarantee of equal protection under Article I, § 11 of the New York Constitution?

The Appellate Division majority answered this question in the negative and ruled that the motion court erred in concluding that the guarantee of equal protection requires permitting individuals in same-sex couples access to civil marriage. R13A, 18A-22A, 89.

3. Whether if the Court concludes that the Domestic Relations Law's ("DRL") limitation of marriage to different-sex couples is unconstitutional, the appropriate remedy is a Court order requiring that access to marriage be made equally available to same-sex couples and that the DRL be construed to cure the constitutional defect?

The Appellate Division majority answered this question in the negative and ruled that the motion court erred in concluding that the appropriate remedy for the unconstitutional exclusion of same-sex couples from civil marriage is an order requiring that full marriage rights be accorded same-sex couples and that the DRL be construed to cure the constitutional defect. R13A-15A, 25A-26A, 89-90.

STATEMENT OF FACTS

A. The Plaintiffs

The ten plaintiffs are lesbian and gay New Yorkers who comprise five same-sex couples. The plaintiff couples each have been denied marriage licenses by defendant. R449-50, 471, 499, 536, 558.[1] These couples share the same kinds of bonds and family life — including, for several, parenting children together — as countless other New Yorkers who have been permitted to marry and can take for granted the myriad protections and benefits that come only with marriage.

Daniel Hernandez, age 48, and **Nevin Cohen**, age 43, are in a committed relationship of over seven years. R444, 452-53. Shortly after they met in 1998, Daniel gave up his career in California and moved to New York to build a life here with Nevin. R445-46. The two share a professional commitment to building environmentally sound, affordable, and vibrant urban communities. R445-46. Daniel works on urban redevelopment projects with Jonathan Rose Companies. *Id.* Nevin, an environmental planner and teacher, took the lead in writing New York City's recycling law when he worked as a policy analyst for the City Council. R453.

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[1] Detailed affidavits of plaintiffs and their family members appear in the Record at 442-570, are cited throughout the Statement of Facts, and are excerpted in greater detail in the Affirmation of Susan L. Sommer at R419-41.

Daniel and Nevin are close to their extended families and have introduced each other to their respective religious and ethnic traditions. R448-49, 454, 460. Together they rent their Manhattan apartment, own a home in upstate New York, have joint checking and savings accounts, and share responsibility for their expenses and one another's needs. R446-47.

Nevin knows firsthand how much harder it is for same-sex couples to weather times of crisis without the protections of marriage. Before his relationship with Daniel, Nevin lost his partner of ten years to AIDS. Because they were not married, Nevin was not given the same medical information or involved in decision-making at his partner's hospital bedside the way a spouse would be. R456. Daniel and Nevin want the respect and protections for their relationship that come only with marriage. R447-48, 455-57. Their families want this for them as well. Daniel's father has felt the bitter-sweetness of celebrating the wedding of one son while lamenting that the other is barred by the government from marrying the person he loves. R461.

Lauren Abrams, age 40, and **Donna Freeman-Tweed**, age 45, are lesbians in a committed relationship of eight years. R464, 474. Lauren, who grew up on Long Island, is a midwife at Mt. Sinai Hospital in Manhattan. R464-65. Donna, a native of the Caribbean Island of St. Kitts, moved to New York as a child to join her mother, who had come to this country seeking better life opportunities.

Donna is a Physician Assistant and works at the Brooklyn College Health Clinic. R474-75.

Lauren and Donna live in Brooklyn with their sons, six-year-old Elijah Adé Abrams-Tweed and 20-month-old Micah Jabari Abrams-Tweed. Lauren is the biological mother of Elijah and Micah, who were conceived through anonymous donor insemination. R466-69, 476-78. Donna's second-parent adoption of Elijah was finalized in 2002, and following Micah's birth she and Lauren began the process of petitioning the State for second-parent adoption of him as well. R468-69, 477. Their extended families are supportive of their relationship and actively involved with Elijah and Micah. R467, 483-84, 489.

Lauren and Donna have combined their finances and done what they can to protect the security of their family through joint bank accounts, wills, health care proxies, guardianship papers, and domestic partner registration. R469. This has come at considerable expense, and they worry about the many ways these measures still leave them unprotected. R468-70. Lauren and Donna have built a relationship and a family based on love, commitment, and mutual respect. They long for the social recognition and rights that only marriage can afford them. R470-71, 478.

Michael Elsasser, age 51, and **Douglas Robinson**, age 54, have been in a committed relationship for the past two decades. R494, 501. Douglas is an

Assistant Vice President and Technical Project Manager at Citibank and also served as a Member of the Board of New York City Community School District No. 2. R501-02. Michael is a woven textile stylist and technician at a Manhattan-based company and vice-president of the co-op board in the building in which the family lives. R495. They were among the first couples to register as New York City domestic partners in 1993 after the registry was created. R502. In 1994, they had a union ceremony at the Riverside Church, where they exchanged rings, witnessed by family and friends. *Id.*

Michael and Douglas live in Harlem, where they have raised their two sons, Justin, age 20, and Zachary, age 17. R502-03. The boys refer to Michael as "Pop" and Douglas as "Dad." R504. Douglas adopted their sons from the New York City foster care system when the boys were infants, at a time when both members of a gay couple could not adopt children together. R496, 502-04. The boys were born in disadvantaged circumstances that left them with health, psychological, and academic challenges. R503-04. Michael and Douglas have devoted tremendous care and resources to help their children overcome these challenges, hiring therapists and enrolling one of the boys in specialized private schools. R504-05. Justin, an avid soccer player, attends a private liberal arts college in upstate New York. R505-06, 513-14. Zachary is succeeding in high

school, with free time left over to study the drums and bike with his friends. R505-06, 518.

Michael and Douglas share living expenses, have intertwined their finances, and paid for wills, health care proxies, and powers of attorney. R498, 506-08. They have stretched themselves financially to care for their sons and to bear the added expenses married couples are saved, but, like many other New York same-sex couples, they have been unable to afford on top of everything else for Michael to enter into second-parent adoptions of their boys. R496. Michael, Douglas, and their sons seek the protections and full respect and dignity for their family that married couples and their families receive. R498, 509, 514-15, 519.

Mary Jo Kennedy, age 50, and **Jo-Ann Shain**, age 53, are lesbians in a committed relationship of 24 years. R522, 531. Mary Jo, a family practice physician, is the medical director of a family health center in Sunset Park, Brooklyn that serves a largely Latino and Arab-American patient base, many of whom are low-income. R523. Jo-Ann is editor of medical publications for lawyers at Lexis/Nexis Matthew Bender. R532. They met at a public health conference in 1981, began dating, and soon realized they were meant to be together. *Id.*

Mary Jo and Jo-Ann live in Brooklyn with their 17-year-old daughter, Aliya Kennedy Shain, who was conceived through anonymous donor insemination.

R532-33, 538. Jo-Ann gave birth to Aliya; Mary Jo adopted her in 1996, after second-parent adoptions became legal in New York. R525. The family travels together, takes vacations with extended family and friends, and volunteers in their community. R534, 539-41. Mary Jo and Jo-Ann have taught Aliya to be secure in herself, to think for herself, to pursue her interests, and to stand up for her beliefs. R546. Indeed, Mary Jo's sister and her husband have so much respect for the couple as parents that they have designated Mary Jo and Jo-Ann to care for their own child should something happen to them. R546-47.

Mary Jo and Jo-Ann combined their finances when they moved in together in 1984 and make joint decisions on all important financial matters. R532. They registered as domestic partners in New York City in 1993, but recognize that domestic partnership is a poor substitute for marriage, providing them with virtually none of its privileges and protections nor the respect accorded married families. R527. Next year Mary Jo and Jo-Ann will celebrate their twenty-fifth anniversary together and fervently wish to do so as a married couple. R535. They want to marry for their daughter's sake as well, so that she will not continue to be made to feel that her family does not count as much to the government and society. R535. Aliya wants to be able to walk her mothers down the aisle. She too believes they deserve this as a family. R542.

Daniel Reyes, age 32, and **Curtis Woolbright**, age 38, have been committed to each other and have lived together for five years. R551, 560. They want to take the next step in their relationship and marry. R556, 561. Daniel is the Director of an Acute Emergency Food Assistance Program for Yorkville Common Pantry in Harlem, and Curtis is a waiter and aspiring voice-over artist. R552, 560.

Daniel and Curtis are proud of what they have built as a couple. They take turns cleaning house, cooking meals, doing laundry, and caring for their two dogs. They also contribute equally to all of their expenses, including rent on their Harlem apartment, utilities, groceries, credit card payments, car insurance, and dog care. R554, 561. Curtis supported them both when Daniel was temporarily unemployed. R561. Curtis and Daniel want to obtain legal documents to cobble together some of the protections that married couples automatically receive and that can be critical in times of emergency, but they have not been able to afford to do so. R556, 563.

Daniel and Curtis learned about the value of commitment from their own parents. Daniel's parents supported each other throughout their marriage, including during his father's losing battle against lung cancer. R556-57. Curtis's parents encountered bigotry as an interracial couple. R561-62. 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. R568-69. 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. Daniel and Curtis share the same level of commitment for each other that each of their parents shared and seek respect for their commitment through marriage. R554-56, 561.

B. Civil Marriage Provides Unparalleled Protections And Legal And Societal Respect For A Family

Plaintiffs seek to enter into the civil institution of marriage to make a profound private and public commitment to their loved one, 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 to those whom it permits to marry. R17-20.

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

Medical decision-making: Because they cannot marry, plaintiffs are denied automatic rights married couples have to make medical decisions for one

another in emergencies or when a partner is incapacitated.[2] While legal papers like health care proxies can provide unmarried couples some measure of protection, they are costly and not automatically honored. Moreover, medical emergencies do not always allow plaintiffs time or money to prepare or gather paperwork. R456, 508, 527-28, 534, 557, 562.

Securing parent-child bonds: One of the most significant hardships for plaintiffs is their exclusion from presumptions of parenthood afforded to married couples. If, as married spouses, a plaintiff couple elected to conceive a child through donor insemination, the child would have an automatic legal parent-child relationship with each of them at birth. DRL § 73. Costly adoptions would not be necessary. Similarly, a stepparent can adopt simply on the consent of the parent spouse. DRL § 115-b(8).

By contrast, "second-parent adoption" of an unmarried partner's child — while a welcome right under New York law — intrudes on a family's privacy and is a laborious, lengthy, and expensive process during which the child has no

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[2] *See, e.g.*, N.Y. Pub. Health Law § 2965(2)(a) (affording spouse priority status, second only to court appointed guardian, to act as surrogate for his or her incapacitated spouse with respect to order not to resuscitate); N.Y. Comp. Codes R. & Regs., tit. 14, § 27.9(b) (providing authority to consent to spouse's medical treatment in mental health care facility); N.Y. Mental Hyg. § 9.45 (granting right to arrange for mentally ill spouse to be enrolled in emergency psychiatric program); N.Y. Mental Hyg. Law § 81.07(d)(1)(ii) (granting right to be notified of any petition made for court to appoint guardian for personal needs or property management for mentally incapacitated spouse); N.Y. Pub. Health Law § 2896-h (granting right to receive copies of inspection reports for nursing home where spouse resides).

legal relationship with one parent and is at risk should the child's only legally recognized parent die or become incapacitated. R468-69, 477, 525, 539. Some plaintiffs, like many other same-sex couples, cannot afford the expense of adoption. R496. This can have especially tragic consequences for the non-biological, non-adoptive parent and his or her children if the relationship between the parents ends acrimoniously, because, even after many years of parenting, the non-adoptive parent is denied standing in New York to seek even visitation with the children. *See Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).

Family economic security: Because they cannot marry, plaintiffs are denied certain rights associated with real estate ownership, including the ability to own property as tenants by the entirety, which protect against creditors and allow for automatic descent of property to the surviving spouse without probate.[3] Laws uniquely facilitate the transfer of other property between spouses in numerous ways as well.[4] Marriage also imposes reciprocal responsibilities on spouses,

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[3] *See* N.Y. Est. Powers & Trusts Law § 6-2.2(b); *Prario v. Novo*, 168 Misc. 2d 610, 611 (Sup. Ct. Westchester Cty. 1996); *Kozyra v. Goldstein*, 146 Misc. 2d 25, 28 (Sup. Ct. Suffolk Cty. 1989); R447. Plaintiff couples who rent their homes also have fewer protections because they cannot marry. R447, 555-56.

[4] *See, e.g.*, N.Y. Tax Law § 1115 (exempting sale of automobile by one spouse to another from sales tax); N.Y. Aband. Prop. Law § 206(1)(b) (permitting surviving spouse to bring petition for escheated land); N.Y. Aband. Prop. Law § 208(2) (allowing conveyance of escheated land to surviving spouse without consideration); N.Y. Real Prop. Tax Law § 467 (extending property tax exemptions where one spouse is 65 or older). *See also* N.Y. Gen. Oblig. Law § 3-309 (allowing conveyance or transfer of real or personal property directly between spouses without intervention of third person); N.Y. Ins. Law § 3440 (private passenger motor vehicles,

including the legal requirement that they provide each other with financial support or face legal redress in certain circumstances, such as if one spouse is a recipient of public assistance.[5]

In addition to legal rights and obligations embodied in New York statutes, many private parties rely on the State's conferral of marriage and its definition of "spouse" in providing benefits. Though health insurance coverage is frequently available through an employee health plan for a dependent spouse, many plans will not provide coverage for same-sex partners of employees, who must then go uninsured except for public assistance, or obtain a separate policy, with greater premiums, exclusions, and deductibles. Additional marital and family benefits offered to married spouses by businesses such as auto insurers, car rental agencies, health clubs, and others are denied to same-sex couples.[6]

Protections in the event of spousal death or divorce: Many of the far-reaching protections that come with marriage are set in motion when a spouse dies, through, for example, rights of intestate succession and the spouse's right of

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for purposes of insurance, defined as owned by individual or spouses, but not by two unmarried individuals).

5 *See* N.Y. Soc. Serv. Law § 101. *See also* DRL § 52; N.Y. Ins. Law § 3205 (spouses may take out insurance on one another); N.Y. Correct. Law §§ 320, 351 (spouse may petition for appointment of committee of estate of jailed spouse).

6 *See also* N.Y. Ins. Law § 4216(f) (allowing employee to include spouse in group life insurance coverage); N.Y. Ins. Law § 3220 (allowing insurer to provide for payment of life insurance benefit to insured's spouse); R455, 469, 507, 535, 555-56.

election.[7] Though same-sex partners can obtain some measure of security through wills and other documents (albeit revocable and judicially reviewable), even the best planning cannot protect against many hardships following the death of an unmarried partner, such as potential loss of the family home due to the tax burdens of inheritance.[8] Wills also cannot confer other rights afforded only to surviving spouses under New York law, such as rights to bring a wrongful death claim or to collect workers' compensation benefits.[9] A host of additional protections for

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[7] *See, e.g.*, N.Y. Est. Powers & Trusts Law §§ 4-1.1 and 5-1.1-A; N.Y. Surr. Ct. Proc. Act § 1303 (granting surviving spouse automatic right to at least partial distribution of deceased's intestate estate and to act as voluntary administrator of estate); N.Y. Real Prop. Law § 204 (giving surviving spouse right to remain in marital home for 40 days after deceased's death and to receive reasonable sustenance out of estate); N.Y. Est. Powers & Trusts Law § 5-3.1 (entitling surviving spouse to personal property of deceased that is not deemed part of estate, including automobiles valued at less than $15,000 and intimate possessions such as clothing, pets, and photographs). *See also* R564.

[8] *See* N.Y. Tax Law § 952 (citing I.R.C. § 2011) & I.R.C. § 2056 (together, reducing New York estate tax imposed where property passes from decedent to his or her surviving spouse); *see also* R447, 469-70, 528, 563.

[9] *See* N.Y. Est. Powers & Trusts Law § 5-4.4(a); N.Y. Civ. Serv. Law § 154-b; N.Y. Workers' Comp. Law § 16; N.Y. Workers' Comp. Law § 33 (mandating payment of workers' compensation benefits by employer to surviving spouse); N.Y. Workers' Comp. Law § 305(4)(b) (providing workers' compensation to spouse in event of death of civil defense volunteer); N.Y. Workers' Comp. Law §§ 15(4), 16 (entitlement to death or disability benefits owed as workers' compensation); *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476 (2d Dep't 2005) (surviving partner of couple that obtained Vermont civil union could not pursue wrongful death claim); *In re Valentine v. American Airlines,* 17 A.D.3d 38, 42 (3d Dep't 2005) (same-sex partner of 14 years not entitled to workers' compensation survivors' benefits). *See also Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 509 (1968) (spouse may bring action for loss of consortium).

surviving spouses are likewise unavailable to plaintiffs and other same-sex couples.[10]

If a relationship ends in separation or divorce, New York law and courts provide a crucial structure and forum for effecting the family's transition. Family courts make determinations about custody, visitation, and support in the best interests of children of the marriage. DRL § 240. Courts also assist couples in dividing their property, DRL § 234, and making determinations about alimony and maintenance payments and equitable disposition of marital property, DRL § 236. Same-sex couples are denied this assistance.

Domestic partnership registries do not approach the protections and status of marriage: Several of the plaintiff couples have registered as

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[10] *See, e.g.*, N.Y. Soc. Serv. Law § 169 (surviving spouse of veteran eligible for veteran assistance); N.Y. Vol. Fire. Ben. Law §§ 7, 18 (payment of accrued and death benefits to surviving spouse); N.Y. Retire. & Soc. Sec. Law § 78(h) (surviving spouse to receive supplemental retirement allowances); N.Y. Retire. & Soc. Sec. Law § 162 (surviving spouse eligible for supplemental pensions); N.Y. Exec. Law § 227-a (death benefits for surviving spouse of member of division of state police); N.Y. Gen. Mun. Law § 146 (surviving spouse may contest devise or bequest for more than one-half of testator's estate); N.Y. Gen. Mun. Law § 163 (surviving spouse's ownership and control rights over deceased spouse's cemetery lot); N.Y. Ins. Law § 3221 (conversion privilege to surviving spouse as to group or blanket accident and health insurance coverage); N.Y. Surr. Ct. Proc. Act § 1001(1) (right to administer estate of deceased spouse who dies intestate); N.Y. Vol. Amb. Workers Ben. Law § 18 (payments to spouses of certain state employees killed in performance of duty); N.Y. Pub. Health Law § 4301(2) (authority to permit organ donation in absence of designation by deceased spouse); N.Y. County Law § 677 (rights to apply directly for copy of deceased spouse's autopsy report if death was caused by unlawful means and to allow healthcare providers to release confidential medical information about deceased); N.Y. C.P.L.R. 4504(c) (surviving spouse may waive privilege between physician and deceased patient); N.Y. Pub. Health Law § 4174 (entitling survivor to copy of death certificate of deceased spouse); *Beller v. City of N.Y.*, 269 A.D. 642, 643 (1st Dep't 1945) (consent of surviving spouse required for autopsy of deceased).

domestic partners under New York City law. R456, 469, 498, 527. The limited benefits of such registration, however, are minimal compared to those of civil marriage, essentially consisting of visitation rights with domestic partners in city facilities; partner health benefits, bereavement leave, and child care leave for City employees; and eligibility to qualify as a family member for purposes of New York City-owned or -operated housing. N.Y.C. Admin. Code § 3-244(a)-(f); *see also* R498, 509, 527. There is no statewide law creating a domestic partner, civil union, or similar status.

While those with adequate resources can obtain certain limited protections for themselves, their same-sex partners, and their children through such measures as second-parent adoptions, wills, and health care proxies, doing so is costly and time-consuming and offers far less than the protections automatically granted with marriage. R455-56, 498, 534-35. And many couples cannot afford the thousands of dollars it can cost to hire lawyers to prepare legal documents to obtain even these protections. R508, 534-35, 556, 563.

2. Marriage confers personal, societal, and other intangible benefits

Beyond the tangible protections marriage confers is the immeasurable and central role it plays in the lives of those who marry and in our culture as a whole. Plaintiffs understand that as a society we recognize the decision whether and whom to marry as life transforming, "perhaps the most important decision a

person can make." R561. Marriage is both a unique expression of a private bond and profound love between a couple, and society's most significant public proclamation of commitment to another person for life, an expression plaintiffs are denied. "One of the most hurtful things about not being able to marry Nevin is that I constantly have to say 'we are partners' or 'we are living together,' instead of 'we are married.'" R447. No other terms come close in communicating instantly a couple's commitment and the legal sanction and respect accorded their relationship. *See also* R446-47, 449, 485, 526, 535, 558, 561, 564.

Plaintiffs experience how the denial of their right to marry relegates them and their children to a second-class status. "As long as we cannot marry, we are not full citizens. . . . Without the right to marriage itself, we are denied full respect and dignity for our families." R498; *see also* R448, 456, 470, 535, 562. This discrimination also injures plaintiffs' children, who likewise feel that their families are disrespected by the government. Aliya Kennedy Shain feels that "[w]e shouldn't be told by the state that we're not good enough. I've grown up with my parents and I've seen that what they deserve is marriage. We deserve this as a family." R542; *see also* R514-15, 519. Plaintiffs try to explain to their children "why our government labels our family differently, but the explanation is never satisfactory. The message remains the same: our family is seen as less valuable in the eyes of the law." R498.

Many plaintiffs and their families, a number of whom come from interracial backgrounds or are interracial couples themselves, see a link between the State's denial to them of the right to marry and the now rejected practice of denying interracial couples the same right. Yet while the U.S. Supreme Court declared anti-miscegenation laws unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967), "almost 40 years later, [we are still] facing official state discrimination against [our] own relationship[s]." R562; *see also* R461, 490, 541-42, 567, 569.

For plaintiffs, domestic partnership, civil union, or some other measure short of access to full civil marriage would perpetuate, not remedy, the hurtful discrimination against their families. "Simply in name alone, the government tells us that civil unions and domestic partnerships are different and less valuable." R556. "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 built with one another as . . . something less than other couples' shared lives." R448. Being barred access to civil marriage denies plaintiffs something that to them is irreplaceable. R447-48, 456, 470-71, 498, 509, 527-28, 535, 556, 563.

PROCEEDINGS BELOW

The amended complaint in this action was filed on March 24, 2004 in State Supreme Court, New York County. R77. The parties cross-moved for

summary judgment, with both sides agreeing that there are no disputed issues of material fact. *See* R17.

New York Supreme Court Justice Doris Ling-Cohan issued a memorandum decision and order on February 4, 2005 granting plaintiffs' motion for summary judgment and denying defendant's cross-motion. R7-68. The motion court concurred in the parties' interpretation of the DRL, concluding that "both the inclusion of gender-specific terms in multiple sections of the DRL, and the historical context in which the DRL was enacted, indicate that the Legislature did not intend to authorize same-sex marriage." R23. The court held that "the exclusion of same-sex couples from eligibility for civil marriages infringes the fundamental right to choose one's spouse" and fails applicable strict scrutiny. R39-48. The court also held that the exclusion discriminates on the basis of sexual orientation in violation of the guarantee of equal protection. R55-61. The court rejected as not even legitimate or rational several purported justifications for the ban asserted by defendant and certain *amici*, including rationales based on maintaining a traditional definition of marriage, ensuring consistency with federal and other states' laws, and procreation and childrearing concerns. R40-57. To remedy the constitutional violations, the court enjoined defendant from denying marriage licenses to couples based on the sex of the partners and ordered a curing

construction of the DRL to change previously gendered terminology like "husband" and "wife" to gender-neutral terms like "spouse." R68.

Defendant initially sought appeal directly to this Court from the motion court's order pursuant to CPLR 5601(b)(2). R3. This Court ordered the appeal transferred to the Appellate Division, First Department on March 31, 2005. R4b.

On December 8, 2005, a majority of the Appellate Division reversed the order of the motion court, with Justice David Saxe dissenting. R7A-96A. The majority ruled that plaintiffs' fundamental right to marry is not infringed by their exclusion from marriage with their chosen partners. R22A-24A. According to the majority, plaintiffs' right to equal protection also is not violated by the exclusion, which the majority concluded satisfies rational review in light of the State's purported interest in fostering heterosexual procreation and childrearing within marriage. R19A-22A. The majority further opined that had the motion court been correct that plaintiffs' constitutional rights are violated by the marriage restriction, it still would have been error to order access to marriage and a curing construction of the DRL as a remedy, rather than leaving to the legislature exclusive responsibility for remedying the constitutional violation. R15A-18A, 24A-27A. Justice James Catterson filed a separate concurrence, agreeing that neither the

guarantees of due process nor of equal protection are violated by excluding same-sex couples from access to marriage. R27A-61A.

Justice Saxe in his dissent asserted that the motion court had correctly held that the marriage laws violate plaintiffs' fundamental right to marry. R63A-78A. He also concluded that the laws' classification on the basis of sexual orientation and sex warrant heightened scrutiny. R78A-86A. He further found that none of the asserted justifications for restricting marriage to different-sex couples satisfies even rational review (R86A-93A) and concluded that the order of the motion court should be affirmed (R96A).

ARGUMENT

I.

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

Plaintiffs each have found the one unique person he or she wants to marry, but defendant has rejected their choices, telling them that to exercise the right to marry in New York they must select different-sex partners. For lesbian and gay adults like plaintiffs, this means they are banished from marrying the one person they love. The State may not so regiment this deeply personal and important part of its citizens' lives. Safeguarding fundamental privacy interests against governmental interference in matters as intimate as the choice of one's

marital partner is essential to the ordered liberty our constitutional traditions protect. Being forced by the State into an unmarried life would represent an intolerable and fundamental deprivation for the great majority of individuals. It is equally so for plaintiffs and their fellow lesbian and gay New Yorkers. Also repugnant should be any notion that the State knows best and may dictate whom one may or may not marry when plaintiffs' decisions in this realm impose no harms upon 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).

Much more is required to abridge the meaningful exercise of personal liberty in this arena than invocation of past practice, majority preference, or vague concerns about the marriages of heterosexuals. New York's exclusion of same-sex couples from marriage directly infringes on plaintiffs' fundamental rights under the New York Constitution and is subject to strict scrutiny. Defendant cannot allege a State interest that is "compelling" and "narrowly tailored" to justify this infringement, and has put none forward. *See Rivers v. Katz*, 67 N.Y.2d 485, 495-97 (1986); *see also Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 431 (2001).

A. New York's Constitution Protects The Fundamental Right Of All Its Citizens, Including Those Who Are Lesbian Or Gay, To Marry The One Person Each Loves

New York's unique history as a social and cultural mecca and its historical acceptance of diversity have propelled it to a leading role in protecting civil liberties under its State Constitution. *See, e.g., People v. Scott*, 79 N.Y.2d 474, 488 (1992) (rejecting claims to diminish State Constitution's broad privacy protections that "presuppose[] the ideal of a conforming society, a concept which seems foreign to New York's tradition of tolerance"); *People v. P.J. Video*, 68 N.Y.2d 296, 302, 309 (1986) (State Constitution imposes more exacting privacy protections in view of State's "cultural and historical position as a leader in the educational, scientific and artistic life of our country" and "recognition that New York is a State where freedom of expression . . . has not only been tolerated, but encouraged").

The protections of the New York Constitution have been held to extend beyond those found in the federal constitution, which sets the *floor*, but not the ceiling, for the rights of the individual. Federal due process decisions are relevant, including to establish the baseline of constitutional protections, and in themselves support plaintiffs' claim to exercise their fundamental right to marry. *See, e.g., Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979). "[O]n innumerable occasions," however, 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) (citation omitted). *See also Cooper*, 49 N.Y.2d at 79; Judith S. Kaye, *Dual Constitutionalism in Practice & Principle*, 61 St. John's L. Rev. 399, 405 (1987).[11]

In view of its distinctive history and traditions, New York has been particularly protective of a range of personal autonomy rights relating to the liberty and equality interests at stake in this action. Indeed, the tradition of independent judicial inquiry under New York's Constitution dates back to early Court of Appeals decisions interpreting the Due Process Clause found in Article I, § 6, which provides in relevant part: "No person shall be deprived of life, liberty or property without due process of law." Notwithstanding its textual resemblance to its federal counterpart, the State provision has acquired greater breadth in New York. In the mid-nineteenth century, the New York judiciary emerged as a pioneer in independently advancing and protecting individual liberties, most notably by developing and expanding the doctrine of substantive due process. Peter J. Galie,

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[11] Plaintiffs proceed only under the State Constitution and its independent and robust guarantees of due process and equal protection. Federal precedents of the last three decades, discussed below, make evident that the federal guarantees also support plaintiffs' exercise of the right to marry, though these precedents have not yet been applied to same-sex couples who seek to marry. *But cf. Baker v. Nelson,* 409 U.S. 810 (1972) (*dismissing appeal from Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971)), discussed below at 76-77. Thus this is not a case in which the Court is called on to determine whether the State Constitution provides rights denied under the federal.

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

As part of the guarantee of liberty under Article I, § 6, New York's Constitution affords every citizen of this State a fundamental "right to privacy," described 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 protects, for example, autonomy in choices about procreation, *Hope v. Perales*, 83 N.Y.2d 563, 577 (1994); forming and sustaining family relationships, *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548 (1985); *Cooper*, 49 N.Y.2d at 80-82 (1979); and childrearing, *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 468 (1953). So cherished is this right that this Court has described it as "'the most comprehensive of rights and the right most valued by civilized men.'" *People v. Onofre*, 51 N.Y.2d 476, 485-86 (1980) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

It is well-established that the exercise of personal choice in marriage is a fundamental right central among those shielded by the right to privacy. "'[A]mong the decisions that an individual may make without unjustified government interference' are personal decisions relating to marriage." *Onofre*, 51 N.Y.2d at 486 (citation omitted). *See also Doe*, 71 N.Y.2d at 52; *Cooper*, 49 N.Y.2d at 80 (marriage is a "fundamental right"); *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 500 (2001) (Smith, J., concurring) ("marriage is a fundamental constitutional right"); R30-33.

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) (affirming State constitutional right of same-sex couples to marry). In an oft-cited passage, the U.S. Supreme Court explained that marriage is sheltered from government interference because of its profound importance to individual liberty:

> Marriage is a coming together for better or for 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).

In *Turner v. Safley*, 482 U.S. 78 (1987), upholding the right of a prison inmate to marry, the Supreme Court 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." *Id.* at 95-96.

The New York courts likewise have recognized that the choice of two people to commit to emotional and financial interdependence is at the core of marriage. *See, e.g., Doe,* 71 N.Y.2d at 66 n.1 (summarizing same "incidents of marriage" articulated in *Turner*, including "expression of emotional support and public commitment; the exercise of religious faith and personal dedication; and the status of marriage in relation to the receipt of . . . government benefits and property rights"); *DeJesus v. DeJesus*, 90 N.Y.2d 643, 648 (1997) (marriage is a "partnership"); *Diemer v. Diemer*, 8 N.Y.2d 206, 210 (1960) (intimacy of couple is part of "essential structure of marriage"). It is no different for plaintiff couples.

Appreciating that the right to marry would be hollow if the government dictated one's marriage partner, courts have placed special emphasis on protecting the freedom to marry the spouse one chooses. This Court 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 Fearon v. Treanor*, 272 N.Y. 268, 273 (1936) ("Our people believe that marriage should be entered into freely as a matter of choice, not through fear, restraint or compulsion") (upholding legislature's repeal of cause of action for breach of promise to marry). Other courts have made the same point in landmark decisions of both recent and older vintage. *See Goodridge*, 440 Mass. at 327-28, 798 N.E.2d at 958 ("The right to marry means little if it does not include the right to marry the person of one's choice."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring Virginia's anti-miscegenation law unconstitutional); *Perez v. Sharp*, 32 Cal. 2d 711, 717, 198 P.2d 17, 21 (1948) ("essence of the right to marry is freedom to join in marriage with the person of one's choice") (declaring California's anti-miscegenation law unconstitutional).

The fundamental nature of the right to marry derives not from its common law history as an institution joining a man and a woman but from the protections for personal autonomy in intimate matters that the Constitution safeguards for all adults. The core components of the liberty interest in marital choice — the freedom to find love, companionship, intimacy, security, family, and commitment — are common denominators of human life. They do not hinge on the sex of one's chosen partner, but belong to every person in this State, lesbians and gay men included.

As the undisputed affidavits of plaintiffs and their family members attest, plaintiffs' relationships share all the hallmarks of marriage. *See* R418-570. *See also, e.g., Braschi v. Stahl Assocs. Co.*, 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"); *In re Jacob*, 86 N.Y.2d 651, 661(1995) (best interests of child served by permitting same-sex partner of child's biological parent to adopt under DRL § 110, underscoring "fundamental changes that have taken place in the makeup of the family"); *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 motion 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. Like different-sex couples, plaintiffs experience the profound yearning to enter into marriage and build a family with the one person each cherishes. They cannot be denied the freedom to participate in one of life's most "momentous acts of self-definition," *Goodridge*, 440 Mass. at 327-28, 798 N.E.2d at 958, because as lesbian and gay adults they have fallen in love with a partner of the same sex.

B. Plaintiffs Seek To Exercise The Same Liberty To Marry The Person Of One's Choice Long Protected By The New York Constitution, Not Some Novel, Devalued Right To "Same-Sex Marriage"

Neither the Appellate Division majority nor defendant disputed that marriage and marital partner choice are long-established, core liberties protected from government interference. Recognizing this legal tradition and its implications here, they recast the issue as whether the Court should recognize a "new" right of "same-sex marriage," as if the group seeking to exercise a liberty interest should affect whether a right is fundamental. They reasoned that because, as they see it, marriage *by definition* does not extend to same-sex couples, plaintiffs seek not to enter into marriage itself but to "redefin[e] traditional marriage." R24A. Citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), they disparagingly characterize plaintiffs' claim as one for a distinct and novel right, not access to the "right to marry," which they claim is "deeply rooted" in our "history and tradition" and "implicit in the concept of ordered liberty" only if invoked by different-sex partners. R24A.

This skewed methodology mis-frames the liberty interest at issue, narrowing it to embody the very exclusion being challenged while misapprehending the role history and tradition properly plays in this analysis — deploying these guideposts merely to reinforce the status quo rather than to inform an understanding of the core liberty interests truly at stake. This approach is at

odds with this Court's settled jurisprudence eschewing rigid formulas that fail to appreciate the shared liberty interests protected by our Constitution. The majority simply repeated an error of reasoning most recently condemned by the U.S. Supreme Court in its landmark substantive due process decision, *Lawrence v. Texas*, 539 U.S. 558 (2003), an error that should not be imported into State constitutional jurisprudence.

This Court does not subscribe to the exceedingly narrow approach followed below. Instead, the Court has analyzed liberty interests in terms that recognize and embrace the underlying principles at stake for all. Indeed, *People v. Isaacson,* 44 N.Y.2d 511, 521 (1978), cited by the concurrence to suggest that due process protects only those rights that can be narrowly pinpointed in a specific history and tradition (R32A), holds that "due process is a flexible doctrine," not subject to a "precise line of demarcation or calibrated measuring rod with a mathematical solution." *Isaacson,* 44 N.Y.2d at 521. Due process rests on "fundamental and necessarily general but pliant postulates." *Id. See also Scott,* 79 N.Y.2d at 490-91 ("we decline to adopt any rigid method of analysis" or "fixed analytical formula" to determine whether State fundamental rights apply); *id.* at 504 (emphasizing "that, in an evolving field of constitutional rights, a methodology must [not] stand as an ironclad checklist to be rigidly applied on pain of being accused of lack of principle") (Kaye, C.J., concurring).

In *Onofre*, holding unconstitutional New York's centuries-old consensual sodomy prohibition, the Court rejected "[a]t the outset . . . a literal reading" of the concept of a "right to privacy as a right to maintain secrecy with respect to one's affairs or personal behavior." 51 N.Y.2d. at 485. It described the right to privacy in fuller, flexible terms, as "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint." *Id.* Had the methodology of the majority below then held sway, the Court would have rejected the claim in *Onofre* as one for a "new right" without historical grounding for "unmarried persons" to engage in sexual intimacy. *See id.* at 484. Instead, it explicitly held that "the right of privacy" encompasses "individual decisions as to indulgence in acts of sexual intimacy by unmarried persons." *Id.* at 488.[12] *See also Scott,* 79 N.Y.2d at 502 (Kaye, C.J., concurring) ("under the State Constitution, defendants' reasonable expectation of privacy — *not some new privacy right*, but the privacy right encompassed within the guarantee against unreasonable searches and seizures, as that guarantee is uniformly defined — has been transgressed") (emphasis added).

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[12] While *Onofre* relied on federal constitutional grounds, following the Supreme Court's contrary analysis in *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court registered its independence from *Bowers'* approach by continuing to cite *Onofre* as valid law delineating independent *State* constitutional principles of special importance to New York's citizen. *See, e.g., Scott,* 79 N.Y.2d at 487 (citing *Onofre* as "vindicating a broader privacy right" under New York State law); *id.* at 489.

In *Onofre,* this Court was decades ahead of the U.S. Supreme Court in recognizing the true fundamental liberty interest at issue in private consensual sexual activity between people of the same sex. In 2003, in *Lawrence*, the Supreme Court joined this Court in recognizing that the liberty to enter into intimate relationships, a freedom protected by the federal constitution, is *not* diminished or redefined because it is exercised between people of the same sex. 539 U.S. 558. The majority and concurrence below assiduously avoided any engagement with the Court's ruling in *Lawrence* — even though it parallels *Onofre*, is the latest statement of the Supreme Court's substantive due process jurisprudence, and specifically addresses the rights of gay people to form and sustain intimate relationships. Inexplicably, the concurrence even turned for support to the *Lawrence dissent* and the *reversed* lower court opinion from the Texas intermediate appeals court, along with earlier, less germane federal cases. *See* R29A, 45A-46A.

Lawrence held that Texas's prohibition of sexual intimacies between same-sex partners violated the liberty interest of lesbians and gay men in autonomy from government interference in decisions about their personal relationships, just as it would for married or other unmarried persons. 539 U.S. at 586. In overruling *Bowers*, the Court in *Lawrence* explicitly rejected the same methodology that the majority and concurrence applied here. The *Bowers* Court had recast the right at

stake in a challenge by a gay man to Georgia's sodomy statute as a claimed "constitutional right of homosexuals to engage in acts of 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" or "implicit in the concept of ordered liberty." *Id.* at 196.

In *Lawrence*, the Supreme Court said that its prior constricted framing of the issue in *Bowers* "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. The Court declared that "*Bowers* was not correct when it was decided, and it is not correct today." *Id.* at 578. Properly conceived, the issue in *Lawrence*, *Onofre*, and *Bowers* — and equally 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 due process. *Id.* at 574 (quotations omitted).

Lawrence teaches that the "liberty protected by the Constitution allows homosexual persons" the right all adults share to make choices about our "personal bond[s]" with another. *Id.* at 567. Though there is no long history of tolerance for non-marital sexual relations or for homosexuality, the Supreme Court in *Lawrence* nonetheless sheltered lesbian and gay intimate relationships as it had the relationships of other Americans. 539 U.S. at 571. Pointing to the line of fundamental rights 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." *Id.* at 574. The Court thus rejected the notion that liberty interests and substantive due process rights it already had identified could be restricted based on traditional assumptions about who should be permitted their protection.

Though *Lawrence* did not present or purport to determine whether excluding same-sex couples from marriage violates the federal constitution or can be justified, the Court clarified the proper methodology to follow: *fundamental constitutional rights guaranteed to all may not be "defined" to exclude gay people*, who have the same claim as anyone else to autonomy from government interference in core personal decisions.

The majority and concurrence below not only disregarded *Lawrence* but misread earlier federal precedents to buttress their dismissive treatment of plaintiffs' claims. In *Glucksberg*, the Supreme Court called for a "careful description" of the asserted "liberty interest" at stake — there involving a claimed right to the assistance of a third party in effecting one's death, to which no legal protection has traditionally attached. 521 U.S. at 720-21, 723. Here the liberty interest at issue — the contours of which have already been given careful description in the jurisprudence as the right to marry the person of one's choice —

has traditionally received firm legal protection. The Court in *Glucksberg* focused on whether the federal constitution guaranteed *all* individuals a right lacking precedent in our legal history. It was not confronted with whether one group of people could be denied access to a right recognized for many yet historically denied a few, the circumstance in *Lawrence, Onofre,* and again here.[13]

As the Supreme Court later made absolutely clear in *Casey* and *Lawrence*, a "careful description" does not mean characterizing the liberty interest in the narrowest possible manner to make inevitable a conclusion that the claimed right could not have fundamental protection because historically it has been denied to those who now seek to exercise it.[14] "'History and tradition are the starting

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[13] Other federal cases relied on by the concurrence do not support the proposition that fundamental rights must be defined at such a level of specificity as to accord protection only to those persons and exact practices already protected throughout history and tradition. *See* R30A-31A. For example, the opinion in *Michael H. v. Gerald D.,* 491 U.S. 110 (1989), cited by the concurrence, represented only a two-Justice plurality and followed *the very portion of Bowers later criticized in Lawrence. Id.* at 127 n.6. Other Justices in *Michael H.* expressly dissented from this methodology as "inconsistent" with the Court's approach in due process landmarks, including *Loving, Turner, Griswold,* and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where the Court "characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part); *see also id.* at 136 (Brennan, J., dissenting). Even the author of the *Michael H.* plurality opinion has acknowledged that the Court has never adopted its reasoning. *VMI,* 518 U.S. at 567-58 (Scalia, J., dissenting). A majority of the Court expressly rejected this rigid approach in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847 (1992) (it is "tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified . . . . But such a view would be inconsistent with our law.") (internal citations omitted).

[14] Chief Justice John Roberts recently confirmed this point again during his nomination hearings, responding to a question about the role of history in the assessment of a liberty interest that "you do not look at it at the narrowest level of generality, which is the statute that's being

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 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. This critical distinction is central to the basic due process guarantee of equal liberty for all. *See Lawrence,* 539 U.S. 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."); *Goodridge*, 440 Mass. at 320, 798 N.E.2d at 953 (in "matters implicating marriage, family life, and the upbringing of children," constitutional concepts of due process and equal protection "frequently overlap"). The Due Process Clause does not distinguish among classes of people, extending the Constitution's shield to guard the highly personal associations and choices of some adults, but not protecting the very same associations and choices for others. Rather, a fundamental right is discerned from the profound significance of a decision in the personal and private life of all individuals — here the choice to enter into the intimate commitment of marriage with a loved one.

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challenged because, obviously, that's completely circular." *Nomination of J. John Roberts to the U.S. Supreme Court: Hearing Before the S. Judiciary Comm.*, 2005 WL 2237049, 109th Cong. 2-3 (2005) (statements of J. John Roberts and Sen. Joseph Biden).

Thus, in *Cooper v. Morin*, striking down a prohibition on contact visits for pretrial detainees, the Court did not dismiss the interest at stake as some claimed *new* and ahistorical "fundamental right" of accused felons to physical contact with visitors while incarcerated. The Court instead recognized that "the fundamental right to marriage and family life" that all share applies to pretrial detainees and requires the government to allow contact visits with family members. 49 N.Y.2d at 80. [15] Nor would this Court have affirmed in *In re Raquel Marie X.* 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 been determinative. 76 N.Y.2d 387, 397 (1990). And the involuntarily committed mental patients in *Rivers v. Katz* would have failed in their claim to a fundamental right to refuse anti-psychotic medication because of past historical disregard of the autonomy rights of such individuals. 67 N.Y.2d 485 (1986). *See also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (right of access to contraceptives "must be the same for

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[15] The concurrence asserted that *Cooper* must be read narrowly in light of this Court's subsequent decision in *Doe*, 71 N.Y.2d 48, and selectively read *Doe* as standing for no more than the proposition that "prison inmates have no state or federal constitutional right to conjugal visits." R36A. But in *Doe* this Court *underscored* that constitutional protections for decisions surrounding the marriage relationship apply as well to prisoners, whose liberties, though necessarily restricted, may be curtailed only to serve legitimate penal objectives. *See* 71 N.Y. 2d at 52-53. While the Constitution permits curtailing prisoners' liberties because of the overriding need to protect society from the threat they pose, it does *not* permit restricting the liberties of persons who harm no one, merely because they are gay or lesbian and attracted to partners of the same sex. *See Lawrence,* 539 U.S. at 578 (gay people "are entitled to respect for their private lives.").

the unmarried and the married alike," despite absence of historical protection of sexual conduct of unmarried persons); *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 deny unmarried father fundamental rights guaranteed other parents).

Other courts specifically applying the right to marry to same-sex couples have recognized as well the error of defining a right according to those traditionally permitted to exercise it. Justice Greaney wrote in *Goodridge* that "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question." 440 Mass. at 348, 798 N.E. 2d at 972-73 (Greaney, J., concurring). *See also Halpern v. Attorney General of Canada,* 172 O.A.C. 276 ¶ 71 (2003) ("[A]n argument that marriage is heterosexual because it 'just is' amounts to circular reasoning. It sidesteps the entire [] analysis.") (holding that exclusion of same-sex couples from marriage violates Canadian Charter of Rights and Freedoms). R287.[16]

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[16] *See also In re Coordination Proceeding,* No. 4365, 2005 WL 583129, at * 4 (Cal. Super. Mar. 14, 2005), *appeal docketed,* Judicial Council Coordination Proceeding No. 4365 (Cal. Ct. App. June 15, 2005); *Castle v. Washington,* No. 04-2-00614-4, 2004 WL 1985215, at *13 (Wash. Super. Ct. Sept. 7, 2004), *appeal docketed,* No. 7596-1 (Wash. Sup. Ct. Sept. 10, 2004); *Andersen v. King County,* No. 04-2-04964-4-SEA, 2004 WL 1738447, at * 11 (Wash. Super. Ct. Aug. 4, 2004), *appeal docketed,* No. 75934-1 (Wash. Sup. Ct. Aug. 31, 2004); *Brause v. Bureau Vital Statistics,* No. 3AN-95-6562 CI, 1998 WL 88743, at *3 (Alaska Super. Ct. Feb. 27, 1998).

The constitutional guarantee of liberty embodies our State's abiding respect for the autonomy of each individual to pursue happiness by their own lights and evolves to reach the needs of each generation of New Yorkers:

> [I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.

Kaye, *Dual Constitutionalism*, 61 St. John's L. Rev. at 422 n.78 (quoting *United States v. Classic,* 313 U.S. 299, 315-16 (Stone, J.)).

Plaintiffs cannot be excluded from exercise of the core right to marry their chosen life partners simply because of historical resistance to the idea that marriage should embrace committed relationships forged between two people of the same sex. As Justice Kennedy wrote in *Lawrence*:

> 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

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Other courts evaluating claims to marriage for same-sex couples, including a few New York trial courts, have made the same mistake as the Appellate Division in narrowing the right to marry from its full liberty-based dimensions to a crabbed identity-based right to "same-sex marriage." *See, e.g., Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. 1995) ("same-sex marriage is not a 'fundamental right' . . . because that kind of relationship is not 'deeply rooted in this Nation's history and tradition'") (citation omitted); *Standhardt v. Superior Ct. ex rel. County of Maricopa,* 206 Ariz. 276, 285, 77 P.3d 451, 455 (2003); *Seymour v. Holcomb*, 7 Misc. 3d 530, 537 (Sup. Ct. Tompkins Cty. 2005), *appeal docketed*, No. 0458/2004 (3d Dep't Mar. 23, 2005); *Matter of Shields v. Madigan*, 5 Misc. 3d 901 (Sup. Ct. Rockland Cty. 2004), *appeal docketed*, No. 2004-10100 (2d Dep't Nov. 16, 2004).

> 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.

C. Transformations In The Legal Structure Of Marriage, Unthinkable To Earlier Generations, Demonstrate That Ingrained Assumptions About A Fixed Definition Of Marriage Are Not Beyond Constitutional Review

A recurring theme of defendant and the Appellate Division majority is that marriage immutably is an institution of different-sex couples. The fact that marriage no longer is so limited in the state of Massachusetts or in the nations of Canada, the Netherlands, Belgium, Spain, and — soon — South Africa, unarguably disproves this contention. Many other entrenched convictions about the "essence" of marriage — including that only same-race unions were marriages under "God's law" and state statute and that by "nature" marriage was a patriarchal arrangement in which men and women hewed to strict and remarkably unequal gender roles — are now viewed as archaic and repugnant.

As dissenting Justice Saxe observed below, "the reliance placed by the majority in this case on the term 'traditional marriage' to justify its ruling, reflects a determined effort to avoid acknowledging these fundamental changes in the institution of marriage as well as in our society generally." R73A. It also

ignores the undisputed reality that lesbian and gay couples forge deep bonds of love and interdependence, bring children into the world and rear them together, and seek to shelter the families they build as married couples do. The courts have played a crucial role in our history to ensure that marriage rights conform to constitutional values and respect for shared human experience, rather than deferring to ahistorical declarations that marriage "just is" an institution with an immutable "essential" form.

1. The legacy of challenges to anti-miscegenation laws demonstrates that the fundamental right to marry may not be denied based on longstanding beliefs about the exclusionary nature of marriage

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 such couples. Anti-miscegenation laws had been in place since colonial days,[17] remained common into the 1960s,[18] enjoyed overwhelming public support,[19] and had been steadily upheld

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

[18] *Loving*, 388 U.S. at 6 n.5 (16 states still prohibited interracial marriages in 1967).

[19] "In 1948, when California became the first state to strike down a ban on interracial marriage, nine out of 10 Americans opposed such unions." Gail Mathabane, *Gays Face Same Battle Interracial Couples Fought*, USA Today, Jan. 26, 2004, at 13A (R866). Nearly twenty years later, at the time of the *Loving* opinion, seven out of 10 Americans still disapproved of such unions. 3 Dr. George H. Gallup, *The Gallup Poll; Public Opinion, 1935 – 1971*, at 2168 (William P. Hansen et al. eds., 1972) (R871).

in generations of cases on the basis of supposed "natural law." *See, e.g., State v. Gibson*, 36 Ind. 389, 1871 WL 5021, at *10 (1871) ("The natural law which forbids . . . intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted . . . different natures" to the races) (quoting *Philadelphia & West Chester R.R. Co. v. Miles,* 2 Am. L. Rev. 358 (Pa. Sup. Ct. 1867)); *Scott v. State,* 39 Ga. 321, 1869 WL 1667, at *3 (1869) ("offspring of these unnatural connections are generally sickly and effeminate"). Courts upholding these laws denied that they derived from "'prejudice, nor caste, nor injustice of any kind," insisting that the purpose was "simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.'" *Gibson,* 1871 WL 5021, at *10.

Long into the twentieth century, the sheer weight of precedent accepting the constitutionality of bans on interracial marriage was deemed sufficient justification in and of itself to perpetuate these discriminatory laws. *See, e.g., Jones v. Lorenzen*, 441 P.2d 986, 989 (Okla. 1965) (upholding Oklahoma law since "great weight of authority holds such statutes constitutional"); *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. 1955) (noting that anti-miscegenation statutes had been upheld in an all but "unbroken line of decisions in every State in which" they were challenged), *judgment vacated*, 350 U.S. 891 (1955), *adhered to on remand*, 90 S.E.2d 849 (Va. 1956).

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

The *Perez* majority acknowledged that anti-miscegenation laws were based on the age-old "assumed" view that interracial marriages were "unnatural" and counter to the essence of marriage. *Id.* at 720, 198 P.2d at 22. But rather than accept this label unthinkingly, the court fulfilled its responsibility to ensure that, no matter how strongly tradition or public sentiment might support such laws, legislation infringing the fundamental right to marry is not immune to meaningful review. *Id.* at 715, 198 P.2d at 19. The majority rejected the notion that the legislature's authority to regulate the institution of marriage conferred unchecked power to define who may marry and who may not. *See, e.g., id.* at 745, 753, 198 P.2d at 37, 42 (Schenk, J., dissenting). It understood as well that the long duration of a wrong cannot justify its perpetuation. *Id.* at 726, 198 P.2d at 26. Nor, the majority understood, had the Constitution changed; rather, its mandates had become more clearly recognized. *Id.* at 736, 198 P.2d at 19-21, 32 (Carter, J., concurring) ("the statutes now before us never were constitutional").

Two decades after the groundbreaking *Perez* decision, the United States Supreme Court in *Loving* became the second court in the land to strike down an anti-miscegenation law, holding the Virginia ban to violate the fundamental right to marry and the guarantee of equal protection. As in *Perez,* the trial court in *Loving* had rejected the rights of adults to choose their marital partners based on assumptions about natural law: "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.'" *Loving*, 388 U.S. at 2 (quoting opinion of Virginia trial court).

Declaring that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State," *id.* at 12, the Court in *Loving* recognized that due process guarantees the right of each individual to autonomy to make their own decisions about who they will marry, regardless of long-held cultural views.

Assertions that *Loving* is solely an equal protection precedent or that its holdings are limited to racial restrictions are insupportable. R24A, 45A-47A.[20]

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[20] The concurrence heatedly objected to *any* reliance on such civil rights precedents, claiming that "same-sex unions" do not warrant mention even "in the same breath." R47A. Yet the U.S. Supreme Court did just that in *Lawrence*, making the analogy that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 U.S. at 577-78 (quotations omitted). Of course, analogies to the uniquely appalling discrimination faced by racial minorities in our nation's history are not exact. But as the dissent recognized, "the legal reasoning of [decisions dismantling race discrimination] is appropriately considered, even if not directly applicable, when statutes create other types of discriminatory classifications."

Loving expressly declared that its holding had an independent basis in due process and that the law's racial restriction impermissibly limited the exercise of the fundamental right to marry, a right shared by "all the State's citizens." *Loving,* 388 U.S. at 12. Later, in *Zablocki,* 434 U.S. 374 (1978), the Court called *Loving* its "leading decision" on "the right to marry" and reiterated that the decision

> could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry. . . . Although *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) (internal citation omitted). *See also Casey,* 505 U.S. at 848 ("Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving*"). The *Loving* Court understood that the liberty at stake — deeply rooted in history and

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R.70A n.3. Some plaintiffs and family members themselves have encountered discrimination because of their race or ethnic origins — including being barred by anti-miscegenation laws from marriage with their loved ones — and understand well that though racial and anti-gay discrimination certainly are not the same, the lessons learned from past civil rights struggles are relevant here. *See* R567-70 ("Many of the same reasons I heard in the 1960's as to why I should not have the right to marry my husband I hear today as to why my son should not have the right to marry Daniel.") (Affidavit of Karen Woolbright); *see also, e.g.,* R7-11, 461, 508-09, 562.

guaranteed to all — was the established fundamental freedom to choose with whom one will spend daily married life.

2. Outmoded definitions of marriage, driven by expectations that spouses must play strict gender roles, also have been discarded

Like racial restrictions, deeply ingrained sex-based restrictions in marriage have been eliminated despite their long pedigree. The conviction expressed by the majority below that civil marriage rights turn exclusively on "innate, complementary, procreative roles" of males and females (R18A) revives stereotypes about sex roles in marriage that have been rejected in case after case. In fact, the deeply rooted liberty interest in autonomy to choose one's marital partner depends no more on the sex of the person one loves than it does on the race of that person.

Fixed beliefs — based on "the law of the Creator" and "nature herself" — about the "wide difference in the respective spheres and destinies of man and woman" long confined married women to the "benign offices of wife and mother," under the legal dominion of their husbands. *Bradwell v. Illinois,* 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding ban on women's practice of law). At our country's founding, under the prevailing legal doctrine of coverture, the husband essentially owned his wife as property. A married woman's "very being and existence . . . was suspended . . . , or entirely merged or incorporated in

that of her husband." *Whiton v. Snyder*, 88 N.Y. 299, 43 Sickels 299 (1882). *See also* 1 W. Blackstone, *Commentaries*, Book 1, Ch. 15, at 442-43.

Beginning in the mid-nineteenth century, New York, like many states, began dismantling the entrenched tradition of coverture and evolving in its stead a legal marriage structure premised on full equality between the sexes and enabling each couple to chart its own course. Over time the courts and legislature rejected as "'an anachronism that no longer fits contemporary society'" that something essential about the "nature" of a man or of a woman should be enshrined in our marriage laws. *Medical Bus. Assocs., Inc. v. Steiner*, 183 A.D.2d 86, 91-92 (2d Dep't 1992) (citation omitted).

To purge the vestiges of this notion, the courts, among other steps, permitted married women to retain legal rights to their property and earnings, *Gage v. Dauchy*, 34 N.Y. 293, 296 (1866); eliminated the husband's unilateral "property interest" in "personal enjoyment of his" wife's body, *Oppenheim v. Kridel*, 236 N.Y. 156, 161 (1923); and altered the doctrine of necessaries to impose reciprocal rather than sex-based duties of spousal support, *Medical Bus. Assocs.*, 183 A.D.2d at 91-92. Thus "in today's society, marriage is a 'partnership, with neither spouse necessarily dependent financially on the other.'" *Id.* (citation omitted). *See also, e.g., Orr v. Orr,* 440 U.S. 268, 283 (1979) (declaring unconstitutional alimony statute reflecting a state "preference for an allocation of family responsibilities

under which the wife plays a dependent role").[21] Most recently this Court struck down as inconsistent with contemporary conceptions of marriage and constitutional rights a last remnant of coverture, the statutory "marital exemption" to the crime of rape that dated back to pre-colonial England. *People v. Liberta*, 64 N.Y.2d 152, 163 (1984).

Invocation of gendered "procreative roles" as supposedly essential to the right to marry likewise disregards what New York courts, statutes, and public policy have made abundantly clear — that spouses' intimate bonds, *not* their capacity or intent to procreate, are at the core of the right to autonomy in marriage. *See, e.g., 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) ("[I]t cannot be held, as a matter of law, that the possession of the organs necessary to conception are essential to entrance to the marriage state"); *Zagarow v. Zagarow*, 105 Misc. 2d 1054, 1057 (Sup. Ct. Suffolk Cty. 1980) ("the parties are free to decide when and if and how often they will have children").[22]

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[21] Only following a string of New York and federal court decisions like *Orr* declaring unconstitutional an array of statutory gender restrictions in laws governing the economic life of married families did the New York legislature in 1980 pass the Equitable Distribution Law, L. 1980, ch. 281, which "generally cleansed Domestic Relations Law, the Family Court Act, the General Obligations Law, and other chapters of out-moded distinctions based solely on gender" to reflect that "the marriage relationship, . . . more modernly, [is] an economic partnership." Scheinkman, *Practice Commentaries, Domestic Relations* § 236, at 205 (McKinney's 1999); *see also id.* § 236, at 207.

[22] The belief that marriage invariably is "until death do you part" was another fixed constellation that has yielded in past decades to New York's "recognition that it is socially and

Insistence that the fundamental right to marry governs only if marital partners adhere to distinct sex roles is an anachronism out of sync with the evolution in marriage laws and the protected liberty to make these life-defining decisions for oneself.

3. Civil marriage no longer is exclusively confined to different-sex couples

Just as courts finally looked beyond the status quo and prejudices about race and sex that long thwarted judicial review of marriage restrictions, so too are more courts now appreciating their obligation to safeguard the constitutional marriage rights of lesbian and gay adults on the same basis as all others. While marriage between same-sex couples is currently available in only a handful of jurisdictions, it can no longer be said that there is but one universal legal definition of marriage that unquestioningly excludes lesbian and gay unions. Already courts elsewhere in this country and abroad have come to see the injustice

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morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status." *Gleason v. Gleason,* 26 N.Y.2d 28, 35 (1970). Since 1966, New York has permitted a form of "non-fault" divorce, *see* New York Laws, 1966, ch. 254, despite long and widely held convictions that divorce risks the very "stability of our government." *In re Estate of Lindgren,* 181 Misc. 166, 169 (Surr. Ct. Kings Cty. 1943). *See Palmer v. Palmer*, 1 Paige's Ch. 276 (N.Y. Ch. 1828) ("[I]t would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it."). The Supreme Court also has repeatedly vindicated the right to remarry following divorce. *See Zablocki*, 434 U.S. at 388-90; *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (state requirement that indigent individuals pay court fees to obtain divorce unconstitutionally burdened fundamental right to marry); *see also* DRL § 8 (amended in 1966 to permit either party to remarry after divorce).

in perpetuating a definition of marriage that imposes unconstitutional harms on lesbian and gay couples and their families for no worthy purpose.

The Massachusetts Supreme Judicial Court's landmark 2003 decision in *Goodridge* brought full marriage rights to same-sex couples for the first time in a U.S. state. The Massachusetts court recognized that the fundamental right to marry the person of one's choice, guaranteed to all, cannot be read to exclude same-sex couples simply because by long tradition they were denied access to that right: "We are mindful that our decision marks a change in the history of our marriage law. . . . Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. 'Our obligation is to define the liberty of all. . . .'" *Goodridge,* 440 Mass. at 312, 798 N.E.2d at 948 (quoting *Lawrence*). Thousands of same-sex couples have married in Massachusetts, with scant conflict resulting.[23]

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[23] *See* Pam Belluck, *Massachusetts Rejects Bill To Eliminate Gay Marriage*, N.Y. Times, Sept. 15, 2005, at A14 (Mass. legislature rejected attempt to amend state constitution to ban marriage for same-sex couples "after a largely conflict-free year in which some 6,600 same-sex couples got married and lawmakers who supported it got re-elected"). Since *Goodridge*, several courts beyond the motion court below have ruled that denying same-sex couples the right to marry violates state constitutional guarantees. *See In re Coordinated Proceedings* (Cal.); *Castle* (Wash.); *and Andersen* (Wash.), cited above at 43 n.16; *and Deane v. Conaway*, 2006 WL 148145.

In the past several years marriage rights also have been extended to same-sex couples in the Netherlands,[24] Belgium,[25] and Spain,[26] and just two months ago the South African high court held that same-sex couples are entitled to marriage rights as a matter of national constitutional law.[27]

Moreover, beginning with Ontario in 2003, nine successive provincial courts in Canada ruled that excluding same-sex couples from the right to marry violates the Canadian Charter of Rights and Freedoms, resulting in access to marriage for same-sex couples in those Canadian provinces.[28] The Canadian

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[24] *See Same-Sex Marriages*, Ministry of Justice, Netherlands, *available at* http://www.justitie.nl/english//Themes/family_law/same-sex_marriages.asp?ComponentID=34250&SourcePageID=34258 (R370-79).

[25] *See Belgium Passes Gay Marriage Law*, Agence France-Presse, January 30, 2003 (R382); Chambre des Représentants de Belgique, "Ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil," 5e Session de la 50e Législature, Doc 50 2165/003 (Jan. 30, 2003), *available at* http://www.dekamer.be/FLWB/pdf/50/2165/50K2165003.pdf (foreign language text of Belgium code provision granting right to marry to same-sex couples) (R385-92).

[26] *See* Boletin Oficial del Estado, http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=2005/11364.

[27] *See Minister of Home Affairs v. Fourie*, Case CCT 60/04 (S. Africa Const. Ct. 2005), *available at* http://www.constitutionalcourt.org.29/uhtbin/hyperion-image/J-CCT60-04.

[28] *See Halpern v. Attorney General of Canada*, 172 O.A.C. 276 (2003) (Ontario) (R264); *Catholic Civil Rights League v. Hendricks*, No. 500-09-012719-027 (Can. Ct. App. Mar. 19, 2004) (Quebec) (R304); *Egale Canada, Inc. v. Attorney General of Canada*, 2003 B.C.L.R. (4th) 1 (2003) (British Columbia) (R319); *Dunbar v. Yukon*, [2004] Y.J. No. 61 (QL) (Yukon) (R368); *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (QL) (Manitoba); *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (QL) (Nova Scotia); *N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669 (QL) (Saskatchewan); http://www.cbc.ca/story/canada/national/2004/12/21/samesex-newfoundland041221.html (Newfoundland); *Harrison v. Canada (Attorney General)*, [2005] N.B.J. No. 527 (QL) (New Brunswick).

Parliament then made full marriage rights for same-sex couples the law of the land with adoption of The Civil Marriage Act in the summer of 2005.[29] Thousands of same-sex couples have legally wed across the border in Canada, including New York residents who have returned home to this State lawfully married.

Although lesbian and gay New Yorkers may not marry here, the New York State Attorney General has affirmed that out-of-state marriages by same-sex couples that are valid where contracted must be legally respected in this State under principles of comity, (R195-97), and other government agencies and municipalities have agreed. As a result, a growing number of same-sex couples whose marriages are acknowledged and respected in this State now live within New York's borders.[30] No longer can marriage be said to be an institution that by *definition* excludes same-sex couples.

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History teaches that purported justifications for inequities in fundamental marriage rights warrant strict scrutiny. This Court should not heed discredited arguments, resurrected here again, that marriage's legislated definition

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29 The Civil Marriage Act, S.C. 2005, c. 33, *available at* http://www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=c38.

30 *See, e.g.,* Erin Texeira, *Insurance Coverage; A Victory in Insurance for Gay Couples*, Newsday, July 19, 2004, at A.08 (R394).

or "essential" form places it beyond reach of the constitutional guarantees of liberty and equality these plaintiffs enjoy.

II.

THE MARRIAGE EXCLUSION FAILS EQUAL PROTECTION SCRUTINY UNDER THE ELEVATED STANDARDS APPLICABLE TO DENIALS OF FUNDAMENTAL RIGHTS AND TO CLASSIFICACTIONS BASED ON SEXUAL ORIENTATION OR SEX

The marriage law's exclusion of lesbian and gay people from the freedom to marry, and from the crucial tangible and intangible benefits that come only with marriage, gives rise to a distinct constitutional violation — the denial of equal protection.[31] That separate violation involves the unequal deprivation of a fundamental right, triggering strict scrutiny. *See Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 332 (1976).[32]

But elevated scrutiny applies even without a finding that a fundamental right is at stake; equal protection also guards individuals against unjustified discrimination based on irrelevant characteristics. Here the State denies each plaintiff the ability to marry any person from the group to whom gay people are innately attracted, including the unique person each loves. The marriage laws

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[31] New York's Equal Protection Clause, Art. I, § 11, provides in relevant part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

[32] Plaintiffs' due process and equal protection rights are here "linked in important respects" by the government's deprivation to them of the fundamental right to marry their loved one, a right extended fully to heterosexuals. *Lawrence*, 539 U.S. at 575; *see* above at 41.

thus discriminate on the bases both of sexual orientation and of sex, making them subject to stringent judicial scrutiny. As the dissent below correctly recognized, because the DRL denies same-sex couples the ability to marry without even a legitimate and rational basis — much less the more substantial government interest required to sustain infringements of a group's fundamental rights or discrimination on the basis of sexual orientation or sex — it must be held to violate the State Equal Protection Clause.

The legislative history of the adoption of the Equal Protection Clause as a whole suggests a distinctively New York concern with protecting minority rights. The 1938 Constitutional Convention that adopted New York's equality guarantee recognized that the federal version had up to that point "been narrowly construed and limited to a restricted field," requiring a stronger State provision in order to protect the rights of minorities. *See* Sub-Committee on Bill of Rights and General Welfare of the New York Constitutional Convention Committee, *Problems Relating to Bill of Rights and General Welfare* 222 (1938) (R250). The Convention further noted that the prevailing construction of the Civil War Amendments would "permit statutes compelling separate accommodations in public conveyances, segregation in public schools . . . or forbidding marriage between Negroes and whites." *Id.* at 223 (R251). Thus, only by enacting a separate state prohibition on discrimination could New York proscribe "practices

by the State itself or any subdivision thereof which have been held not to be violative of the Federal provision." *Id.*[33] New York's equal protection guarantee was enacted with particular but not exclusive concern with eradicating discrimination against African-Americans. It also was intended to address "[d]iscrimination [that] has existed against other groups and races."[34] The Convention added a further provision specifying coverage of other groups to make this even more explicit. *Id.* at 224 (R252).[35]

The State's equal protection jurisprudence, like its due process tradition, reflects a heightened concern for protecting minority rights. Although the equal protection guarantee "was intended to afford coverage as broad as that

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[33] The Convention further understood that it was writing a State constitution in the face of mounting challenges here and abroad to minority civil liberties, including the disproportionate economic impact of the Great Depression on African-Americans and the onset of Nazi persecution of Jews in Europe. "In the 18th and 19th centuries, . . . [the essential problem of government] was how to establish the will of the majority in representative government. In the world of today, the problem is how to protect the integrity and civil liberties of minority races and groups. The humane solution of that problem is now the supreme test of democratic principles, the test indeed, of civilized government." II Revised Record of the [1938] Constitutional Convention of New York, at 1066 (remarks of Sen. Robert F. Wagner) (R258).

[34] A 2001 amendment to the New York Constitution, mandating that more than 170 gender-specific terms throughout the charter be made gender-neutral, further demonstrates New York's particular commitment to equality and to ensuring that a person's sex not be used as a limitation on their access to the full measure of constitutional rights. *See* 2001 NY Bal. Meas. 1 (amending New York Constitution to render it gender-neutral); *see also* 2001 Sess. Law News of N.Y. Assem. Conc. Res. 2001-2002 Regular Sessions, in Assembly (A. 3960) (concurrent resolution of the Assembly and Senate with text of the proposed amendment).

[35] That provision states that: "[N]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

provided by the Fourteenth Amendment," *Brown v. State*, 89 N.Y.2d 172, 190 (1996), "[d]espite 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." Kaye, *Dual Constitutionalism*, 61 St. John's L. Rev. at 416 n.60.

As the dissent below rightly recognized, New York requires an *independent* State constitutional analysis under the equal protection guarantee. R79A-80A; *see also Brown v. State,* 9 A.D.3d 23, 26 (3d Dep't 2004) (adjudication and independent analysis of state equal protection claim required despite adverse decision on federal claim). "[A] State constitutional provision's presence in the document alone signifies its special meaning to the People of New York; thus the failure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy." *People v. Alvarez*, 70 N.Y.2d 375, 379 n. (1987); *see also People v. Scott*, 79 N.Y.2d 474, 496 (1992). Equal protection's mandate — to "impose[] a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment," *Brown,* 89 N.Y.2d at 190 — is violated by denial to plaintiffs of the same access to marriage granted other New Yorkers.

A. The State's Denial Of Marriage To Plaintiffs Discriminates On The Basis Of Sexual Orientation And Cannot Survive Close Scrutiny

More than 20 years ago this Court reserved the question of whether classifications based on sexual orientation require heightened constitutional scrutiny. *See Under 21 v. City of New York,* 65 N.Y.2d 344 (1985). Consistent with New York's distinctive respect for individual rights and liberties, the Appellate Division had suggested that such discrimination is suspect and warrants heightened scrutiny. *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). After the Supreme Court's decision in *Bowers* the following year, many lower federal and state courts reasoned (faultily) that if the so-called "behavior that defines the class" of gay people constitutionally could be criminalized then "it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious." *Padula v. Webster,* 822 F.2d 97, 103 (D.C. Cir. 1987). *See* R79; *see also Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989). Subsequent generations of cases reflexively followed the prevailing assumption, grounded in *Bowers,* that classifications on the basis of sexual orientation warranted no special scrutiny. *See, e.g., In re Valentine v. American Airlines,* 17 A.D.3d 38, 42 (3d Dep't 2005).

Lawrence's resounding repudiation of *Bowers* demands reconsideration of precedent relying on its reasoning or holding. Examining *Bowers*' aftermath, the *Lawrence* Court characterized *Bowers* as an "invitation to subject homosexual persons to discrimination" in the public and private spheres and to "demean[]" their lives. *Lawrence,* 539 U.S. at 575. *Lawrence* thus erased the precedential value of decisions rooted in the illegitimate reasoning of *Bowers,* including those denying that classifications based on sexual orientation are inherently suspect. The dissent below appropriately concluded that "the heightened scrutiny standard should . . . apply" to such classifications. R83A. This Court should conclude the same.

The equal protection guarantee is intended to effect "the abolition of all caste-based and invidious class-based legislation." *Plyler v. Doe*, 457 U.S. 202, 213 (1982). Thus, where the State classifies its citizens using factors that are "seldom relevant to the achievement of any legitimate state interest," courts *assume* that the laws in question embody prejudice or antipathy — "a view that those in the burdened class are not as worthy or deserving as others." *Cleburne,* 473 U.S. at 440. This doctrine recognizes that certain groups historically have "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Id.* at 441 (citation omitted). Discrimination

against these groups must therefore be justified by more than a legitimate and rational purpose.

For "suspect classifications," which include race, alienage, and national origin, the classification must be narrowly tailored to serve a compelling governmental interest by using the least discriminatory means to achieve its objective. *See Brown,* 89 N.Y.2d at 190; *Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985); *Alevy*, 39 N.Y.2d at 332; *see also Aliessa,* 96 N.Y.2d at 431. For "quasi-suspect" classifications, such as sex and legitimacy, an intermediate standard of scrutiny is applied.[36]

Though there is no rigid test for a particular group to qualify for heightened scrutiny, the U.S. Supreme Court has deemed relevant criteria to include whether: 1) the group historically has been subjected to purposeful discrimination, or 2) the trait used to define the class is unrelated to the ability to perform and participate in society. *See, e.g., Cleburne,* 473 U.S. at 440-41; *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313 (1976). Focus is also sometimes given to a third consideration, 3) the group's relative political powerlessness. *See Cleburne,* 473 U.S. at 440-41; *Aliessa,* 96 N.Y.2d at 431. Neither this Court nor the Supreme

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[36] Intermediate scrutiny requires that classifications at least be substantially related to a sufficiently important government interest. *See Cleburne,* 473 U.S. at 440-41. In more recent years the Supreme Court has required that gender classifications be substantially related to an "exceedingly persuasive justification." *VMI,* 518 U.S. at 531.

Court has required all three criteria to be present to find that a classification is inherently suspect or quasi-suspect. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Murgia*, 427 U.S. at 313; *Aliessa,* 96 N.Y.2d at 430 (focusing on one factor — inability of aliens to vote, "inhibit[ing] their ability to protect their interests" — as justifying strict scrutiny).

Discrimination based on sexual orientation meets all indicia of suspectness, and legislated exclusions of gay people from rights accorded others therefore should be subjected to closer scrutiny.[37] Indeed, defendant does not dispute that gay people long have experienced purposeful discrimination and 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."

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[37] The Supreme Court has never ruled on whether sexual orientation classifications are suspect or quasi-suspect. The majority opinion below summarily declared that "[s]exual orientation is not subject to one of the stricter equal protection analyses" (R21A), citing *Romer v. Evans*, in which the Supreme Court struck down an anti-gay Colorado constitutional amendment under the federal equal protection guarantee because it did not satisfy "even . . . conventional" rational review. 517 U.S. 620, 632 (1996). But the Supreme Court's application of rational review in *Romer* cannot be read as a *rejection* of heightened scrutiny for measures that classify on sexual orientation lines, since, as the dissent below correctly noted, "the Court there needed to go no further than the most deferential standard, because it emphatically concluded that a provision which exists only in order to disqualify a class of persons from the right to seek specific protection from the law has no legitimate basis." R92A. This Court has demonstrated especial willingness to depart from "traditional[ly] applied equal protection tiers in favor of appropriate "tests in situations where such review is warranted." *Alevy,* 39 N.Y.2d at 333-34 (enunciating "middle ground tests" in advance of Supreme Court's articulation). For the reasons discussed below, sexual orientation classifications warrant at least intermediate scrutiny. *See* R92A.

Nor could anyone reasonably dispute that gay people historically have been and today remain the target of severe discrimination. Painful accounts of the discrimination suffered by gay men and lesbians fill volumes of history and case books and appear daily in our nation's newspapers.[38] This Court need look no further than the conclusions drawn by the State legislature and the U.S. Supreme Court that gay people long have been the victims of purposeful discrimination. The New York legislature recently recognized this, in its 2002 passage of the Sexual Orientation Non-Discrimination Act ("SONDA"):

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

2002 N.Y. Sess. Laws Ch. 2, § 1. *See also* Hate Crimes Act of 2000, N.Y. Penal Law § 485.05(1)(a), Part 4, Title Y (adding sexual orientation as basis for enhanced penalty for hate crimes to race, national origin, ancestry, and other characteristics afforded suspect classification protection). The Supreme Court likewise acknowledged in *Lawrence* that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," 539 U.S. at 571, and that

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[38] *See generally* William N. Eskridge, *Challenging the Apartheid of the Closet* (1999); John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (1988).

"state-sponsored condemnation" has led to "discrimination both in the public and in the private spheres," *id.* at 575.

There also can be no legitimate claim that homosexuality is at all related to the ability to perform and participate in society. New York expressly prohibits discrimination against gay people in areas such as employment, adoption, post-divorce custody, public accommodations, and other contexts, recognition that sexual orientation has no correlation with ability to perform in society or is in itself a legitimate basis for differential treatment.[39]

Finally, gay men and lesbians are a minority group facing significant obstacles in achieving protection from discrimination through the political process. It is still the case in many quarters that "[b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*).

The contention that certain recent advances made by lesbians and gay men in the political arena means that heightened scrutiny is not warranted greatly

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[39] *See, e.g.,* SONDA, 2002 N.Y. Sess. Laws Ch. 2, § 1; *Braschi*, 74 N.Y.2d at 211 ("equally valid[] view of a family includes two adult lifetime partners"); 18 N.Y.C.R.R. 421.16(h)(2) ("Applicants [to adopt] shall not be rejected solely on the basis of homosexuality"); *In re Jacob*, 86 N.Y.2d 656 (approving "second parent" adoptions by gay and lesbian adults); *In re Adoption of Anonymous,* 209 A.D.2d 960, 960 (4th Dep't 1994) ("[i]n the context of child custody cases, . . . a parent's sexual orientation . . . is not determinative").

exaggerates the ability of gay people to rectify entrenched discrimination through the political process. Other than a few well-publicized examples, there are relatively few openly gay officials in any branch of New York government. Indeed, the political process challenges gay people face in New York are perhaps best demonstrated by the fact that SONDA was not passed until 2002, although it was first introduced 31 years earlier, in 1971.[40] And while locales like New York City, Albany, Ithaca, Rochester, and Westchester County have hard-won domestic partnership registries, these offer few practical protections for same-sex couples in those jurisdictions. Nothing approaching comprehensive statewide domestic partner protections, let alone marriage or even civil unions, has been enacted for same-sex couples in New York.

Moreover, classifications based on race and sex have been held to require heightened scrutiny notwithstanding 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 mark the end of a history of purposeful discrimination. *Id.* at 687-88 (citing anti-discrimination legislation to support conclusion that classifications based on sex merit heightened scrutiny). As the dissent below observed, "homosexuals as a class fall well within

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[40] *See* Philip M. Berkowitz and Devjani Mishra, *Sexual Orientation Non-Discrimination Act*, N.Y.L.J., Jan. 9, 2003, at 5 (R416).

the category of a 'discrete and insular minority' which is being shut out of the political process." R83A.[41]

Evading these arguments, the concurrence wrongly reasoned that the DRL's facial exclusion of same-sex couples from marriage does not even discriminate on the basis of sexual orientation since "[h]omosexuals *may* marry persons of the *opposite* sex, and heterosexuals may *not* marry persons of the *same* sex." R47A (emphasis in original). In this poor vision of equality gay people should be satisfied with their "right" to enter into unsuitable marriages with different-sex partners to whom they have no innate attraction. This argument is emblematic of a profound "failure to appreciate" that what is withheld from plaintiffs is fundamental and life-defining. *Lawrence,* 539 U.S. at 567.

It is also wrong as a matter of equal protection law. Restricting marriage to different-sex couples undeniably limits gay people from marrying their chosen partners and constitutes discrimination based on sexual orientation. *See, e.g., Lawrence*, 539 U.S. at 583 (prohibition on sodomy between partners of same sex discriminates against "gay persons as a class") (O'Connor, J., concurring). *See*

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41 Considering this question, the Appellate Division in *Under 21* concluded that gay people "constitute a significant and insular minority of this country's population" that has been the object of considerable "opprobrium," rendering them "particularly powerless to pursue their rights in the political arena." They have been the target of "historic[] . . . hostility" based on "deep-seated prejudice rather than . . . rationality." And the discrimination against them has often "infringe[d] various fundamental constitutional rights, such as the right[] to privacy." *Under 21,* 108 A.D.2d at 257 (quoting *Rowland,* 470 U.S. at 1014-15 (Brennan, J., dissenting from denial of *ceriorari*)).

also below at 72-73 (responding to similar "equal application" defense made against sex discrimination claim).

The concurrence below further contended that a sexual orientation equal protection claim must be premised on an express record of a subjective purpose on the part of the legislature to discriminate against gay people in the marriage laws. R48A. But because the DRL, as understood by all parties and judges 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).[42] Furthermore, as the dissent below recognized,

> [t]he discriminatory impetus for the distinction made by the 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

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[42] *Washington v. Davis*, 426 U.S. 229 (1976), and the other authorities cited by the concurrence (R48A) require 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, e.g., id.* at 241-42; *People v. New York City Transit Authority*, 59 N.Y.2d 343, 346 (1983) ("facially neutral seniority system"). Moreover, 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, 126-27 (1996) (noting that for this reason *Washington v. Davis* "does not have . . . sweeping effect") (citation omitted).

> homosexuals, or same-sex couples; that intent was implicit.

R84A-85A.

The marriage laws' discrimination on the basis of sexual orientation — a caste-based classification that assumes plaintiffs and other same-sex couples are not "worthy" or "deserving" of marriage — should be strictly scrutinized and found anathema to New York's guarantee of equal protection. The State offers no sufficient government justification that its classification based on sexual orientation is narrowly tailored to serve.

B. The State's Denial Of Marital Choice To Plaintiffs Discriminates On The Basis Of Sex

In addition to classifying on the basis of sexual orientation, the State's marriage laws also explicitly classify — and discriminate — on the basis of sex. Simply put, if plaintiff Mary Jo Kennedy were male instead of female, she would be given a license to marry Jo-Ann Shain. The State demands that Kennedy fulfill a woman's expected role of marrying a man, or remain unmarried. As the dissent recognized, the sex-based classification could not be starker. R82A-83A. It violates equal protection because the defendant cannot show that the classification survives heightened scrutiny. *VMI,* 518 U.S. at 531 (classification must be substantially related to an "exceedingly persuasive justification"); *see also Liberta*, 64 N.Y.2d at 170 (classification must be substantially related to "important governmental objective"); *People v. Santorelli*, 80 N.Y.2d 875, 876 (1992).

The majority credited the "equal application" defense — that because men and women alike are barred from marrying a person of the same sex, the marriage law is not discriminatory. R20A. But the Constitution's concern in Article I, § 11 is to "secure rights and privileges to individuals, as individuals." *Brown,* 89 N.Y.2d at 193. The use of sex-based stereotypes to thwart a plaintiff from enjoying rights is not excused by doing the same to other individuals. Past courts have recognized the terrible human price when individuals are "barred by law from marrying the person of [their] choice and that person to [them] may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Perez*, 32 Cal. at 725, 198 P.2d at 25.

The "equal application" argument has been rebuffed in leading race and sex discrimination cases. In *Loving,* the Court held: "[W]e reject the notion that the mere 'equal application' of a statute containing [discriminatory] classifications is enough to remove the classifications from the [constitutional] proscription of all invidious . . . discriminations." 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. The *Perez* court too recognized that "[t]he 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." 32 Cal. 2d at 716, 198 P.2d at 20.

Similarly, in a case involving peremptory challenges based on gender stereotypes, the Supreme Court emphasized that regardless of whether the government's practice was to stereotype both men and women in the venire, "individual jurors" of either gender had a right not to be discriminated against because of sex-based stereotypes. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-41 (1994). The Court rejected the dissenting view of Justice Scalia, *id.* at 159, that there could be no discrimination because members of both sexes are subject to peremptory challenge, *id.* at 141 n.12.[43] Equal protection is, after all, "concern[ed] with rights of individuals, not groups. . . . At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *Id.* at 152-53 (Kennedy, J., concurring) (citations omitted).[44] As the dissent below noted, "[t]hat the law equally denies both sexes the right to marry one of

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[43] The State equal protection guarantee has likewise been held to be violated by the exercise of peremptory challenges on the basis of sex, whether used to strike men, *People v. Blunt,* 162 A.D.2d 86 (2d Dep't 1990), or women, *People v. Allen*, 199 A.D.2d 781 (3d Dep't 1993).

[44] Contrary to the arguments of the majority and concurrence below, rejection of the "equal application" defense is not limited to cases involving pernicious racial stereotypes, nor is it inappropriate to transfer key lessons from that context when examining other forms of discrimination. *See J.E.B.,* 511 U.S. at 141-42 (drawing upon authority on race discrimination); *Blunt*, 162 A.D.2d at 90 ("There is no basis in common sense or logic to adopt any other rationale [of equal protection] because the discriminatory use of peremptory challenges is based on gender rather than race."). *See also* above at 49-50 n.20.

their own gender does not remove it from the category of gender discrimination." R83A.

While the marriage laws' restriction falls on the basis of its facial sex classification, insistence on a male-female couple as the only appropriate configuration for marriage should be recognized for what it is — a form of gender stereotyping that is impermissible under our constitutional law. "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." *Santorelli*, 80 N.Y.2d at 881 (Titone, J., concurring). 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. It must be recognized that the same sort of impermissible stereotypes are at play when the State insists that a man's rightful role is to "take" only a woman in marriage, and a woman's only a man, so that each will follow their prescribed gender roles. *See* above at 51-54.

Numerous jurists, in addition to dissenting Justice Saxe below (R82A-83A), have recognized the sex discrimination inherent in restricting the right to marry on the basis of one's sex and have concluded that heightened scrutiny is required for such classifications. *See Baehr v. Lewin*, 74 Haw. 530, 534, 852 P.2d

44, 47 (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"); *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006) (rejecting equal application defense and finding Maryland's marriage restriction to be unconstitutional sex discrimination); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (Alaska's marriage laws discriminate on basis of sex); *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. State*, 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.

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

The concurrence mistakenly concluded, as the defendant also argued below, that the New York courts' duty independently to assess plaintiffs' equal protection claim under the State Constitution is short-circuited 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). R40A-41A. 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, not whether New York's marriage exclusion violates *this State's* independent constitutional guarantees. In adjudicating such claims, this Court "is 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)); *see also* above at 27-28, 61.

Moreover, especially given intervening decisions undercutting *Baker's* rationale, at this point the Supreme Court's summary dismissal cannot properly be seen as authoritative in *any* case, even one brought under the federal equal protection guarantee. While defendant is correct that summary dismissals from 1972 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 binding effect in *any* court by substantial "doctrinal developments" since 1972, including *Romer*, *Lawrence*, *Zablocki*, *Turner*, and the Supreme Court's determination that a higher level of scrutiny applies to gender-based classifications, *e.g.*, *VMI*, 518 U.S. at 533. *See also* R191 (New York's Attorney General has agreed that *Baker* "no longer carries any precedential value"). The dissent here properly observed that "it would amount to an abdication of our responsibility to base our ruling on a 1972 dismissal of an appeal from the Minnesota Supreme Court's decision in *Baker v. Nelson*." R79A-80A.

III.

THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE DOES NOT RATIONALLY SERVE ANY LEGITIMATE GOVERNMENT INTEREST

The majority and concurrence below voted to sustain as rational the exclusion of same-sex couples from marriage. They rested their analyses on the thinnest of reeds, that the law serves purported government interests in

(a) maintaining marriage as a different-sex-only institution for the sake of children born of heterosexual liaisons (R19A), and (b) perpetuating tradition as an end in itself (R49A). These rationales cannot survive *any* level of scrutiny. Indeed, although defendant initially advanced the "perpetuating tradition" justification and its close relative, the desire to remain uniform with discriminatory marriage laws elsewhere, both were rejected by the motion court, and defendant abandoned these implausible explanations in the Appellate Division.[45] As the dissent below correctly observed (R93A), the marriage restriction fails even "rationally [to] further [any] legitimate, articulated state purpose." *Doe*, 71 N.Y.2d at 56 (quotations omitted). Plaintiffs here address each interest put forth by defendant or the opinions below.

A. Even Rational Review Is No Mere Rubber-Stamp Of Legislative Determinations; It Requires That Legislative Classifications At Minimum Bear A Rational Relationship To A Legitimate Government Purpose

There can be no dispute that the exclusion of plaintiffs from the marriage laws of New York harms their intimate relationships, their personal and family security, and their standing in the larger community. The Court's general obligation to defer to legislative judgments no longer controls when a law

[45] In similar marriage litigation pending in the Second and Third Departments, the State defendants, represented by the New York Attorney General, advanced similar rationales in defense of the marriage restriction. *See, e.g, Seymour,* 7 Misc. 3d at 535-36; *Shields,* 5 Misc. 3d at 907.

arbitrarily inflicts harm on a group of citizens as this law does. This is true as to any legislative measure, even one drawing a mundane economic classification. But even more so here, where the focus of the marriage law exclusion is so personal and has such pervasive ramifications for plaintiffs' lives and liberty interests, the Court should closely consider whether the exclusion of same-sex couples from the marriage laws is based on rote acceptance of ingrained discrimination as "normal," or actually serves a legitimate government interest in a rational way.

"Conventional and venerable" equal protection principles require that any challenged difference in legislative treatment between two groups at minimum must (1) have a legitimate governmental purpose, *and* (2) rationally further that purpose. *Romer,* 517 U.S. at 633, 635; *Liberta,* 64 N.Y.2d at 163; *Onofre*, 51 N.Y.2d at 491-92. It is the classification itself — why the legislature places two groups on opposite sides of a line it draws — that must be justified to survive equal protection scrutiny. Likewise, in evaluating the rationality of legislation like the marriage law under the due process guarantee of the New York Constitution, the Court focuses on whether the ends purportedly explaining the law's design are truly furthered by the exclusionary means employed. *McMinn,* 66 N.Y.2d at 549 ("reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" is required) (quotations omitted).

A purported state interest that is not logically furthered by the legislative classification or does not explain why one group but not another was singled out for adverse treatment fails even the most deferential 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"). The Court does not accept at face value that state interests *generally* served by a law overall suffice to explain its exclusionary structure. *McMinn*, 66 N.Y.2d at 550-51. This basic premise of rational review cannot be dismissed as a demand for "mathematical symmetry" unnecessary to sustain legislative classifications. *People v. Abrahams,* 40 N.Y.2d 277, 285 (1976). Instead, the requirement that the distinction drawn by the statutory scheme be rationally related to a legitimate state end is fundamental to the most basic requirements of due process and equal protection, enforcing the requirement that the legislature not impose arbitrary disadvantages on a segment of the State's citizens. *Id.*

The Court must evaluate whether excluding same-sex couples from marriage rationally furthers a legitimate interest based on real-world facts. Laws must be "grounded in a sufficient factual context for [a court] to ascertain some relation between the classification and the purpose it serve[s]." *Romer,* 517 U.S. at 632-33. *See also Liberta*, 64 N.Y.2d at 165 (rejecting speculative government

justifications for marital rape law, such as avoiding "disruption" to marriages from permitting prosecution of abusive husband); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (explanations offered "must find some footing in the realities of the subject addressed by the legislation"); *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County,* 488 U.S. 336, 343-44 (1989) (property tax assessments based on speculative valuations failed rational review).

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 under rational review is more searching where laws "inhibit[] personal relationships." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring); *McMinn,* 66 N.Y.2d at 549-50 (examining over- and under-inclusiveness of zoning law's restrictive definition of family excluding households of individuals unrelated by biology, marriage, or adoption); *Onofre*, 51 N.Y.2d at 492 (rejecting argument that prohibition on sodomy between unmarried persons advances interests in marriage). *See also, e.g., Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973) (law denying food stamps to households of unrelated individuals failed rational review); *Eisenstadt,* 405 U.S. at 447-55 (law banning contraceptives to unmarried persons violates equal protection).

Moreover, classifications may not be "drawn for the purpose of disadvantaging the group burdened by the law," *Romer,* 517 U.S. at 633, nor can the government justify discrimination against one group as a mere desire to *preference* another group of persons. *Metropolitan Life Insur. Co. v. Ward*, 470 U.S. 869, 882 & n.10 (1985). Finally, distinctions that reflect disapproval of a minority or negative stereotypes about a group are illegitimate public purposes that cannot sustain a legislative classification under *any* standard of review. Both this Court and the Supreme Court have called for greater skepticism about government justifications that operate to deny important rights to a group of people, particularly where those justifications reflect traditional attitudes disadvantaging or disapproving of that group: "[W]e have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence,* 539 U.S. at 580 (O'Connor, J., concurring); *see also Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 448, 449; *Onofre*, 41 N.Y.2d at 490-92; *Liberta*, 64 N.Y.2d at 164.

B. Excluding Same-Sex Couples From Marriage Is Not Rationally Related To Any Government Interest In Having Procreation And Childrearing By Heterosexuals Occur Within Marriage

The majority below credited as sufficient to sustain the marriage restriction the asserted "legislative policy rationale . . . [of] fostering heterosexual marriage as the social institution that best forges a linkage between sex,

procreation and child rearing." R19A. It is questionable whether permitting marriage to all heterosexual adults, whatever their procreative and childrearing intentions, furthers this asserted goal even as to heterosexuals, but even if it did, it is not enough that the government has a legitimate reason 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 whom are parenting children and need the protections of marriage for their families every bit as much as heterosexual couples do. Excluding same-sex couples from marriage has not even a tenuous relationship to convincing heterosexuals to procreate and rear children within marriage. 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 these procreative and childrearing purposes. *See McMinn*, 66 N.Y.2d at 549.[46]

In *Onofre*, this Court made clear that a generally valid state purpose cannot sustain a challenged classification that in no way *furthers* that purpose. The

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[46] The majority below cites *People v. Whidden*, 51 N.Y.2d 457 (1980), for the proposition that the government interest need not "be furthered by both those included in the statutory classification and those excluded from it." R22A. However, *Whidden* is consistent with equal protection jurisprudence in requiring that the burden a classification imposes on an affected group further a valid state interest. The statutory rape law in *Whidden,* imposing greater penalties on adult males who have sexual relations with females under the age of 17 than on adult females who have relations with underage males, was tailored to serve the government's express purpose of deterring unwanted teenage pregnancies. *Id.* at 461. The Court therefore found that the burden imposed on adult males was justified. *Id.* Here, similarly, it is the *burden* imposed on same-sex couples through exclusion from civil marriage, not just the benefits extended to others, that must rationally further a legitimate government purpose.

Court assumed that the State's asserted interests in "protecting and nurturing the institution of marriage" and the rights of married people were "legitimate matters of public concern," but still struck the challenged law under rational review because there was no "rational relationship between those objectives and the proscription" of the sodomy law. 51 N.Y.2d at 492-93. "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.*

Likewise, in *McMinn*, this Court did not stop its review once legitimate government interests for a zoning ordinance were articulated. 66 N.Y.2d at 547. Instead, the Court applied rational review to declare an ordinance restricting "single-family" housing to any number of persons related by blood, marriage, or adoption or to two unrelated persons age 62 or older "both fatally overinclusive . . . and underinclusive." *Id.* at 549. 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 due process because

> a municipality may not seek to achieve [this purpose] by enacting a zoning ordinance that "limit[s] the definition of family to exclude a household which in every but a biological sense is a single family." . . . [I]f a household is "the functional and factual equivalent of a natural family," the ordinance may not exclude it from a single-family neighborhood and still serve a valid purpose. This ordinance . . . 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 (citations omitted).[47]

Similarly, the heterosexual procreation rationale in its various forms cannot sustain New York's exclusion of same-sex couples from marriage. Indeed, that rationale is so disconnected from the particular discrimination it is offered to justify that it is "impossible to credit." *Romer,* 517 U.S. at 635. First, that the State allows and promotes marriage for different-sex couples that have not had, cannot have, or have no intention of having children, reflects that the *sine qua non* of marriage is the relationship between two committed adults, not procreation. *See* above at 53. As even the *Lawrence* dissenters observed, "encouragement of procreation" could not "possibly" be a justification for denying gay couples

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[47] *See also Foss v. City of Rochester,* 65 N.Y.2d 247, 259-60 (1985) ("As commendable as the Legislature's [objective] may be, it is not enough that it had a rational reason for enacting these statutes. There must also be a rational reason for deliberately imposing the demonstrably different tax burdens on similar properties because of their different geographic locations."); *Romer,* 517 U.S. at 633 (striking down law whose terms were "at once too narrow and too broad," belying any "rational relationship to an independent and legitimate legislative end"); *Cleburne,* 473 U.S. 432 (requirement that home for mentally disabled obtain special use permit when other group residences were not so required was not rationally related to purported government objective, as evidenced by over- and under-inclusivity of requirement); *Moreno,* 413 U.S. at 537 (striking down rule disqualifying households of unrelated members from food stamps because it "simply does not operate so as rationally to further the prevention of fraud," the interest purportedly served); *Eisenstadt,* 405 U.S. at 448 (striking down ban on sale of contraceptives to unmarried individuals because "the effect of the ban . . . has at best a marginal relation to the proffered objective").

marriage, "since the sterile and the elderly are allowed to marry." *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).[48]

Moreover, many lesbian and gay couples, including plaintiffs, have and raise children together as well. The 2000 United States Census identified 46,490 households of same-sex partners in New York State. Over 34% of these lesbian couples and 21% of these gay male couples are raising children in their homes,[49] proportions not so far different from those for married couples, fewer than half of whom have children in their homes.[50] Same-sex couples in New York are thus raising an estimated 31,000 children.[51] *See also Alison D.*, 77 N.Y.2d at 658 (criticizing "fixing biology as the key" to protecting relationships between

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

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

50 Simmons and O'Connell, at 9 (R408).

51 *See* Jay Weiser, *Foreward: The Next Normal: Developments Since "Marriage Rights for Same-Sex Couples in New York"* 13 Col. J. Gender & L. 48, 49 n.5 (2004).

children and their gay or lesbian parents, and noting that "as many as 8 to 10 million children are born into families with a gay or lesbian parent") (Kaye, J., dissenting).[52]

Court precedents fostering and protecting the bonds between lesbian and gay parents and their children confirm New York's firm view that gay people are no different than anyone else in their fitness as parents. *See* above at 67 n.39; *In re Jacob*, 86 N.Y.2d 651, 668 (1995) (approving second-parent adoptions by lesbian or gay partner to serve best interests of children and confirming that "[a]ny proffered justification for rejecting [adoptions] based on a governmental policy disapproving of homosexuality or encouraging marriage would not apply"); *In re Adoption of Carolyn B.*, 6 A.D.3d 67, 68 (4th Dep't 2004); *In re Adoption of Anonymous*, 209 A.D.2d at 960; *In re Adoption of Jessica N.*, 202 A.D.2d 320, 320 (1st Dep't 1994). *See also* 18 N.Y.C.R.R. 421.16(h)(2).[53]

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[52] The Supreme Court has noted that the "demographic changes of the past century make it difficult to speak of an average American family." *Troxel v. Granville,* 530 U.S. 57, 63 (2000). For example, medical advances in recent decades have allowed many more families to conceive and raise children. Countless heterosexual, gay, and lesbian couples and single adults use assisted reproductive technologies to expand their families. *See, e.g., Kass v. Kass*, 91 N.Y.2d 554, 562 (1998) ("In the past two decades, thousands of children have been born through [in vitro fertilization], the best known of several methods of assisted reproduction.").

[53] The concurrence below accepted as a legitimate governmental interest the promotion of different-sex parents over same-sex parents. R58A. To its credit, defendant has not asserted such an illegitimate and irrational government interest, which is contrary not only to State policy but also to the consensus of the nation's leading child welfare and mental health organizations. *See* R88A, 59, 907-15, 1137-1216. The *Goodridge* majority explicitly rejected this argument, distilled by dissenting Justice Cordy in that case and repeated by the concurrence here, as irrational. *Goodridge*, 440 Mass. at 339 n.30, 798 N.E.2d at 966 n.30. *See also Baker*, 170 Vt.

The majority below explained that marriage "ensures a stable family structure for the rearing, education and socialization of children," "promotes sharing of resources between [parents] and the children that they procreate," and "creates and develops a relationship between parents and child based on real, everyday ties." R19A-20A. But *un*explained, again, is what conceivable interest the government then has in *denying* these same benefits to the biological or adoptive children of lesbian and gay couples.[54]

It is no answer to the grave discrimination suffered by same-sex families to say the State wants to assist different-sex families. *Metropolitan Life*, 470 U.S. at 882 & n.10. Marriage is not a scarce resource that must be guarded from overuse. Banning same-sex couples with children from marrying is *antithetical* to the welfare of these children, forcing same-sex couples to rear their

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at 222, 744 A.2d at 884-85. Moreover, as the dissent below noted, granting such a "preference to heterosexuals would be an acknowledgment of purposeful discrimination, contrary to the policies embodied in decisions like *Jacob* and *Braschi*." R95A.

[54] In an effort to bridge this logical gap, the concurrence below emphasized that only different-sex couples may procreate "unintentionally" through their sexual liaisons and argued that the State has a unique interest in fostering different-sex marriage in order to encourage a stable environment for children born of these unexpected pregnancies. The concurrence opined that this purported state interest was sufficient to sustain the marriage ban, framing the issue as "whether the *recognition* of same-sex marriage would *promote* all of the same state interests that opposite-sex marriage does, including the interest in marital procreation.'" (R60A (citing *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005) (emphasis added)). The concurrence rested this departure from settled jurisprudence on an inapposite case applying Indiana's *sui generis*, inverted form of rational review, one that asks only for a link between the law's purposes and those who *can* marry rather than a link that rationally justifies why some cannot. 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.

families without the security and protections that come with marriage. *See* R44; *Goodridge*, 440 Mass. at 335, 798 N.E.2d at 963 ("[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."); *Baker*, 170 Vt. at 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.").

The State has no legitimate interest in privileging some children over others depending on the manner in which they were conceived and whether their parents are married or not. *See Jacob,* 86 N.Y.2d at 667 (depriving children of legal relationship with de facto parents "based solely on their biological mother's sexual orientation or marital status" "raise[s] constitutional concerns"); *Levy v. Louisiana,* 391 U.S. 68, 71 (1968) ("[T]he illegitimate child . . . certainly is subject to all the responsibilities of a citizen. . . . How under our constitutional regime can he be denied correlative rights which other citizens enjoy?").

Excluding same-sex couples from marriage ill-serves these families while providing no benefit to anyone else's. No legitimate State concern with procreation and childrearing is rationally advanced by inflicting this needless harm on plaintiffs.

C. The Government Has No Legitimate Interest In Seeing A Discriminatory "Traditional Understanding Of Marriage" Remain The Law Simply Because It Has Been The Law

A purported State interest in preserving a "traditional" understanding of marriage as a different-sex institution cannot in itself justify barring plaintiffs from civil marriage. If the preference to keep a discriminatory definition in place because people are accustomed to it and may have strong feelings were a legitimate state interest then much civil rights progress in our history would have been stymied. Such an "interest" is a tautology that provides no "independent" justification at all, but advocates an illegitimate "classification of persons []for its own sake." *Romer*, 517 U.S. at 635. "Perpetuation of the status quo is not a legitimate end of government . . . if the status quo has been judicially found wanting." *Foss*, 65 N.Y.2d at 260.

This desire to "just keep things the way they are" must be recognized as nothing but all too familiar code for "we don't want those people in our club." As the *Lawrence* dissent recognized, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original).

This Court and the Supreme Court have made clear time and again that the State may not deny rights to a group of people based on no more than

traditional attitudes disadvantaging or disapproving of that group. That is the lesson of: *Liberta,* which rejected anachronistic views about the subservient role of women as the purported interest served by the marital rape exception, 64 N.Y.2d at 164; *Onofre,* which in striking down New York's sodomy law 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," 51 N.Y.2d at 490; *Palmore v. Sidoti,* which recognized that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect," 466 U.S. 429, 433 (1984); *Romer,* which held that a singular desire to "disadvantag[e] the group burdened by [a] law," namely lesbians and gay men, is an illegitimate government objective, 517 U.S. at 633, 635; and *Lawrence,* which held that notwithstanding that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," such disapproval cannot give rise to a legitimate reason to penalize lesbian and gay relationships, 539 U.S. at 571.

D. The Government Has No Legitimate Interest In Remaining Consistent With Discriminatory Laws In Other Jurisdictions

Defendant wisely abandoned on appeal its only other suggested "purpose" for prohibiting plaintiffs from marrying — a purported interest in maintaining uniformity with similar limitations imposed by other states and the

federal government. The motion court correctly labeled this argument "irrational and perverse." R46.

It would be the antithesis of federalism for a state to bind itself to marriage discrimination practiced elsewhere rather than to follow the dictates of its own constitution with respect to individual rights. As Chief Judge Kaye has observed, "Dual sovereignty has in fact proved itself not a weakness but a strength of our system of government. States, . . . by recognizing greater safeguards as a matter of State law can serve as 'laboratories' for national law. . . ." *Scott*, 79 N.Y.2d at 505-06 (Kaye, J., concurring) (citation omitted).

In rejecting the same "uniformity" argument, the Massachusetts high court explained that:

> [W]e would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere.

Opinion of the Justices to the Senate, 440 Mass. 1201, 1209, 802 N.E. 2d 565, 571 (2004). *See Deane,* 2006 WL 148145 (rejecting State's argument that constitutionality of Maryland's bar to marriage of same-sex couples could turn on other states' laws); *see also P.J. Video*, 68 N.Y.2d at 304 ("the practical need for

uniformity can seldom be a decisive factor" in light of the paramount need to protect constitutional rights).

An elaborate body of comity law already exists nationwide because, under principles of federalism, states are *not* uniform in their laws regarding marriage. *See, e.g., Van Voorhis v. Brintnall*, 86 N.Y. 18, 25-27 (1881). Until the Supreme Court's 1967 *Loving* decision, for example, the states were divided with respect to anti-miscegenation laws. *See Loving,* 388 U.S. at 6 n.5 (1967). Today, New York permits first cousins to marry while many other states do not,[55] has age of consent rules for marriage that vary from the laws of other jurisdictions,[56] and does not confer common law marriage while some other states do.[57] Familiar tools of comity and choice of law doctrine, not the deprivation of the constitutional rights of a minority, offer the answer to any purported concern about uniformity with other states.

Denying plaintiffs access to civil marriage does not even rationally further any legitimate government purpose. This serious infringement on

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

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

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

plaintiffs' rights thus violates the Due Process and Equal Protection Clauses of the New York Constitution.

IV.

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

The only appropriate remedy to cure the unconstitutional deprivation of plaintiffs' right to marry is straightforward: a judicial decree construing the DRL's provisions in a gender-neutral manner to eliminate restrictions on marriage between same-sex partners, and an injunction requiring that marriage licenses be issued to plaintiffs and that they and other New York same-sex couples be granted full access to civil marriage and all its attendant rights and protections.

This Court has explained that when a statute runs afoul of the State Constitution, a reviewing court is faced with two possible remedies: it "may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formally excluded." *Liberta*, 64 N.Y.2d at 170. In choosing between these two options, the "court's task is to discern what course the Legislature would have chosen to follow if it had foreseen [the court's] conclusions as to underinclusiveness." *Id.* at 171. *See Califano v. Westcott*, 443 U.S. 76, 89-90 (1979) (to cure unconstitutional under-inclusiveness of statute providing welfare benefits to families where father, but not mother, was

unemployed, Supreme Court ordered term "father" replaced by gender-neutral term "parent"; alternative, denying welfare benefits to all, "would impose hardship on beneficiaries whom Congress plainly meant to protect").[58]

As in *Liberta* and *Westcott,* New York courts have frequently employed this remedial approach to bring in line with constitutional equal protection demands laws drawing distinctions, like the DRL's marriage law provisions, according to a person's sex. Courts then have followed the simple expedient of requiring gendered terminology to be read as gender-neutral in order to cure the constitutional defect while preserving intact the remainder, and core, of the statutory scheme.[59] Indeed, the gendered provisions of the DRL that have been read to permit only male-female couples to marry are among the last vestiges of a

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[58] The majority's observation below that "courts [should not] correct supposed . . . omissions or defects in legislation" (R16A) (citing McKinney's Cons. Laws of NY, Book 1, Statutes § 73, 1 at 147-48 [1971]) is misplaced. That same chapter acknowledges that where, as here, a statute runs afoul of "some restriction on the lawmaking power found in the federal or state Constitutions" it is within a court's power to "strike down" or "decline to enforce" it. Statutes § 150 at 312-13. Moreover, this chapter notes that a court may read the statute in a manner that cures the constitutional infirmity without voiding the entire statute, taking into account "whether the Legislature, if partial invalidity had been foreseen, would have wished the remainder to be enforced alone." *Id.* at 328.

[59] *See, e.g., In re Lisa M. UU v. Dominick*, 78 A.D.2d 711, 711 (3d Dep't 1980) (to avoid equal protection violation, court "read [section 514 of the Family Court Act] in a gender-neutral manner authorizing the court to impose the obligation of paying for the confinement expenses of the mother of the child upon either the mother or father or both as the court, in its discretion, may deem proper"); *Goodell v. Goodell*, 77 A.D.2d 684, 685 (3d Dep't 1980) (reading DRL § 236 in gender-neutral manner to include "wife" as well as "husband" to "preserve its constitutionality"); *Childs v. Childs*, 69 A.D.2d 406, 418-19 (2d Dep't 1979) (DRL provisions deemed to use term "spouse" rather than "wife," thereby authorizing award of counsel fees to either spouse on gender-neutral needs basis).

system of domestic relations laws constructed around distinct gender roles in marriage and now largely cleansed by the courts and legislature of their gendered terminology and substance. *See* above at 51-53. *See, e.g.,* DRL §§ 12 (to marry spouses must declare "that they take each other as husband and wife"); 15(1)(a) (to obtain marriage license couple must provide names of "husband" and "bride").

There is no doubt that the legislature would not want the entire marriage statutory scheme struck down. Nor do plaintiffs advocate this result. Indeed, such a remedy would be antithetical to the relief plaintiffs do seek: access to the vitally important institution of marriage. *See Goodridge*, 440 Mass. at 342, 798 N.E.2d at 969 ("Here no one argues that striking down the marriage laws is an appropriate form of relief. . . . We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."). It is an easy matter, requiring no legislative deliberations or action, to correct the constitutional infirmity in the relevant marriage statutes by ordering them to be read in gender-neutral terms and eliminating restrictions based on the sexes of the partners.

This was the remedy the motion court correctly ordered. R64. The Appellate Division majority, in *dicta,* and defendant, however, took the untenable position that even if the courts conclude that denying plaintiffs access to marriage violates their constitutional rights, such a remedy would "exceed[] the courts' constitutional mandate and usurp[] that of the Legislature." R15A. This suggests

the Court should disregard settled jurisprudence governing the judiciary's obligation to remedy an unconstitutionally over- or under-inclusive statutory scheme and change the rules for this case. The Court should avoid such self-inflicted institutional wounds.

In asserting that the Court should stay its hand and let the legislature fashion a remedy, the majority implicitly endorsed permitting that body to relegate same-sex couples to a legislated arrangement like civil union or domestic partnership, short of full marriage rights. Such a remedy would unfairly perpetuate an inferior status for same-sex relationships that would continue to violate New York's constitutional guarantees. 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.

This Court should reject any argument that a legislative scheme short of marriage, such as civil unions, would cure the constitutional infirmity. Such a remedy would only reinforce a damaging State-sponsored message that lesbian and gay people are unworthy of marriage and that their families are less deserving of respect from their government. Quoting Justice Brandeis, this Court warned that "[o]ur Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Scott,* 79 N.Y.2d at 487. There is only one lesson the government should be permitted to teach: that lesbian and gay adults are entitled to true equality in the exercise of fundamental rights cherished by all.

Rejecting the proposal that same-sex couples could be relegated to "civil union" rather than "marriage," the Massachusetts Supreme Judicial Court recognized that "[t]he 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." *Opinion of the Justices,* 440 Mass. at 1207, 802 N.E.2d at 570 (holding that enactment of civil unions in Massachusetts would not cure constitutional infirmities of marriage statute as applied to same-sex couples). "The history of our nation has demonstrated that separate is seldom, if ever, equal." *Id.* at 1206, 802 N.E.2d at 569. *See also Lawrence*, 539 U.S at 585 ("A legislative classification

that threatens the creation of an underclass . . . cannot be reconciled with the Equal Protection Clause") (O'Connor, J., concurring) (quotations omitted).

Moreover, the majority's *dictum* is at odds with the very essence of the courts' duty to safeguard constitutional rights from political vicissitudes and "the reach of majorities and officials." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). "The Court . . . plays a crucial and necessary function in our system of checks and balances. It is the responsibility of the judiciary to safeguard the rights afforded under our State Constitution." *LaValle*, 3 N.Y.3d at 128; R29-30. This Court should not lead New York down the dangerous path proposed by the majority below. Plaintiffs are entitled to the only constitutional remedy for the State's marriage discrimination — an order granting them the full right to marry.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court reverse the judgment of the Appellate Division and reinstate the judgment of the motion court.

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LAMBDA LEGAL DEFENSE
AND EDUCATION FUND

By: _____
Susan L. Sommer
David S. Buckel
Alphonso David

120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

KRAMER LEVIN NAFTALIS
& FRANKEL LLP

By: _____
Jeffrey S. Trachtman
Norman C. Simon
Darren Cohen

1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Attorneys for Plaintiffs-Appellants