COURT OF APPEALS OF THE STATE OF NEW YORK

SYLVIA SAMUELS, DIANE GALLAGHER, HEATHER McDONNELL, CAROL SNYDER, AMY TRIPI, JEANNE VITALE, WADE NICHOLS, HARNG SHEN, MICHAEL HAHN, PAUL MUHONEN, DANIEL J. O'DONNELL, JOHN BANTA, CYNTHIA BINK, ANN PACHNER, KATHLEEN TUGGLE, TONJA ALVIS, REGINA CICCHETTI, SUSAN ZIMMER, ALICE J. MUNIZ, ONEIDA GARCIA, ELLEN DREHER, LAURA COLLINS, JOHN WESSEL, WILLIAM O'CONNOR, MICHELLE CHERRY-SLACK, and MONTEL CHERRY-SLACK, Plaintiffs-Appellants, - against - THE NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK, Defendants- Respondents.	Appellate Division, Third Department Docket No. 98084 Albany County Clerk's Index No. 1967-04

(caption continued on next page)

BRIEF OF AMICI CURIAE RELIGIOUS ORGANIZATIONS, NEW YORK CONGREGATIONS AND CLERGY, AND OTHER NEW YORK FAITH-BASED COMMUNITIES IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants,	:	New York County Clerk's Index No. 103434/04
- against -	:	
VICTOR L. ROBLES, in his official capacity as City Clerk of the City of New York,	:	
Defendant-Respondent.	:	

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INTRODUCTION

Amici Curiae ("*amici*") support the right of all committed couples to marry, regardless of sexual orientation. *Amici* encourage this Court to overturn the decisions below and conclude that restricting marriage rights under the New York Domestic Relations Law ("DRL") to couples of opposite sex is unconstitutional, in light of the diverse religious faiths practiced across New York and the associated protections and freedoms guaranteed by the New York Constitution.

As representatives of a wide variety of religious faiths, traditions, and other religious organizations in the State of New York, and as supporters of the right of persons to enter into marriage with a person of the same sex, *amici* believe that any invocation of "tradition" to support the Defendant's position in this case raises grave concerns for religious freedom.

Amici submit this brief to counter the arguments raised by Appellee and urge recognition of the following principles in this Court's analysis: (1) marriage equality for same-sex couples is an issue of civil rights, not religious rights, because there is a fundamental distinction between civil marriage and the religious rites of matrimony; (2) the free exercise of religion is not constrained, but enhanced, by recognizing the civil right of marriage between same-sex partners; (3) given the diversity of religious thought and practice, separation of church and state requires an interpretation of the DRL without reference to any single conception by any single religious tradition of what is "morally correct" or "morally appropriate" from a religious standpoint; and (4) many diverse religious groups support the right of marriage for all committed couples, including same-sex couples.

Amici urge the Court to reiterate the fundamental distinction between civil marriage sanctioned by the State and the religious rites of matrimony governed by

an individual faith's practice. Our State's constitutional hallmarks of fairness and justice require equal rights of access – without regard to gender or sexual orientation – to civil marriage.

STATEMENT OF THE INTEREST OF THE *AMICI CURIAE*

Amici are religious organizations, congregations, and clergy that support the right of all committed couples to enter into civil marriage, including same-sex couples. *Amici* include the following national and international religious organizations with millions of members across the country and in New York State: The Academy for Jewish Religion; Affirmation Gay & Lesbian Mormons; Affirmation: United Methodists for Lesbian, Gay, Bisexual, and Transgender Concerns; The Association of Humanistic Rabbis (International and New York); AXIOS Eastern & Orthodox LGTB Christians; The Central Conference of American Rabbis; DignityUSA; The Jewish Reconstructionist Federation; Lutherans Concerned/North America; More Light Presbyterians; The National Catholic Church of America; The National Council of Jewish Women; The Parents Reconciling Network; The Reconstructionist Rabbinical Association; The Society for Humanistic Judaism; The Union for Reform Judaism; United Church of Christ Coalition for Lesbian, Gay, Bisexual and Transgsender Concerns; The Unitarian Universalist Association; The Universal Fellowship of Metropolitan Community Churches; and The Workmen's Circle/Arbeter Ring.

Amici also include the following religious organizations with thousands of members across the State of New York: The Center of the Shining Light (New York, NY); Dignity New York (New York, NY); Dignity-Integrity/Rochester, Inc. (Rochester, NY); Interfaith Advocates for Lesbian, Gay, Bisexual and Transgender People (Rochester, NY); Lesbian, Gay, Bisexual and Transgender Interfaith Partnership of Westchester (Westchester County); The National Council of Jewish

Women, New York State Public Affairs Committee; The New Seminary (New York, NY); Presbyterian Welcome (New York, NY); The Reform Jewish Voice of New York State (statewide); Soulforce (New York, NY); Welcoming Presbyterians of the Genesee Valley (Rochester, NY); and The Workmen's Circle/Arbeter Ring New York Region (statewide).

Amici also include the following congregations with thousands of members located throughout the State of New York: Beth Am, the People's Temple (New York, NY); The Board of Trustees of the First Unitarian Society of Westchester (Hastings-On Hudson, NY); The City Congregation for Humanistic Judaism (New York, NY); Community Unitarian Church at White Plains; Congregation Beth Simchat Torah (New York, NY); Downtown United Presbyterian Church of Rochester; East End Temple (New York, NY); First Congregational United Church of Christ (Gloversville, NY); First Congregational United Church of Christ (Niagara Falls, NY); First Presbyterian Church of Albany, New York; Iglesia San Romero de Las Américas, United Church of Christ (New York, NY); Kolot Chayeinu/Voices of Our Lives (Brooklyn, NY); Metropolitan Community Church (New York, NY); Metropolitan Community Church of the Hudson Valley (Albany, NY); Nauraushaun Presbyterian Church of Pearl River; Open Arms Metropolitan Community Church (Rochester, NY); The Social Responsibility Council of the First Unitarian Church of Rochester; South Presbyterian Church (Dobbs Ferry, NY); St. Mark's Episcopal Church (Penn Yan, NY); Temple Beth-El of Great Neck; The Temple of Universal Judaism (New York, NY); Temple Sinai (Rochester, NY); Third Presbyterian Church of Rochester, New York; Unitarian Universalist Church of Buffalo; Unitarian Universalist Church of Canton; Unitarian Universalist Congregation at Rock Tavern; Unitarian Universalist Fellowship of Big Flats; Unitarian Universalist Fellowship of Huntington; Unitarian Universalist Fellowship of Poughkeepsie; United Methodist Church of

St. Paul and St. Andrew (New York, NY); and The Village Church (New York, NY) (formerly Metropolitan-Duane United Methodist Church).

Amici also include the following individual clergy and religious leaders located throughout the State of New York and beyond: Rev. Patricia Ackerman; Rabbi David Adelson; Rev. Kaaren Anderson; Rev. Dr. Lynn Ashley; Rev. Kevin Bean; Rabbi Shelley Kovar Becker; Rev. Holly Beyar; Rabbi Binyamin Biber; Rev. Lynn Carman Bodden; Rev. James R. Bridges; Rev. Mary Ann Brody; Rev. Lee Ann Bryce; Rev. David M. Bryce; Rev. Pat Bumgardner; Rabbi Steven D. Burton; Rev. James P. Campbell; Rev. Roko Sherry Chayat; Rev. Thomas A. Clemow; Rev. Steven C. Clunn; Rabbi Ayelet Cohen; Rabbi Bruce Mark Cohen; Rev. Jennifer Crow; Rev. Dr. Edgard Danielsen-Morales; Rev. Susan De George; Rev. Denise Donato; Rev. Koshin Paley Ellison; Rabbi Rachel Esserman; Rabbi Sheldon Ezring; Rev. William D. Feinberg; Cantor Jennifer Frost; Cantor Rebecca Garfein; Rabbi Matthew Gewirtz; Rev. Richard S. Gilbert; Rabbi Michael Goldman; Rabbi Arthur Green; Rev. Kay Greenleaf; Rabbi David Greenstein; Rabbi Lisa Grushcow; Rev. Dr. Robert W. Gunn; Rabbi Joshua Gutoff; Rev. Michael W. Hopkins; Rev. Deborah L. Hughes; Rev. Barbara Hulsing; Rev. Carol A. Huston; Rev. Tomi Jacobs; Bishop Alfred Johnson; Rev. James. F. Karpen; Rabbi Alan J. Katz; Rabbi Leora Kaye; Rabbi Sharon Kleinbaum; Pastor Hector Laporta; Rabbi Robert Levine; Rabbi Ellen Lippmann; Rev. John Magisano; Rabbi Jeffrey M. Marker; Rev. Anne Marsh; Rev. J. Andrew McTyre; Rabbi Michelle Brand Medwin; Rabbi Paul J. Menitoff; Rev. Joel Miller; Rev. Kimberly Miner; Rev. Deb Morra; Rabbi Linda Motzkin; Rev. James F. Mulcahy; Chaplain Michael J. Nicosia; Rev. Deborah A. Packard; Rev. David C. Parsons; Pastor Marna J. Pritchard; Rev. Susan Veronica Rak; Rev. Paul Ratzlaff; Rev. Gail A. Ricciuti; Rabbi David Rosenn; Rev. Deborah Steen Ross; Rabbi Roger Ross; Archbishop Richard G. Roy, OSJD; Rev. Jill R. Russell; Rev. M. Zell Schwartzman; Rabbi

Peter H. Schweitzer; Rev. Willie J. Seals, Jr.; Rev. Stanley Sears; Rabbi Leonard Sharzer; Rabbi Michael Strassfeld; Rev. Krishna Stone; Rev. Charles H. Straut, Jr.; Rev. Scott Summerville; Rev. Scott Tayler; Rev. Paul Tenaglia; Rabbi David A. Teutsch; Rev. William McD. Tully; Rev. Phillip M. Trzynka; Rev. George Tyger, Elder James S. Uleman; Rev. Karha Us; Rev. Mieke Vandersall; Rev. Lynn E. Walker; Rev. Dr. Kathleen Waters; Rev. Gordon V. Webster; Rabbi Margaret Moers Wenig; Rev. Judith Westerhoff; Rev. Wade Wheelock; Rev. Dr. Robert D. Williams; Rev. Mark N. Wind, Ph.D.; Rabbi Paula Jayne Winnig; The Very Rev. C. Denise Yarbrough; Rabbi Eric Yoffie; Rev. Dr. Pat Youngdahl; Rabbi Irwin A. Zeplowitz; and Rabbi Shawn Zevit.

Amici represent a wide variety of religious faiths and traditions that mirror the rich diversity of the citizens of New York State. Though *amici* represent different faiths and practice in different ways, *amici* stand united in support of the dignity of loving, committed same-sex couples, and believe that same-sex couples should be permitted to enter into civil marriage. *Amici* submit this brief to counter the argument that current marriage laws, to the extent that they discriminate against same-sex couples, must be upheld in deference to the traditions or religious beliefs of only certain groups of citizens. *Amici* urge this honorable Court to order the State of New York to include same-sex couples under the civil legal framework of the marriage laws in the DRL.

ARGUMENT

I. ALTHOUGH MARRIAGE HAS BOTH A RELIGIOUS AND A CIVIL MEANING, THE DRL DEFINES AND GOVERNS ONLY THE INSTITUTION OF CIVIL MARRIAGE

Our society typically uses the same word, "marriage," to describe both the religious rite and the state-sanctioned process for the legal union of two people. It

therefore has been applied both to wedding ceremonies performed within the confines of a religious community ("religious marriage"), as well as to the licensing and solemnization process set forth in the DRL ("civil marriage"). However, the DRL explicitly defines the legal concept of marriage as a civil institution, and many religious faiths have long held views of religious marriage that diverge greatly from New York's construct of civil marriage. Entitlement to the legal status of civil marriage, therefore, should be unaffected by the varying and divergent concepts of religious marriage.

A. Civil Marriage Is a Legal Status Created by The State

Civil marriage is a legal institution regulated by a statutory process used by the State to confer a legal status, accompanied by a panoply of rights, protections and obligations, upon a pair of individuals who have met the State's marriage criteria. The DRL states, unequivocally, "Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential." DRL § 10 (emphasis added). New York statutes establish marriage as a legal status, created through the issuance of a marriage license by the State, in connection with solemnization by a presiding civil or religious official authorized to perform a civil marriage ceremony. *See* DRL § 10 (marriage, a civil contract), § 11 (by whom a marriage must be solemnized), § 12 (marriage, solemnized by), § 13 (marriage, licenses). Once solemnized, civil marriage is a status that is recognized legally, apart from and regardless of religious background or whether any particular religious tradition has sanctioned the union.

The IAS court in *Hernandez v. Robles* carefully noted that the legal questions before it pertained to the civil, rather than the religious, institution of marriage:

> While, undeniably, religious institutions have a historical and spiritual interest in marriage and the recognition of those married under their tenets, ultimately it is the government's choice as to which relationships to recognize as valid civil marriages and whether, and the degree to which, legal protections, burdens and privileges should be conferred on that civil institution.

Hernandez v. Robles, 7 Misc. 3d 459, 497-98, 794 N.Y.S.2d 579, 609 (Sup. Ct. N.Y. County 2005). Similarly, Justice Saxe noted in his Appellate Division dissent in the same case, "Civil marriage is an institution created by the state, and the state makes numerous rights and benefits available to those entering into that status." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 377 (1st Dep't 2005) (Saxe, J., dissenting). These New York court decisions regarding the civil nature of the laws governing marriage are not singular. For example, the United States Supreme Court has long recognized the secular nature of civil marriage, explaining that, "[m]arriage is often termed . . . a civil contract . . . and does not require any religious ceremony for its solemnization." *Maynard v. Hill*, 125 U.S. 190, 210 (1888). It is therefore inappropriate for a court to consider a particular religious viewpoint, or religious principles generally, when considering whether same-sex couples can constitutionally be excluded from civil marriage.

While the DRL allows for a marriage to be solemnized by religious officials pursuant to DRL § 11 (1), the legal requirements that individuals must meet to enter into a civil marriage nonetheless remain within the sole and exclusive purview of the State. In effect, the presiding religious official acts as an agent of the State for the purpose of satisfying the DRL's solemnization requirement. *Id.*

(stating that a marriage may be solemnized by a "clergyman or minister of any religion").[1] Of course, the DRL does not require a couple to have their marriage solemnized by a religious official. Instead, it allows for a variety of civil officials to perform the ceremony, including mayors, county executives, and judges. DRL § 11 (2)-(3). It is clear that civil marriage, even when solemnized by a religious official, is a civil status conferred by the State.

B. Religious Weddings Are Diverse Rites Created by Communities of Faith, and Are Distinct from Civil Marriage Under the DRL

The parameters of religious ceremonies are governed by the belief systems of individual religious faiths, clergy or houses of worship, and therefore are separate from the parameters of marriage set forth in the DRL. Consistent with the traditions of their faith, religious leaders pass judgment upon the suitability of potential couples and choose whom they will join in religious unions. Communities of faith are not compelled to accept the State's parameters for civil marriage, and indeed, many religious institutions do not accept them. As such, religious conceptions of marriage vary widely.

Some religious marriage criteria are far more restrictive than the civil criteria found in the DRL. Conservative Judaism, for example, prohibits interfaith marriages: "Rabbis and cantors affiliated with the Conservative Movement may not officiate at the marriage of a Jew to a non-Jew, may not co-officiate with any

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1 New York Religious Corporations Law ("RCL") defines "clergyman" and "minister" to "include a duly authorized pastor, rector, priest, rabbi, and a person having authority from, or in accordance with, the rules and regulations of the governing ecclesiastical body of the denomination or order, if any, to which the church belongs, or otherwise from the church or synagogue to preside over and direct the spiritual affairs of the church or synagogue." RCL § 2.

other clergy, and may not officiate or be present at a purely civil ceremony."[2] Other religious faiths, like Roman Catholicism, reject re-marriages after legal divorce: "[i]f the divorced are remarried civilly, they find themselves in a situation that objectively contravenes God's law."[3] Such differences between religious and civil marriage strictures have always existed and demonstrate that if New York were to recognize civil marriages of same-sex couples (as it does interfaith marriages and re-marriages after divorce), those unions would confer a legal status wholly separate from any single religious conception of marriage.

New York courts have recognized that religious communities may confer and regulate religious marriage separate from, and more restrictively than, laws governing civil marriage. This Court has explicitly recognized that:

> Notwithstanding . . . civil divorce, plaintiff wife is not considered divorced and may not remarry pursuant to Jewish law, until such time as a Jewish divorce decree, known as a 'Get', is granted . . . [which] may be obtained . . . before a 'Beth Din,' a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law.

Avitzur v. Avitzur, 58 N.Y.2d 108, 112, 459 N.Y.S.2d 572, 573, *cert. denied,* 464 U.S. 817 (1983). In *Avitzur*, the plaintiff ex-wife brought an action to compel her defendant ex-husband to appear before the religious tribunal that, according to their prior agreement, was to decide whether to grant a religious divorce. In

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2 *See, e.g.*, Leadership Council on Conservative Judaism, Statement on Intermarriage (Mar. 7, 1995), *available at* http://www.uscj.org/intmar/statement.html (last visited April 7, 2006).

3 Catechism of the Catholic Church – Part Two, Section Two, Chapter 3, Article 7 – The Sacrament of Matrimony, *available at* http://www.vatican.va/archive/catechism/p2s2c3a7.htm (last visited April 7, 2006). ("In fidelity to the words of Jesus Christ – 'whoever divorces his wife and marries another, commits adultery against her; and if she divorces her husband and marries another, she commits adultery.'").

holding only that a civil court could enforce that portion of the contract in which the parties agreed to refer their disputes to a nonjudicial forum, and could compel the ex-husband to appear, the *Avitzur* court implicitly recognized that the religious tribunal could impose its more strict religious view of marriage and refuse to grant a religious divorce to the civilly divorced couple. *See id.* The court also observed that the religious restrictions on divorce had no effect on the civil marital status of the parties: "Certainly nothing the Beth Din can do would in any way affect the civil divorce." *Id.* at 115, 459 N.Y.S.2d at 573.

On the other hand, some religions confer marriage in a far more expansive and inclusive manner than New York's current restrictions on access to civil marriage. For example, many religious faiths and communities of worship officiate and celebrate the religious marriages of gay and lesbian couples. *See* discussion *infra* at 15-20. These examples also demonstrate that the religious and civil institutions of marriage can and do vary greatly without doing harm to either.

II. ALLOWING SAME-SEX COUPLES TO PARTICIPATE IN CIVIL MARRIAGE WILL NOT IMPINGE ON THE FREE EXERCISE RIGHTS OF RELIGIOUS GROUPS

Different conceptions of civil and religious marriage have long coexisted without any negative impact on either because of New York's long tradition of separation of Church and State. Once civil marriage between same-sex couples is recognized in New York, separation of Church and State will protect the choice of the religious faiths that decide not to recognize such marriages, as well as those that do. Therefore, any claim that personal religious or moral beliefs will be compromised by extending civil marriage to same-sex couples is without basis. All committed couples are constitutionally entitled to the equal right to enter into civil marriage, regardless of the religious views of those who oppose such unions.

The separation of Church and State as guaranteed by the Constitution and the laws of New York protects the free exercise of religion. *See* N.Y. CONST. art. I, § 3. According to one legal historian, "New York was the first state to abandon, by constitutional provision, the previously established churches. Of the first wave of state constitutions adopted between 1776 and 1784, New York came closest to establishing complete religious freedom." Peter J. Galie, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 50 (1996). Specifically, New York's 1777 Constitution guaranteed:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided,* That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

N.Y. CONST. art. XXXVIII (1777) (emphasis in original), *available at* http://www.yale.edu/lawweb/avalon/states/ny01.htm#1 (last visited April 7, 2006).[4]

New York state courts have applied the New York Constitution's guarantee of free exercise to protect the rights of people of faith. *See, e.g., Williams v. Bright*, 230 A.D.2d 548, 658 N.Y.S.2d 910 (1st Dep't 1997) (ruling on a claim based both on the state and federal guarantees of free exercise by remanding a civil lawsuit for a new trial with jury instructions that allowed plaintiff to present the religious basis for her refusal of medical treatment). Moreover, the New York state courts have also applied the First Amendment of the United States

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[4] The New York Constitution was subsequently amended by the people of New York to establish the separation of Church and State in terms of school finance. *See* N.Y. CONST. art. XI, § 3.

Constitution and its doctrine of separation of Church and State. *See, e.g., Grumet v. Bd. of Educ.*, 81 N.Y.2d 518, 601 N.Y.S.2d 61 (1993), *aff'd*, 512 U.S. 687 (1994) (noting that the First Amendment requires that legislation neither advance nor inhibit religion and applying the test created in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). These constitutional protections are precisely the reason why civil and religious marriages remain distinct and separate – by affirming civil marriage as a legal status separate from religious practice, the State ensures that all religious communities have the freedom to contemplate and decide which unions are consistent with their belief systems.

Adhering to both the state and federal doctrines of separation of Church and State, New York courts have allowed to flourish the long standing autonomy of religious institutions to follow their own tenets and choose at which weddings they will officiate. For example, some religious groups in New York recognize weddings only between couples that practice the same religion, or only between couples comprised of individuals who have never divorced. New York courts have not interfered with the right of these religious faiths to define religious marriage as they see fit, and this religious autonomy would continue even after a ruling in favor of civil marriage for same-sex couples.

Indeed, in the *Hernandez* case below, the IAS court recognized that the doctrine of separation of Church and State would protect the free exercise of religion after the State establishes civil marriage for same-sex couples:

> [T]he Court emphasizes that government recognition that same-sex couples may be civilly married does not impact on those married under the tenets of their individual faith, and does not require that religious institutions change their tenets, nor their definition of marriage under their faith.

Hernandez, 7 Misc. 3d at 498, 794 N.Y.S.2d at 610. If this Court rules that same-sex couples are constitutionally entitled to the same civil marriage rights as opposite-sex couples, the autonomy of religious institutions to determine their own guidelines for religious weddings would remain undisturbed, and the entitlement to the legal status of marriage would then be available for all those who choose to enter it.

III. THE ISSUE OF CIVIL MARRIAGE BETWEEN SAME-SEX COUPLES MUST BE DECIDED AS A MATTER OF CIVIL LAW, WITHOUT REFERENCE TO ANY PARTICULAR RELIGIOUS TRADITION

In the cases at bar, some other *amicus curiae* have invoked "traditional values" as a basis for upholding the current laws that restrict same-sex couples from civil marriage. However, as Justice Scalia recognized, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). The arguments based on "tradition" are nothing more than thinly veiled appeals to the moral and religious disapproval that some individuals hold against gay and lesbian people.

For example, several *amici* submitted a brief in the *Hernandez* case to the Appellate Division, First Department, that argued, "Tradition is one demonstration of the innate characteristic of marriage as the union of one man and one woman." Brief of Proposed Intervenors-Appellants at 15. A signatory to that brief explained his position against marriage for same-sex couples, stating that "[he] believe[s] in marriage the way God created it." Tom Campisi, *Churches Make a Bold Statement at Marriage Renewal Day Rally*, TRI-STATE VOICE, July 2004, *available at* http://www.tristatevoice.com/Archives_7_2004.htm (last visited April 7, 2006) (quoting *amicus* Ruben Diaz, Sr.). In light of New York's constitutional

commitment to the separation of Church and State, moral or religious disapproval is an inappropriate basis for New York civil law to discriminate against an entire class of citizens.

Moreover, the "traditional values" rationale for discriminating against a class of citizens has been expressly rejected by both the New York and federal judiciaries. When this Court struck down the marital rape exception, it held that rationales for government measures based on "archaic notions" and "traditional justifications [that] no longer have any validity" are an illegitimate basis for lawmaking. *People v. Liberta*, 64 N.Y.2d 152, 163-64, 45 N.Y.S.2d 207, 213-14 (1984). Similarly, in striking down New York's sodomy law, this Court stressed that "disapproval by a majority of the populace . . . may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy." *People v. Onofre*, 51 N.Y.2d 476, 490, 434 N.Y.S.2d 947, 952 (1980).

When the *Hernandez* case was decided by the Appellate Division, First Department, only the dissenting opinion correctly recognized that certain moral biases cannot justify discrimination. Justice Saxe noted, "An explicit policy giving preference to heterosexual couples would also have to be rejected if viewed as an expression of the Legislature's, or the public's, moral beliefs or biases." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 389 (1st Dep't 2005) (Saxe, J., dissenting). Justice Saxe's reasoning properly follows the rulings of the New York Court of Appeals in *People v. Liberta* and *People v. Onofre.*

The United States Supreme Court very recently elaborated on the principle that a religious "moral" rationale cannot justify discrimination. In *Lawrence v. Texas*, the Court noted that, "for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the

traditional family." *Lawrence*, 539 U.S. at 570. But the Court concluded that these rationales give rise to "no legitimate state interest." *Id.* at 578; *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion) (striking down a housing ordinance that limited occupancy of a unit to a narrowly defined family); *Lawrence v. Texas*, 539 U.S. at 583 (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. . . . Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.").

Thus, as this Court considers the fundamental right of same-sex couples to join in the civil institution of marriage, it should not be swayed by a claim by some individuals that their particular religious values demand that the State discriminate within the institution of civil marriage. To do so would run counter to New York's long adherence to the separation of Church and State by endorsing one particular view of marriage held by particular religious groups. Moreover, deferring to a particular definition of marriage endorsed by particular religious groups would be contrary to established precedent and would undermine New York's tradition of supporting diversity of religious thought within the state.

IV. IN ADDITION TO SUPPORTING FULL CIVIL MARRIAGE EQUALITY, MANY RELIGIOUS TRADITIONS ALREADY CELEBRATE THE MARRIAGES OF SAME-SEX COUPLES IN THEIR RELIGIOUS COMMUNITIES

The restrictive notion of marriage as a union only between a man and a woman would be a fundamentally flawed basis upon which to deny marriage equality to same-sex couples, particularly when this antiquated belief has been rejected by many diverse religious traditions and faiths. A growing number of

religious traditions and faith organizations support equal civil marriage rights and regularly perform religious marriages for same-sex couples.

For example, the Reform Jewish movement, the largest Jewish movement in North America with more than 900 congregations and 1.5 million members, supports the rights of same-sex couples to obtain civil marriage and allows its rabbis to perform religious wedding ceremonies for same-sex couples.[5] Within the Reform movement, the Central Conference of American Rabbis ("CCAR") constitutes by far the largest association of religious leaders. The rabbis of the CCAR recognize that civil marriage is a question of civil law, completely distinct from rabbinic officiating at religious marriages.[6] Similarly, the Jewish Reconstructionist Movement, with over 100 congregations across North America, recently adopted a resolution in favor of full civil marriage equality for same-sex couples and has allowed rabbis to officiate gay and lesbian religious marriages since 1993.[7]

Several predominant Christian denominations also recognize the validity and dignity of same-sex relationships within their communities. On July 4, 2005, the General Synod of the United Church of Christ (UCC), which has 1.3 million

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5 The Union for Reform Judaism (formerly the Union of American Hebrew Congregations) has consistently affirmed its commitment to welcoming gay and lesbian couples in its congregations, and in 1993 expanded that support with a resolution supporting full equality under the law, including legal recognition of same-sex relationships. Resolution on Same Gender Officiation (Mar. 2000), *available at* http://www.rcfm.org/positions/refjudaism.htm (last visited April 7, 2006).

6 Outline for Informational CCAR Weblink on Same Gender Marriage (Feb. 2, 2005), *available at* http://ccarnet.org/Articles/index.cfm?id=213&pge_id=1606 (last visited April 7, 2006).

7 Resolution in Support of Civil Marriage for Same-Sex Couples (Mar. 16, 2004), *available at* http://www.therra.org/resolution-Mar2004.htm (last visited April 7, 2006).

members, officially endorsed same-sex marriage rights.[8] This resolution passed with an estimated 80% of the UCC's 884-member General Synod voting in favor.[9] Similarly, the Unitarian Universalists, with more than 1,000 congregations across the country, expressly provide that its clergy and congregations may celebrate the religious marriages of same-sex couples.[10] That these two traditions support religious marriage for gay and lesbian couples is particularly noteworthy because each traces its history directly to the Puritans of New England.[11] In addition, the Episcopal Church, with 2.4 million members nationwide, permits priests, as a matter of pastoral care, to perform liturgies and blessings at weddings between couples of the same sex.[12]

The American Friends Service Committee ("AFSC") and many individual Quaker institutions have also long supported civil marriage rights for same-sex

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8 Shalia Dewan, *United Church of Christ Backs Same-Sex Marriage*, N.Y. TIMES, July 5, 2005, at A10. Leaders of the United Church of Christ (UCC), with 6,000 local congregations in the United States and Puerto Rico, have consistently and again recently affirmed the importance of "equal rights for all couples who seek to have their relationships recognized by the State." *See* United Church of Christ Leaders denounce Federal Marriage Amendment; call for action and dialogue on marriage (Apr. 28, 2004), *available at* http://www.ucc.org/news/u042804.htm (last visited April 7, 2006).

9 Doug Cross, *United Church of Christ Passes Gay Marriage Favoring Resolution*, ASSOCIATED PRESS, July 5, 2005.

10 In 1996, the Unitarian Universalist Association's Board of Trustees adopted a resolution in support of both civil and religious marriage for same-sex couples. *See* History of Unitarian Universalist Involvement in and Support of Bisexual, Gay, Lesbian and Transgender Issues (1996), *available at* http://www.uua.org/obgltc/resource/history.html (last visited April 7, 2006).

11 Mark W. Harris, *Unitarian Universalist Origins: Our Historic Faith* (Oct. 2002), *available at* http://www.uua.org/info/origins.html (last visited Mar. 30, 2005); United Church of Christ, About the UCC, *available at* http://www.ucc.org/aboutus/shortcourse/ (last visited April 7, 2006).

12 *See* Resolution C051 of the 74th General Convention (2003), Rites: Blessings of Committed Same-Gender Relationships, *available at* http://www.integrityusa.org/gc2003/FinalResolutions/C051%20Rites%20Blessing%20of%20Committed%20Same-Gender%20Relationships.htm (last visited April 7, 2006).

couples. In its statement in support of equal civil marriage rights, the AFSC noted that:

> We are aware that many are calling for civil unions for lesbian, gay, bisexual, and transgender people and some people wish to reserve civil marriage for heterosexual couples alone. It is our belief that government sanction should be applied equally. All couples should be granted civil union licenses or all should be granted marriage licenses. [13]

The Universal Fellowship of Metropolitan Community Churches ("UFMCC") has specifically ministered to the needs of gay, lesbian, bisexual and transgender Christian communities since its inception over thirty-five years ago, in 1968. UFMCC allows its members to obtain, and authorizes clergy to perform, holy unions or the Rite of Holy Matrimony for same-sex couples.[14]

In addition to these religious denominations, many faith organizations are working within their respective traditions for the full inclusion of gays and lesbians and the recognition of both civil and religious marriages between same-sex partners. The Executive Director of Lutherans Concerned/North America, a Christian Ministry comprised of individuals who assert God's love for all people of all sexual orientations and gender identities, recently stated that:

> As members of the Body of Christ and practicing Lutherans, we [lesbian and gay members of the Lutheran Church] are secure in our God-given faith despite the long years of exclusion by our church. We believe that

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13 Minute on Civil Marriage (Jan. 9-10, 2004), *available at* http://www.afsc.org/build-peace/equal-marriage.htm (last visited April 7, 2006). The Executive Committee of the AFSC Board of Directors, acting at the direction of the full board, approved a statement supporting marriage equality in January 2004. *Id.*

14 Bylaws of the Universal Fellowship of Metropolitan Community Churches, Article III, Section C pertaining to rites of the Church, effective July 2003, *available at* http://www.mccchurch.org (last visited April 7, 2006).

> the Good News of the Gospel will ultimately prevail. We remain committed to the removal of discriminatory policies that violate our calls to ministry and marginalize our relationships.[15]

Similarly, in August of 2003, the board of directors of DignityUSA, a national organization of gay, lesbian, bisexual and transgender ("GLBT") Catholics and GLBT-supportive Catholics, adopted this resolution:

> Consistent with the pursuit of liberty and justice for all, same-sex couples should have full and equal access to the rights and responsibilities bestowed by civil marriage. . . . As Catholics, we remind our Church of a foundational conviction of our faith: God is love and all who abide in love abide in God and God abides in them. The love that brings and binds two people of the same, or opposite sex, together has a divine source.[16]

Finally, the Alliance of Baptists "supports the rights of all citizens to full marriage equality, and . . . affirm[s] anew that the Alliance will 'create places of refuge and renewal for those who are ignored by the church.'"[17]

Therefore, this Court should not uphold New York's current, discriminatory application of marriage laws based on the argument that religious tradition would require such an outcome. Different religious faiths will continue to come to

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15 Press Release, Lutherans Concerned/North America, Lutheran Alliance remains focused on the full participation of gays and lesbians in the life of the Lutheran Church (Jan. 13, 2005), *available at* http://www.lcna.org/lcna_news/2005-01-13.shtm (last visited April 7, 2006).

16 Press Release, DignityUSA, DignityUSA Urges Washington State Supreme Court to Uphold Lower Court Rulings Affirming Marriage Equality (Mar. 1, 2005), *available at* http://www.dignityusa.org/news/050301seattle.html (last visited April 7, 2006).

17 Alliance of Baptists Statement on Same Sex Marriage (Apr. 17, 2004), *available at* http://www.allianceofbaptists.org/sssm-2004.htm (last visited April 7, 2006). The Alliance of Baptists is a national coalition of individuals and churches "dedicated to the preservation of historic Baptist principles, freedoms, and traditions." *Id.*

various conclusions on the issue of religious marriage for same-sex couples, but this has no bearing on the issue of the right to civil marriage for these couples. Given the diversity of religious thought on the issue of marriage between same-sex partners, any invocation of "traditional values" to justify the exclusion of loving same-sex couples from the right of civil marriage is wholly inappropriate and without rational basis, and therefore should not form the basis for a decision by this Court.

CONCLUSION

The issue before this Court is a civil, not a religious or moral, issue. Communities of faith must retain their freedom to develop their own views on religious solemnization of marriage. Protection of religious freedoms does not, however, mean that the views of some religions and faiths can or should be used to deny same-sex couples the legal rights granted to, and responsibilities imposed upon, married couples by the State. The decisions below should be overturned.

Respectfully submitted,

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