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Court of Appeals
of the
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.

In the Matter of the Application of:

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and 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.

BRIEF OF PROFESSORS OF HISTORY AND FAMILY LAW AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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April 20, 2006

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INTEREST OF AMICI CURIAE

Amici Curiae are professors of history and family law, specializing in the history of marriage, families, and the law at universities throughout the United States. We have written leading books and articles analyzing the history of marriage and marriage law in the United States. This brief is submitted to assist the Court's deliberations by offering an analysis of the history of marriage law and practice based on our scholarship. Our names, institutional affiliations, and brief biographies are set out in Exhibit B to the Affirmation of Suzanne B. Goldberg in Support of Permission to File a Brief as Amici Curiae (April 20, 2006).

SUMMARY OF ARGUMENT

The history of marriage in New York is a history of change. Since the State's earliest days, marriage has undergone continuous reexamination and revision. Indeed, the idea that an entity called "traditional" marriage exists in a form that bars appellants' claims here misconceives history. Marriage in New York today – a partnership between two adults who are equal in the eyes of the law – bears little resemblance to marriage as it existed at the State's founding or even a few decades ago.

The relevant history demonstrates further that all marriage rules remain subject to meaningful judicial review and that a rule's vintage is not, by itself, sufficient justification for its retention. Instead, over time, the State's courts and legislature have transformed or invalidated numerous so-called traditional features of marriage.

The historical record shows that, through adjudication and legislation, all of New York's sex-specific rules for marriage have been invalidated save for the one at issue here. In addition, this record shows that the State has *never* treated a couple's capacity to procreate as essential to marriage. Moreover, throughout its statehood, New York has not maintained uniformity between its marriage rules and those of other states.

This ongoing evolution of marriage throughout New York's history renders implausible the suggestion that marriage has an essential, traditional structure that mandates the exclusion of same-sex couples. To the contrary, there is – and has always been – substantial fluidity in the rules of marriage. The developments in marriage law over time – including the present focus on interdependence and the complete rejection of gendered rules – have rendered the different-sex eligibility rule anachronistic. Further, because marriage has *never* been fixed either as a legal status or a social construct, references to a longstanding tradition of excluding same-sex couples cannot reasonably explain the retention of the rule here.

ARGUMENT

I. The Legal Definition of Marriage in New York Has Never Been Static; Features of Marriage Once Thought Essential Have Been Revisited and Rejected Consistently Over Time.

By resting their analysis on the idea that "traditional marriage" requires the exclusion of same-sex couples, the appellate courts below assumed that marriage is a fixed status with certain foundational elements that cannot be changed except, perhaps, by the Legislature. Samuels v. New York State Dep't of Health, __

A.D.3d __, 2006 N.Y. Slip. Op. 01213, at 13 (3d Dep't Feb. 16, 2006) (finding that the legislature could legitimately seek "to preserve the historical legal and cultural understanding of marriage"); Hernandez v. Robles, 26 A.D.3d 98, 107 (1st Dep't 2005) (observing that the trial court's ruling "redefin[ed] traditional marriage"). But see Hernandez, 26 A.D.3d at 133 (Saxe, J., dissenting) (noting "the extent to which the fundamental characteristics of the institution [of marriage] have changed, and continue to change, over time"). But legal developments throughout New York's history belie this view of marriage as historically static and demonstrate that the historical exclusion of same-sex couples from marriage describes but does not *explain* or *justify* the continuation of that rule.[1] Instead, through a steady stream of decisions and statutory amendments, New York's courts and legislature have continuously adjusted and abandoned elements once thought to represent the foundations of marriage.

A. The Shift Away From the Common Law Coverture Regime Transformed the Meaning of Marriage in New York in the 19th and Early 20th Centuries.

Until well into the 19th century, marriage in New York meant the complete merger of a woman's legal identity into that of her husband. Indeed, for most

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[1] The appellate courts missed this important distinction between history as descriptive and history as a justification for discrimination. See, e.g., Samuels, 2006 N.Y. Slip. Op. at 8, 13 (holding that legislative intent "to preserve the historic legal and cultural understanding of marriage" justified the different-sex couple marriage restriction, "which long predates the constitutions of this country and state").

Likewise, respondents mistakenly equate the historical exclusion of same-sex couples with the essence of marriage. See, e.g., Brief of Respondents State of New York and Department of Health at 13 ("[T]he word 'marriage' has always been understood to mean the legal union of one man and one woman . . . ."); Brief of Respondent Robles at 41 ("As early as 1885, the Supreme Court recognized that marriage is the union of one man and one woman.").

people, marriage was unimaginable in any other way.[2] As the Court for Correction of Errors put it in 1830,[3] "the wife . . . and her husband constitute but one person." Martin v. Dwelly, 6 Wend. 9 (N.Y. 1830). See also People ex rel. Barry v. Mercein, 3 Hill 399, 407 (N.Y. Sup. Ct. 1842) ("The very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband.") (citation omitted); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 11-12 (2000) (describing the sudden change in a woman's rights upon marriage under the coverture regime).

For both men and women, negating a married woman's independent legal capacity, including her capacity to own property in her own right, was understood as one of marriage's indispensable elements. As the Supreme Court of Judicature wrote in 1824, "a husband, in virtue of his marriage, becomes absolute owner of the goods and chattels of his wife." Udall v. Kenney, 3 Cow. 590 (N.Y. Sup. Ct. 1824). See also Barber v. Harris, 15 Wend. 615 (N.Y. Sup. Ct. 1836) ("[D]uring the life of the husband, he undoubtedly has the absolute control of the estate of the wife, and can convey or mortgage it for that period.").

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[2] Religious tradition and civil law both shaped early models of marriage. See Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 65-66 (1985) (observing shifts in the treatment of marriage as a sacrament). However, since colonial times, New York's government has overseen marriage as a civil institution rather than a religious contract. See Maynard v. Hill, 125 U.S. 190, 212 (1888), quoting Wade v. Kalbfleisch, 58 N.Y. 282 (1874) ("'The general statute . . .' . declares [marriage] a civil contract, as distinguished from a religious sacrament.").

[3] As this Court is aware, from early statehood through 1847, the State had two high courts: the Court for the Correction of Errors (N.Y.) and the Court of Chancery (N.Y. Ch.). William H. Manz, Gibson's New York Legal Research Guide 116-17 (3d ed. 2004). The Supreme Court of Judicature (N.Y. Sup. Ct.) functioned as an intermediate appellate court from 1821-1847. Id.

The collapse of women's legal identity upon marriage extended to wives' ability to contract as well. As the Supreme Court of Judicature observed in 1819, "[i]t is a settled principle of the common law, that *coverture* disqualifies a *feme* from entering into a contract or covenant, personally binding upon her." Jackson ex dem. Clowes v. Vanderheyden, 17 Johns. 167 (N.Y. Sup. Ct. 1819). See also Wood v. Genet, 8 Paige Ch. 137 (N.Y. Ch. 1840) ("[I]t is perfectly well settled that a *feme covert* cannot bind herself, personally, by any contract or agreement . . . .").

Husbands' control over their wives meant, too, that women had limited recourse in response to "restraint" by their husbands. Mercein, 3 Hill at 408 ("[T]he courts of law will still permit the husband to restrain the wife of her liberty in case of any gross misbehavior.") (citation omitted); see also Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2123-24 (1996) (explaining the common law view that since a husband was legally liable for his wife's misbehavior, he also possessed the power to "restrain" her) (quoting 1 William Blackstone, Commentaries *445).

This gendered concept of marriage reflected in coverture emerged from the view that the colonial family was a "little commonwealth" whose members were bound together by a well-defined set of reciprocal duties and the shared aims of domestic tranquility. Michael Grossberg, Governing the Hearth: Law & the Family in Nineteenth-Century America 4-5 (1985) (citation omitted). The husband was, by legal entitlement and informal social code, the "governor" of this colonial household. Id. The wife and children, in turn, were dependents within the husband's domain. See Mary Ann Mason, From Father's Property to Children's

Rights: The History of Child Custody in the United States 6-13 (1994) (discussing colonial parents' rights and responsibilities).

Against this background, a woman's "civil death" upon marriage was seen as both natural and essential to the healthy continuation of marriage and the broader society. See Peggy A. Rabkin, Fathers to Daughters: The Legal Foundations of Female Emancipation 19 (1980) (discussing married women's legal status in New York prior to 1848). As the Supreme Court of Judicature explained in 1820, "no man of wisdom and reflection can doubt the propriety of the rule, which gives to the husband the control and custody of the wife." Jaques v. Trustees of Methodist Episcopal Church, 17 Johns. 548, 584 (N.Y. Sup. Ct. 1820). "[T]his socially constructed rule [of unity] was identified as part of 'the natural order of things.'" Isabel Marcus, Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State, 37 Buff. L. Rev. 375, 392 (1988) (citation omitted). See also Hendrik Hartog, Man & Wife in America: A History 102-03 (2000) (describing the 19th century's perception of coverture "as a simple and sincere expression of human natures" and "based on unchanging scriptural truth"). Consequently, coverture was also seen as necessary "to preserve the harmony of the marriage relationship." Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 996 (2002).

But by the middle 19th century, the institution of marriage had changed considerably. Marriage no longer meant the absolute legal subordination of women to their husbands. In 1848, New York became one of the first states in the

country to authorize married women to own property as independent individuals. Doris Jonas Freed et al., Married Women's Rights, N.Y.L.J., Feb. 26, 1991, at 3. The Act provided in part:

> The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

Act of Apr. 7, 1848, ch. 200 § 1, 1848 N.Y. Laws 307, 307. The following year, the Act was amended to provide married women with the power to contract as well. Act of Apr. 11, 1849, ch. 375 § 1, 1849 N.Y. Laws 528, 528 (authorizing a married woman "to convey and devise real and personal property . . . as if she were unmarried").

Not surprisingly, the opponents of these changes proclaimed that removing the husband from his role as the "ultimate locus of power within the home" would lead to domestic chaos and the destruction of the nation. Grossberg, supra, at 282. In 1844, for example, a New York State legislative committee observed "that allowing married women to control their own property would lead 'to infidelity in the marriage bed, a high rate of divorce, and increased female criminality,' while turning marriage from 'its high and holy purposes' into something arranged for 'convenience and sensuality.'" E.J. Graff, What is Marriage For? 30-31 (1999) (citation omitted). A prominent New York lawyer opposed the notion of women's independent property ownership out of similar fears that it would lead "husband and wife [to] become armed against each other to the utter destruction of the

sentiments which they should entertain towards each other, and to the utter subversion of true felicity in married life." Rabkin, supra, at 95 (quoting Report of the Debates and Procedures of the Convention for the Revision of the Constitution of the State of New York 1846 at 1057 (William G. Bishop & William H. Attree eds., 1846)).

Despite these concerns, the element of legal unity of spouses, which had been thought of as essential to marriage since statehood, continued to change throughout the 1850s and 1860s through a stream of legislative acts and judicial decisions. These changes included statutes protecting married women's savings deposits (Act of Mar. 25, 1850, ch. 91, 1850 N.Y. Laws 142), ensuring married women the right to vote as stockholders in elections (Act of June 30, 1851, ch. 321, 1851 N.Y. Laws 616), and protecting a woman's right to sue and be sued and to keep her earnings during marriage (Act of Mar. 20, 1860, ch. 90, 1860 N.Y. Laws 157 (the "Earnings Act")).[4] Reflecting New York's leadership role in altering the meaning of marriage, the Earnings Act has been described as arguably the nation's "boldest" legislation on behalf of married women's legal rights. Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York 28 (1982).

Courts played a significant role in determining the elements of marriage. At first, for example, the judiciary adhered to the previously settled view that married

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[4] The provisions of the Earnings Act allowing women to sue and be sued were repealed in 1880 and then reinstated a decade later. Joseph A. Ranney, Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin, 6 Wm. & Mary J. Women & L. 493, 529 (2000).

women were limited in their ability to contract. See, e.g., Bertles v. Nunan, 92 N.Y. 152, 160 (1883) (holding that "[t]he ability of the wife to make contracts is limited"). By 1908, however, the Court of Appeals rejected that position: "Courts of law now recognize the separate existence of a husband and his wife the same as courts of equity and give to each the same rights and remedies." Winter v. Winter, 191 N.Y. 462, 475 (1908).

New York's courts likewise eroded earlier rules limiting wives' ability to sue in tort. Traditional requirements that a husband be joined to any tort action against a married woman were rejected. Compare Bertles, 92 N.Y. at 161 ("[T]he common-law rule as to the liability of the husband for the torts and crimes of his wife are still substantially in force."), with Quilty v. Battie, 135 N.Y. 201, 209 (1892) (finding that a husband was "not a proper party defendant" in a case against the wife for "a trespass committed by her in the care and management of her separate estate"). Similarly, the State's high court recognized a married woman's right to sue third parties for personal torts. See Bennett v. Bennett, 116 N.Y. 584, 590 (1889) (holding that a married woman had the same legal capacity as her husband to bring suit at common law for alienation of affections).

By 1923, New York courts not only had rejected the traditional understanding of marriage as coverture but also had characterized as "archaic" the common law understanding that a husband "had a property interest in [his wife's] body and a right to the personal enjoyment of his wife." Oppenheim v. Kridel, 236 N.Y. 156, 161 (1923). In setting aside the different rules for husbands and wives regarding claims of criminal conversation, the Court pointedly observed that the only objection to the

wife's claim had been "the plea that the ancient law did not give it to her." Id. at 165. "Reverence for antiquity," however, "demands no such denial," the Court wrote. Id.

B. Since the Mid-20th Century, New York Has Continued to Change Elements of Marriage Once Considered Unalterable.

Changes to what once had been thought of as "core" elements of marriage have continued during the past several decades. These changes reshaped, among other things, rules regarding interspousal immunity, spousal testimonial privilege, the doctrine of necessaries, loss of consortium, and sexual relations between spouses. Both individually and together, these shifts demonstrate, again, that there has never been "traditional" marriage as such and that nothing in the contemporary structure of marriage requires the exclusion of same-sex couples.[5] See Hernandez, 26 A.D.3d at 132 (Saxe, J., dissenting) ("The common understanding of the term marriage has not always been what it is today. The institution of marriage has changed remarkably over the centuries.").

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[5] Recent international developments show, too, that marriage continues to evolve. Belgium, the Netherlands, Canada, and Spain now recognize marriages of same-sex couples on the same basis as marriages of different-sex couples. See ABA Section of Family Law, A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships, 38 Fam. L. Q. 339, 407-08 (2004); Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 33, 43 (Can.) (finding marriage rights for same-sex couples to be consistent with the Canadian Charter and noting decisions from provincial courts mandating recognition of same-sex couples' unions); Civil Marriage and the Legal Recognition of Same-Sex Unions, http://canada.justice.gc.ca/en/fs/ssm/ (last updated Oct. 20, 2005); Renwick McLean, Spain Legalizes Gay Marriage; Law is Among the Most Liberal, N.Y. Times, July 1, 2005, at A1.

Also, in 2004, the Supreme Court of Appeal of South Africa found that exclusion of same-sex couples from common law marriage rights violated South Africa's Constitution. Fourie v. Minister of Home Affairs, 2005 (3) BCLR 241 (SCA) (S. Afr.). Nearly ten years earlier, Hungary's Constitutional Court recognized common law marriages of same-sex couples. See White Paper, supra, at 410 (discussing 1995 ruling by Hungary's Constitutional Court recognizing common-law marriages of same-sex couples).

1. Interspousal Immunity and Spousal Testimonial Privilege

The doctrine of interspousal immunity was long understood as fundamental to marriage. Traditionally, "neither spouse could sue the other civilly for personal injuries wrongfully inflicted upon the other." People v. Morton, 284 A.D. 413, 416 (2d Dep't) (affirming larceny conviction of husband for theft of wife's property), aff'd, 308 N.Y. 96 (1954). Conferring such a right, it was feared, would be "destructive of that conjugal union and tranquility." Longendyke v. Longendyke, 44 Barb. 366, 366 (N.Y. Cty. 1863).

This immunity had widespread repercussions. For example, married women could not sue their husbands for assault and battery, see id.; Schultz v. Schultz, 89 N.Y. 644 (N.Y. Cty. 1882); Abbe v. Abbe, 22 A.D. 483 (2d Dep't 1897), trespass upon their person, Caplan v. Caplan, 268 N.Y. 445 (1935), malicious prosecution, Allen v. Allen, 246 N.Y. 571 (1927), or slander, Freethy v. Freethy, 42 Barb. 641 (N.Y. Cty. 1865).

Eventually, however, this element of marriage that was once thought unalterable was written out of existence. See Act of May 27, 1937, ch. 669 § 1, 1937 N.Y. Laws 1520, 1520 (providing that spouses could sue each other for wrongful personal injuries); see also State Farm Mut. Auto. Ins. Co. v. Westlake, 35 N.Y.2d 587, 591 (1974) ("No longer is it considered contrary to public policy for one spouse to sue another for damages for personal injuries.").

In 1954, the Court of Appeals went further than the legislature, extending the abrogation of interspousal immunity to include criminal cases so that a husband could be convicted of larceny for theft of his wife's property. See Morton,

308 N.Y. at 99 ("We are not fearful, as was the court in 1863 . . . that this will 'involve the husband and wife in perpetual controversy and litigation' or 'sow the seeds of perpetual discord and broil[.]'") (citation omitted). In the Second Department's ruling in the same case, the court observed that "[i]t would not be consonant with our present social concepts of husband and wife to say that one is not a person separate from the other." Morton, 284 A.D. at 418.

New York courts similarly cast aside the longstanding rule that spouses could not be compelled to testify against each other in court. See, e.g., People v. Watkins, 63 A.D.2d 1033, 1034 (2d Dep't 1978) (holding that the traditional privilege protecting spouses from testifying against each other "does not extend to communications between spouses" in connection with a criminal conspiracy) (internal quotations omitted); People v. Smythe, 210 A.D.2d 887, 888 (4th Dep't 1994) (same).

2. Loss of Consortium

As recently as 1958, the Court of Appeals sustained the deeply rooted traditional rule that husbands, but not wives, could recover for loss of consortium – even while it recognized that the rule was "based on outworn theory." Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 527 (1958). "The reason for this rule is that the wife at law is supposed to render services in and about the home and in caring for the children." Oppenheim, 236 N.Y. at 168.

But ten years later, in Millington v. Southeastern Elevator Co., 22 N.Y.2d 498 (1968), the Court of Appeals rejected this traditional element of marriage, holding that "we . . . remove the discrimination in the existing law by

acknowledging the equal right of the wife to damages as a result of her loss of consortium." Id. at 505. Explaining its elimination of this once "venerable" element of marriage, see id. at 508, the Court wrote that "'[t]he gist of the matter is that in today's society the wife's position is analogous to that of a partner, neither kitchen slattern nor upstairs maid.'" Id. at 503 (citation omitted). See also id. at 508-09 (stating that the old rule "'no longer expresses a standard of care which accords with the mores of our society'") (quoting Gallagher v. St. Raymond's R.C. Church, 21 N.Y.2d 554 (1968)).

3. Doctrine of Necessaries

An additional, striking example of the fundamental changes to sex-based distinctions in marriage arises in connection with the doctrine of necessaries, once viewed as "'one of the most primary and absolute principles in New York law.'" See Med. Bus. Assoc., Inc. v. Steiner, 183 A.D.2d 86, 91 (2d Dep't 1992) (quoting Douglas J. Besharov, Practice Commentaries, N.Y. Fam. Ct. Act § 412, at 33 (McKinney 1991)). Under the traditional rule, husbands, but not wives, were obligated to support the family. See Garlock v. Garlock, 279 N.Y. 337, 340 (1939) ("[T]he duty rests upon the husband to support his wife and his family, not merely to keep them from the poorhouse, but to support them in accordance with his station and position in life."). Cf. Med. Bus. Assoc., Inc., 183 A.D.2d at 91 (describing "[t]he obligation of a husband to support his wife" as "comport[ing] with the traditional family structure of the husband as sole breadwinner and the wife as full-time homemaker").

In 1989, the Third Department recognized the outmoded nature of this common law rule, holding that spouses had reciprocal, rather than sex-based, duties to pay for each other's necessaries. Our Lady of Lourdes Mem. Hosp., Inc. v. Frey, 152 A.D.2d 73 (3d Dep't 1989). In 1992, the Second Department agreed, holding that the gendered doctrine of necessaries violated the State's equal protection guarantee. See Med. Bus. Assoc., Inc., 183 A.D.2d at 91 (describing the traditional rule as "an anachronism that no longer fits contemporary society") (citations omitted).

4. Sexual Relations

Finally, the treatment of sexual relations between spouses as an element of marriage has also undergone significant change. For over 150 years, the law was clear: a man could have sexual relations with his wife any time he so chose. People v. Liberta, 64 N.Y.2d 152, 162 (1984) (citing an 1852 New York treatise on this point). Indeed, a wife's presumptive consent to sexual relations with her husband had long been considered fundamental to the marriage right. Id. Yet in 1984, the Court of Appeals rejected this deep-rooted understanding of marriage. The traditional rationales for the marital rape exemption, it held, no longer withstood rational basis review. Id. at 163. See also People v. De Stefano, 121 Misc. 2d 113, 127 (Suffolk Cty. 1983) (same).

As the history of marriage demonstrates, fears that the institution of marriage would be endangered accompanied each change to elements once thought of as essential to marriage. The Massachusetts Supreme Judicial Court observed, for example, that "[a]larms about the imminent erosion of the 'natural' order of

marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of 'no-fault divorce.'" Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003). Yet, that court added, "[m]arriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution." Id. Justice Saxe, in his dissent in Hernandez, reinforced that changes to marriage have been continuous, observing that "[t]he institution of marriage has changed remarkably over the centuries." Hernandez, 26 A.D.3d at 132 (Saxe, J., dissenting).

The Court of Appeals made this same point regarding unfounded predictions of harm flowing from legal changes to familial relationships when it recognized tort liability between siblings in 1939. Rozell v. Rozell, 281 N.Y. 106 (1939). The Court observed that "[t]he modern family . . . is far different in structure, status and internal social and legal relationship than the family of ancient times." Id. at 109. It added: "Not withstanding such changes from tradition [to the rules governing family relations], predictions of dire results to the continued peace and amity of the family relationship have not been sustained." Id. at 111.

The historical record demonstrates, in short, that familiar, longstanding marriage rules have been rejected over time and that marriage has no "essential" structure that requires it to be limited to different-sex couples.

II. Courts Have Been at the Forefront of Invalidating Longstanding Marriage Rules that Conflict with Constitutional Rights.

The decision below in Hernandez faults the trial court for allegedly rewriting the state's Domestic Relations Law and creating a new constitutional right, "an act that exceeded the court's constitutional mandate and usurped that of the Legislature." Hernandez, 26 A.D.3d at 102. See also Samuels, 2006 N.Y. Slip. Op. at 17 ("In our opinion, the Legislature is where changes to marriage of the nature urged by plaintiffs should be addressed."). But this view is fundamentally at odds with constitutional history in New York and elsewhere. While legislatures have played a role in the evolution of marriage over time, courts have played an independent and important role in rejecting traditional marriage rules.

Most famously, perhaps, the United States Supreme Court expanded the range of couples eligible to marry in Loving v. Virginia, 388 U.S. 1 (1967), when it invalidated the anti-miscegenation laws of Virginia and fifteen other states. Nearly two decades earlier, the California Supreme Court had paved the way for Loving by invalidating that state's longstanding race-based marriage rules. Perez v. Lippold, 198 P.2d 17 (Cal. 1948). The California court did so over the objection of the dissent, which, like the appellate courts here, argued that "[t]he determination of proper standards of behaviour must be left to the Congress or to the state legislatures in order that the well being of society as a whole may be safeguarded or promoted." Id. at 37 (Shenk, J., dissenting).

In numerous areas, New York courts have similarly invalidated marriage rules that were once considered traditional and expressly rejected arguments that,

in the area of marriage, courts were bound to follow the legislature's prerogatives. For example, while acknowledging "the danger of usurping the role of the Legislature," the Court of Appeals did not hesitate to abolish the traditional marital rape exemption. Liberta, 64 N.Y.2d at 172. Even the recent legislative reform of the rule, which revised but did not repeal the exemption, and the fact that over forty states continued to recognize some form of exemption did not inhibit the Court from exercising its authority. See also Morton, 308 N.Y. 99 (invalidating interspousal immunity in criminal context notwithstanding that legislature had abolished the immunity only in civil cases).[6]

Notably, the legislature did not remove the gendered rules that were widespread in numerous statutes until after the courts had invalidated many of them. See Alan D. Scheinkman, Practice Commentaries, N.Y. Dom. Rel. Law § 236, at 205 (McKinney 1999); see also id. § 236, at 207. The U.S. Supreme Court provided the initial impetus for reform of the Domestic Relations Law. See Orr v. Orr, 440 U.S. 268, 279-80 (1979) ("[T]he old notio[n] that generally it is the man's primary responsibility to provide a home and its essentials, can no longer justify a statute that discriminates on the basis of gender.") (internal quotation marks omitted) (alterations in original). New York's courts subsequently took steps to eliminate sex-based legislative rules. See, e.g., Childs v. Childs, 69 A.D.2d 406 (2d Dep't 1979) (removing sex-based restrictions from judicial assignment of counsel fees in matrimonial proceedings). Only after a series of

[6] When the Court struck down the state's longstanding prohibition of consensual sodomy, People v. Onofre, 51 N.Y.2d 476 (1980), it too rejected the claim that it was committing "an act of judicial legislation." Id. at 504 (Gabrielli, J., dissenting).

such decisions did the legislature enact New York's Equitable Distribution Law in 1980, which broadly removed sex-based rules from the Domestic Relations Law. See N.Y. Dom. Rel. Law § 236 (McKinney 1999). Outside the area of Domestic Relations Law, New York courts also have acted before the legislature to reject gendered rules as unconstitutional, even in the face of significant statutory authority – and tradition – to the contrary. See, e.g., A. v. City of New York, 31 N.Y.2d 83 (1972) (invalidating different rules for adjudicating the delinquency of young men and women).

In sum, the appellate courts in Hernandez and Samuels were incorrect in suggesting that the legislature's position on marriage rights for same-sex couples is effectively immune from judicial review. Indeed, where constitutional rights are at stake, the Court has both a duty to intervene and a tradition of doing so.

III. Spousal Interdependence Comprises the Essential Element of Marriage Today in New York; Alleged State Interests in the Sex of Marriage Partners and in Procreation Do Not Justify the Exclusion of Same-Sex Couples from Marriage.

A. New York's Jurisprudence and Statutes Now Identify Interdependence as the Essence of Civil Marriage.

On numerous occasions, New York's courts have identified the essence of marriage today not in the separate, gendered roles of husbands and wives nor in the function of procreation, but instead in the interdependence of the marital partners. This interdependence is, in large part, economic. See Holterman v. Holterman, 3 N.Y.3d 1, 7 (2004) (stating that the Domestic Relations Law "recognize[s] marriage as an economic partnership"); DeLuca v. DeLuca, 97 N.Y.2d 139, 144

(2001) (describing the "'contemporary view of marriage as an economic partnership'") (quoting DeJesus v. DeJesus, 90 N.Y.2d 643, 648 (1997)); Koehler v. Koehler, 182 Misc. 2d 436, 442 (Suffolk Cty. 1999) ("The underlying rationale of the reforms [to the Domestic Relations Law] of 1980 was the assumption that marriage was purely an economic partnership and should be treated as such.").

Beyond economics, New York's courts have also recognized emotional interdependency and sexual intimacy as important to marriage. In addressing the concept of loss of consortium, for example, the Court of Appeals explained that the loss comprised not only "support or services" but also "such elements as love, companionship, affection, society, sexual relations, solace and more." Millington, 22 N.Y.2d at 502. See also Hernandez, 26 A.D.3d at 132-33 (Saxe, J., dissenting) ("[B]oth the law and the population generally now view marriage . . . as a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support.").

The statutes governing marriage implicitly have recognized this concern with mutual care through their focus on insuring the consent of the parties to the marriage and on promoting the partners' commitment to each other. See, e.g., N.Y. Dom. Rel. Law § 7(1)-(5) (McKinney 1999) (providing for nullification when a party to the marriage was incapable of consent or consent arose from force, duress, or fraud); N.Y. Dom. Rel. Law § 236[B][6][a][5], [8] (McKinney 1999)

(setting out conditions for maintenance awards based on one party having foregone opportunities or provided homemaking or other services for the other).

Likewise, the jurisprudence and statutory framework regarding divorce reinforce that interpersonal commitment is the linchpin of civil marriage today. While divorce was once viewed as risking "the stability of our government," In re Estate of Lindgren, 181 Misc. 166, 169 (Kings Cty. 1943), and "preced[ing] the downfall of a nation," id. at 170, contemporary law holds that society is better off when couples lacking interpersonal commitment do not remain married. As the Court of Appeals observed, modern New York divorce law rests on a "recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them 'to extricate themselves from a perpetual state of marital limbo.'" Gleason v. Gleason, 26 N.Y.2d 28, 35 (1970) (citation omitted). See also Halsey v. Halsey, 296 A.D.2d 28, 30 (2d Dep't 2002).

B. The Rule Limiting Marriage to Male-Female Couples Reflects an Earlier Era of Gendered Roles for Husbands and Wives; Current Law Does Not Treat the Sex Difference Between Marital Partners as Important or Relevant.

The sex of the marital partners has become legally irrelevant, a reality which is reflected in the evolution of standards regarding care of children upon the dissolution of a marriage. The changes in this area – from a preference for fathers to a preference for mothers to a sex-neutral position – reveal the rule limiting marriage to male-female couples to be an outgrowth of an earlier view, since

rejected, that marriage involved naturally and legally distinct roles for men and women.

Early on in custody disputes, New York courts embraced the common law rule that the father, not the mother, was entitled to custody of their children. "That the father has, by the common law, the paramount right to the custody and control of his minor children, and to superintend their education and nurture, is too well settled to admit of doubt." People ex rel. Olmstead v. Olmstead, 27 Barb. 9, 9 (N.Y. Cty. 1857). See also Linda R. v. Richard E., 162 A.D.2d 48, 54 n.3 (2d Dep't 1990) ("Gender had long been the primary factor in awarding custody, beginning with ancient and common-law doctrine of absolute patriarchal control . . . ."). Even after statutory changes in 1860 explicitly granted married women joint custody of their children, see Act of Mar. 20, 1860, ch. 90 § 9, 1860 N.Y. Laws 157, 159, courts continued to find that "the recognized paramount right of the father must prevail over the otherwise equal claims of the mother." People ex rel. Brooks v. Brooks, 35 Barb. 85, 92 (N.Y. Cty. 1861).

By the late 1800s, the absolute, seemingly "natural" rule favoring fathers gave way to a maternal presumption in child custody disputes, particularly when young children were involved. See Osterhoudt v. Osterhoudt, 28 Misc. 285, 287 (N.Y. Cty. 1899) ("[T]he tender guidance of a mother is of incalculable advantage, and should only be lost to [young children] by her death or misconduct."). This maternal preference remained in force for much of the 20th century. See, e.g., People ex rel. Himber v. Himber, 136 N.Y.S.2d 456, 458 (N.Y. Cty. 1954) ("[W]hen it becomes necessary to make a choice between mother and father it is to

the child's best interest and welfare to be brought up and reared by his mother . . . .").

More recently, though, the State's courts revisited this once-"normal" preference for maternal care and concluded that sex-based parenting rules are outdated and not essential to marriage (or marital dissolution) after all. As the Second Department observed, "[w]hile the role of gender in making custody determinations has had a lengthy social and legal history, it finds no place in our current law." Linda R., 162 A.D.2d at 53-54. See also Fountain v. Fountain, 83 A.D.2d 694, 694 (3d Dep't 1981) ("A presumption of 'maternal superiority' is now considered to be outdated."). Cf. Hernandez, 26 A.D.3d at 141 (Saxe, J., dissenting) (stating that neither the scientific literature nor leading professional organizations such as the American Psychological Association have found parents' gender or sexual orientation to be relevant to healthy child development).

New York's custody and child support statutes reflect the same gender-neutral position regarding the treatment of children upon marital dissolution. See N.Y. Dom. Rel. Law § 70(a) (McKinney 1999) ("In all cases there shall be no prima facie right to the custody of the child in either parent . . . ."); N.Y. Dom. Rel. Law § 240(1) (McKinney 1999) (same). As a result, courts now regularly award custody to fathers, even when both parents are found to be fit. See, e.g., Bryant v. Nazario, 306 A.D.2d 529 (2d Dep't 2003).

These shifts in custody rules and in the doctrine and law that constitute marriage underscore that conventional understandings, while not to be denigrated, cannot alone justify the continued enforcement of an otherwise discriminatory law

or doctrine. As Justice Holmes remarked, dissenting in Lochner v. New York, 198 U.S. 45 (1905), "the accident of our finding certain opinions natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Id. at 76 (Holmes, J., dissenting).[7] That is certainly the case here, where the different-sex eligibility requirement reflects the view of marriage as a gendered status that has long been rejected by both the courts and legislature. The present focus of both the courts and the legislature is now trained instead on the spouses' commitment to each other, a factor that has no legitimate connection to the sex of the marital partners.

C. The Capacity to Procreate Has Never Been Treated as Essential to Marriage in New York.

The history of marriage in New York as well as contemporary state law demonstrates that neither the capacity to procreate nor the risk of accidental procreation has ever been treated as an essential element of marriage. While references to the importance of procreation have appeared occasionally in dicta, neither courts nor statutes treat procreation as fundamental to marriage. Mirizio v. Mirizio, 242 N.Y. 74, 81 (1926), relied upon by Respondent Robles for the

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[7] The U.S. Supreme Court has taken this point to heart, affirming in numerous cases that while history is a useful starting point for analysis, the past alone cannot justify retention of a discriminatory, exclusionary rule. See, e.g., Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("'[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . .'") (quoting Williams v. Illinois, 399 U.S. 235, 239 (1970)); Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.").

proposition that marriage is "'for the purpose of begetting offspring,'" Brief of Respondent Robles at 58, is illustrative. Despite its rhetoric, Mirizio did not concern procreation at all. Instead, at issue was whether a wife was entitled to support when she refused to be sexually intimate with her husband after the husband failed to keep his promise to undergo a Catholic wedding ceremony. Id. at 77, 84. The court rejected her claim not because procreation is essential to marriage, but because the refusal of sexual intimacy constituted a violation of "the fundamental obligation of the marriage contract." Id. at 81.

In 1960, this Court made the same point: the capacity to procreate is *not* the essential concern of marriage law in New York. Diemer v. Diemer, 8 N.Y.2d 206 (1960). In Diemer, the wife "unequivocally declared that she would not have any sexual relations with her husband until they were remarried before a Roman Catholic priest." Id. at 209. Characterizing the refusal as "strik[ing] at the civil institution of marriage," id. at 210, the Court granted the husband a decree of separation. In doing so, the Court reinforced that Mirizio concerned sexual intimacy rather than procreation: "That a refusal to have marital sexual relations undermines the essential structure of marriage is a proposition basic to this court's decision in the Mirizio case and as obvious as it is authoritative." Id.

The State's annulment statutes and jurisprudence confirm that the capacity to procreate has been neither necessary to nor sufficient for marriage. Over a century ago, the Second Department found that the inability to "become a mother" did not make it "impossible for the defendant . . . to enter into the marriage state." Wendel v. Wendel, 30 A.D. 447, 448-49 (2d Dep't 1898) (citations omitted). The

court reasoned: "[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, so long as there is no impediment to the indulgence of the passions incident to this state." Id. at 449. Simply put, procreation was not the foundation of marriage.

In Zagarow v. Zagarow, 105 Misc. 2d 1054 (Suffolk Cty. 1980), the court likewise held that a wife's refusal to procreate was not a ground for divorce. "Unlike marital sexual relations, which are, per se, part of the essential structure of marriage, the parties are free to decide when and if and how often they will have children," the court wrote. Id. at 1057. See also id. at 1059 ("It would be futile to rule that a woman must submit to a pregnancy and then hold that she may legally abort it."); De Stefano, 121 Misc. 2d at 123 (quoting Zagarow, 105 Misc. 2d 1054).

Even the Domestic Relations Law provision that "physical cause" could render a marriage voidable, N.Y. Dom. Rel. Law § 7(3) (McKinney 1909), relates not to the capacity to procreate but rather to the capacity for sexual intimacy. The Court made this clear in 1930, when it distinguished the ability to bear children from the ability to "perform[] the functions of a wife or a husband." Lapides v. Lapides, 254 N.Y. 73, 80 (1930) (observing that "[t]he inability to bear children is not such a physical incapacity as justifies an annulment"); see also Goodridge, 798 N.E.2d at 961 ("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."); William M. Hohengarten, Note, Same-Sex Marriage and the Right of Privacy, 103 Yale L.J. 1495, 1512 (1994) ("[L]aws

governing domestic relations do not treat the ability to procreate as a precondition of marriage. The marital relationship is valued in its own right as a legal commitment between two intimately related adults, not because it is sometimes connected with procreation."); id. at 1523 ("Far from denying [opposite sex] couples the right to marry simply because they are unable to reproduce biologically, the law allows them to marry and then protects their decision to form a family by presuming that they are the joint parents of children born into their household."). Cf. Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (stating that "encouragement of procreation" could not justify excluding same-sex couples from marriage).

As the history and current law regarding the elements of marriage demonstrate, neither procreation nor gendered roles for the marital partners is essential to marriage today. Instead, taken together, they reveal the different-sex eligibility rule to be inconsistent with the standards of marriage as they have evolved.

IV. New York Historically Has Not Maintained Uniformity with Other States in Its Definition of Marriage.

Throughout history, New York has always followed its own course in defining and transforming the elements of marriage in the ways discussed above. Indeed, the State has not sought uniformity with other states' marriage laws either through its marriage statutes or through the liberal comity principles by which it has traditionally and voluntarily recognized other states' marriages. The State's history thus contradicts respondents' claim that the status of marriage in other

states should govern New York law. See Brief of Respondents State of New York and Department of Health at 40-43; see also Hernandez v. Robles, 7 Misc. 3d 459, 483-85 (N.Y. Cty. 2005) (considering the City's argument regarding "Consistency with Federal Law and Other States").

New York's comity law, which reflects the State's autonomous decision to recognize virtually all marriages that are valid where they are celebrated, has led to recognition of marriages that the State's own law does not permit. See In re Estate of May, 305 N.Y. 486, 490 (1953) ("[T]he legality of a marriage between persons . . . is to be determined by the law of the place where it is celebrated."). For example, New York's courts have recognized common law marriages, marriages between an uncle and a niece, and remarriage by an adulterer, among others. See, e.g., Mott v. Duncan Petroleum Transp., 51 N.Y.2d 289, 292 (1980) ("It has long been settled law that although New York does not itself recognize common-law marriages . . . a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted."); Estate of May, 305 N.Y. at 492-93 (recognizing the out-of-state marriage of an uncle and a niece, despite the State's prohibition of such marriages); Van Voorhis v. Brintnall, 86 N.Y. 18 (1881) (recognizing remarriage of man who traveled out of state to evade New York's prohibition against remarriage).

The State's generous comity doctrine also requires recognition of same-sex couples' marriages and partnerships celebrated out of state. See 2004 N.Y. Op. Atty. Gen. No. 1 (finding that state comity law would require recognition of same-sex couples' out-of-state marriages). New York City itself has acknowledged that

it will accord full legal respect to marriages of same-sex couples entered out of state. Letter from Anthony Crowell, Special Counsel to the Mayor, City of New York, to Alan Van Capelle, Executive Director, Empire State Pride Agenda (Apr. 6, 2005), http://www.prideagenda.org/pdfs/NYC Letter Recognizing Same-Sex Marriage.pdf.

The only exceptions that New York courts have suggested could prevent the recognition of a valid out-of-state marriage are "cases, first of incest or polygamy coming within the prohibitions of natural law . . . ; second, of prohibition by positive law. " Van Voorhis, 86 N.Y. at 26 (citation omitted). The Court of Appeals has stressed, further, that foreign-based rights should be enforced unless the transaction "is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." Intercontinental Hotels Corp. (Puerto Rico) v. Golden, 15 N.Y.2d 9, 13 (1964).

Just as New York's liberal treatment of out-of-state marriages illustrates the State's willingness to maintain marriage law that is not uniform with other states, so too New York's relatively conservative divorce law shows the State's lack of commitment to uniformity. In the 19th century, the State's divorce laws were "notorious for their rigidity and inflexibility." Hendrik Hartog, Marital Exits and Marital Expectations in Nineteenth Century America, 80 Geo. L.J. 95, 116 (1991). As "the last state to move toward liberalizing its divorce laws," Marcus, supra, at 417 n.159, New York banned remarriage by the party liable for the divorce during much of the 19th century. See Act of May 19, 1879, ch. 321 § 1, 1879 N.Y. Laws 405, 405 (limiting right of defendant convicted of adultery to remarry). Until

1966, adultery was the only ground for divorce. N.Y. Dom. Rel. Law § 170 (McKinney 1966) (amending state law to provide six grounds for divorce, including, inter alia, abandonment and separation pursuant to court order or written agreement). Even today, New York remains differently situated from other states with respect to divorce. It is now the only state in the country to "require[] the finding of fault or living apart pursuant to a legal document as a basis for divorce." S.C. v. A.C., 4 Misc. 3d 1014(A), 2004 N.Y. Slip. Op. 50884, at 8 (Queens Cty. June 17, 2004).

Thus, neither historically nor today can New York's marriage law be characterized fairly as conforming with that of other states.

CONCLUSION

As illustrated above, in the last two centuries, marriage has enjoyed a history of evolution, not of static immutability, with innumerable changes to features of marriage that were once thought to be essential. These changes to the institution of marriage over time have rendered the current rule excluding same-sex couples from marriage inconsistent with New York law, which has repudiated gendered marriage rules as unconstitutional and has never held the ability to procreate to be an essential element of marriage. Consequently, the respondents' procreation-related argument lacks a legitimate relationship to the concerns of equality and interdependence that are the now-settled underpinnings of marriage. Likewise, the historical and ongoing absence of uniformity between marriage rules of New York and other states demonstrates that claims about uniformity cannot support the rule challenged here.

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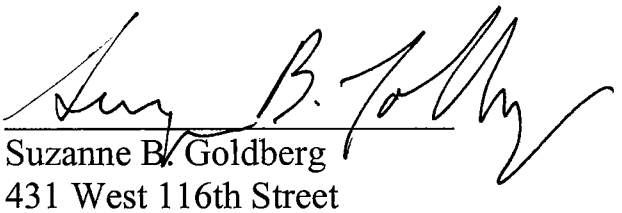
Respectfully Submitted,



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