No Argument Requested

Case No. 512996

Supreme Court of the State of New York

Appellate Division – Third Department

MARK YONATY,

Plaintiff-Respondent-Appellant,

- against -

JEAN MINCOLLA,

Defendant-Appellant-Respondent.

JEAN MINCOLLA,

Third-Party Plaintiff-Appellant-Respondent,

- against -

RUTHANNE KOFFMAN,

Third-Party Defendant-Appellant-Respondent.

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND EMPIRE STATE PRIDE AGENDA AS *AMICI CURIAE*

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MISCELLANEOUS

Amici curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and Empire State Pride Agenda ("Pride Agenda") respectfully submit this memorandum of law concerning the disputed legal issue of whether New York law deems defamatory per se statements falsely describing a person as lesbian, gay or bisexual.

INTERESTS OF *AMICI CURIAE*

Lambda Legal is a national organization, with thousands of New York members, dedicated to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those living with HIV through impact litigation, education and policy work. Since its founding in New York in 1973, and for nearly 40 years, Lambda Legal has been advocating for equality for people who are lesbian, gay or bisexual in New York and throughout the United States, and has been counsel or *amicus* in scores of cases establishing the rights of lesbians, gay men and bisexuals in many areas. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down consensual sodomy prohibitions as unconstitutional); *Stern v. Cosby*, 645 F. Supp. 2d 258 (S.D.N.Y. 2009) (predicting that New York Court of Appeals would hold that it is not defamatory per se to describe someone as lesbian, gay or bisexual); *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010) (holding that, as matter of comity, Vermont civil union of New York residents established one partner's parentage of child born to other partner during their civil union); *Dickerson v. Thompson*, 88 A.D.3d 121 (3d Dep't 2011) (according comity to same-sex couple's Vermont civil union for purpose of granting its dissolution) (*Dickerson II*); *Dickerson v. Thompson*, 73 A.D.3d 52 (3d Dep't 2010) (holding that New York Supreme Court has subject matter jurisdiction to entertain an action for equitable and declaratory relief seeking dissolution of a Vermont civil union) (*Dickerson I*); *Lewis v. N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 216 (3d Dep't 2009) (upholding government recognition of out-of-state marriages of same-sex couples), *aff'd sub nom. Godfrey v. Spano*, 13 N.Y.3d 358 (2009). Lambda Legal submits this

brief because the predicate finding necessary to recognition of Plaintiff-Respondent-Appellant Mark Yonaty's ("Respondent's") defamation per se claim – that lesbians, gay men and bisexuals are subjects of public hatred, ridicule, aversion or contempt – conflicts with New York public policy of protection to and respect for lesbians, gay men and bisexuals, and would have a harmful and stigmatizing effect on people who are lesbian, gay or bisexual.

Founded in 1990, the Empire State Pride Agenda (the "Pride Agenda") is New York's statewide civil rights and advocacy group committed to winning equality and justice for lesbian, gay, bisexual and transgender ("LGBT") New Yorkers and their families. The Pride Agenda is one of the largest statewide LGBT organizations in the country with staff across New York State and offices in New York City and Rochester. It is dedicated to ensuring that all New Yorkers are protected from discrimination and bias-motivated harassment and violence, and that all New Yorkers and their families are respected and supported by their government. The Pride Agenda's core priorities have included its work to secure measures that protect against discrimination based on sexual orientation and gender identity and expression in employment, education, credit, housing and public accommodations, and protect LGBT families. The Pride Agenda was instrumental in passage of New York's Sexual Orientation Non-Discrimination Act ("SONDA"), which in 2003 added sexual orientation to the state's Human Rights Law, and is currently working to similarly add gender identity and expression. The Pride Agenda was among the lead groups advocating for the Dignity for All Students Act passed in 2010 to prevent and address bias-based bullying and discrimination in the New York State's public schools. Over many years, the Pride Agenda played a leading role advocating for legal recognition of the relationships of same-sex couples in statutes and policies providing equity for same-sex couples and families in areas such as medical decision making, bereavement and family leave, and many

other areas including, most recently, the Marriage Equality Act of 2011 allowing same-sex couples the right to marry. The Pride Agenda thus has continuously tracked the development of legal protections afforded to lesbians, gay men and bisexuals and their families by all three of New York's branches of government. The Pride Agenda submits this brief to share with this Court its expertise concerning the evolution of New York state law and policy regarding the treatment of lesbians, gay men and bisexuals.

PRELIMINARY STATEMENT

Plaintiff-Appellant-Respondent Mark Yonaty ("Respondent") claims that he was slandered per se by statements describing him as gay or bisexual.[1] The Court of Appeals has never deemed such statements defamatory per se, and the Appellate Division decisions that considered the question in depth are from years ago. The supreme court below recognized that "the law may, at some point, change in response to evolving social attitudes regarding homosexuality" but determined that it was "bound to follow" prior decisions of the Appellate Division holding "that imputation of homosexuality constitutes defamation per se." R.16 (citations omitted).[2] This Court is not bound by those older decisions interpreting public attitudes of another era, and to hold that statements describing a person as lesbian, gay or bisexual could be defamatory per se, this Court would have to hold that it is publicly shameful and odious to be lesbian, gay or bisexual. *See Kimmerle v. N.Y. Evening Journal, Inc.*, 262 N.Y.

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[1] Defendant-Appellant-Respondent Jean Mincolla ("Appellant") testified that she told people that Plaintiff-Respondent-Appellant Mark Yonaty ("Respondent") was gay or bisexual. *See, e.g.* R.301, 311, 314 (statements describing Yonaty as bisexual or gay); R.303 (statements that Yonaty was dating a man). Statements conveying substantively that information were made by Defendant-Third Party Plaintiff-Appellant-Respondent Jean Mincolla, and by Third Party Defendant-Appellant-Respondent Ruthanne Koffman.

[2] "R" refers to the Record on Appeal.

99, 102 (1933). In a recent federal decision, Judge Chin predicted that the Court of Appeals would rule differently from those older cases, and that finding such statements to be defamatory per se today would be completely inconsistent with contemporary New York public policy and laws regarding people who are lesbian, gay or bisexual, which accord these members of the community substantial legal respect. *See Stern*, 645 F. Supp. 2d at 275.[3]

For purposes of determining whether statements describing a man as gay or bisexual are defamatory per se, the question is not whether lesbians, gay men and bisexuals have attained full equality or whether anti-gay bias has been completely eradicated, but whether someone identified as lesbian, gay or bisexual would tend to be subjected to public hatred, contempt, ridicule or disgrace. Respectfully, that question should be answered by taking into account the ways in which New York public policy respects people who are lesbian, gay or bisexual. Indeed, in many significant ways, New York *prohibits* treating them as shameful and odious.

A principle of law that would automatically award money damages to someone merely for having been incorrectly described as lesbian, gay or bisexual is based on a flawed premise that is incompatible with decisions of this Court and others involving the legal recognition of out-of-state marriages and civil unions of same-sex couples. In those decisions, courts carefully reviewed New York public policy and consistently concluded that New York accords respect to those relationships. It would be strange indeed for New York to respect the *same-sex relationships* of people who are lesbian, gay or bisexual while simultaneously accepting or even expecting that the *individuals in* those relationships will be subjected to public hatred, contempt, ridicule or disgrace. Because the public policy of this State affirms that it is neither shameful nor

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[3] Then-District Judge Chin was later appointed to the Second Circuit Court of Appeals.

disgraceful to be lesbian, gay or bisexual, statements that inaccurately describe a person's sexual orientation are not, as a matter of law, defamatory per se.[4]

ARGUMENT

IN CONTEMPORARY NEW YORK, IT IS NOT DEFAMATORY PER SE TO DESCRIBE A PERSON AS LESBIAN, GAY OR BISEXUAL

Respondent claims that statements incorrectly describing him as gay or bisexual were slanderous per se. But that would be the case only if such statements are, as a matter of law, defamatory – in other words, only if being viewed as gay or bisexual leads to "public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace[.]" *See Kimmerle*, 262 N.Y. at 102; *see also Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379 (1977) (statement is "libelous or actionable [per se] without alleging special damages if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society") (citations omitted).

"Defamation, consisting of the twin torts of libel and slander, is the invasion of the interest in a reputation and good name." *Hogan v. Herald Co.*, 84 A.D.2d 470, 474 (4th Dep't 1982), *aff'd on op. below*, 58 N.Y.2d 630 (1982). Defamation "necessarily . . . involves the idea of disgrace." *Bytner v. Capital Newspaper, Div. of Hearst Corp.*, 112 A.D.2d 666, 667 (3d Dep't 1985) (citations omitted). "Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance." *Aronson v. Wiersma*, 65 N.Y.2d 592, 593 (1985).

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[4] This brief does not, therefore, address any other issue raised by the parties below or on appeal.

Although in the past some courts applying New York law concluded that it was defamatory per se to describe someone as lesbian, gay or bisexual,[5] New York public policy and other persuasive data reflecting public attitudes demonstrate that today such statements are *not* defamatory per se.

A. Court decisions from other eras are not dispositive of whether statements incorrectly describing someone as lesbian, gay or bisexual are defamatory per se in the present day.

A cause of action for slander or libel must be predicated on the publication of a statement of fact that is not only false but also defamatory. *See, e.g., Albert v. Loksen*, 239 F.3d 256, 265-66 (2d Cir. 2001) (citations and footnotes omitted) (applying New York law of slander). Even false and defamatory statements, however, are insufficient to sustain a cause of action absent either special damages or per se liability. *See, e.g., Liberman v. Gelstein*, 80 N.Y.2d 429, 434 (1992) (slander); *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) (libel, applying New York law).[6]

The tort of defamation – particularly defamation per se – is intended to provide a remedy to persons whose reputation in the community has been seriously damaged; it does not provide a remedy for minor or trivial insults. "Whether language has [a defamatory] tendency depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place." *Mencher v. Chesley*, 297 N.Y. 94, 100 (1947) (citations omitted). In *Mencher*, the Court of Appeals concluded that in 1947, "having regard for the current public attitude – transitory though it may be . . . a false charge that one is a

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[5] *See, e.g., Matherson v. Marchello*, 100 A.D.2d 233, 241 (2d Dep't 1984) (holding that statements describing man as gay or bisexual were defamatory per se "at this point in time").

[6] Special damages contemplate "the loss of something having economic or pecuniary value." *Liberman*, 80 N.Y.2d at 434-35 (citation omitted).

communist is basis for a libel action." *Id.* The Court supported its conclusion with reference to information in "public opinion polls and in other studies [and] in legislation and executive orders enacted and promulgated during the past several years which subject communists and their affiliates and sympathizers to loss of public office and private position and, in some cases, even to deportation proceedings." *Id.*

Just as once harmless words can later be deemed defamatory, the reverse trajectory can also occur, so that words deemed defamatory in an earlier era may cease to have that effect. *Compare, e.g., Sydney v. MacFadden Newspaper Publ'g Corp.*, 242 N.Y. 208, 213-14 (1926) (citing cases establishing that it was libelous per se "to say a man is colored [sic] . . . [if] he happens to be a white man"), *with, e.g., Johnson v. Staten Island Advance Newspaper Inc.*, 13 Misc. 3d 1215(A), 2004 WL 4986754, at *6 (N.Y. City Civ. Ct. Richmond Cnty. July 23, 2004) (acknowledging decision in *Sydney*, but rejecting that its conclusion remained correct, concluding that in 2004, it was not defamatory to incorrectly identify person's race). *Mencher*, *Sydney* and *Johnson* demonstrate that when evaluating whether statements are defamatory, it is contemporary public attitude that matters, not the attitudes of a different era.

The New York Court of Appeals has not decided a case in which a person claimed to have been defamed per se by a statement incorrectly describing the person as lesbian, gay or bisexual; obviously, therefore, the Court of Appeals has never found such statements to be defamatory per se. *Stern*, 645 F. Supp. 2d at 273. *See also* R.16. Neither has this Court.

In *Liberman*, the Court of Appeals listed four categories of statements upon which an action for slander can be maintained without the need to allege or prove special damages.

> The four established exceptions (collectively "slander per se") consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman. When

> statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven.

80 N.Y.2d at 435 (citations omitted). Obviously, none of the four exceptions identified by the Court of Appeals refers to or includes "homosexual behavior." While one Appellate Division decision, in 1981, listed "homosexual behavior" as a fifth category, respectfully the continued reliability of that conclusion is undermined not only by the age of that decision, but because the statements at issue in that case had nothing to do with sexual orientation. *See Privitera v. Phelps*, 79 A.D.2d 1, 3 (4th Dep't 1981) (listing "homosexual behavior" as additional category of statements deemed slanderous per se), *abrogated in part by Liberman*, 80 N.Y.2d at 435.[7]

The only Appellate Division decision containing an in-depth discussion of whether it was defamatory per se to describe someone as lesbian, gay or bisexual is nearly 30 years old.[8] *See Matherson v. Marchello*, 100 A.D.2d 233 (2d Dep't 1984). In *Matherson*, the court said that in 1984, the claim that such statements were defamatory per se presented a "difficult question." *Id.* at 241. While recognizing that "an increasing number of homosexuals [were] publicly expressing satisfaction and even pride in their status," the court accorded greater significance to

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[7] In *Privitera*, the court concluded that the statements at issue – that one plaintiff was a "member of the Mafia" and a "criminal," and that both plaintiffs were in the "mob" – were not slanderous per se. *See* 79 A.D.2d at 2, 4. In 2001, this Court quoted *Privitera*'s five-category list in a defamation decision in which, like *Privitera*, the allegedly defamatory statements did not suggest that the plaintiff was lesbian, gay or bisexual. *See Tourge v. City of Albany*, 285 A.D.2d 785, 785 (3d Dep't 2001) (concluding that the statements "[w]e have a complaint against one of your teachers, Ed Tourge" and that Tourge was "to stay away from [one defendant's] future stepdaughter" were not slander per se). As explained in Section B, contemporary public policy reflects many developments subsequent to 2001, when *Tourge* was decided.

[8] The reported decisions involving such claims prior to *Matherson* contained little analysis and reached conflicting conclusions. *Compare Stein v. Trager*, 36 Misc. 2d 227, 228 (Sup. Ct. Erie Cnty. 1962) (not slanderous per se to say that plaintiff was "homosexual" because statement did not charge crime) *with Nowark v. Maguire*, 22 A.D.2d 901, 901 (2d Dep't 1964) (slanderous per se to state, "You are both queers. Even your wife said you were odd and she was stuck with you. I'll take you to court for bothering my seven-year-old orphan").

the absence of protections against discrimination based on sexual orientation, and the existence of "[l]egal sanctions imposed on homosexuals in areas ranging from immigration to military service[.]" *Id.* at 241-242 (internal citations omitted). The court explained that it felt "constrained . . . *at this point in time*" to hold it was defamatory per se to say that a married man had a boyfriend. *Id.* (emphasis added).[9]

Subsequent decisions continued to cite *Matherson* or other decisions from even earlier eras without discussing whether intervening developments warrant re-evaluating *Matherson*'s dated 1984 conclusions concerning the status of lesbians and gay men without acknowledging, much less considering, the explicitly and inherently time-sensitive nature of those conclusions. *See, e.g., Klepetko v. Reisman*, 41 A.D.3d 551, 552 (2d Dep't 2007) (citing *Matherson* and stating that "false imputation of homosexuality is 'reasonably susceptible of a defamatory connotation'" but dismissing claim because statement "that the plaintiff lived together with another middle-aged man does not readily connote a sexual relationship"); *E.B. v. Liberation Publ'ns, Inc.*, 7 A.D.3d 566, 566-567 (2d Dep't 2004) (dismissing, as time-barred, libel claim based on use of plaintiff's photograph "to illustrate, advertise and market a homosexually-themed book"). *See also* R.16 (acknowledging "evolving social attitudes regarding homosexuality" but concluding that it was "bound to follow" the conclusions expressed in prior Appellate Division rulings deeming statements imputing homosexuality to be defamatory per se, citing *Matherson* and other cases).[10]

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[9] Other decisions contemporary to *Matherson* reached the same conclusion without discussion. *See, e.g., Dally v. Orange Cnty. Publ'ns*, 117 A.D.2d 577, 578 (2d Dep't 1986) (citing *Matherson*).

[10] Apart from the decision below, in recent years, only one court applying New York law – relying largely on cases more than 20 years old – added "'imputations of homosexuality' to the list of [the] types of statements that are per se slanderous." *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni*, 585 F. Supp. 2d 520, 549 (S.D.N.Y. 2008). The court incorrectly (continued . . .)

As discussed in more detail in Section C below, a federal court recently called upon to apply New York defamation law carefully reviewed contemporary New York public policy and attitudes, and concluded that in the present era, statements describing a man as gay or bisexual are not defamatory per se because "[t]he past few decades have seen a veritable sea change in social attitudes about homosexuality." *Stern*, 645 F. Supp. 2d at 273. As explained in Section B, significant developments within the past decade include, for example, the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003);[11] the enactment of laws prohibiting discrimination based on sexual orientation in employment, housing, credit, education and public accommodations, protecting lesbians, gay men and bisexuals from bias-motivated crime and harassment in public schools – and, more recently, permitting same-sex couples to marry; court decisions affirming the respectable status of gay men and lesbians in other areas of public life; corporate policies demonstrating a commitment to equality for gay men and lesbians; and the presence of openly lesbian and gay public officials in elected and appointive government positions throughout New York. Those developments demonstrate that in contemporary New York, it is neither shameful nor odious to be identified as lesbian, gay or bisexual – and, therefore, statements misidentifying a person's sexual orientation are not defamatory per se.

(continued . . .)
identified the question as whether it was time to "declare victory" over antigay prejudice, not whether lesbians, gay men and bisexuals are viewed as disgraceful, and reached the wrong legal conclusion. *Id.*

[11] *Lawrence* has been described as "a sea change in United States Supreme Court jurisprudence concerning the rights of gay persons." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 467 (Conn. 2008). *See also Stern*, 645 F. Supp. 2d at 273-74 (referring to *Lawrence* as the "[f]irst and, perhaps most important[]" evidentiary component demonstrating changed social attitudes).

B. New York public policy respects the rights and relationships of people who are lesbian, gay or bisexual.

The sources of information about public attitudes identified in *Mencher* and in *Matherson* are very similar to the sources of New York public policy that this Court and others have examined and consistently found to be respectful of lesbian, gay and bisexual people who are in same-sex relationships. *See, e.g., Dickerson I*, 73 A.D.3d at 54; *Lewis*, 60 A.D.3d at 221. As this Court explained, "New York's public policy has long been defined as the law of the state, whether found in the Constitution, the statutes or judicial records." *Dickerson I*, 73 A.D.2d at 54 (citations and internal quotation marks omitted); *Lewis*, 60 A.D.3d at 221. Each source of public policy demonstrates substantial respect for people who are lesbian, gay or bisexual. None of those sources suggest, much less warrant, a conclusion that being identified as lesbian, gay or bisexual would be so shameful or odious that statements concerning a person's sexual orientation are defamatory per se.

1. Court decisions demonstrate that lesbians, gay men and bisexuals are not regarded with the shame, disgrace or odium required to make statements about a person's sexual orientation defamatory per se.

In the past decade, the U.S. Supreme Court and the New York Court of Appeals have issued important decisions making clear that lesbian, gay and bisexual people are not regarded with the public hatred, shame and obloquy necessary to establish defamation per se. *See Kimmerle*, 262 N.Y. at 102.

a) United States Supreme Court decisions addressing the rights of lesbians, gay men and bisexuals demonstrate respect.

In *Lawrence*, the United States Supreme Court held that gay men and lesbians "are entitled to respect for their private lives" and that criminalizing their private consensual sexual conduct violates the Federal Constitution. 539 U.S. at 578. The Court held that criminalizing consensual sodomy violates the Federal Due Process Clause, and overruled *Bowers v. Hardwick*,

478 U.S. 186 (1986), noting that continuing *Bowers* as precedent would "demean[] the lives of homosexual persons." 539 U.S. at 575. The Court explained that even though sodomy prohibitions were rarely enforced, their mere presence as law impermissibly stigmatized gay people. "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* As the Court found, "[t]he stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged." *Id.* In *Lawrence*, the Court rejected state laws stigmatizing gay people. It would be inconsistent with that premise for New York – where minor offenses are inadequate to support a slander per se claim[12] – to treat being gay as so stigmatizing that its law and courts will penalize a person who falsely claims that another person is gay.

Even before *Lawrence*, the United States Supreme Court repudiated anti-gay animus as constitutionally repugnant, holding that the bare desire to harm lesbians and gay men was not even a legitimate or rational basis for government action. *See Romer v. Evans*, 517 U.S. 620, 634 (1996). In *Romer*, the Court struck down a class-based amendment to Colorado's Constitution as a violation of the Equal Protection Clause of the U.S. Constitution because the amendment was "born of animosity toward the class of persons affected[,]" *id.*, and the amendment "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." *id.* at 635.

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[12] *See Liberman*, 80 N.Y.2d at 435.

b) New York Court of Appeals decisions involving the rights of lesbians, gay men and bisexuals demonstrate respect.

Decisions of courts throughout New York have consistently affirmed that New York public policy toward lesbians, gay men and bisexuals accords them respect. Decades before *Lawrence* was decided, for example, the New York Court of Appeals held that criminalizing consensual sodomy was unconstitutional and recognized the fundamental right of gay men and lesbians to engage in sexual intimacy. *See People v. Onofre*, 51 N.Y.2d 476, 494 (1980).

In its most recent decision involving the rights of people who are lesbian, gay or bisexual, the Court of Appeals held that, as a matter of comity, a New York lesbian couple's Vermont civil union established one partner's parentage of a child born to the other partner during their civil union. *See Debra H.*, 14 N.Y.3d at 601. The Court found that according comity to the parties' civil union for that purpose was consistent with New York's public policy – and that courts are to "locate[] the public policy of the state in 'the law as expressed in statute and judicial decision" and also consider[] 'the prevailing attitudes of the community.'" *Id.* at 600 (citation omitted). The Court's recent determination that New York's public policy warrants recognition of civil unions of same-sex couples makes incongruous any holding that lesbians, gay men and bisexuals are such objects of public hatred, ridicule and contempt that it is defamatory per se to identify a person as lesbian, gay or bisexual.

In its decision interpreting the rights of lesbians, gay men and bisexuals under the New York Constitution, *Hernandez v. Robles*, 7 N.Y.3d 338, 366 (2006), a majority of the Court of Appeals ruled that the State Constitution is not violated by withholding the right to marry to same-sex couples. Yet all members of the *Hernandez* Court agreed that the Legislature could or perhaps *should* amend the Domestic Relations Law to permit same-sex couples to marry. *See id.* at 358-59 ("[T]he Legislature may . . . extend marriage or some or all of its benefits to same-sex

couples.") (plurality op.); *id.* at 379 ("It may well be that the time has come for the Legislature to . . . consider granting these individuals additional benefits through marriage . . . .") (Graffeo, J., concurring); *id.* at 396 (Kaye, C.J., dissenting). "The Court of Appeals' opinion in *Hernandez* is simply inconsistent with the notion that gays and lesbians are the subject of scorn and disgrace." *Stern*, 645 F. Supp. 2d at 274.

Other decisions also demonstrate that the Court of Appeals does not view lesbians, gay men and bisexuals to be held in such low regard. In *Godfrey v. Spano*, the Court affirmed the authority of state and local government officials to ensure that the partners of lesbian, gay and bisexual employees could receive benefits on equal terms with different-sex spouses – rejecting arguments that those officials had exceeded their authority when doing so. 13 N.Y.3d at 376.

The decisions of the Court of Appeals interpreting rights of gay men and lesbians in other areas are similarly devoid of indicia that gay men and lesbians face societal contempt, ridicule or disgrace. *See, e.g., Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 496 (2001) (same-sex partners entitled to pursue claim under New York City Human Rights Law to receive same student housing as married couples); *Matter of Jacob*, 86 N.Y.2d 651, 656 (1995) (lesbian partner of child's biological mother who is raising child with biological parent can become child's second parent by means of adoption); *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 212-13 (1989) (same-sex life-partners entitled to same protections under rent control laws as spouses and other family members).

In each of these decisions, the Court of Appeals determined the rights of lesbians, gay men and bisexuals in some of the most important areas of life, and determined that sexual orientation is irrelevant to one's ability to participate in those aspects of society. The holdings

and reasoning of these cases are irreconcilable with the findings necessary to conclude that a person is defamed per se by being incorrectly identified as lesbian, gay or bisexual.

c) Decisions of this Court and other New York courts addressing the rights of lesbians, gay men and bisexuals demonstrate respect.

As with the Court of Appeals decisions described above, recent decisions of this Court and other New York courts analyzing the rights of, and public attitudes toward, lesbians, gay men and bisexuals could not be reconciled with the conclusion that being identified as gay is defamatory per se.

In *Dickerson I*, this Court concluded that as a matter of comity, civil unions are recognized under New York law, and explained that "the public policy of our state protects same-sex couples in a myriad of ways." 73 A.D.3d at 54. Prior to the Marriage Equality Act, this Court had reviewed New York public policy and concluded that out-of-state marriages of same-sex couples were recognized under New York's marriage recognition rule. *Lewis*, 60 A.D.3d at 221-23. Of particular relevance to defamation law – and to whether statements describing someone as lesbian, gay or bisexual will tend to subject them to public contempt or disgrace – this Court explained in *Lewis* that "New York's public policy . . . cannot be said to abhor the recognition of out-of-state same-sex marriages." 60 A.D.3d at 222.

Many other appellate and lower courts throughout the State have concurred that out-of-state marriages between same-sex couples are subject to legal respect in New York. *See, e.g., Matter of Est. of Ranftle*, 81 A.D.3d 566, 567 (1st Dep't 2011) (affirming Surrogate Court's denial of petition challenging validity of out-of-state marriage of same-sex surviving spouse); *Godfrey v. DiNapoli*, 22 Misc. 3d 249, 252 (Sup. Ct. Albany Cnty. 2008) (upholding State Comptroller's authority to provide that Canadian marriages of same-sex couples are to be recognized for purposes of State Retirement System); *Martinez v. Cnty. of Monroe*, 50 A.D.3d

189, 193 (4th Dep't 2008), *appeal dismissed*, 10 N.Y.3d 856 (2008) (requiring that benefits available to employees' spouses also be made available to those in marriages of same-sex couples solemnized out of state, even though the marriage could not have been solemnized within New York); *Golden v. Paterson*, 23 Misc. 3d 641, 654 (Sup. Ct. Bronx Cnty. 2008) (upholding lawfulness of directive from Governor Paterson's counsel requiring all state agencies to review their operations to ensure respect to marriages of same-sex couples to fullest extent of the law).

The many decisions concluding that recognition of the marriages of lesbians and gay men does not offend New York public policy reached that conclusion after evaluating the current status of lesbians and gay men in New York. *See, e.g., Golden*, 23 Misc. 3d at 651-654 (summarizing judicial, legislative and executive decisions and policies respecting rights of lesbian, gay and bisexual New Yorkers and concluding that recognition of out-of-state marriages of same-sex couples is consistent with New York law and public policy). These cases are reliable indicators of the public policy and attitudes inconsistent with maintaining imputation of homosexuality as defamation per se. As these cases demonstrate, in contemporary New York lesbians, gay men and bisexuals are certainly not held in "public contempt, ridicule, aversion or disgrace[.]" *See Rinaldi*, 42 N.Y.2d at 379; *Kimmerle*, 262 N.Y. at 102.

In *Golden*, the court aptly concluded:

> Surely the Legislature, the majorities of the Court [of] Appeals in *Braschi* and *Jacob,* and its Chief and Associate Judges, albeit in dissent, in *Hernandez* were not so out of the mainstream as to contradict New York's public policy and morality. These expressions of New York's public policy are only consistent with a tradition of affording equal rights to all New Yorkers, a tradition not to be abandoned lightly[.]

Golden, 23 Misc. 3d at 653. *See also Lewis*, 60 A.D.3d at 222 ("New York's public policy . . . cannot be said to abhor the recognition of out-of-state same-sex marriages."). Nor does New

York's public policy find lesbian, gay men and bisexuals – whether in a relationship or not – to be abhorrent or disgraceful.

The substantial legal respect accorded lesbians, gay men and bisexuals in decisions of this Court and other New York courts require rejection of the claim that being identified as lesbian, gay or bisexual is so shameful and odious that a false identification is slanderous per se.

2. New York's statutory law accords respect for lesbians, gay men and bisexuals that is incompatible with deeming an erroneous description of a person's sexual orientation to be defamatory per se.

Over the past decade, the New York Legislature has acted to promote the equality of, and to forbid acts of prejudice and hostility against, lesbians, gay men and bisexuals in a wide range of areas.

Most recently, on June 24, 2011, the New York Legislature passed the Marriage Equality Act, strongly supported by the Governor, granting same-sex couples the right to marry in New York.[13] 2011 N.Y. Laws 95 (eff. July 24, 2011). The Marriage Equality Act demonstrates that the day is far past when identifying a person as lesbian, gay or bisexual could be deemed defamation per se.

Even before the Marriage Equality Act, the Legislature had enacted, with executive approval, measures to provide same-sex domestic partners with legal rights and benefits otherwise reserved to spouses. Under them, partners have rights to: visit their partner in a

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[13] Years earlier, in June 2007 and again in May 2009, the New York State Assembly twice approved legislation, each of which also had gubernatorial support, that would have granted same-sex couples the right to marry. *See* Rick Karlin, *One 'I Do' for Gay Marriage*, Times Union (Albany, N.Y.), June 20, 2007, at A1; Joseph Spector, *N.Y. Assembly Passes Same-Sex Marriage Legislation*, U.S.A. Today, May 13, 2009, *available at* http://www.usatoday.com/news/nation/2009-05-12-ny-gaymarriage_N.htm. Although the Senate did not act on that legislation, the measures' support in the Legislature and from the Governors contradict any presumption of the type of antipathy that would warrant deeming it shameful or contemptible to be lesbian, gay or bisexual.

hospital, nursing home or health care facility, N.Y. Pub. Health Law § 2805-q; control the disposition of their deceased partner's remains, *id.* at § 4201; make health care decisions, including issuance of orders not to resuscitate, concerning their partner if the partner lacks decision-making capacity, *id.* at §§ 2965, 2994-d; give or consent to an anatomical gift on behalf of their deceased partner, *id.* at §§ 4301, 4351; and be provided funeral and bereavement leave from employment for the death of their partner or their partner's relatives, N.Y. Civ. Rights Law § 79-n.

The Dignity for All Students Act, enacted in 2010, requires proactive measures by public school districts to address discrimination and harassment based on various traits including actual or perceived sexual orientation. 2010 N.Y. Laws 482 § 12. The Legislature's inclusion of lesbian, gay and bisexual students in an act premised on their dignity, the purpose of which is to protect these students from harassment, cannot be reconciled with a conclusion that a same-sex sexual orientation is disgraceful.

New York has protected people who are lesbian, gay or bisexual against discrimination based on sexual orientation since the State's Human Rights Law was amended in 2002 to prohibit discrimination based on sexual orientation in employment, public accommodations, credit, education and housing. N.Y. Exec. Law § 296. *See also* N.Y. Educ. Law § 313 (equal educational opportunity without regard to, *inter alia*, sexual orientation). New York's hate crimes law similarly provides for increased severity of punishment of crimes against victims selected because of, *inter alia*, sexual orientation. N.Y. Penal Law § 485.00 *et seq.*

These laws speak to the public policy consensus that has rejected, and opposes, acts based on animus toward people because they are lesbian, gay or bisexual.

3. Executive orders, local laws and private sector actions further refute claims that being identified as lesbian, gay or bisexual is cause for shame or disgrace.

Executive orders, local laws and policies of private corporations and the media respecting people who are lesbian, gay or bisexual further demonstrate that public attitudes do not support a holding that it is defamatory per se to misidentify a person's sexual orientation.

As this Court recognized in *Dickerson I*, New York "has also evidenced a clear commitment to respect, uphold and protect parties to same-sex relationships by executive and local orders extending recognition to same-sex couples and granting benefits accordingly." 73 A.D.3d at 54-55 (citations omitted). In May 2008, New York's Governor issued a directive to all state agencies directing them to review state agency policy statements to ensure recognition of out-of-state marriages between spouses of the same sex. *See Golden*, 23 Misc. 3d at 654 (affirming Governor's authority to do so, noting public policy support for recognition of out-of-state marriages). As a result, even before the Marriage Equality Act, these marriages were uniformly respected by the State government.

Those in same-sex relationships long have been accorded respect and protections in New York in many other contexts as well. Since 2001, all three branches of State government provide benefits to domestic partners of State employees, as do numerous local governments, including Albany and New York City. *See* Richard Perez-Pena, *Bruno Agrees on Domestic Partner Benefits*, N.Y. Times, Jan. 20, 2001, at B4; *see also* City of Albany, *General Licenses: Marriage Licenses and Domestic Partnerships, available at* http://www.albanyny.org/Businesses/LicensesPermits.aspx (last checked Jan. 19, 2012) (stating that "Albany was the first city in New York State to offer Domestic Partnerships."). Numerous private sector employers also prohibit discrimination based on sexual orientation; for example, as of 2008 when the events at issue in the parties' dispute occurred, 473 (94.6%) of the Fortune 500

companies did so. *See* Equality Forum, *Fortune 500 Project, available at* http://www.equalityforum.com/fortune500/index.cfm (last visited Jan. 19, 2012) (listing companies that provide sexual orientation discrimination protection as of 2008).

Moreover, there are at least 45 openly gay or lesbian elected or appointed officials in government service in New York, including judges in the federal and state courts, state legislators, mayors, and city council members – such as the Speaker of the New York City Council, Christine Quinn, and the President Pro Tempore of the Common Council of Albany, Richard Conti. *See* Gay & Lesbian Leadership Institute, *Openly LGBT Appointed & Elected Officials, available at* http://www.glli.org/out_officials/officials_map (select North America, then select New York) (last visited Jan. 19, 2012). A holding that identifying a person as lesbian, gay or bisexual is defamatory per se would require concluding that these many openly lesbian, gay and bisexual public servants are held in "public hatred [and] shame" because of their sexual orientation. *Kimmerle*, 262 N.Y. at 102. That manifestly is not the case.

Of course, the increasing social acceptance of homosexuality and the many court decisions and executive and legislative actions throughout New York affirming the civil rights of lesbians and gay men should not be misinterpreted to mean that New York has entirely solved the problem of anti-gay discrimination.[14] But while discrimination against people who are lesbian, gay or bisexual has not been fully eradicated, being described as lesbian, gay or bisexual

[14] The executive branch of the federal government acknowledges that discrimination based on sexual orientation should be subjected to heightened judicial scrutiny because of historic discrimination against people who are lesbian, gay or bisexual that was based on unjustified stereotypes. *See, e.g.*, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The history of discrimination against lesbians, gay men and bisexuals warrants vigilance against perpetuating that discrimination today. Treating homosexuality as so shameful or odious as to warrant categorization as defamation per se is unwarranted under contemporary standards, and would serve only to enshrine that historical discrimination.

does not subject a person to the kind of public animosity that justifies the statement's treatment as defamatory per se. One need only read the weekly newspaper announcements of marriages and other unions of same-sex couples, printed alongside those of different-sex couples, to recognize that being identified as in a relationship with a person of the same sex now is widely seen as cause for pride and celebration, not stigma and shame.

C. New York public policy requires re-evaluation and rejection of the conclusions in older decisions that it was defamatory per se to "impute homosexuality."

Although in the past some courts applying New York law concluded that it was defamatory per se to describe someone as lesbian, gay or bisexual,[15] the sources of New York's public policy summarized in Section B above strongly and uniformly suggest that, today, such statements are *not* defamatory per se.

As explained in Section A above, the few New York decisions to address whether statements that "impute homosexual behavior" were defamatory per se did not consider the impact of recent legislative and court decisions and other advances recognizing the improved status of lesbians, gay men and bisexuals. Respectfully, this Court should not adopt the conclusions reached in those decisions. In contrast, the judicial decisions and other sources of New York public policy summarized in Section B above *do* reflect the impact of developments and, taken together, compel the careful examination, and ultimate rejection, of the premise underlying Plaintiff's defamation claim. *See Mencher*, 297 N.Y. at 100 ("words, harmless in one age . . . may be highly damaging to reputation at another time").

In *Stern*, the most recent federal decision to consider whether describing someone as lesbian, gay or bisexual is defamatory per se under New York law, the court reviewed contemporary public attitudes, just as courts had done in earlier defamation decisions like

[15] *See, e.g., Matherson*, 100 A.D.2d at 241-42, discussed in Section A.

Mencher and *Matherson*. *See Stern*, 645 F. Supp. 2d at 271-276. The court concluded that contemporary attitudes do not support a holding that such statements are defamatory per se, and identified the support for that conclusion in three areas. First, the court explained that the United States Supreme Court's invalidation of laws criminalizing intimate sexual conduct in *Lawrence* foreclosed reliance on criminality as a basis for deeming statements imputing homosexuality to be defamatory per se. *Id.* at 273-74. Second, the court explained that the "current of contemporary public opinion" of lesbians, gay men and bisexuals, demonstrated by the introduction of marriage equality legislation and by majority support in opinion polls for recognition of same-sex relationships, does not view them as "shameful or odious." *Id.* at 274. Third, the court explained that the respectful attitude of the New York Court of Appeals toward lesbians, gay men and bisexuals in *Hernandez* was "simply inconsistent with the notion that gays and lesbians are the subject of scorn and disgrace." *Id.*

The court ruled that, particularly after *Lawrence*, describing someone as gay could no longer be deemed defamatory per se. *Stern*, 645 F. Supp. 2d at 275. The court further explained:

> While I certainly agree that gays and lesbians continue to face prejudice, I respectfully disagree that the existence of this continued prejudice leads to the conclusion that there is a widespread view of gays and lesbians as contemptible and disgraceful. Moreover, the fact of such prejudice on the part of some does not warrant a judicial holding that gays and lesbians, merely because of their sexual orientation, belong in the same class as criminals.

Id. See also Albright v. Morton, 321 F. Supp. 2d 130, 136-39 (D. Mass. 2004) (holding that, under Massachusetts law, describing someone as gay could no longer be deemed defamatory per se, particularly after *Lawrence*, and explaining that courts still deeming such statements as defamatory per se relied on no-longer-valid criminal statutes and "fail[ed] to incorporate more recent decisions recognizing homosexuals' equal rights") (citing *Lawrence*), *aff'd on other*

grounds sub nom. Amrak Prods., Inc. v. Morton, 410 F.3d 69 (1st Cir. 2005). The *Albright* court concluded that "[c]ontinuing to characterize the identification of someone as a homosexual defamation *per se* has the same effect," *id.* at 137, as the criminalization of consensual private sexual activity, which the Supreme Court in *Lawrence* found impermissibly "demeans the lives of homosexual persons," *Lawrence*, 539 U.S. at 575.

Courts in many other jurisdictions likewise have held that statements falsely identifying someone as lesbian, gay or bisexual are not defamatory per se. *See Greenly v. Sara Lee Corp.*, No. CIV S-06-1775, 2008 U.S. Dist. LEXIS 35472, at *27 & n.15 (E.D. Cal. Apr. 30, 2008); *Regehr v. Sonopress, Inc.*, No. 2:99CV690K, 2000 WL 33710902, at *4 (D. Utah Apr. 14, 2000); *Hayes v. Smith*, 832 P.2d 1022, 1023-25 (Colo. App. 1991); *Boehm v. Am. Bankers Ins. Group, Inc.*, 557 So. 2d 91, 94 & n.1 (Fla. DCA 1990); *Moricoli v. Schwartz*, 361 N.E.2d 74, 76 (Ill. App. Ct. 1977); *Donovan v. Fiumara*, 442 S.E.2d 572, 577 (N.C. Ct. App. 1994).

To hold otherwise, based on outdated prejudices about lesbian and gay individuals, would impermissibly resurrect a government-opposed stigma that the Supreme Court has held should not be perpetuated in our law. *Lawrence*, 539 U.S. at 575. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore*, 466 U.S. at 433. If Respondent had been incorrectly described as African-American and sued for defamation, his claim today would be quickly dismissed, *see Johnson*, 13 Misc. 3d 1215(A), 2004 WL 4986754, at *6, even though New York law would have recognized such a claim in the past, *see Sydney,* 242 N.Y. at 213-14, and even though society has not completely eradicated racial prejudice. Recognition of such a claim would validate biases that have been rejected as a matter of law and public policy. *See Albright*, 321 F. Supp. 2d at 138-39 (comparing statement

that plaintiff is homosexual "to statements falsely linking a plaintiff to racial, ethnic or religious groups, which plainly would not qualify as defamation per se today").

Respectfully, this Court today should not hold that gay men and lesbians are categorically the subject of public hatred, ridicule, aversion or contempt – and should, instead, hold that statements describing someone as lesbian, gay or bisexual are not defamatory per se.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should hold that as a matter of New York law, statements describing someone as lesbian, gay or bisexual do not subject the person to such public hatred, shame or ridicule as to satisfy the requirements for defamation per se.

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