To Be Argued By:
ROBERTA A. KAPLAN
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Court of Appeals

STATE OF NEW YORK

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER MCDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARNG 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,

Plaintiffs-Appellants,

—against—

The NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Preliminary Statement

Appellants in this historic case are gay and lesbian couples in committed relationships who seek to obtain the vast array of protections, as well as the dignity and recognition, that come with civil marriage. Appellants hail from upstate and down, from rural, urban and suburban New York. They come from all walks of life: a bank teller and an artist, a public school teacher, a nurse, a police officer, a lawyer and a New York State Assembly member. They are young and old; Catholic, Protestant, Jewish and non-religious; African-American, white, Latino and Asian.

Appellants' relationships bear all the familiar hallmarks of committed adult family relationships. Several of them have nursed each other through critical illnesses, while others have shared the joys of childrearing. Many of them own homes together. They all love one another and look forward to spending the rest of their lives together. In other words, Appellants are in every practical sense no different from the countless married couples whom we know as our neighbors, co-workers, friends and family. The State has not disputed this; nor did the Appellate Division, Third Department in the decision below.

What sets Appellants apart, however, is the lack of legal recognition of their relationships and their families. Despite the fact that Appellants live their

lives as if they were married, the State of New York forbids them from obtaining the tangible and intangible rights and protections that come with civil marriage.

The consequences of that exclusion are profound. The institution of civil marriage reaches into nearly every aspect of a couple's life and brings with it enormous social and economic protections. Marriage, after all, is the universally recognized social structure for two people who have committed to build a life together. And in this State, as in the rest of the nation, it is surrounded by a complex legal structure that reflects that commitment. Laws about property and taxes, childrearing, medical decisionmaking, even death and dying reflect the understanding that married people function not as separate individuals, but as a unit.

What are the State's justifications for denying these important protections to an entire class of citizens simply on the basis of who they love?

First, the State asserts, and the Third Department agreed, that excluding gay men and lesbians from civil marriage is rational because the historic and cultural understanding of marriage is between a man and a woman. To say that discrimination is "traditional," however, is simply to say that the discrimination has existed for a long time. Under bedrock principles of equal protection analysis, a classification cannot be maintained merely for its own sake. Instead, the classification (here, the exclusion of gay men and lesbians from civil

marriage) must advance a state interest that is separate from the classification itself. *See Romer* v. *Evans*, 517 U.S. 620, 635 (1996). The State's attempt to justify the exclusion of same-sex couples from civil marriage on the basis of "history" fails this basic requirement because the "tradition" of excluding gay men and lesbians from civil marriage is no different from the classification. Put another way, a history or a tradition of discrimination – no matter how entrenched – does not make the discrimination constitutional. Indeed, if the law were otherwise, any number of abhorrent practices, long ago declared unconstitutional, would still be permissible.

Second, the State contends that excluding gay men and lesbians from civil marriage somehow fosters the government's interest in encouraging procreation by *heterosexual* married couples. But, as the Third Department agreed, "precluding same-sex couples from marrying does not encourage opposite-sex couples to have and raise children." (R. 681) Because excluding gay people from civil marriage does not in any way encourage married heterosexual people to have children, encouraging heterosexual procreation is not a rational basis on which to sustain the exclusion of gay people from marriage. Furthermore, as the Third Department also conceded (*Id.*), the desire or ability to procreate is not required in order to marry, nor is marriage required to procreate. Many heterosexual couples choose not to bear children. Others simply can't. And,

certainly, gays and lesbians raise thousands of children in New York – indeed, children are routinely placed with gay families for foster care or adoption. As a result, excluding same-sex couples from civil marriage is completely disconnected from any goal of encouraging procreation within marriage. In light of this disconnect, the Third Department erred in accepting the notion that the simplistic correlation between heterosexuals and procreation, standing alone, was sufficient to justify the *exclusion* of same-sex couples from the protections of civil marriage.

Finally, the State argues that the discrimination is legitimate because of New York's interest in promoting "uniformity" in its marriage laws. In a similar vein, the Third Department relied on the fact that many other states have passed statutes or constitutional amendments maintaining the "traditional" definition of marriage. (R. 680) But to justify the exclusion of gay men and lesbians from civil marriage because "others do it too" is no more a justification for the discriminatory classification than the contention that the discrimination is rational because it has existed for a long time. The scope of the protection afforded by the New York Constitution does not depend on whether other states in other parts of the country condone discrimination; New York must make its own determination and the State cannot identify any legitimate interest here that is served by following the lead of other states. In addition, it defies credulity for New York to assert that it excludes same-sex couples from civil marriage in order to

maintain uniformity in its marriage laws since New York's marriage law already differs in myriad material respects from the laws of other states, and states vary widely in the extent to which they afford same-sex couples the protections associated with civil marriage.

Thus, not one of the State's purported justifications rationally furthers a legitimate governmental objective. Even if some form of "rational basis" review did apply here (and, as described below, it does not), the Third Department committed error and ignored this Court's precedents when it acknowledged the significant flaws in the State's purported justifications, but nevertheless held that they (just barely) satisfy the requirements of the State Constitution. This case, after all, is not about the kind of economic regulation that this Court upholds routinely under rational basis scrutiny, be it the salary differential between judges in Monroe and Sullivan Counties, *Affronti* v. *Crosson*, 95 N.Y.2d 713 (2001), or regulations promoting casino gambling on Indian reservations, *Dalton* v. *Pataki*, 5 N.Y.3d 243 (2005). Rather, this case is about whether it is consistent with the New York Constitution to deny rights and benefits that most married New Yorkers take for granted to an entire class of citizens simply because of who they are. This Court has never shied away from applying rational basis review to strike down statutes that discriminate against broad classes of individuals based on their personal relationships.

The Third Department also erred fundamentally by applying rational basis review, the lowest level of scrutiny this Court applies under the New York Equal Protection Clause, to these purported justifications. Heightened judicial scrutiny – not the rational basis standard – applies here, both because the right to marry the person of one's choice is a fundamental right protected by the Due Process Clause and because the statutes at issue discriminate on the basis of sexual orientation and gender. And both the State and the Third Department have conceded that Appellants should win, and the decision below should be reversed, if anything other than the most deferential form of rational basis review is applied.

The Due Process Clause of our State Constitution affords all New Yorkers a fundamental right to marry the person that they love, which the Domestic Relations Law (DRL) denies to gay men and lesbians completely, thereby triggering strict scrutiny. The State's argument, accepted by the Third Department, that Appellants actually seek some form of new constitutional right to "same-sex marriage," distorts decades of accepted due process jurisprudence. The fundamental nature of the right to marry the person of one's choice has long been recognized as part of the personal autonomy protected by the Due Process Clause of the New York Constitution, which this Court has long held is more protective of individual rights than its federal counterpart.

The question here is whether one group of people can be excluded from an existing fundamental right, not whether the Court should recognize some new right. Time and time again, courts have recognized that existing due process rights apply to everyone, despite long histories of having excluded one group or another from those rights. This is true, for example, with respect to the right to custody of one's children (despite a long history of excluding unwed fathers from that right), the right to control what happens to one's body (despite a long history of excluding the mentally disabled from that right), and even the right to privacy (despite attempts to exclude unmarried people from that right). It is true as well with respect to the right to marry, despite longstanding traditions of excluding prisoners, divorcees and interracial couples from that right. Appellants here seek simply the same right to marry the person they love that all other New Yorkers (including prisoners) already have. That is no more a "new" right than it was a "new" right when this Court recognized that gay people have the same right to private sexual intimacy that everyone else has. *People* v. *Onofre,* 51 N.Y.2d 476 (1980).

The denial of civil marriage to gay men and lesbians triggers heightened scrutiny for two other reasons as well. Under well-established principles of equal protection jurisprudence, lesbians and gay men, like women, constitute a specially protected class. Because classifications based on sexual

orientation are obviously not related to an individual's merit, and because there clearly exists a history of discrimination based on sexual orientation, such classifications, like classifications based on gender, should be scrutinized by the courts with special care.

* * *

This case presents this Court with a critical choice – to apply the constitutional doctrines presented here dispassionately, as have courts in other states (which would lead to reversal of the decision below), or to join the courts that have ruled the other way, largely in deference to "tradition" or "history," thereby distorting basic principles of due process and equal protection in the process. Ultimately, history will see one choice – ending discrimination against gay men and lesbians – as principled, not to mention obvious, and the other as lacking in both constitutional and moral vision. As the United States Supreme Court has recognized, "[t]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence* v. *Texas*, 539 U.S. 558, 579 (2003). This Court vindicated this same principle when it struck down a statute prohibiting consensual adult sodomy more than two decades before the United States Supreme Court did, holding that the sensibilities of those opposed to homosexuality did not justify discrimination against a group of people or the abridgement of that group's ability to exercise a

fundamental right. *Onofre*, 51 N.Y.2d at 489 n.3. Just as this Court employed such reasoning to strike New York's sodomy law in 1980, it should honor this legacy and fulfill the New York State Constitution's promise of liberty and equality by striking New York's exclusion of same-sex couples from civil marriage in 2006.

Questions Presented

1. Does the Due Process Clause of the New York Constitution require that the existing fundamental right to civil marriage apply to gay people who wish to marry a person of the same sex, thereby requiring the State to advance a compelling state interest to justify the exclusion (which the State concedes it cannot do)?

   The court below, erroneously believing that allowing same-sex couples to marry would require a "redefinition" of the fundamental right to marriage, declined to require the State to advance a compelling interest. (R. 674)

2. Regardless of the level of scrutiny applied, does the State's exclusion of same-sex couples from civil marriage violate the New York Constitution because the exclusion does not rationally advance any state interest?

   The court below, erroneously showing unwarranted deference to the Legislature, held that the rational basis test was satisfied based upon the State's significantly flawed justifications of "tradition" and "procreation" for excluding same-sex couples from civl marriage. (R. 679-82)

3. Does the Equal Protection Clause of the New York Constitution require that the State's exclusion of same-sex couples from marriage be examined with heightened scrutiny because it classifies persons on the basis of their sexual orientation and gender, thereby requiring the State to advance a compelling or important state interest to justify the discrimination (which the State concedes it cannot do)?

   Relying on its own recent (incorrectly decided) precedent, and ignoring (a) the long history of discrimination faced by gay men and lesbians in the State of New York, (b) the fact that sexual orientation bears no relation to an individual's ability to

contribute to society, and (c) the major obstacles faced by gays and lesbians in achieving legislative protection, the court below wrongly declined to apply heightened scrutiny to the exclusion of same-sex couples from civil marriage. (R. 678) Further, the court below incorrectly viewed the statutes at issue as "facially neutral" in terms of gender, and thereby declined to apply heightened scrutiny, overlooking the fact that gender clearly determines whom an individual may marry. (R. 678)

Statement of Jurisdiction

Jurisdiction in this appeal is proper as of right under CPLR § 5601(b)(1). Appellants bring claims under Article I, §§ 6 and 11 of the New York State Constitution, and no other claims. Those constitutional issues are thus the only ones addressed by the Appellate Division opinion below, and that opinion finally determined the action. (R. 668-85)

The constitutionality of the DRL's exclusion of same-sex couples from marriage presents questions that are substantial. The resolution of this appeal will affect the protections of many thousands of same-sex couples in committed relationships across this State in areas ranging from survivorship benefits to healthcare benefits to property distribution. And there is plainly substantial ground for disagreement as to the merits of the constitutional questions involved. *See* Opinion of the New York Attorney General, No. 2004-1, dated March 3, 2004, at 9. *Compare, e.g., People* v. *Greenleaf,* 5 Misc. 3d 337 (New Paltz Just. Ct. 2004), and *Hernandez* v. *Robles*, 7. Misc. 3d 459 (N.Y. Sup. Ct. 2005), with *Hernandez* v. *Robles*, -- A.D.3d --, 805 N.Y.S. 2d 354 (2005), and *Samuels and Gallagher, et al.* v. *New York State Dep't of Health, et al.*, No. 98084, Third Dep't, Feb. 17, 2006.

Appellants have preserved each and every claim that they raise in this Court. (R.58-77, 668-85)

Statement of the Case

A. The Protections of Marriage

The State does not dispute, nor did the Third Department below, that by reflecting the reality of life as a committed couple, the institution of civil marriage creates vitally important protections, rights and obligations.

Medical Decisionmaking. Appellants care deeply about the right to make medical decisions for one another. In New York, a married person is entitled to an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse. *See* N.Y. Comp. Codes R. & Regs., tit. 14, Part 27. Appellants, however, lack that important protection.

Appellants Ellen Dreher, who is 69, and Laura Collins, who is 61, have been together for more than 30 years. They are very concerned about whether they will be able to make medical decisions for each other should an emergency occur. (R. 309-10) As Ellen explains, "Laura is the person who knows me best and whom I trust more than anybody else . . . ." (*Id.*) Ellen and Laura do not know if their relationship will be respected as they grow older and find themselves at the mercy of the health care system. (*Id.*) Sadly, as the experiences of other Appellants show, their fears are well founded.

When Appellant Carol Snyder was diagnosed with breast cancer 12 years ago, she and her partner Heather McDonnell tried to head off any problems

by finding a "gay friendly" surgeon. (R. 325) Even so, the hospital staff constantly raised skeptical and harassing questions about their relationship, and Heather was often forced to leave the room during complicated and painful procedures. (*Id.*) As a result of this experience, they went to a lawyer and signed health care proxies. (R. 326) But when Carol later had a medical emergency, hospital staff once again tried to separate them, demanding to inspect their "papers." (*Id.*) At another point, medical staff insisted that the couples' daughters be contacted with respect to a critical medical decision, because they recognized only Carol's children as her "next of kin." (*Id.*) Carol and Heather's experience shows that legal arrangements that attempt to replicate some of the protections that come with civil marriage are in fact poor substitutes for the universally understood concept of marriage.[1]

Health Care Benefits. Marriage typically provides a couple with a number of health and medical benefits. For example, it is a common practice of employers to make insurance available to the spouses of their employees, *see* N.Y.

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[1] Many of the Appellants have sought to establish by contract some legal protections for their relationships in an attempt to replicate some of the elaborate protections that come with civil marriage. Those arrangements are incomplete, however, since many protections that come with marriage cannot be obtained by private contract. *See, e.g., Matter of Valentine*, 17 A.D.3d 38 (3d Dept 2005) (workers compensation benefits); *Langan* v. *St. Vincent's Hosp.*, 25 A.D.3d 90 (2d Dept 2005) (right to sue for wrongful death). In addition, efforts to establish even those limited arrangements are cumbersome and beyond the financial resources of many ordinary New Yorkers. Even worse, they leave Appellants with a well-founded fear that the protections that they have tried to put in place may not work when tested in times of crisis, or may be undone in the future.

Ins. L. § 3220 (McKinney 2004), and to continue to provide health coverage for the spouse of a person who is laid off or dies, *see id.* § 3221.

Healthcare benefits are a constant source of anxiety for many of Appellants. For instance, Appellant Cynthia Bink had to leave a job she loved and had held for 17 years in order to take a job that would offer her partner, Ann Pachner, the medical coverage that she needed. (R. 283-85) Ann, who is self-employed as a sculptor, had worked part-time jobs in the past in order to pay her $4,000 annual premium for health insurance. (R. 282) But when Ann was diagnosed with breast cancer a few years ago, Cynthia and Ann became concerned that Ann would not be able to continue to afford health insurance. (*Id.*) Although Cynthia's new job provided insurance coverage for Ann, the new coverage was inferior to that under her old plan, and Cynthia also has to pay taxes on the domestic partner portion of the coverage because the State treats it as income, whereas spousal insurance benefits would be exempt from taxation. (*Id.*)

Children. Certain protections associated with marriage concern children. When a married couple has children, those children receive the social and legal protections of marriage, such as the presumption of legitimacy and parentage, *see* N.Y. Jur. 2d § 345, as well as numerous other rights, *see generally* N.Y. Soc. Serv. L. (McKinney 2004). Furthermore, children whose parents are married obtain a measure of family stability and economic security based on their

parents' legal status that is largely inaccessible, or not as readily accessible, to children whose parents are not married. Some of these benefits are social, such as the enhanced approval that still attends the status of having married parents. Others are material, such as greater ease of access to family-based government programs that come with the presumption of parentage.

These protections are very important for Appellants also. For example, Amy Tripi recently gave birth to her first child, whom she plans on raising jointly with her partner, Jeanne Vitale. (R. 369) They are applying for Jeanne to be a second legal parent through adoption. But they are concerned about the harms that may result to their child from the lack of legal recognition of their relationship, even if they secure a second-parent adoption. (R. 371) In addition, Amy and Jeanne are concerned about the dangers that their child may encounter during the period before Jeanne is legally recognized as the child's second parent, particularly if Amy becomes incapacitated or is otherwise unable to make decisions on the child's behalf. (*Id.*)

Survivorship and Inheritance. Upon the death of a spouse, marriage confers a number of important financial benefits on the surviving spouse. These include the automatic right to inherit and administer the property of a deceased spouse who dies intestate, *see* N.Y. Est. Powers & Trusts L. § 4-1.1 (McKinney 2004); N.Y. Surr. Ct. Proc. Act § 1001(1) (McKinney 2004); entitlement to bank

accounts of a deceased spouse, *see* N.Y. Surr. Ct. Proc. Act § 1310 (McKinney 2004); and the right to make appropriate funeral and burial arrangements for a deceased spouse, *see Darcy* v. *Presbyterian Hosp.*, 202 N.Y. 259 (1911); *Fromm* v. *Fromm*, 280 A.D.2d 1022 (3d Dept 1952); *Beller* v. *City of New York*, 269 A.D. 642 (1st Dept 1945).[2]

These rights matter to Appellants as well. For example, John Wessel and William ("Billy") O'Connor established their own small business in the mid-1980s, to which they devoted the bulk of their professional lives. (R. 387-88) As John explained, "working as a couple, Billy and I have earned every single penny we have together. All of our assets are co-mingled, and our property is entirely jointly owned." (R. 388) Although John and Billy have named each other the exclusive beneficiaries of each other's wills (R. 388-89), they will be subject to substantially higher inheritance taxes than if they were married, *see* N.Y. Tax L. § 601 (McKinney 2004).

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[2] In certain circumstances, a spouse's death provides additional financial protections such as entitlement to death or disability benefits owed as workers compensation, *see* N.Y. Workers' Comp. L. §§ 15(4), 16, 33, 305(4) (McKinney 2004); payments to the spouses of certain State employees (fire fighters, police officers, and prosecutors, among others) killed in the performance of duty, *see, e.g.,* N.Y. Vol. Fire Ben. L. § 18 (Consol. 2004); N.Y. Vol. Amb. Work Ben. L. § 18 (Consol. 2004); the right to bring claims for wrongful death and loss of consortium, *see* N.Y. Est. Powers & Trusts L. §§ 5-4.1, 5-4.4(a) (McKinney 2004), *Millington* v. *Se. Elevator Co.*, 293 N.Y.S.2d 305 (N.Y. 1968); *Wheaton* v. *Guthrie*, 453 N.Y.S.2d 480 (4th Dept 1982); and entitlement to benefits under crime victim compensation statutes, *see* N.Y. Exec. L. § 624(1)(b)(i) (McKinney 2004).

Other Benefits. The benefits of marriage extend well beyond momentous events such as the birth of a child or the purchase of a home. In New York, the rights available only to married couples affect activities as mundane as renting a car or casting an absentee ballot. For Appellants, the inability to marry affects virtually every aspect of their relationship to the State. For example, a spouse, and only a spouse:

- may be entitled to a marital tax deduction, *see* N.Y. Tax L. § 601 (McKinney 2004), and other rights associated with real estate ownership such as the ability to own property as tenants by the entirety, a form of ownership that provides certain protections against creditors and allows for the automatic transfer of property to the surviving spouse without probate, *see* N.Y. Est. Powers & Trusts L. § 6-22(b) (McKinney 2004); *In re Lyon's Estate*, 233 N.Y. 208 (1922); *Prario* v. *Novo*, 168 Misc. 2d 610 (S. Ct. Westchester Cty 1996).

- may request an absentee ballot or provide registration assistance to the other spouse. N.Y. Elec. L. §§ 5-122, 5-216 (McKinney 2005); N.Y. Elec. L. § 15-122 (McKinney 2005).

- cannot be evicted from their home if their spouse is serving in the military. N.Y. Mil. L. § 309 (McKinney 2005).

- is exempt from certain hunting, fishing, and trapping licenses on the property of the other spouse. N.Y. Envtl. Conserv. L. §11-0707 (McKinney 2005).

- is protected from intrusions into marital communications. CPLR § 4502(b) (McKinney 2005).

- is automatically covered by a vehicle rental agreement signed by the other spouse. N.Y. Gen. Bus. L. § 396-z(1)(a) (McKinney 2005).

- can receive greater pharmaceutical insurance if the couple is elderly. N.Y. Exec. L. §§ 547-(g)-(h) (McKinney 2005).

As outlined in greater detail in the record, (R. 571-600), the rights denied to Appellants are breathtaking in scope, diversity, and number. Indeed, Appellants' inability to get married causes them to be reminded on a daily basis that the State has deemed them to be inferior and unworthy simply because of their sexual orientation.[3]

B. Proceedings Below

Appellants commenced this lawsuit on April 7, 2004, seeking a declaration that the provisions of New York State's Domestic Relations Law that prohibit marriage between same-sex couples are invalid under the New York Constitution. (R. 78-111) By stipulation with Appellees, the New York State Department of Health and the State of New York, Appellants moved for summary judgment on the grounds outlined above. (R. 117) Appellees cross-moved for summary judgment. (R. 394) On December 7, 2004, the Supreme Court, Albany County (Teresi, J.) denied Appellants' motion and granted the State's cross-motion in a six-page opinion. (R. 60-66)

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[3] Of course, when a marriage fails, the law provides a host of mechanisms for the couple's separation, including the equitable division of marital property on divorce, *see* DRL § 234; temporary and permanent alimony rights, *see id.* § 236(A); the right to separate support on separation of the parties that does not result in divorce, *see id.* § 236(A); as well as the application of predictable rules of child custody, visitation, and support, DRL § 369. A same-sex couple with children or who have pooled their assets for many years need these protections as much as any heterosexual couple does.

Specifically, the Supreme Court, Albany County, rejected Appellants' equal protection claims, finding that the DRL does not contain a gender classification. (R. 60-61) The Supreme Court then determined that with respect to the DRL's classification of persons on the basis of sexual orientation, it was bound by the Second Department's decision in *Matter of Cooper*, 187 A.D.2d 128 (1993), and that the State's interest in "tradition" and "uniformity" were legitimate reasons for the challenged discrimination. (R. 61-62) The Supreme Court also rejected Appellants' due process claims, again stating that it was required to follow *Matter of Cooper*. (R. 64-65)[4]

Appellants timely noticed an appeal to this Court pursuant to CPLR § 5601 (R. 6, 27), which this Court subsequently transferred to the Appellate Division, Third Department. (R. 3) The Third Department held oral argument on October 17, 2005, and on February 16, 2006, issued an eighteen-page opinion affirming the trial court. The Third Department rejected Appellants' due process claim, holding that it "represents a significant expansion into new territory which is, in reality, a redefinition of marriage." (7) Following its own decision, *Matter of Valentine*, 17 A.D.3d 38 (3d Dept 2005), the Third Department held that a

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[4] As a decision of the Second Department, *Matter of Cooper* plainly is not binding on this Court. Moreover, it is not even persuasuve, as it relied heavily on *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971), and *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). *Matter of*

classification based on sexual orientation did not trigger heightened equal protection scrutiny. Also relying on *Matter of Valentine*, the Third Department held that the exclusion of same-sex couples from marriage did not discriminate on the basis of gender, and thus did not require heightened scrutiny on that basis either.

Applying an extremely deferential form of rational basis review under the Equal Protection Clause, the Third Department conceded that "the logic" of the State's purportedly rational bases "is neither flawless nor finely tailored." (R. 679) Nevertheless, the Third Department, without citing any support in the law for "tradition" as an appropriate criterion for constitutional analysis, held that maintaining "the historic, legal and cultural understanding of marriage" justified the exclusion of same-sex couples from civil marriage. (R. 680)

The Third Department then turned to the State's purported justification that excluding same-sex couples from civil marriage rationally encourages procreation. The Third Department "accept[ed] for purposes of this case" a number of propositions as not "seriously disputed," including, among others, that "precluding same-sex couples from marrying does not encourage opposite-sex couples to have and raise children," and that "many same-sex couples

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Cooper, 187 A.D.2d at 133-134. For reasons we discuss elsewhere in this brief, the reasoning in both of those cases has been rejected, and they are no longer good law.

currently raise children and both partners are good parents." (R. 681) Accordingly, the Third Department concluded, "if the test being employed was not rational basis, the overinclusive and underinclusive nature of this basis would create considerable problems for defendants; a fact that defendants conceded at oral argument." (*Id.*) The Third Department nevertheless went on to find the purported justification of procreation to be rational, on the ground that "[i]t is an undisputed biological fact that the vast majority of procreation still occurs as a result of sexual intercourse between a male and a female." (*Id.*)

On February 17, 2006, Appellants timely noticed their appeal to this Court.

Argument

I. NEW YORK'S MARRIAGE LAW DENIES GAY AND LESBIAN PEOPLE THE FUNDAMENTAL RIGHT TO MARRY THE PERSON THEY LOVE

The New York Constitution protects an individual's right to marry the person that he or she loves as an element of the larger sphere of personal autonomy guaranteed by the Due Process Clause, N.Y. Const., Art. I, § 6. Any right guaranteed by the State Constitution applies equally to everyone, no matter whether gay men and lesbians – or anyone else – may have been denied the opportunity to exercise this right in the past. The DRL excludes same-sex couples from that basic right and thus violates the New York Constitution, because the

State has conceded that it cannot show that the exclusion is necessary and narrowly tailored to advance a compelling government interest.

A. The Due Process Clause Protects the Right to Marry

The Due Process Clause protects certain rights of personal autonomy, including the right to life, bodily integrity and intimate association. These rights are fundamental "[i]n our system of a free government, where notions of individual autonomy and free choice are cherished." *Rivers* v. *Katz*, 67 N.Y.2d 485, 493 (1986). The core of that due process right, the area where it is most jealously protected by New York courts, concerns committed adult relationships: decisions about marriage, sexual intimacy, and childbearing and childrearing. *See, e.g., Hope* v. *Perales*, 83 N.Y.2d 563, 571 (1994) (identifying a "fundamental right to choose" under Art. I, § 6); *Rivers*, 67 N.Y.2d at 493-98 (establishing, under Art. I, § 6, the right of certain persons to refuse medical care); *Onofre,* 51 N.Y.2d 476 (right to private sexual intimacy), *Cooper* v. *Morin*, 49 N.Y.2d 69, 78-81 (1979) (holding that pre-trial detainees have a right to marriage and family life under Art. I, § 6); *People ex rel Portnoy* v. *Strasser*, 303 N.Y. 542 (1952) (right of capable parents to raise children as they see fit).

Central to that liberty is the fundamental right to marry. New York courts have long recognized that the right to marry goes to the core of individual

liberty because the decision to marry is one of the most significant decisions a person can make. As one court has explained:

> Marriage is the cornerstone of the family. It is a recognized fundamental right and a relationship favored in the law. . . . It is also more — much more. "[It] is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

People v. *DeStefano*, 121 Misc. 2d 113, 121 (S. Ct. Suffolk Cty 1983) (quoting *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965)).

The United States Supreme Court could not have been clearer: "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967). Although the anti-miscegenation law challenged in *Loving* was struck down on both due process and equal protection grounds, later decisions confirmed the independent significance of *Loving*'s due process holding by describing the case as the "leading decision" on "the right to marry." *Zablocki* v. *Redhail,* 434 U.S. 374, 383 (1978). As the *Zablocki* Court subsequently explained, the *Loving* Court's decision to rule on due process as well as equal protection grounds "confirm[s] that the right to marry is of fundamental importance for *all* individuals." *Id.* at 384 (emphasis added).

This Court has made it equally plain on numerous occasions that there exists a fundamental right to marry that is protected under Article I, § 6 of the New York Constitution. Indeed, in *Cooper* v. *Morin*, this Court concluded that the "fundamental right to marriage and family life" endures even when an individual is detained in jail. 49 N.Y.2d at 80 (citing, *inter alia*, *Zablocki*, 434 U.S. at 383-87, and *Boddie* v. *Connecticut*, 401 U.S. 371 (1971)). *See also Levin* v. *Yeshiva Univ.*, 96 N.Y.2d 484, 500 (2001) (G.B. Smith, J., concurring) ("[M]arriage is a fundamental constitutional right.") (citing *Loving* and *Zablocki*); *Crosby* v. *State*, 57 N.Y.2d 305 (1982) (holding that the "decision of whom one will marry" is "clearly" protected by Article I, § 6); *People* v. *Shepard*, 50 N.Y. 2d 640, 644 (1980) (acknowledging that "the government has been prevented from interfering with an individual's decision about whom to marry").

B. The Constitutionally Protected Right to Marry Applies Equally to Gay and Lesbian New Yorkers Wishing to Marry a Partner of the Same Sex

History plays an important role when courts set out to determine what substantive rights the Due Process Clause protects. To identify the scope of protected liberty, courts look for rights which are (1) "objectively, 'deeply rooted in this Nation's history and tradition,'" and (2) "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations omitted). As discussed above, marriage easily qualifies on both counts.

See Zablocki, 434 U.S. at 383-85; *Loving*, 388 U.S. at 12; *Shepard*, 50 N.Y.2d at 644; *Cooper*, 49 N.Y.2d at 80.

But while courts use history and tradition to identify the *interests* that due process protects, they do not carry forward historical limitations on *who* may exercise a right once the right is recognized as being protected by due process. That critical distinction — that history guides the *what* of due process rights, but not the *who* of which individuals have them — is central to the due process jurisprudence.

For example, at common law, a child born out of wedlock had no father in the eyes of the law – the child was "*nullius fillius*," or "kin to nobody." *See, e.g., Hughes* v. *Decker*, 38 Me. 153 (1854). Yet neither this Court nor the United States Supreme Court even contemplated the notion that an unwed father could be denied the due process parental right to the care, custody, and control of his child simply because, as a historical matter, unmarried fathers had no legally recognized rights. *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) (unwed father has protected parental rights); *In re Raquel Marie X.*, 76 N.Y.2d 387, 397 (1990) (unwed father had right to veto adoption of his newborn child). Because parental rights, like marriage rights, are fundamental rights that implicate the most basic notions of personal autonomy, this Court, in *In re Raquel Marie X.,* recognized that denying those rights to unwed fathers violates the guarantees of the Due Process

Clause – even though "until the 1970's unwed fathers had no legally recognized [parental] interest." *Id.*.

Similarly, once it was understood that there was a constitutionally protected liberty from bodily restraint, neither this Court nor the Supreme Court had any trouble concluding that persons who were mentally ill and had been committed to an institution enjoyed that right as well. *Youngberg* v. *Romeo*, 457 U.S. 307 (1982); *Rivers* v. *Katz*, 67 N.Y.2d 485, 495-96 (1986). In *Rivers*, this Court held that notwithstanding the "historic view" that the mentally ill ceased to enjoy many fundamental liberties, the "nearly unanimous modern trend" was to "reject any argument that the mere fact that appellants are mentally ill reduces in any manner their fundamental liberty interest," absent a compelling state interest. *Id.* at 494-95. Indeed, if the reality of who had enjoyed that right historically were determinative, the tradition of forced sterilization of the mentally ill, *see Buck* v. *Bell*, 274 U.S. 200 (1927), or of their indefinite confinement, *see O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), would have been fatal to the claims in *Rivers* and *Youngberg*. They were not.

This same principle — that due process looks to history to determine what is protected, not who enjoys the right — is also manifest in the United States Supreme Court's cases about the right to privacy. In *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965), the United States Supreme Court held that a state could not

make it a crime for married couples to use contraceptives. The decision rests on a right that the Court explained is older than the Bill of Rights itself: the right to privacy in marriage. *Id.* Later, in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), the United States Supreme Court struck down a ban on the distribution of contraceptives to *unmarried* persons. Importantly, the Court in *Eisenstadt* did not suggest that this country had a history of protecting the privacy of unmarried people that would prevent the state from regulating their private sexual behavior. Instead, the Court specifically held that fundamental rights, once recognized, belong to everyone: "[I]f the right to privacy means anything, it is the right of the individual, *married or single,* to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis added).

The United States Supreme Court's cases about the fundamental right to marry also embody this core due process principle. For example, the traditional right to marry did not include a right to divorce and marry a second time. England, the source of our common law, did not permit divorce until 1857, and while some states in the nineteenth century allowed legal separation, complete legal divorce was rare, often required an act of the state legislature, and was typically restricted to extreme situations, as in New York, where adultery was the only permissible ground. Lawrence Friedman, *A History of American Law* 179-86 (1973). But the

United States Supreme Court has repeatedly vindicated the right to marry a second time. In *Zablocki* v. *Redhail*, 434 U.S. 374, 388-90 (1978), for example, the United States Supreme Court held that a state could not impose restrictions on the ability of a "dead-beat dad" to remarry, even if he was behind in child support payments. And in *Boddie* v. *Connecticut,* 401 U.S. 371, 380-81 (1971), the United States Supreme Court held that a state could not require indigents to pay court fees in order to get a divorce, since doing so unduly burdened their fundamental right to marry.

Not surprisingly, the traditional right to marry also did not extend to prisoners. Nevertheless, in *Cooper* v. *Morin*, this Court held that "the fundamental right to marriage and family life," among other liberty interests, required that "contact visits" be permitted between prisoners and their spouses and families. 49 N.Y.2d at 80. Similarly, in *Turner* v. *Safley*, 482 U.S. 78, 95-97 (1987), the United States Supreme Court held that the state could not restrict an inmate's ability to marry without providing sufficient justification. Again, had the fundamental right to marry been limited to the contexts in which that right had been traditionally recognized, *Cooper* and *Turner* would have come out the other way.

Historically, the right to marry also did not extend to persons of different races. *See, e.g.*, Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law -- An American History* 253-54 (2002) (laws prohibiting

marriage between whites and other races existed in colonial America and in many states for three centuries). Just 19 years before miscegenation laws were struck down in *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967), 38 states banned interracial marriage, six of those 38 states by constitutional provision. Wallenstein, *supra*, at 159-160. Yet the *Loving* Court held that the fundamental right to marry applied to interracial couples just as it did to same-race couples. 388 U.S. at 12. So too did the California Supreme Court, nearly twenty years before the Supreme Court's decision in *Loving*. *See Perez* v. *Lippold*, 198 P.2d 17, 21 (Cal. 1948) ("[T]he essence of the right to marry is freedom to join in marriage with the person of one's choice.").

There is a fundamental principle behind the courts' decisions in all of these cases – the notion that fundamental rights are protected for some groups and not others is antithetical to our constitutional system of equality under law. The only difference between this case and this Court's precedents in *Raquel Marie X., Rivers,* and *Cooper* is the identity of the group seeking to exercise a fundamental right that historically had been placed off limits to them. In those cases, the group at issue was unwed fathers, the mentally ill and pre-trial detainees; here, it is gay men and lesbians. Neither the State nor any of the courts below has pointed to a single decision of this Court or the United States Supreme Court holding that fundamental rights are generally limited to those who had a historic right to

exercise them, or that gay people do not have the same fundamental rights that other Americans have.

There is one such case, but it illustrates precisely our point. In *Bowers* v. *Hardwick*, the United States Supreme Court decided that the issue before it was not whether a state could regulate the private sex lives of all of its citizens (as the Georgia law in question did) but rather "whether the Federal Constitution confers a fundamental right *upon homosexuals* to engage in sodomy." 478 U.S. 186, 191 (1986) (emphasis added). By holding that fundamental rights may be limited to some people, and saying that history could be used to decide which ones, *Bowers* marked an unprecedented deviation from the United States Supreme Court's prior due process jurisprudence.

But the analysis in *Bowers* was not simply unprecedented, it was wrong. As the United States Supreme Court stated emphatically in *Lawrence,* "*Bowers* was not correct when it was decided, and it is not correct today." 539 U.S. at 578. In striking down a Texas law that criminalized certain intimate acts only when performed by same-sex couples, *id.* at 571-73, the *Lawrence* Court did not conduct the historical analysis that it prescribed in *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), in order to determine whether a right is protected by due process. That analysis was not warranted in *Lawrence* because, as the due process cases above illustrate, in *Lawrence,* the Court was vindicating an existing

fundamental right with respect to a group of Americans who previously had not enjoyed that right. Instead, following *Eisenstadt* and other due process cases, the Court held that gay people cannot be excluded from the existing right to sexual intimacy, even though, as a historical matter, they may have been prohibited from a full enjoyment of the right. *Id.* at 567. This Court had recognized the same principle twenty-three years earlier when it found that there was no basis for "excluding [unmarried and same-sex couples] from the same protection" of the fundamental right to privacy enjoyed by married couples with respect to their sexual conduct. *People* v. *Onofre,* 51 N.Y.2d 476, 488 (1980) (relying in part on *Eisenstadt*).[5]

In this case, because the right to marry has already been recognized as fundamental, the fact that gay New Yorkers have until now been denied the opportunity to exercise that right is constitutionally irrelevant. In other words, the issue here is no more whether there is a fundamental right to "same-sex marriage" than the issue in *Onofre, Bowers* or *Lawrence* was whether there was a fundamental right to engage in "same-sex sodomy." In both instances, the right

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[5] These decisions reflect the fact that the Due Process Clause incorporates a commitment to the principle of equality under the law no less than the Equal Protection Clause, *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976), because the two constitutional provisions "are linked in important respects." *Lawrence*, 539 U.S. at 575. *See also Bolling* v. *Sharpe*, 347 U.S. 497 (1954) ("discrimination may be so unjustifiable as to be violative of due process"). In other words, a fundamental right cannot be protected for some groups and not others absent a compelling state interest.

already protected by due process (in the sodomy cases, the right to privacy; here, the right to marry) cannot be circumscribed based simply on a history of excluding gay people from its scope. *See, e.g., Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003); *In re Coordination Proceeding re Marriage Cases*, No. 4365, 2005 WL 583129 at *9 (Cal. Super. Ct. Mar. 14, 2005); *Castle* v. *Washington*, No. 04-2-00614-4, 2004 WL 1985215 at *12-14 (Wash. Super. Ct. Sept. 7, 2004); *Anderson* v. *King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *5-7 (Wash. Super. Ct. Aug. 4, 2004); *Brause* v. *Bureau of Vital Statistics*, No. 3AN-95-6562CI, 1998 WL 88743, at *6 (Alaska Super. Ct. 1998), *superseded by* Alaska Const. Art. 1, § 25.

In its decision, the Third Department ignored this significant body of constitutional due process jurisprudence. Instead, it cited a series of this Court's precedents dating from the early part of the last century for the proposition – which we do not dispute – that marriage is a fundamental aspect of personal autonomy. (R. 675) (citing *Mirizio* v. *Mirizio*, 242 N.Y. 74 (1926); *Fearon* v. *Treanor*, 272 N.Y. 268 (1936); and *Fisher* v. *Fisher*, 250 N.Y. 313 (1929)). The Third Department then cursorily concluded, without supporting logic or reasoning, that permitting committed same-sex couples to marry "would, to a certain extent, extract some of the deep roots that support [marriage's] elevation to a fundamental right." (*Id.*)

But the removal of historical limitations on who can exercise a right does not make the right any less fundamental. That was not true for the right to privacy, which started out being based on the marital relationship, but was then recognized to apply to unmarried individuals as well as gay people. It was not true for the right to parental control of children, which started out being based on a mother's biological link with her child, but was then recognized as covering a father's relationship with a child as well. Like the prisoners in *Cooper* and the "dead-beat dad" in *Zablocki*, Appellants desire no change to the institution of marriage -- rather, they simply seek access to the dignity and protections it offers.

Washington v. *Glucksberg*, 521 U.S. 702 (1997), relied upon by the State and Third Department for the proposition that fundamental rights are linked to what has historically been protected, is entirely consistent. In *Glucksberg*, the Court held that, while historically, people were understood to have a "fundamental" right to refuse medical treatment, *Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), there was no such historic right, and thus no fundamental right, to take affirmative steps to hasten death without state interference. 521 U.S. at 728. But *Glucksberg* was addressing whether to recognize a new fundamental right for *everyone*, not whether an existing right should apply to a discrete group of people who had historically been excluded from it. *Glucksberg* is therefore not in tension with the logic of this Court in *Raquel*

Marie X, when it "extended" parental rights to unwed fathers, who had historically been excluded from those rights, and with the analysis in *Rivers*, when this Court recognized that certain basic liberty rights could not be denied to the mentally ill, despite a longstanding practice otherwise.[6]

C. Because the New York Constitution Provides Greater Due Process Protection Than the U.S. Constitution, the Right to Marry Cannot Be Denied to Gay and Lesbian New Yorkers Absent a Compelling State Interest, Which the State Has Conceded Does Not Exist

The New York Constitution provides even greater protection for liberty than does the U.S. Constitution. In recognition of the fact that "the Federal and State due process clauses were adopted to combat entirely different evils," the New York courts "on innumerable occasions . . . [have] given our State

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[6] Nor does *Baker* v. *Nelson*, 409 U.S. 810 (1972) dictate a contrary result. In *Baker*, a same-sex couple seeking the right to marry challenged Minnesota's marriage law as violating federal due process and equal protection guarantees. The Minnesota Supreme Court upheld the statute on rational basis grounds. *Baker* v. *Nelson,* 191 N.W. 2d 185, 187 (Minn. 1987). The United States Supreme Court then dismissed the *Baker* appeal "for want of a substantial federal question." This Court is not bound by the dismissal of *Baker* since that case involved a question of federal, rather than state, law, and in any event, the dismissal did not reflect the Court's agreement on the merits of the constitutional issue involved. *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979); *cf. Onofre*, 51 N.Y.2d at 493 (holding that a summary affirmance by the Supreme Court "does not necessarily signify approval of the reasoning by which the lower court resolved the case"). Indeed, summary dismissals need not be followed when subsequent "doctrinal developments indicate otherwise." *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975). Since 1972, the Supreme Court has made decisions (1) striking down restrictions on the right to marry, *see Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Turner* v. *Safley*, 487 U.S. 78 (1987); (2) finding that laws and classifications that have no purpose other than to disadvantage gay people cannot survive rational basis review, *Romer* v. *Evans*, 517 U.S. 620 (1996); (3) holding that the fundamental right to privacy protects gay and straight people equally,

Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution." *Sharrock* v. *Dell Buick-Cadillac*, 45 N.Y.2d 152, 159, 160 (1978). *See also People* v. *LaValle*, 3 N.Y.3d 88, 129 (2004); *People* v. *Scott*, 79 N.Y.2d 474, 487 (1992).

Where, as here, the text of the relevant State and Federal constitutional provisions are not materially different, the courts use what has been called "noninterpretive review" to determine whether a provision of the New York Constitution reaches beyond the lesser federal guarantees. Specifically, New York courts look at the following factors, among others: (1) "the history and traditions of the State in its protection of the individual right;" (2) "any identification of the right in the State Constitution as being one of peculiar State or local concern;" and (3) "any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right." *People* v. *P.J. Video, Inc.*, 68 N.Y.2d 296, 302-03 (1986). *See also In re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 N.Y.3d 665, 674-75 (2005).

This Court's jurisprudence already demonstrates that the protections of New York's Due Process Clause surpass the Federal constitution when matters

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Lawrence v. *Texas*, 539 U.S. 558 (2003); and (4) affording heightened scrutiny to sex classifications, *Craig* v. *Boren*, 429 U.S. 190 (1976).

of family life and personal relationships are at issue. For example, New York courts have rejected zoning restrictions limiting occupancy to nuclear families as inconsistent with New York's Due Process Clause notwithstanding the fact that the United States Supreme Court had rejected a challenge to similar ordinances brought under the Federal constitution. *McMinn* v. *Town of Oyster Bay*, 105 A.D.2d 46, 58 (2d Dept 1984), *aff'd*, 66 N.Y.2d 544 (1985); *compare Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). And, as discussed above, in *Cooper* v. *Morin*, this Court held that the failure of a prison to provide contact visits to pretrial detainees violated New York's Due Process Clause, even though the Federal Constitution provided no analogous protection. 49 N.Y.2d 69, 80-82 (1979).

In light of this State's history of protecting gay people from discrimination, *see, e.g., Matter of Jacob*, 86 N.Y.2d 651 (1995); *Braschi* v. *Stahl Assocs.*, 74 N.Y.2d 201 (1989), as well as the "distinct attitudes" of New Yorkers reflected in the laws of this State, the Due Process Clause of the New York Constitution can and should be interpreted more broadly than its federal counterpart if necessary to vindicate the right of gay and lesbian New Yorkers to marry the person that they love.

* * *

Because the DRL completely excludes same-sex couples from the fundamental right to marry, which is guaranteed by the protections of New York's Due Process Clause, the exclusion must satisfy strict scrutiny. To satisfy this standard, the State must show that excluding same-sex couples from marriage is necessary to advance a "compelling" government interest and that there is no less-intrusive means of advancing it. *L. Pamela P.* v. *Frank S.*, 59 N.Y.2d 1, 6 (1983). Even though the Third Department erred in its application of the Due Process Clause, the court below correctly found that the State could not meet this exacting standard, a point that the State has conceded. Nor, as we discuss in Section II below, can the State justify its exclusion of same-sex couples from marriage under a less stringent standard of review.

II. NEW YORK'S MARRIAGE LAW VIOLATES THE NEW YORK CONSTITUTION BECAUSE IT FAILS EVEN RATIONAL BASIS REVIEW

The Equal Protection Clause, Article I, § 11 of the New York Constitution "imposes a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment." *Brown* v. *New York*, 89 N.Y.2d 172, 190 (1996). The basic command of equal protection is that the State must give the same treatment to all who are similarly situated in terms of a law's purpose.

Courts apply various levels of scrutiny to laws that treat people differently, depending on whether the law burdens people based on specific characteristics and whether the law interferes with individuals' fundamental rights. *See City of Cleburne* v. *Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985); *Brown* v. *New York,* 250 A.D.2d 314, 321 (3d Dept 1998). However, because the exclusion of same-sex couples from marriage does not rationally further *any* legitimate state interest, it cannot survive even rational basis review, much less the heightened scrutiny that rightfully applies here.[7] In other words, no rational person could conclude that gay men and lesbians are not similarly situated to heterosexuals when it comes to the protections of civil marriage.

Although the State has asserted that the exclusion of gay men and lesbians from civil marriage advances certain interests, those interests either are not legitimate or are not rationally furthered by excluding same-sex couples from marriage. Moreover, the standard of rational basis review urged by the State, and adopted by the Third Department below, conflicts with this Court's precedents that require special care when reviewing laws that affect individuals' personal

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[7] It is equally true that courts must at times abandon this deference to the Legislature, and instead apply suspicion to certain invidious classifications. As already discussed above, New York's marriage law triggers heightened scrutiny under the Due Process Clause because marriage is a fundamental right. In addition, for the reasons discussed in Section III below, the DRL also triggers heightened scrutiny under the Equal Protection Clause because the DRL discriminates against New Yorkers based on their sexual orientation and their gender.

relationships or discriminate against entire classes of persons based simply on who they are.

A. This Court Applies Rational Basis Review With Particular Care Where, as Here, the Law at Issue Involves Personal Autonomy and Relationships

To satisfy the rational basis standard of review, a classification made by the State must at least "rationally further some legitimate, articulated state purpose." *Doe* v. *Coughlin*, 71 N.Y.2d 48, 56 (1987). In evaluating legislation under this test, a court must "ascertain both the basis of the classification involved and the governmental objective purportedly advanced by the classification. The classification must then be compared to the objective to determine whether the classification rests upon some ground of difference having a fair and substantial relation to the object for which it is proposed." *Abrams* v. *Bronstein*, 33 N.Y.2d 488, 493 (1974) (internal quotation omitted).

Thus, "[t]he rational basis standard has two prongs: (1) the challenged action must have a legitimate purpose and (2) it must have been reasonable for the legislators to believe that the challenged classification would have a fair and substantial relationship to that purpose." *Abberbock* v. *County of Nassau*, 213 A.D.2d 691, 691 (2d Dept 1995). When this level of equal protection scrutiny is applied, if there is a rational connection between the classification and the

governmental purpose, then courts typically sustain the statute. *See id.* (salary differential for county managerial and non-managerial/union employees).

Rational basis challenges typically involve statutes or regulations addressing "economic or social welfare concerns," and with respect to such issues, courts typically defer to the judgment of the Legislature. *See, e.g., Lovelace* v. *Gross*, 80 N.Y.2d 419, 427 (1992). Examples of some, but certainly not all, of such cases include: *Affronti* v. *Crosson*, 95 N.Y.2d 713 (2001), where the Court denied a challenge to the difference in judicial salaries between Monroe and Sullivan County; *Port Jefferson Healthcare Facility* v. *Wing*, 94 N.Y.2d 284 (1999), where the Court rejected a challenge to certain nursing home tax assessments in connection with the Medicaid program; *Dalton* v. *Pataki*, 5 N.Y.3d 243 (2005), where the Court denied a challenge to casino gambling regulations; *Crosby* v. *Workers Compensation Board*, 57 N.Y.2d 305 (1982), where the Court rejected a challenge to the scheme for the payment of attorneys' fees in workers compensation claims; and *Lovelace*, 80 N.Y.2d at 427, where the Court rejected a challenge to a statute requiring that a portion of grandparents' income be deemed available to infants in determining eligibility for a welfare program. Not surprisingly, in such cases, the Court often employs language emphasizing the degree of deference to be paid to the Legislature. *See, e.g., Affronti*, 95 N.Y.2d at 719 ("The rational basis standard of review is a 'paradigm of judicial restraint.'")

(citations omitted); *Dalton*, 5 N.Y.3d at 265-66 (under rational basis review, a classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification . . .") (cited by Third Department (R. 678)).

But what the State and the Third Department fail to recognize is that while this Court has largely deferred to the Legislature and sustained economic classifications in such circumstances, this Court has been far more receptive to the less common type of rational basis challenges to statutes that implicate issues of personal autonomy and relationships, rather than economic or welfare regulations. When confronted with such cases, this Court has *carefully* examined the actual connection between the classification and the purpose and has refused to accept fanciful, arbitrary or hypothetical justifications for the unequal treatment. As this Court has explained, the analysis to be conducted in such cases is whether the statute "arbitrarily burden[s] a particular group of individuals." *People* v. *Liberta,* 64 N.Y.2d 152, 163 (1984); *see also id.* at 163 (a classification "must be reasonable and must be based upon some ground of difference that rationally explains the different treatment") (internal quotation omitted); *People* v. *Onofre*, 51 N.Y.2d 476, 491 (1980) (same).

Indeed, the language of extreme deference to the Legislature, cited by the Third Department below (R. 678), appears exclusively in this Court's cases

involving economic regulations and is notably absent from this Court's cases involving statutes that inhibit personal relationships. Several of this Court's decisions are illustrative. In *People* v. *Liberta*, for example, this Court considered the constitutionality of the marital exemption in New York's rape law, which did not cover the rape of a wife by her husband, and applied the rational basis test to the law's different treatment of married and unmarried men.[8] In striking down the statute, the Court considered several conceivable rationales proffered by the State, including several that unquestionably could be "legitimate State interests," *id.* at 165, but nevertheless concluded that none of them was rationally furthered by the marital exclusion in the rape law. For example, although the State argued that the exemption protected "against governmental intrusion into marital privacy," this Court concluded that there is no rational connection between allowing a husband to rape his wife and protecting marital privacy because the right to privacy protects consensual acts, not sexual assaults. *Id.* at 165.

Similarly, although the State asserted in *Liberta* that eliminating the marital exemption would be "disruptive" to marriages, the Court concluded that such a justification was "not tenable" because the rape itself caused the disruption,

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[8] In the second part of this Court's decision in *Liberta*, it considered the classification in the statute which provided that only men could be convicted of marital rape. 64 N.Y.2d at 167-70. Because that statute, like the DRL here, classified based on gender, the Court analyzed it under a standard of heightened scrutiny.

not "the subsequent attempt of the wife to seek protection through the criminal justice system." *Id.* The State offered additional justifications for the statutory exemption concerning the gravity of the crime and difficulty of proof, all of which were similarly rejected by the Court as lacking merit. *Id.* at 166. As the *Liberta* court summarized: "[w]e find that there is no rational basis for distinguishing between marital and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand the slightest scrutiny." *Id.* at 136.

In *People* v. *Onofre*, 51 N.Y.2d 476 (1980), this Court struck down New York's consensual sodomy law under rational basis review because, among other things, it found "no relationship — much less [a] rational relationship — between [the state's] objectives" and the challenged law.[9] In that case, the State had suggested that outlawing consensual sodomy between unmarried persons furthered society's interest in "protecting and nurturing the institution of marriage and what are termed 'rights accorded married persons.'" *Id.* at 492 (quoting *Eisenstadt*, 405 U.S. at 447). The Court easily rejected this argument, concluding that the State could make no showing "as to how, or even that, the statute banning

[9] In the first part of its decision in *Onofre*, the Court analyzed the consensual sodomy statute using due process principles. 51 N.Y.2d at 485-91; *see also id.* at 492 n.6.

consensual sodomy between persons not married to each other preserves or fosters marriage." *Id.* Nor could the State explain "how consensual sodomy relates to rights accorded to married persons; certainly it is not evident how it adversely affects any such rights." *Id.*

Finally, in *McMinn* v. *Town of Oyster Bay*, 66 N.Y.2d 544 (1985), this Court found a town zoning ordinance unconstitutional under rational basis review where the ordinance did not logically further the proffered government interest.[10] The town ordinance at issue in *McMinn* limited residence in a single-family house to any number of people related by blood, marriage, or adoption, or to a maximum of two unrelated individuals. As in *Liberta*, this Court acknowledged that the zoning ordinance "was enacted to further several legitimate governmental purposes." *Id.* at 549. These included, according to the Court, the preservation of the character of the neighborhood, reduction of parking and traffic problems, control of population density and the reduction of noise and disturbance. *Id.* Nevertheless, the Court held that the ordinance "bore no reasonable relationship" to these identified objectives, because the definition of family in the zoning

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[10] Although the Court's analysis in *McMinn* was conducted under the Due Process Clause, the Court used a test substantially identical to the standard applied in equal protection cases. *See* 66 N.Y.2d at 549 ("[i]n order for a zoning ordinance to be a valid exercise of the police power it must survive a two-part test: (1) it must have been enacted in furtherance of a legitimate governmental purpose, and (2) there must be a "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end.").

ordinance, by prohibiting a young unmarried couple from occupying a four-bedroom house, was "*fatally overinclusive.*" *Id.* at 549 (emphasis added). By the same token, the *McMinn* Court also held that the statute was impermissibly "*underinclusive*" because it "fail[ed] to prohibit occupancy of a two-bedroom home by 10 or 12 persons who are related only in the most distant manner and who might well be expected to present serious overcrowding and traffic problems." *Id.* at 549-50. (emphasis added).

As this Court's decisions in *Liberta*, *McMinn* and *Onofre* show, this Court has never been hesitant to strike down under the rational basis test a law that classifies citizens on the basis of their marital status, their sexual orientation, or even the nature of their chosen family unit. While the State does not have to submit "evidence" supporting a statutory distinction in such circumstances, in order to uphold the statute, a court must still be able to discern some logical connection between the exclusion and a legitimate state interest based on facts and circumstances in the real world. In other words, this Court does not "rubber-stamp" laws that are egregiously under- or over-inclusive when such laws have the practical effect of burdening individuals' family lives and personal relationships.

One of the fundamental errors of the decision below is that, although it recognized the questionable logic of the State's justifications for the exclusion of same-sex couples from civil marriage, it nevertheless grounded its decision almost

entirely on the proposition that courts automatically defer to legislative decisions under the rational basis test. (R. 698) The Third Department's decision to uphold the statute, notwithstanding the lack of a logical connection between denying same-sex couples the right to marry and the State's purported justifications, demonstrated an unwarranted deference to the Legislature's discriminatory classifications in contravention of this Court's precedents.

B. Excluding Gay Men and Lesbians From Marriage Does Not Rationally Further Any Legitimate State Interest

Adherence to this Court's jurisprudence in examining each of the State's proffered justifications requires reversal of the Third Department's conclusion that there exists some hypothetical, albeit tenuous, basis for the DRL's exclusion of same-sex couples from marriage. The interests identified by the State -- and largely accepted by the Third Department -- as justifying the disparate treatment either are not legitimate in the first place, or are not rationally furthered by discriminating against gay men and lesbians.

1. History/Tradition

The most honest explanation of why New York excludes same-sex couples from civil marriage is simply because New York has always done so. The Third Department concluded that the State's interest in "preserv[ing] the historic legal, and cultural understanding of marriage" justifies excluding same-sex couples from civil marriage. (R.700) But that purported justification -- tradition -- does

not explain the classification; it simply repeats it, and thereby fails to identify a state interest "independent" of the classification, as the Equal Protection Clause requires.

Neither the State nor the Third Department cites any authority from this Court for the proposition that discrimination is lawful simply because it has a historical pedigree. Nor could they. The most basic principle of equal protection is that the government may not adopt a classification simply to disadvantage a particular group. *United States Dep't of Agric.* v. *Moreno,* 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional purpose to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (emphasis in original). It follows, then, that a legitimate purpose must be "independent" of the classification itself, *Romer*, 517 U.S. at 635; a classification justified by a purpose that embodies the distinction would be "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.*

Offering "history" or "tradition" as the justification for limiting marriage to heterosexual couples presents the same problem. The classification and the purpose are one and the same; keeping gay couples out of marriage is *both* the classification and the purpose. In other words, "it is circular reasoning, not

analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Goodridge*, 798 N.E.2d at 961 n.23; *see also Perez*, 198 P.2d at 27 ("Certainly the fact alone that. . . discrimination has been sanctioned by the state for many years does not supply justification."). To say that New York has had a classification for a long time does not explain *why* the classification exists, much less why it is justified. *See People* v. *Onofre*, 51 N.Y.2d 476, 491 (1980) (criticizing dissent for relying upon "historical, conventional characterization" of consensual sodomy). Since "tradition" does not advance an independent state interest, it is simply a prohibited "classification for its own sake." *Romer*, 517 U.S. at 635.

The Third Department held, in short, that gay people are properly excluded from the protections of civil marriage because they have always been excluded from marriage in New York. Although, that statement offers no reason for the unequal treatment, the Constitution requires there to be a reason. In addition, as this Court recognized in *Liberta* when it first recounted the long history associated with the marital rape exemption dating back to the common law, 64 N.Y.2d at 162, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule

simply persists from blind imitation of the past." *Id.* at 167 (*quoting* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897)).

While it recognized that a long tradition of banning interracial marriages was insufficient to save anti-miscegenation laws in *Loving* v. *Virginia*, the Third Department sought to distinguish *Loving* by asserting that "the law in *Loving* did not seek to redefine the historical understanding of marriage, but instead involved a race-based barrier to a traditional one woman, one man union." (R.700) The Appellate Division was wrong in two respects. First, at the time it was decided, *Loving* did, in fact, depart from a deeply ingrained understanding of what marriage was and, in particular, what marital relationships were natural or appropriate. Marriage had been defined in race-based terms for several centuries prior to the *Loving* decision in 1967, *see Wallenstein*, *supra*, at 253-54, making race a part of the very definition of marriage in a way that can hardly be understood today. Indeed, public opinion overwhelmingly opposed interracial marriage even after the *Loving* decision.[11]

Second, the fact that the tradition of discrimination in *Loving* could not withstand the heightened scrutiny that racial classifications trigger does not

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[11] *See* Charlotte Astor, *Gallup Poll: Progress in Black/White Relations, But Race Is Still an Issue*, USIA Electronic Journal, Vol. 2, No. 3 (Aug. 1997), available at http://usinfo.state.gov/journals/itsv/0897/ijse/gallup.htm (reporting that in 1972, five years after *Loving*, 75% of all white Americans still opposed interracial marriage)).

mean that traditions of other kinds of discrimination can withstand lesser levels of constitutional review. That is because a tradition of discrimination is irrelevant to an equal protection analysis in the first place. Far from reinforcing the past, the Equal Protection Clause is designed to root out discrimination, including discrimination that has endured for centuries. As one commentator has explained, the Equal Protection Clause is aimed at protecting "disadvantaged groups from discriminatory practices, however deeply engrained and longstanding" they may be. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988). *See also Watkins* v. *U.S. Army*, 837 F.2d 1428, 1440 (9th Cir. 1988) (distinguishing a due process claim, which looks to history to define the existence of a fundamental right, from an equal protection claim, which "simply requires that the majority apply its values evenhandedly"), *aff'd on other grounds, Watkins* v. *U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (en banc).

Finally, to the extent adherence to the traditional definition of marriage is based on this State's desire to express its moral disapproval of same-sex relationships, such sheer animus, of course, can *never* be a legitimate rationale under the Constitution. This Court recognized this bedrock principle of constitutional jurisprudence over twenty years ago in striking down New York's sodomy statute: "We express no view as to any theological, moral or

psychological evaluation of consensual sodomy. . . . [I]t is not the function of . . . our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values. . . ." *People* v. *Onofre*, 51 N.Y.2d 476, 488 n.3 (1980). *See also Under 21* v. *City of New York*, 108 A.D.2d 250, 252 (1st Dept 1985) ("It is quite easy to succumb to the strong emotions which are frequently evoked by the issue of homosexuality. But it is not necessary to vindicate homosexuality as a way of life for this Court to uphold Executive Order No. 50."), *rev'd on other grounds*, 65 N.Y.2d 344 (1985); *Lawrence*, 539 U.S. at 577-78 (rejecting proffered interest in moral disapproval of same-sex intimacy as justification for anti-sodomy laws); *id.* at 601; (Scalia, J., dissenting) (recognizing that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples.") (emphasis in original); *Romer*, 517 U.S. at 635 (animosity towards gay men and lesbians is not a legitimate state interest); *Moreno,* 413 U.S. at 534 (desire to disadvantage a group of people is not a legitimate state interest).

2. Procreation/Child Welfare

The Third Department reasoned that the DRL's limitation of civil marriage to heterosexual couples rationally furthers the State's interest in promoting procreation among heterosexuals and the welfare of their children. Although the State's interests in encouraging people to have and raise children are

legitimate, excluding same-sex couples from marriage does not rationally further those interests. The requisite connection is lacking both because (1) as a matter of logic, excluding gay men and lesbians from civil marriage does not in fact promote procreation, and (2) because any possible connection between the exclusion of gay men and lesbians from civil marriage and a goal of encouraging people to have children is so tenuous that it cannot be credited. Finally, it is beyond question that excluding gay people from civil marriage does not promote the welfare of anyone's children, especially in light of settled New York law approving parenting by gay people.

(a) Excluding Gay People From Marriage Has No Logical Relationship to Encouraging Others to Procreate

Various government actions could promote procreation. The government could give tax breaks to couples who have children, it could subsidize child care for those couples, or it could mandate generous family leave for parents. Any of these devices -- and many more -- might convince people who would not otherwise have children to do so. But it makes no sense at all to suggest that excluding same-sex couples from marriage encourages heterosexual couples to have children. No one rationally decides to have children because gay people are excluded from marriage. *See Goodridge*, 798 N.E.2d at 963 (rejecting notion that "forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children").

The Third Department actually recognized this obvious logical truth, acknowledging that "precluding same-sex couples from marrying does not encourage opposite-sex couples to have and raise children." (R. 681) And this Court made the same point when it stated in *Matter of Jacob* that "[a]ny proffered justification for rejecting these [second parent adoption] petitions based on a governmental policy disapproving of homosexuality or *encouraging marriage* would not apply." 86 N.Y.2d 651, 668 (emphasis added). *See also Andersen* v. *King County*, No. 04-2-04964 (SEA), 2004 WL 1738447, at *9 (Wash. Super. Ct. Aug. 4, 2004) ("The precise question is whether barring committed same-sex couples from the benefits of the civil marriage laws somehow serves the interest of encouraging procreation. There is no logical way in which it does so.").

The Third Department's error was to assume that, under rational basis review, it was sufficient simply to note that the State wants to grant heterosexual couples the protections that come with civil marriage because having those protections might encourage them to marry and have children. But even if *including* heterosexuals within marriage actually encouraged them to procreate, the DRL's *exclusion* of gay people from civil marriage cannot and does not rationally promote procreation or marriage on the part of heterosexuals. In other words, since the DRL excludes gay people from marriage, it is the *exclusion* that must rationally further a legitimate state interest.

Whenever the government treats some people differently than others and the distinction is challenged under the Equal Protection Clause, a court's task is to determine whether drawing the line where the Legislature did rationally furthers a legitimate state purpose. And that inquiry requires a court to look at both sides of the line – namely, at who is included and who is excluded by the challenged statute. For example, in *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985), the United States Supreme Court struck down a zoning ordinance requiring a home for the developmentally disabled to obtain a special use permit. The city in that case offered various rationales for the requirement, including the home's location in a flood plain, potential municipal liability for the acts of residents of the home, and avoiding traffic congestion. *Id.* at 448-50. While all of these reasons were plausible explanations of why a city might require a special use permit for a group home, the Court nevertheless struck down the ordinance because there was no plausible way to explain why the special use permit requirement applied to group homes, but not to many other land uses that would present similar concerns. *Id.* In other words, the Court looked not only at the question of whether requiring a permit for the group home furthered the proffered government interests, but also at whether *excluding* others from the permit requirement furthered those interests.

Similarly, in *McMinn* v. *Town of Oyster Bay*, 66 N.Y. 544 (1985), this Court looked at both sides of the line created by the challenged law. In that case, the simple fact that there appeared to be some gut-level connection between Oyster Bay's zoning restriction to nuclear families or two-person households and the town's goals of reducing traffic and population density was insufficient to satisfy even the rational basis test. In evaluating the connection between classification and purpose, the Court considered both those who were included in the zoning ordinance and those who were not, and concluded that the line drawn by Oyster Bay was irrational. *Id.* at 550.

Here, the simple fact that heterosexuals procreate, that they may do so within marriage, and that they may even do so without planning it beforehand,[12] does not explain how the line drawn by the DRL furthers any legitimate government interest. Excluding same-sex couples from marriage does nothing to

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[12] The Third Department appears to have suggested that the exclusion of same-sex couples from marriage is justified because opposite-sex couples may procreate "accidentally," while same-sex couples typically have children only after planning the process out, often using assisted reproductive technology. (R. 681-82) But the State cannot discriminate against people based on how they exercise the fundamental right to procreate, *Hope* v. *Perales*, 83 N.Y.2d 563, 575 (1994), without offering a very substantial justification. *See, e.g., Police Dep't of the City of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Indeed, a law denying protections to a class of people in order to discourage them from exercising a protected liberty fails even rational basis review because it is simply not legitimate. *See, e.g., Saenz* v. *Roe*, 526 U.S. 489, 499 n.11, 506 (1999) ("If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional") (quotation omitted).

promote heterosexual procreation, planned or unplanned, marital or non-marital. The only purpose achieved by the DRL is denying gay people the protections of civil marriage, which they and their children need no less than heterosexuals. Since there is no logical connection at all between the exclusion and the goal of promoting heterosexual marriage and procreation, the law fails rational basis review. *Onofre*, 51 N.Y.2d at 492; *McMinn*, 66 N.Y. at 550; *Liberta*, 64 N.Y.2d at 164-66. Having recognized this very point — that "precluding same-sex couples from marrying does not encourage opposite-sex couples to have and raise children," (R. 681) — the Third Department erred in not rejecting outright the State's procreation rationale as irrational.

(b) Excluding Gay Men and Lesbians From Marriage Sweeps So Far Beyond the State's Purported Interest That It Is Impossible to Credit

Even if, contrary to fact, there were *some* connection between the exclusion of same-sex couples from marriage and the encouragement of procreation, the breadth of the protections the DRL makes unavailable to gay people is "so far removed" from the State's asserted goal of promoting procreation that the justification is "impossible to credit." *Romer*, 517 U.S. at 635. Marriage after all, is about much more than producing children, yet the State has chosen to exclude same-sex couples from the *entire* spectrum of protections that come with marriage simply in order to encourage other people to procreate.

In *Romer*, the United States Supreme Court invalidated a Colorado law not because the State of Colorado failed to identify supporting state interests that were legitimate, but because any connection between the law and achieving those interests was too attenuated. In that case, Colorado had amended its state constitution to deprive gay people -- and only gay people -- of the protection from discrimination in any sphere, public or private. *See Romer*, 517 U.S. at 623. Colorado argued that this complete ban on protection for gay people alone was justified by its desire to respect the religious liberties of landlords and employers and to conserve state resources to fight discrimination against other groups. *Id.* at 635.

Although the Supreme Court never said that there was anything illegitimate about these interests, it nevertheless struck down the amendment because the exclusion of only gay people from all protection was "so far removed" from these asserted purposes that it did not rationally advance them. *Id.* The Court explained that the amendment was "so discontinuous with the reasons offered for it," *id.* at 632, that those reasons were "impossible to credit," *id.* at 635. As the Court put it in another case, equal protection will not permit "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne,* 473 U.S. at 446.

Here, New York has chosen a classification — excluding same-sex couples from marriage — that is "so far removed from" and "so discontinuous with" procreation that it is "impossible to credit" as a reason for the law. *Romer*, 517 U.S. at 632-35. As a result, the classification lacks a rational basis.

Two common sense propositions make the arbitrariness of the classification quite clear. First, while procreation may occur within marriage, it is not necessarily linked to marriage. As the Third Department recognized (R. 681), people who marry often do not procreate, people who cannot procreate may nevertheless marry,[13] many people (both straight and gay) procreate outside of marriage,[14] and many people in same-sex relationships have biological children through artificial insemination, surrogacy, or prior relationships. Accordingly, there is no necessary relationship between marriage and procreation.

Second, the protections that the State gives to couples who do marry are largely focused on the *adult relationship*, rather than on the couple's possible role as parents. Many of the protections that married couples enjoy under New

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[13] While New York law provides that a marriage is voidable if either party "is incapable of entering into the marriage from physical cause," DRL § 7(3), that provision simply refers to the capacity to consummate a marriage, rather than the ability to procreate. *See Lapides* v. *Lapides*, 254 N.Y. 73, 80 (1930). Indeed, even physical incapacity may not invalidate a marriage. *See Hatch* v. *Hatch*, 58 Misc. 54 (Sup. Ct., Special Term, Erie Cty 1908).

[14] *See, e.g.*, Joyce A. Martin, *et al.*, *Births: Final Data for 2002*, National Vital Statistics Reports, Dec. 17, 2003, at 8-9 ("Of all births in 2002, 34.0 percent were to unmarried women."); Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the*

York law are focused on the couple; on recognizing, for example, that when they own property they typically function as one unit or that spouses are presumptively the person to make critical health care decisions for each other.[15] As the *Goodridge* court put it, "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." 798 N.E.2d at 961.

These uncontroversial propositions, taken together, mean that if we take the State at its word, it has chosen to exclude same-sex couples from the vast range of protections that come with civil marriage in order to encourage procreation, which is at best only one aspect of the State's interest in marriage. The Third Department recognized this when it conceded that the connection between the exclusion in the DRL and promoting procreation is so inexact as to be both "overinclusive and underinclusive." (R. 681) Given this problem of underinclusiveness and overinclusiveness, under the logic of *McMinn*, the DRL's exclusion of same-sex couples from marriage "bears no reasonable relationship" to the State's goal of encouraging procreation. 66 N.Y.2d at 549. As the United States Supreme Court put it in *Romer,* the "sheer breadth" of what same-sex

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United States, 1940-99, National Vital Statistics Reports, Oct. 18, 2000, at 2 (33% of births in 1999 were to unmarried women).

couples are denied is "so discontinuous with the reasons offered for it" that the exclusion "lacks a rational basis." 517 U.S. at 632. *See also Baker* v. *State*, 744 A.2d 864, 881 (Vt. 1999) (concluding that promoting procreation provided no justification for restricting the benefits of marriage to different-sex couples because the marriage "law extends the benefits and protections of marriage to many persons with no logical connection to the stated government goal" of procreation); *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) (recognizing that the "encouragement of procreation" does not justify excluding same-sex couples from marriage because "the sterile and the elderly are allowed to marry.").

(c) Excluding Gay People From Civil Marriage Does Not Promote Child Welfare

Finally, to the extent that anyone might suggest that it is rational to exclude same-sex couples from civil marriage in order to promote the welfare of children, such an assertion would not be credible. As the Third Department accepted, "many same-sex couples currently raise children and both partners are good parents; [and] the adoption of a child is not dependent upon a parent's sexual orientation or marital status." (R. 681)

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[15] A non-complete description of the protections offered by civil marriage — the majority of which are unrelated to procreation — are discussed at pp. 5-12 above; more detailed information about these protections is in the record at R. 571-600.

The reality is that gay people do parent, that New York approves and promotes parenting by same-sex couples, and that excluding same-sex couples from marriage actually harms their children. *See Matter of Jacob*, 86 N.Y.2d 651 (1995). All of these facts mean there is no rational connection between the exclusion of gay men and lesbians from civil marriage and promoting child welfare.

It cannot be disputed that same-sex couples are raising children all across New York State, and have been for some time. *See* Gary J. Gates & Jason Ost, *Gay & Lesbian Atlas* 129 (2004) (based on 2000 census data, 27% of same-sex couples in New York State have children under 18 living with them). New York approves of adoption by lesbians and gay men both individually and as a couple. *See* 18 N.Y. Code R.R. 421.16(h)(2) ("Applicants shall not be rejected solely on the basis of homosexuality"); *Matter of Jacob*, 86 N.Y.2d 651 (1995) (same-sex partner of a legal parent may adopt that parent's child). Moreover, in this State, a parent's sexual orientation cannot be considered relevant to decisions about custody or visitation, *see, e.g.*, *Guinan* v. *Guinan*, 102 A.D.2d 963, 964 (3d Dept 1984); *M.A.B.* v. *R.B.*, 134 Misc. 2d 317, 331 (S. Ct. Suffolk Cty 1986) and there is a clear policy of placing foster children with lesbians and gay men. *See, e.g., Matter of Commitment of Jessica N.,* 158 Misc. 2d 97, 101 (N.Y. Fam. Ct. 1993).

Given these longstanding policies, excluding same-sex couples from civil marriage in order to improve child welfare would be illogical. Any argument that the State keeps gay people out of civil marriage in order to keep them away from children makes no sense when the State does not keep them away from children in the first place. Such a profound inconsistency between the State's actual practices and interest of child welfare renders the proferred interest "impossible to credit." *Romer*, 517 U.S. at 635; *see also Liberta*, 64 N.Y.2d at 166.

Moreover, since children are actually *harmed* by the exclusion of same-sex couples from civil marriage, such an exclusion certainly cannot promote their welfare. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 964 (internal citations omitted). In construing the DRL to allow for second-parent adoption in a lesbian family in *Matter of Jacob*, 86 N.Y.2d 651 (1995), the Court implicitly recognized this, when it noted that "[t]o rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them." *Id.* at 656.

3. "Everyone Else Does It"/Uniformity

In a variant on the "tradition" rationale, the State has urged that the exclusion of same-sex couples from civil marriage be sustained to ensure consistency with the laws of other states. The Third Department did not explicitly address this purported rationale in the decision below. But simply following the discriminatory lead of other states is plainly not a legitimate state interest. Unless the State can offer some explanation of how being "part of the pack" advances a legitimate goal, banning gay couples from marriage is simply adherence to a tradition of exclusion that is not constitutional. This Court recognized this in *Liberta*, when it noted that at the time the Court struck down New York's marital rape exemption, over 40 states "still retain[ed] some form of marital exemption for rape." 64 N.Y.2d at 163; *see also id.* at n.6.

The uniformity argument has several other flaws. First, the fact that other states also bar same-sex couples from marriage is irrelevant to a proper constitutional analysis and is not supported by any of this Court's precedents. It is inconceivable that the New York Constitution would allow this State to justify a classification in New York law by pointing to discriminatory laws in other states that themselves could not be sustained under the New York Constitution.[16]

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[16] *See Goodridge*, 798 N.E.2d at 967 ("We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us

Whatever the level of protection that other state constitutions provide to their citizens, it does not determine the scope of protection provided by the New York Constitution. As this Court held in the related context of deciding whether state constitutional provisions should be interpreted consistently with the federal constitution, "the practical need for uniformity can seldom be a decisive factor." *People* v. *P.J. Video*, 68 N.Y.2d 296, 304 (1986). *See also Matter of Kimball,* 33 N.Y.2d 586 (1973) (refusing to honor Florida's disbarment of New York attorney based on sodomy conviction in that state).

In other words, the State fails to suggest any legitimate and independent rationale for the laws of other states that prohibit same-sex marriage. Without an independent justification, discriminating against same-sex couples in New York because of the fact that there is discrimination elsewhere is nothing more than impermissible deference to the prejudice of others. *See Cleburne*, 473 U.S. at 448.

The uniformity argument is also flawed because uniformity in the treatment of same-sex couples is simply not possible. Not only does Massachusetts recognize marriage for same-sex couples, but several other states, including Vermont, Connecticut, California, New Jersey, Maine and Hawaii

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from according Massachusetts residents that full measure of protection available under the Massachusetts Constitution.").

provide something much closer to equality for same-sex relationships than does New York.[17] Conversely, some other states have passed legislation expressing moral disapproval of affording civil marriage rights to same-sex couples similar to the Federal Defense of Marriage Act, 1 U.S.C. §7 (R. 680). Thus, refusing to provide any significant protections to same-sex couples does not and cannot make New York law consistent with the law of other states because the law of other states varies widely. The Third Department plainly erred when it cited those states that may have expressed disapproval of civil marriage rights for same-sex couples as cause to deny Appellants those rights under the New York Constitution.

The State's assertion that it excludes same-sex couples from marriage in order to promote consistency with the marriage laws of other states is also impossible to credit since New York's definition of marriage already departs from

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[17] Vermont recognizes "civil unions," which provide "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." 15 Vt. Stat. Ann. § 1204(a). Similarly, legislation became effective in Connecticut on October 1, 2005 providing that same-sex couples "shall have all the same benefits, protections and responsibilities under [Connecticut] law . . . as are granted to spouses in a marriage." 2005 Conn. Legis. Serv. P.A. 05-10, §§ 1(1), 14, 15 (S.S.B. 963) (WEST). The California legislature has likewise established domestic partnerships that provide many of the protections and obligations of marriage. *See* 2001 Cal. Legis. Serv. Ch. 893 (A.B. 25); 2003 Cal. Legis. Serv. Ch. 421 (A.B. 205). In addition, Hawaii, New Jersey and Maine each have a form of domestic partnership registry that provides same-sex couples with protections and benefits that include, among others, inheritance rights, hospital visitation privileges, and tax exemptions. *See generally* Haw. Rev. Stat. § 572C; N.J. Stat. Ann. § 26:8A-1; 22 Me. Rev. Stat. Ann. §§ 2710, 2843-A. And, contrary to the fears implicit in the opinions below, these developments have caused no upheaval or confusion; to the contrary, in these states, as in Massachusetts, the provision of many protections to same-sex couples has been an unremarkable event people other than the same-sex couples whose relationships now enjoy legal recognition.

that of other states in significant ways. For example, New York allows first cousins to marry, *see* DRL § 5, while a majority of states either ban such marriages outright or impose significant restrictions on them.[18] Furthermore, New York allows marriage at the age of 16 with parental consent and at the age of 18 without, *see* DRL §§ 23, 15(2), but other states have set the ages at 17 and 19, and some even higher.[19] In other areas of family law such as adoption, New York departs significantly from the law of other states.[20] The State's professed interest in

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[18] *See* Ariz. Rev. Stat. § 25-101 (2004); Ark. Code Ann. § 9-11-106 (2003); Del. Gen. Stat. § 46b-21 (2003); Idaho Code § 32-206 (2004); 750 Ill. Comp. Stat. 5/212 (2004); Ind. Code Ann. § 31-11-1-2; Iowa Code § 595.19 (2003); Kan. Stat. Ann. § 23-102 (2003); Ky. Rev. Stat. Ann. § 402.010 (2004); La. Civ. Code Art. 90 (2004); Me. Rev. Stat. Ann. tit. 19-A., §§ 651, 701 (2003); Mich. Comp. Laws § 551.4 (2004); Minn. Stat. § 517.03 (2003); Mo. Rev. State. § 451.020 (2004); Mont. Code Ann. § 40-1-401 (2004); Neb. Rev. Stat. § 42-103 (2004); Nev. Rev. Stat. § 122.020 (2004); N.H. Rev. Stat. Ann. § 457:2 (2004); N.D. Cent. Code § 14-03-03 (2004); Ohio Rev. Code Ann. § 3101.01 (2004); Okla. Stat. Ann. tit. 43 § 2 (2004); Or. Rev. Stat. § 106.020 (2004); 23 Pa. Cons. Stat. § 1304 (2004); S.D. Codified Laws § 25-1-6 (2004); Utah Code Ann. § 30-1-1 (2003); Wash. Rev. Code § 26.04.020 (2004); W. Va. Code § 48-2-302 (2004); Wis. Stat. Ann. § 765.03 (2004); Wyo. Stat. Ann. § 20-2-101 (2003). In addition, while New York makes it a crime for an uncle to marry his niece under any circumstances, *see* DRL § 5, at least two states allow such unions, when there is no consanguinity, *see* Wyo. Stat. Ann. § 20-2-101, or where the parties are related by marriage only, *see* Okla. Stat. Ann. tit. 43 § 2.

[19] Nebraska requires that both parties be at least 19, 17 with parental consent. *see* Neb. Rev. Stat §§ 42-102, 42-105. Mississippi requires that the clerk notify the parents of anyone under 21 who wants to marry. With consent, the state permits male applicants to marry at 17, female applicants at 15. *See* Miss. Code Ann. § 93-1-5.

[20] Indeed, New York is one of a small minority of states in which a parent may adopt a child without severing the parental rights of an existing legal parent even where the two parents (straight or gay) are not married. *See Matter of Jacob*, 86 N.Y.2d 651 (1995). In contrast, many other states do not recognize such "second-parent" adoptions. *See, e.g., In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002); *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1996); *In re Adoption of T.K.J. and K.A.K.*, 931 P.2d 488 (Colo. Ct. App. 1996); *In re Angel Lace M.*, 516 N.W.2d 678 (Wisc. 1994). Even more strikingly, "New York is the only jurisdiction which does not have a true no-fault divorce." *Melnick* v. *Melnick*, 146 A.D.2d 538, 542 (1st Dep't 1989) (Asch, J., concurring).

uniformity is thus belied by the body of New York marriage and family law itself. *See Romer*, 517 U.S. at 635 (rejecting purported interests that were "impossible to credit"); *Liberta*, 64 N.Y.2d at 166-67 (same). As the Vermont Supreme Court has explained:

> The State's argument that [its] marriage laws serve a substantial government interest in maintaining uniformity with other jurisdictions cannot be reconciled with [its] recognition of unions . . . not uniformly sanctioned in other states. . . . [T]he State's claim that [its] marriage laws were adopted because the Legislature sought to conform to those of the other forty-nine states is . . . refuted by two relevant legislative choices which demonstrate that uniformity with other jurisdictions has not been a government purpose.

Baker, 744 A.2d at 885.[21]

Because uniformity is not, in fact, possible, and because New York has not, in fact, even sought it with respect to other aspects of the definition of marriage or vast areas of family law, "uniformity" is not an independent, neutral explanation for excluding same-sex couples from marriage.

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[21] In addition, the State simply ignores the fact that our federal system has a well-developed mechanism -- namely, the body of comity law -- to deal with the countless instances when state laws differ on any number of issues. *See, e.g.*, *Van Voorhis* v. *Brintnall*, 86 N.Y 18, 25-27 (1881) (addressing the validity of Connecticut marriage in New York). Since comity law answers the State's uniformity concerns, the exclusion of same-sex couples from marriage does not have the required "fair and substantial relation to the object for which it is proposed." *Abrams* v. *Bronstein*, 33 N.Y.2d 488, 493 (1974); *see also Moreno*, 413 U.S. at 536-37 (existence of regulations addressing government's concerns "casts doubt upon" state's proffered justification for statute).

III. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE FAILS HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

As noted above, the Equal Protection Clause of the New York Constitution guarantees that all New Yorkers in similar circumstances must receive the same treatment. When interpreting provisions of the New York Constitution that are analogous to the federal constitution, this Court, as noted above, has held that the New York provision should be interpreted more broadly than the federal provision if the "history and traditions" of this State or the "distinctive attitudes" of New Yorkers require it. *People* v. *P.J. Video, Inc.*, 68 N.Y.2d 296, 302-03 (1986). Here, as with the Due Process Clause, the traditions and attitudes of this State and its citizens respecting tolerance and equality mean that New York's exclusion of same-sex couples from marriage is unconstitutional.[22]

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[22] Although some cases suggest that New York follows the federal equal protection analysis, *see, e.g, Dorsey* v. *Stuyvesant Town Corp.*, 299 N.Y. 512, 530-31 (1949) (upholding racially restrictive covenant in New York City housing development), New York has actually interpreted its own Equal Protection Clause more broadly than federal courts have interpreted the Equal Protection Clause in the U.S. Constitution. For instance, in *People* v. *Liberta*, 64 N.Y.2d 152 (1984), this Court found that gender and marital exemptions in New York's rape and sodomy statutes violated the Equal Protection Clause of the New York Constitution. *Id.* at 162-70. Nevertheless, the Court affirmed Liberta's conviction. *Id.* at 172. Liberta then brought a habeas petition in federal court, contending that the rape and sodomy statutes, as originally drafted, violated the Equal Protection Clause of the federal Constitution. *Liberta* v. *Kelly*, 839 F.2d 77, 78 (2d Cir. 1988). The U.S. Court of Appeals for the Second Circuit considered the gender exemption in New York's rape statute and found that the gender exemption *did not* violate the Equal Protection Clause of the United States Constitution. *Id.* at 83. Because the rape statute was found to violate the New York Equal Protection Clause, but not the federal Equal Protection Clause, it is clear that the New York Constitution's equal protection provisions are broader than those of the federal Constitution.

Although the exclusion of same-sex couples from marriage fails the most basic level of equal protection review, as demonstrated above, in fact, the New York Constitution requires heightened scrutiny of this disparate treatment.[23] And again, both the State and the Third Department have conceded that the exclusion of same-sex couples from marriage cannot be justified, and must be struck down, if any form of heightened scrutiny applies.

When the State classifies its citizens by using factors that are "seldom relevant to the achievement of any legitimate state interest," the courts *assume* that the laws in question may "reflect prejudice and antipathy," a belief that those in the burdened class are not as "worthy or deserving as others." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Frontiero* v. *Richardson* 411 U.S. 677 (1973) (plurality opinion). In the terms set forth by the United States Supreme Court, which have also been adopted by the New York courts, *see Brown* v. *New York*, 250 A.D. 2d 314, 321 (3d Dept 1998):

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[23] Federal case law traditionally has divided government classifications into three categories when reviewing them under the Equal Protection Clause: suspect, quasi-suspect and non-suspect. *Cleburne*, 473 U.S. at 440. This Court has adopted that same system of classifications in its equal protection analysis under Article I, § 11. *See, e.g., Brown*, 89 N.Y.2d at 190. Classifications based on race, alienage and national origin are suspect, and thus sustainable only where narrowly tailored to serve a compelling government interest. *See id*; *Cleburne,* 473 U.S. at 440. Classifications based upon gender and legitimacy have been held to be quasi-suspect, and thus subjected to intermediate scrutiny: such classifications have been sustainable only where substantially related to a sufficiently important government interest. *See Cleburne*, 473 U.S. at 440-41.

> [A] suspect class is one ". . . subjected to such a history of purposeful unequal treatment, or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process." . . . [These groups have] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Mass. Bd. of Retirement v. *Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973)).[24]

The courts have traditionally looked to at least three factors to identify classifications requiring skepticism. First, they look to see if society has a history of subjecting the group to purposeful unequal treatment, or saddling it with discrimination based on stereotypes and assumptions that the group is less worthy. *See Cleburne*, 473 U.S. at 441; *Frontiero*, 411 U.S. at 685; *see also Rodriguez*, 411 U.S. at 28. Second, the courts look to see if the trait used to define the class (here, homosexuality) is one that typically bears no relation to ability to perform and participate in society. *See Cleburne*, 473 U.S. at 440-441; *Frontiero*, 411 U.S. at 686-87. Finally, they look to see whether the political process is nonetheless

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[24] The United States Supreme Court appears to be moving away from the three-tiered, suspect/quasi-suspect/non-suspect framework for analyzing claims under the Equal Protection Clause, and has reviewed classifications formerly considered quasi-suspect as closely as it scrutinizes suspect classifications. *See United States* v. *Virginia*, 518 U.S. 515, 531 (1996) (holding that classifications based on gender violate equal protection unless they are substantially related to an "exceedingly persuasive justification"). Whether or not the United States Supreme Court continues to collapse the top two tiers of the equal protection standard, and whether or not this Court follows that lead, it is clear that, at a minimum, sexual orientation classifications should be evaluated under *some form* of heightened scrutiny.

generally able to protect the class. *See Cleburne*, 473 U.S. at 441; *Frontiero*, 411 U.S. at 686 n.14.

A. The Exclusion of Same-Sex Couples from Marriage Requires Heightened Judicial Scrutiny Because It Classifies Persons on the Basis of Sexual Orientation

For the reasons discussed below, lesbians and gay men in our society obviously demonstrate all of the characteristics of a suspect class. This Court therefore should carefully scrutinize governmental classifications disadvantaging them, such as the exclusion from civil marriage.

In rejecting heightened scrutiny for classifications based on sexual orientation, the Third Department relied exclusively on its recent decision in *Matter of Valentine*, 17 A.D.3d 38 (3d Dept 2005). Plainly, this Court is not bound by *Matter of Valentine*. That decision, however, should not even be of persuasive value to this Court, as it in turn followed the decision of the Second Department in *Matter of Cooper*, 187 A.D.2d 128 (2d Dept 1993), which relied on the Supreme Court's now-discredited decision in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), which was resoundingly rejected by the Supreme Court. *Lawrence,* 593 U.S. at 578 ("*Bowers* was not correct when it was decided and it is not correct today. It ought not to remain binding precedent."). The Supreme Court's decisive and historic overruling of *Bowers* thus negates the precedential value of the prior case

law, which the Third Department relied on in *Matter of Valentine*, indicating that sexual orientation is not a suspect class.[25]

Examining the issue on the merits — which the courts below failed to do — demonstrates that heightened scrutiny of New York's marriage law is required by the New York Constitution.

1. There Exists a History of Discrimination Against Lesbians and Gay Men in New York

Lesbians and gay men historically have suffered, and today continue to suffer, broad-based discrimination.[26] The State did not seriously contest this point below, and every court to address the issue has reached the same conclusion.[27] Although the forms of the discrimination may have changed over time, group-based animosity toward lesbians and gay men in New York has remained constant. Because of this history of mistreatment, the Equal Protection

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[25] Similarly, in arguing against heightened scrutiny for classifications based on sexual orientation, the State below cited authority that largely relied on *Bowers*. *See, e.g., Schroeder* v. *Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) (citing *Bowers* for the proposition that "homosexuals do not enjoy any heightened protection under the Constitution"); *Equality Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997) ("under *Bowers* . . . homosexuals did not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which defined them as homosexuals was constitutionally proscribable").

[26] Obviously, an exposition of the entire history of discrimination against lesbians and gay men is beyond the scope of this brief. What follows is a summary intended to capture in broad strokes the forms that such discrimination has taken, particularly in New York. A number of *amicus curiae* briefs in the court below discussed this history in more detail, and we expect these *amici* to seek leave to file such briefs in this Court.

[27] *See, e.g., High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben Shalom* v. *Marsh*, 881 F. 2d 454, 465 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Padula* v. *Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987).

Clause of the New York Constitution requires heightened scrutiny for classifications based on sexual orientation.

The New York State Legislature itself recognized this record of discrimination when it passed the Sexual Orientation Non-Discrimination Act ("SONDA") four years ago:

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

2002 N.Y. Laws ch. 2, § 1.

The passage of SONDA in 2002 was an attempt to prohibit certain discrimination that had been ongoing in this State for more than a century, and was in recognition of the discrimination that gay men and lesbians historically had faced. At least as early as the late nineteenth century, the laws were used aggressively to regulate homosexual identity and activity. *See* William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 26-31 (1999) (hereinafter "*Gaylaw*"). Statutes and regulations were passed to censor novels, plays or films with gay or lesbian characters or discussions of homosexuality. *See, e.g., People* v. *Friede*, 233 N.Y.S. 565, 567 (Mag. Ct. 1929) (holding that a book

discussing homosexuality "can have no moral value since it seeks to justify the right of a pervert to prey upon normal members of a community and to uphold such relationships as noble and lofty.")

During the 1950s, public employees were targeted for anti-gay persecution, as "witch hunts" at every level of government became common. *See Gaylaw* at 67. In 1950, following Senator Joseph McCarthy's denunciation of the employment of gay people in the State Department, the Senate conducted a special investigation into the employment of gay people in government. The Senate investigation report concluded that gay men and lesbians were "outcasts," unsuitable for government service. *See* Subcommittee on Investigations of the Senate Committee on Expenditures in the Executive Departments, *Employment of Homosexuals and Other Sex Perverts in Government* (1950). As a result, President Eisenhower issued an executive order in 1953 requiring the discharge of all gay and lesbian employees from any type of federal employment, civilian or military, as "sex perverts." Exec. Order No. 10,450, § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1953).

Remarkably, until as late as the 1970's, being gay was considered to be a mental disorder by medical professionals. Same-sex sexual conduct was diagnosed as evidence of a pathological condition in the nineteenth century, and by the early twentieth century, most medical researchers believed that same-sex sexual conduct was based on a disorder that required medical treatment, which

included electric shock, drug treatment, aversion therapy, and even lobotomy. *See generally* Jonathan Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* (1976). It was not until 1973 that the American Psychiatric Association stopped classifying homosexuality as a mental illness.[28]

Beginning in the mid-1960s, in the context of widespread cultural and legal change and advances in the civil rights of other historically disadvantaged groups, most notably African-Americans and women, discrimination against gay men and lesbians became less flagrant, but hardly disappeared. Indeed, as more and more gay men and lesbians have ceased to hide their identity, that honesty has brought new forms of targeted discrimination: lesbians and gay men in New York continue to be victimized by crimes of hate. According to the 2003 Report of the National Coalition of Anti-Violence Programs, there were 648 incidents of anti-lesbian, gay, bisexual and transgender violence reported in New York State in 2003, an unprecedented 26% increase over the previous year. *See* National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2003*, at 57 (2004). Astonishingly, this number includes 10 murders. *See id.*

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[28] See Website of the American Psychiatric Association, *available at* www.healthyminds.org/glbissues.cfm.

Discrimination thus very much remains a reality today for many lesbians and gay men throughout New York State. This discrimination starts early in life: it is well documented that lesbian and gay youth face intolerance in schools, including New York schools.[29] Gay and lesbian New Yorkers also experience discrimination — both overt and covert — in their attempts to acquire housing and their jobs. *See, e.g., 119-121 E. 97th St. Corp.* v. *New York City Comm'n. on Hum. Trs.*, 220 A.D. 2d 79, 82 (1st Dept 1996) (describing landlord's verbal harassment of gay tenant, including calling him "faggot punk"); *Gomez* v. *Malik*, No. AH-94-006, 1993 WL 856504 at *2 (N.Y.C. Comm. Hum. Rts. 1993) (landlord called tenant a "faggot" and "homo"); *Quinn* v. *Nassau County Police Dep't*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (police officer sexually harassed because of his sexual orientation).

This record of widespread and destructive discrimination cannot seriously be disputed, and demonstrates why sexual orientation is a characteristic that merits heightened scrutiny under the Equal Protection Clause. *See Watkins* v.

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[29] See Joseph G. Kosciw, *The 2003 National School Climate Survey: The School-Related Experiences of Our Nation's Lesbian, Gay, Bisexual and Transgender Youth* 15 (Gay, Lesbian and Straight Education Network ed., 2004). This study revealed that 90% of LGBT youth reported that they either frequently or often hear homophobic remarks in school. Eighty-four percent of students experienced verbal harassment because of their sexual orientation, while 17% were physically assaulted because of their sexual orientation. *Id.* at 14-15. Similarly, in an earlier study of 500 New York City youths, 40% reported that they had experienced a violent physical attack. J. Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 Journal of Interpersonal Violence 295-300 (1990).

United States Army, 875 F.2d 699, 724-25 (9th Cir. 1989) (en banc) (Norris, J., concurring) (noting, in concluding that gays and lesbians are a suspect class for equal protection purposes, that "[d]iscrimination against homosexuals has been pervasive in both the public and private sectors.").

2. Sexual Orientation Is Unrelated to Merit or Ability to Contribute to Society

Sexual orientation, like sex and race, clearly bears no relation to an individual's ability to perform in or contribute to society. Accordingly, the second criterion for a suspect class is satisfied here as well. *See, e.g., Frontiero*, 411 U.S. at 686-87. ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.").

The State did not dispute this below, nor can it: the State of New York, through a number of its policies, has conceded that sexual orientation is irrelevant to any number of important government decisions. For instance, the government has decided that gay men and lesbians should be permitted to adopt children, which is one of the most important responsibilities that an adult can assume. *See* 18 NYCRR § 421.12(h)(2) (qualified adoption agencies "shall not . . . reject [adoption petitions] solely on the basis of homosexuality."). This Court has

likewise concluded that the "best interest of the child" is advanced "by allowing the two adults who actually function as a child's parents to become the child's legal parents," irrespective of the sexual orientation of those two adults. *In re Matter of Jacob*, 86 N.Y.2d 651, 658 (1995).

Moreover, the State of New York, by adopting SONDA, has emphatically rejected the idea that sexual orientation should be relevant to decisionmaking in any number of important areas. SONDA specifically forbids discrimination against gays and lesbians with respect to employment, *see* N.Y. Exec. L. § 291(a), as well as with respect to education, the use of places of public accommodation, and the use and enjoyment of housing and commercial space, *see id.* § 291(b). In short, then, "discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'" *Rowland* v. *Mad River Local Sch. Dist.*, 470 U.S. 1009 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (*quoting Plyler* v. *Doe*, 457 U.S. 202, 216 n.14) (1982)).

3. The Political Process Has Failed Lesbians and Gay Men as a Group, Thereby Requiring Heightened Scrutiny of Classifications That Affect Them

Applying the third and final factor to which the courts look when determining whether a group constitutes a suspect class, it is also clear that gays and lesbians face significant obstacles in the political process. *See Cleburne*, 473

U.S. at 441; *Plyler*, 457 U.S. at 216 n.14. This is the only one of the three factors that the State contested below; the State contended that certain recent legislative advances made by gay men and lesbians mean that heightened scrutiny is not warranted. (R. 417) The State's argument, however, is simply contrary to established law affecting women, racial minorities and other suspect classes, and thus may readily be dismissed.

The political process challenges facing gays and lesbians in New York are perhaps best demonstrated by the fact that SONDA was not passed until 2002, although it was first introduced thirty-one years earlier, in 1971. The bill languished in the Legislature, unable to achieve the support necessary for passage.[30] Even in New York City, where the largest concentration of gays and lesbians in the nation resides, it took 15 years to get a civil rights statute protecting gays and lesbians through the City Council. *See Under 21* v. *City of New York*, 65 N.Y.2d 344, 356 (1985) (discussing failure to pass legislation prohibiting discrimination against gays and lesbians).[31] And, although a domestic partnership

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

[31] The first bill prohibiting discrimination on the basis of sexual orientation was introduced in the New York City Council in 1971. *See The Encyclopedia of New York* 455 (Kenneth T. Jackson ed. 1995). This proposed legislation became the first bill in the history of the City Council to pass out of committee every year and not be enacted, except 1974, when it became the first bill in the history of the City Council to pass out of committee and be defeated by a full vote of the Council. *See id.*; Thomas B. Stoddard, *Bleeding Heart:*

statute exists in New York City and other municipalities throughout the State, including in Albany, Ithaca, Rochester, and in Westchester County,[32] there are still no comprehensive statewide legal protections for same-sex couples in New York. As noted above, this stands in sharp contrast to the situation in several other states, such as New Jersey, N.J. Stat. Ann. 26:8A-1, California, 2001 Cal. Legis. Serv. Ch. 893, Connecticut, Conn. Gen. Stat. § 46b-38bb (2005), Vermont, 15 Vt. Stat. Ann. § 1204(a), Hawaii, Haw. Rev. Stat. § 572C, and Maine, 22 Me. Rev. Stat. Ann. §§ 2710, 2843-A.

In the briefing below, the State made much of the recent passage of SONDA, certain actions affording September 11-related benefits to same-sex domestic partners, and the existence of legislation in some local jurisdictions protecting against sexual orientation discrimination in certain contexts. (R. 417) The Third Department also cited to passage of a "broad array of rights from the Legislature." (R. 684) While Appellants would not necessarily agree that the handful of rights that have been legislated come anywhere close to the "broad array" of rights associated with civil marriage, these advances in certain contexts do nothing to detract from the conclusion that laws disadvantaging lesbians and

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Reflections on Using the Law to Make Social Change, 72 N.Y.U. L. Rev. 967, 980 (1997) (discussing legislative process that led to eventual passage of gay rights law).

[32] *See* Berkowitz and Mishra, *supra*.

gay men should be subjected to heightened scrutiny.[33] Indeed, today women and most racial, ethnic and religious minority groups are protected from discrimination through a broad array of state and federal laws that far exceed the limited protections afforded gay men and lesbians in New York. *See, e.g.,* N.Y. Exec. L. § 290 *et seq.*; 42 U.S.C. § 2000e. The existence of such protections does not change the fact that classifications affecting those minority groups nevertheless are subject to heightened scrutiny.

Indeed, laws discriminating on the basis of race continued to receive strict scrutiny even *after* passage of a series of state and federal anti-discrimination laws. Likewise, sex discrimination was first found to deserve heightened scrutiny *after* passage of Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963 and other federal laws prohibiting sex discrimination. *See, e.g.*, *Frontiero*, 411 U.S. at 687-88. The existence of these protections did not stop the Supreme Court from determining that discrimination on the basis of race and sex must be subjected to heightened scrutiny. To the contrary, the *Frontiero* Court

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[33] In particular, the State may note the recent enactment of a statute affording same-sex couples certain hospital and nursing home visitation rights. *See* N.Y. Pub. Health L. § 280S-q (McKinney 2004). Although potentially of significance for Appellants, it remains the case, as we explain elsewhere, that Appellants maintain well-founded concerns that such efforts to approximate a subset of rights encompassed within marriage will not ensure that Appellants' committed relationships will obtain the protections to which they are entitled. As Appellants have experienced first-hand, other such attempts to fill in some of the gaps resulting from their inability to marry -- such as health care proxies -- have either been misunderstood or disrespected in practice.

noted that such protections constitute strong evidence that Congress had acknowledged a history of purposeful unequal treatment. *See, e.g., id.* (citing anti-discrimination legislation in *support* of conclusion that classifications based on gender must be subjected to heightened scrutiny).[34] It plainly follows, then, that the limited protections for lesbians and gay men that exist today, which are far narrower than those protecting women when gender was first determined to trigger heightened scrutiny, do not preclude strict scrutiny of classifications on the basis of sexual orientation.

As evidence of the weakness of the State's arguments in this regard, it is significant to note that when lesbians and gay men have achieved modest successes in the political arena, the response often has been to change the "rules of the game" in order to eliminate the benefits they have obtained. Specifically, the initiative and referendum process – including the "defense of marriage" statutes cited by the Third Department (R. 680) – has been vigorously used to block legislative protection of lesbians and gay men.[35] Initiatives repealing sexual orientation anti-discrimination laws and prohibiting their future enactment were

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[34] In sharp contrast to these protections, no federal law prohibits employment discrimination by private employers based on sexual orientation, and such discrimination remains lawful in the vast majority of state and local jurisdictions. *See* Human Rights Campaign, *Frequently Asked Questions on Sexual Orientation Discrimination*, *available at* http://www.hrc.org/worknet/nd/nd_facts.asp#3.

passed in Colorado and Maine, as well as in Cincinnati and several municipalities in Oregon and California.[36] Moreover thirteen state constitutional amendments prohibiting marriage for same-sex couples were placed on ballots in 2004 and every one was ratified.[37] This recent round of state constitutional amendments followed the enactment, by referenda, in Hawaii, Alaska, Nevada and Nebraska of amendments barring same-sex couples from marriage.[38] This extraordinary use of the political process to strip the government of the power to protect an unpopular minority mirrors the backlash against the civil rights laws of the 1960s, which took the form of state constitutional amendments that prohibited, or created barriers to the enactment of, laws barring racial discrimination in housing. *See Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

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[35] *See, e.g., Referendums in 3 States Seek to Thwart Gay Rights: Homosexuality Measures in Michigan, Florida and Texas Would Remove Protected Status and Deny Benefits,* L.A. Times, Nov. 4, 2001, at A38.

[36] *See id.*; The Data Lounge, *Maine Civil Rights Repeal, available at* http://www.datalounge.com/datalounge/issues/index. html?storyline=298; Lambda Legal Defense & Education Fund, *History of Anti-Gay Initiatives in the U.S., available at* http://www.lambdalegal.org/cgi-bin/iowa /documents/record?record=16.

[37] Amendments that prohibit marriage for same-sex couples were passed in a broad cross-section of states: Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. With two exceptions, these ballot measures gained the approval of more than 60% of voters, and eight such measures were passed with more than 70% of the vote. *See* National Conference of State Legislatures, *Same-Sex Marriage Measures on 2004 Ballot*, available at http://www.ncsl.org/programs/ legman/statevote/marriage-med.html.

[38] *See* Stephen Buttry and Leslie Reed, *Challenge Is Ahead Over 416*, Omaha World-Herald, Nov. 8, 2000, at 1; Lambda Legal Defense & Education Fund, *Hawaii, Alaska Election Results Don't Stop Freedom to Marry Movement, available at* http://www.lambdalegal.org/cgi-bin /iowa/documents/record?record=302.

Heightened judicial scrutiny of classifications affecting gay men and lesbians is also warranted because, in a rational response to the history of irrational homophobia, many gay men and lesbians have attempted to conceal their sexual orientation in a variety of contexts in order to avoid stigma, discrimination and violence.[39] Such concealment has made it uniquely difficult for gay men and lesbians to assert their rights in the political sphere. As Justices Brennan and Marshall observed, "[b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari;* joined by Marshall, J.); *see also* Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 97-98 n.51 (1991) (noting that "a minority . . . can sometimes only engage in the political process by identifying itself in ways that are physically or economically dangerous for it. The position of homosexuals in many parts of the country and that of blacks in the South for many years are obvious examples.").

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[39] In a 2000 survey, 45% of lesbians and gay men reported that they were not open about their sexual orientation to their employers; 28% were not open to co-workers; and 16% were not open to family members. *See* The Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation* (Nov. 2001), *available at* www.kff.org/content/2001/3193/lgbtsurveyreport.pdf, at 2.

B. Heightened Scrutiny Also Applies Because the DRL Discriminates on the Basis of Gender

In addition to classifying persons on the basis of sexual orientation, New York's marriage laws also explicitly classify individuals on the basis of gender. They permit two individuals of the opposite sex to marry, but do not permit two individuals of the same sex to marry. This gender classification triggers heightened scrutiny under the New York State Constitution.

Put simply, the gender of an individual clearly determines whether and whom he or she may marry: if John and Jennifer each want to marry Susan, John can do so because he is a man, while Jennifer cannot do so because she is a woman. Gender is at the heart of New York's definition of marriage. The Third Department ruled that the DRL is "facially neutral" when it comes to gender. (11) This misses the point — Appellants here seek the right to marry the person they *love*, and they are precluded from doing so because the person they love is of their same gender. They would not be precluded from doing so if the person they love were of another gender. The gender-based classification is thus clear.

In a similar case challenging the constitutionality of excluding same-sex couples from marriage, one state supreme court recognized that such classifications are based on gender. *See Baehr* v. *Lewin*, 852 P.2d 44, 64 (Haw. 1993) (Levinson, J., plurality opinion). The *Baehr* court stated that the specific prohibition of marriage by same-sex couples "regulates access to the marital status

and its concomitant rights and benefits on the basis of the applicants' sex. As such, [the law] establishes a sex-based classification." *Id.* In holding that Alaska's ban on marriage for same-sex couples was a gender-based classification, another court applied the same logic: "[t]hat this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman . . . , only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious." *Brause* v. *Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743, at *6 (Alaska Super. Feb. 27 1998). *See also Deane* v. *Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct., Jan. 20, 2006) (restriction of marriage to different-sex couples is sex discrimination that violates state constitution); *In re Coordination Proceeding re Marriage Cases*, No. 4365, 2005 WL 583129, at *9 (Cal. Super. Ct. Mar. 14, 2005) (same); *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) ("Because our marriage statutes intend, and state, the ordinary understanding that marriage under our law consists only of a union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry. . . . ");[40] *Baker* v. *State*, 744 A.2d 864, 905-06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (same).

[40] The majority in *Goodridge* did not reach this issue because it struck down the ban on marriage between same-sex couples under rational basis review. *Goodridge*, 798 N.E.2d at 961.

In *Loving* v. *Virginia*, 388 U.S. 1 (1967), the United States Supreme Court held that a law that prohibited a white person from marrying anyone other than another white person constituted an impermissible classification on the basis of race. *Id.* at 6. Analyzing that law under the Equal Protection Clause of the United States Constitution, the Supreme Court stated that "there can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race" because "the statutes proscribe generally accepted conduct if engaged in by members of different races." *Id.* at 11. Just as Virginia's prohibition of interracial marriage classified individuals on the basis of race, by analogy, so too does New York's prohibition of same-sex marriage classify individuals on the basis of gender.

In *Loving,* as well as *Baehr, Brause, Goodridge, Baker, Deane* and the California marriage cases, the states insisted that their use of race and gender in their marriage laws was not constitutionally suspect. They argued, as the State does here, that because the laws applied equally to blacks and whites, and to men and women, there was no discrimination, and, they said, no cause for close judicial review. In response to that argument, the California court reasoned as follows:

> To say that all men and all women are treated the same in that each may not marry someone of the same gender misses the point. The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications. As such, for the purpose of an equal protection analysis,

> the legislative scheme creates a gender-based classification.

In re Coordination Proceeding re Marriage Cases, No. 4365, 2005 WL 583129, at *9.

This reasoning reflects the bedrock principle that constitutional rights are individual, not aggregate. As United States Supreme Court Justice Anthony Kennedy has explained, equal protection is:

> concern[ed] with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.

J.E.B. v. *Alabama ex rel. T.B.,* 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (citations omitted). For this reason, the United States Supreme Court has repeatedly rejected the idea that a race- or sex-based classification is not discriminatory merely because it applies equally to all races or sexes. *See Johnson* v. *California*, 112 S. Ct. 1141, 1147 (2005); *Loving*, 388 U.S. at 8; *Califano* v. *Westcott*, 443 U.S. 76, 83-84 (1979); *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964); *Andersen* v. *Martin*, 375 U.S. 399, 403-04 (1964); *Shelley* v. *Kraemer*, 334 U.S. 1, 21-22 (1948).

* * *

For all of the above reasons, the State must justify its exclusion of same-sex couples from marriage by a "compelling" or "important" State interest. But in the court below, the State in fact conceded at oral argument that if this exclusion triggered any form of heightened scrutiny, it would fail. Because, as we have shown, there is not even a rational basis for this classification, it plainly fails the heightened standards of review that apply here.

IV. THE PROPER REMEDY FOR THIS CONSTITUTIONAL VIOLATION IS TO PERMIT SAME-SEX COUPLES TO ENTER INTO CIVIL MARRIAGES

As this Court has held, "when a statute is constitutionally defective because of underinclusion, a court may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formerly excluded." *People* v. *Liberta*, 64 N.Y.2d 152, 170 (1984). The only appropriate remedy for the constitutional infirmities in the DRL set forth above is to extend to same-sex couples the protections of civil marriage under New York law. Failing to provide the full remedy of marriage, and instead offering some lesser protection, would violate due process, create an independent equal protection violation, and also violate Appellants' free expression rights.

As the United States Supreme Court has recognized in other contexts, constitutional guarantees of equal protection prohibit arbitrary discrimination by

government because such treatment is destructive in and of itself, branding the disfavored group as inferior and less worthy. The United States Supreme Court has long recognized that the constitutional guarantee of equality is not only about equal opportunity to secure tangible things such as goods, services, education and employment. Rather, equality is intrinsically important and is protected for its own sake. "[T]he right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler* v. *Mathews*, 465 U.S. 728, 739 (1984). Thus, "discrimination itself" is a harm the Constitution does not tolerate without justification because it "stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore less worthy participants in the political community." *Id.* Unequal treatment that marks a group with a badge of inferiority betrays the constitutional promise of equality no less than more tangible forms of discrimination.[41]

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[41] *See, e.g., Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (the "stigmatizing injury often caused by . . . discrimination . . . is one of the most serious consequences of discriminatory . . . action."); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724-25 (1982) ("if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); *Lawrence*, 539 U.S. at 578 (holding sodomy laws unconstitutional because the continued existence of any laws criminalizing private, consensual same-sex sexual relationships would be ". . . an invitation to subject homosexual persons to discrimination both in the public and the private spheres"); *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879) (excluding black men from juries "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to . . . race prejudice").

Concern about the stigma of government discrimination figured prominently in the United States Supreme Court's recent decision striking down a law that criminalized private, consensual same-sex sexual intimacy, *Lawrence* v. *Texas*, 539 U.S. 558 (2003). In *Lawrence,* the Court emphasized the "stigma" imposed by the law, and the fact that it "demeaned the lives of homosexual persons" and denied them "dignity." *Id.* at 567, 578. As the Court recognized, this kind of stigmatization is an affront to our constitutional system. *Id.*; *see also id.* at 581 (O'Connor, J., concurring) (holding that equal protection prevents a State from creating "a classification of persons undertaken for its own sake") (quoting *Romer* v. *Evans*, 517 U.S. 620, 634-35 (1996)).

In *Goodridge*, the Supreme Judicial Court of Massachusetts held that excluding same-sex couples from the right to marry violates the Massachusetts Constitution because "[i]n so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are . . . inferior to opposite-sex relationships and are not worthy of respect." 798 N.E.2d at 962. For this reason, when the Massachusetts legislature subsequently sought the Court's opinion on the constitutionality of a civil union law drafted in response to *Goodridge,* the Supreme Judicial Court stated that "[t]he bill's absolute prohibition of the use of the word 'marriage' by 'spouses' who are the same sex is more than semantic. The dissimilitude between the terms 'civil marriage' and 'civil union' is

not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex . . . couples to second-class status." *In re Opinions of the Justices to the Senate,* 802 N.E.2d 565, 570 (Mass. 2004) (internal citations omitted).[42]

Appellants' personal experiences confirm this common-sense understanding that no other form of relationship recognition garners the respect of civil marriage. For example, as Amy Tripi explains, "[W]hen we registered with New York City as domestic partners, I was very excited and treated it as if it were a wedding, because it was the closest thing to getting married that we could do at the time . . . . But other people in our life reacted to our registration as domestic partners as if we were not really married . . ." (R. 370) Perhaps Appellant Heather McDonnell described the problem best when she explained that instead of legal documents like health care proxies and phrases like "partner" that are unfamiliar to many, "one word, *married*, would define our relationship and the way that others are required to treat us under the law." (R. 328) (emphasis added).

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[42] Courts in Canada have reached the same result. The Court of Appeal for British Columbia, in mandating equal marriage for same-sex couples, has held that "[a]ny other form of recognition for same-sex relationships, including the parallel institution of [registered domestic partnerships] falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or to leave it to governments to choose amongst less-than-equal solutions." *Barbeau* v. *Attorney General of Canada*, 2003 B.C.C.A. 251 (2003) at ¶ 156. *See also Halpern* v. *Toronto*, 172 O.A.C. 276 (2003) at ¶¶ 102-07.

Failing to grant marriage to same-sex couples as a remedy for the constitutional violations in the DRL would also violate Appellants' free expression rights. Although marriage is undoubtedly a creature of contract, it is also vehicle by which two people can publicly proclaim their commitment and responsibilities toward each other. By joining together in marriage, a couple proclaims publicly the integrity and depth of their love and commitment to each other. *See, e.g.*, *Douglas* v. *Douglas*, 132 Misc. 2d 203, 205 (N.Y. Sup. Ct. 1986) ("a marital partnership is a total commitment, not only to the other party, but also to the marriage, and anything less negates the very idea of marriage"). The State has created the expressive institution of civil marriage, but selectively distributes access to it: heterosexual couples secure access; same-sex couples do not. Under constitutional free expression guarantees, however, "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Chicago Police Dep't* v. *Mosley*, 408 U.S. 92, 96 (1972).

* * *

Throughout the briefing below, State has suggested, and the Third Department agreed (R. 684), that it is for the Legislature, not the courts, to define the scope of the right to marry in New York. (R. 419) But the courts are charged with the responsibility of ensuring that the laws of the State of New York satisfy

minimum constitutional safeguards. Where, as here, a class of individuals has historically been victimized by discrimination and where, as here, such discrimination is perpetuated by the operation of laws adopted through the democratic process, the courts have a special role to play. While the Legislature is, to be sure, authorized to regulate marriage, it is for the judiciary to ensure that the Legislature does not overstep its constitutional bounds and deny the right of civil marriage to a class of people without justification. *See People* v. *LaValle*, 3 N.Y.3d 88, 132 (2004) ("Declaring a statute unconstitutional is not a celebratory event, but from time to time a necessary part of the judicial function and a pillar of our system of checks and balances.") (Rosenblatt, J., concurring);[43] *Andersen* v. *Regan*, 53 N.Y.2d 356, 371 (Cooke, C.J., dissenting) (quoting *Marbury* v. *Madison*, 5 U.S. (Cranch) 137, 177 (1803) ("it bears emphasizing that '[it] is emphatically the province and duty of the judicial department to say what the law is.")

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[43] In contrast to the death penalty statute at issue in *LaValle*, there can be no argument here that the DRL provisions at issue, to the extent that they exclude gay men and lesbians, were carefully considered by the Legislature or that the Legislature "chose to steer a middle course" between competing alternatives, *id.*, at 137 (R. Smith, J., dissenting). Indeed, there is no evidence that the Legislature had considered the question of excluding or including gay men and lesbians when it last codified the marriage statute in 1909. This court faced an analogous situation in the context of construing New York's adoption statute. *See Matter of Jacob*, 86 N.Y.2d 651, 668 (1995) ("To be sure, the Legislature that last codified [the adoption statute] in 1938 may never have envisioned families 'that include [ ] two adult lifetime partners whose relationship is characterized by an emotional and financial

Conclusion

For all the foregoing reasons, we respectfully submit that this Court should reverse the decision of the Appellate Division, Third Department, and remand this action to the Supreme Court, Albany County, with instructions to enter judgment for Plaintiffs-Appellants.

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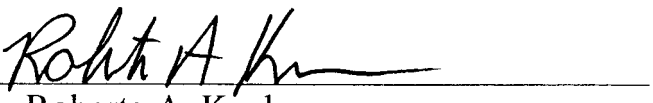
commitment and interdependence'.") (citing *Braschi* v. *Stahl Assocs. Co.*, 74 N.Y.2d 201, 211 (1989)).

Dated: New York, New York
March 3, 2006

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: 

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