

*New York Supreme Court*

*Appellate Division—Third Department*

**Docket No.: 98084**

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

*Plaintiffs-Appellants,*

— against —

THE NEW YORK STATE DEPARTMENT OF HEALTH and THE STATE OF NEW YORK,

*Respondents-Appellees.*

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**BRIEF OF *AMICI CURIAE***

**PARENTS, FAMILIES & FRIENDS OF LESBIANS AND GAYS, INC.,  
FAMILY PRIDE COALITION, HUMAN RIGHTS CAMPAIGN,  
HUMAN RIGHTS CAMPAIGN FOUNDATION, AND  
THE NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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Dated: May 17, 2005

**ALBANY COUNTY CLERK'S INDEX NO. 1967/04**

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: THIRD DEPARTMENT

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SYLVIA SAMUELS and DIANE GALLAGHER, :  
HEATHER McDONNELL and CAROL SNYDER, AMY :  
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HARING SHEN, MICHAEL HAHN and PAUL :  
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KATHLEEN TUGGLE and TONJA ALVIS, REGINA :  
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MONTEL CHERRY-SLACK, : Clerk's Index No.: 1967/04  
  
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Parents, Families & Friends of Lesbians and Gays, Inc., Family Pride Coalition, Human Rights Campaign, Human Rights Campaign Foundation, and The New York City Gay & Lesbian Anti-Violence Project submit this brief as *amici curiae* in support of Plaintiffs-Appellants, who appeal from the decision and order entered below rejecting their challenge to the denial of licenses to marry on the basis that they are of the same sex.

## **STATEMENT OF INTEREST OF *AMICI CURIAE***

As organizations that believe in full equality for all people, *amici curiae* have dedicated their efforts to eradicating the vestiges of invidious discrimination against New Yorkers based on sexual orientation. In the view of *amici curiae*, New York State's failure to recognize marriages between partners of the same sex is in obvious tension with the goal of full equality that they—and this State's Constitution—espouse. In light of the history of discrimination suffered by members of the gay community in this State, *amici curiae* believe that the denial of marriage rights to Plaintiffs-Appellants must be subjected to a searching judicial inquiry that carefully scrutinizes the legitimacy of the State's actions.

The following is a brief description of the *amici*:

**Parents, Families & Friends of Lesbians & Gays, Inc. (“PFLAG”)** is a national, nonprofit family organization, founded in New York in 1973 by heterosexual mothers and fathers, with a grassroots network of over 200,000 members and supporters (including approximately 22,500 New Yorkers). Although PFLAG's members and supporters are predominantly heterosexual, PFLAG promotes the health and well-being of gay, lesbian, bisexual, and transgender persons, their families, and their friends through support, education, and advocacy to promote true, full civil rights for all Americans.

PFLAG is joined on the brief by the New York-based PFLAG chapter **PFLAG Schenectady/Capital City Area**.  
**Family Pride Coalition** is the only national not-for-profit organization exclusively dedicated to securing equality for lesbian, gay, bisexual, and transgender (“LGBT”) parents and their families. The 26-year-old organization is a membership-based coalition of more than 180 local parenting groups and over 10,000 individual members across the country. The Family Pride

Coalition seeks to advance the well-being of LGBT parents and their families by enhancing their sense of belonging and security, and by advocating for their full protection under the law.

**Human Rights Campaign (“HRC”)**, the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where gay, lesbian, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits, and responsibilities. HRC has over 650,000 members, including over 40,000 in the State of New York.

**Human Rights Campaign Foundation** provides the most comprehensive and up-to-date resource for and about lesbian, gay, bisexual, and transgender families. It provides legal and policy information about family law, including marriage and relationship recognition, as well as public education in those areas.

**The New York City Gay & Lesbian Anti-Violence Project** was founded in 1980. The Project serves lesbian, gay, transgender, bisexual, and HIV-positive victims of violence, and others affected by violence. The Project serves the larger community through efforts to educate the public about violence directed at or within our communities and to reform government policies and practices affecting the lesbian, gay, transgender, bisexual, and HIV-positive community, and other survivors of violence.

## **PRELIMINARY STATEMENT**

This brief submitted by *amici curiae*, who are gay and lesbian community organizations active in New York State, will not repeat the various legal arguments in support of the recognition of marriage rights for all New Yorkers regardless of sexual orientation. Those arguments, which *amici curiae* support, are fully addressed in the briefs of Plaintiffs-Appellants and others.

Rather, *amici curiae* wish to provide the Court with historical and contemporary context crucial to a considered judgment on the questions presented in this case. New York has long had a significant community of lesbians and gay men who contribute to the vitality of life in this State. Regrettably, however, that community has faced—and continues to face—arbitrary and invidious discrimination, and even violence, on the basis of sexual orientation. Indeed, state and local government officials have unfortunately been participants in the bleak history of discrimination against gay New Yorkers.

Although in recent years societal attitudes and state-sanctioned treatment of lesbians and gay men have evolved in increasingly positive ways, the lesbian and gay community continues to experience significant barriers to full citizenship due in large part to the legacy of anti-gay discrimination. *Amici curiae* believe that this history of discrimination and continued bias should inform the level of scrutiny this Court gives to the refusal to recognize marriage rights regardless of sexual orientation. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

The evidence of the countless ways in which the financial, emotional, and physical well-being of lesbians and gay men has been affected by targeted invidious discrimination renders

New York State's refusal to sanction marriage for same-sex couples particularly suspect and calls for a searching judicial inquiry into the legitimacy of the State's actions.

## **ARGUMENT**

### **I. Lesbians and Gay Men in New York Have Suffered a Long History of Intentional, State-Sanctioned Discrimination.**

As a result of its long-established and visible gay community, New York has served as a focal point in the history of anti-gay discrimination, and also in the history of the gay-rights movement that arose to fight that discrimination. Only recently has much of this history been explored in detail by legal historians and other academics, who have tended to concentrate on the plight of gay men in New York City through the last century, an area in which source material is rich. The lessons of that history, however, apply equally to lesbians and gay men throughout the State, who were targeted, marginalized, and branded as criminals on account of their sexual orientation.

#### **A. Pre-World War I Through the 1920s.**

Toward the end of the late nineteenth century, discrimination against lesbians and gay men became increasingly prevalent in New York State, fueled by citizen “reform” groups and laws used to target the social and private activities of the gay community.

##### **1. “Reform” Societies.**

In the 1870s, members of New York City’s Victorian middle class organized a host of anti-vice and social-purity societies to combat the City’s “corrupting” influences. Although nominally private, these organizations acted in close consort with public authorities and wielded enormous power and influence in the community. As part of this effort to police working-class life more generally, the City’s emerging gay culture came under the watch of such groups.

For example, the Society for the Suppression of Vice, established in 1872, alerted police to the “degenerate affairs” transpiring at Paresis Hall, a center of gay life. William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 23 (1999) [hereinafter Eskridge, *Gaylaw*]; George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World*, 1890-1940, at 138-41 (1994) [hereinafter Chauncey, *Gay New York*]; Brief of Professors of History George Chauncey, *et al.* as *Amici Curiae* in Support of Petitioners at 13, *Lawrence v. Texas*, 539 U.S. 558 (2003) [hereinafter *Lawrence* Historians’ Brief]. For his part, Anthony Comstock, the founder and leader of the organization, viciously denounced homosexuality, proclaiming: “These inverters are not fit to live with the rest of mankind. They ought to have branded in their foreheads the word ‘Unclean,’ and as the lepers of old, they ought to cry ‘Unclean! Unclean!’ as they go about, and . . . the penalty for their crime . . . ought to be imprisonment for life.” Eskridge, *Gaylaw, supra*, at 24.

By the turn of the century, with the help of police, numerous citizen groups were monitoring New York City’s clubs, parks, and public baths to ferret out suspected illicit sexual activities among men. *Id.* at 23.

## **2. Sodomy Statutes.**

The persecution of gays and lesbians was fully supported by state and local officials. An array of statutes facilitated these efforts. Since colonial times, New York State had criminalized sodomy as a “crime against nature.” Eskridge, *Gaylaw, supra*, app. A1 at 334 (listing the following sodomy statutes: the Duke of York’s Law, Mar. 1, 1665; 1787 N.Y. Laws ch. 21; and 1886 N.Y. Laws ch. 31, § 303). Although New York State did little to enforce these statutes prior to the Civil War, sodomy prosecutions became increasingly common after the 1880s. Eskridge, *Gaylaw, supra*, at 19-20, 25. In 1890, twenty-two men were arrested in New York

City for sodomy or the “crime against nature”; New York City police arrested more than fifty men annually on sodomy charges in the 1910s. *Id.* at 25 & app. C1 at 374; Chauncey, *Gay New York, supra*, at 140.

This increase in prosecutions reflected an intensified concern among New York’s elites, law-enforcement agencies, and social reformers about public expression by lesbians and gay men and same-sex intimacy. In particular, the Society for the Prevention of Cruelty to Children actively encouraged the application of New York’s sodomy statutes to penalize same-sex intimacy. Eskridge, *Gaylaw, supra*, at 25; Chauncey, *Gay New York, supra*, at 140.

### **3. Anti-Cross-Dressing and Anti-Vagrancy Statutes.**

Notwithstanding the ballooning of sodomy prosecutions in the early decades of the twentieth century, sodomy statutes were not the only regulatory device used to combat homosexuality during the period from the Civil War through the 1920s. Another weapon in New York’s regulatory arsenal was an 1845 statute prohibiting cross-dressing. As originally enacted, the New York statute made it a crime to assemble “disguised” in public places; the State subsequently amended the law in 1876 to allow “masquerade or fancy dress ball[s]” if police permission was obtained. Eskridge, *Gaylaw, supra*, at 26-27 (citing 1845 N.Y. Laws ch 3, § 6, amended by 1876 N.Y. Laws ch. 1 (codified at 1881 N.Y. Code Crim. Proc. § 887[7])).

Also important were New York’s public-decency laws. In 1900, New York State expanded the definition of illegal “vagrant” in its Criminal Procedure Code to include “[e]very male person who lives wholly or in part on the earnings of prostitution, or who in any public place solicits for immoral purposes.” *Id.* at 29 (citing 1900 N.Y. Laws ch. 281 (recodified in 1910 N.Y. Laws ch. 382)). Although the primary purpose of the statute was to provide a legal

basis for apprehending pimps who lived on earnings from prostitution, it also provided police with a pretext for targeting lesbians and gay men. *Id.* Indeed, the State legislature enacted the amended statute following the conclusion of a legislative inquiry into the “fairies” and “degenerates” who frequented the state’s dance halls and hotels. *Id.*

#### **4. Disorderly Conduct Laws.**

The most powerful regulatory device for policing the public and private lives of lesbians and gay men in New York prior to World War I, however, proved to be an 1882 law that authorized magistrates to punish “disorderly conduct” as a criminal offense. Eskridge, *Gaylaw*, *supra*, at 30. Sometime before 1915, the New York Police Department created an arrest category for “degenerates” apprehended under this statute. Between 1915 and 1920, the annual number of defendants detained for “disorderly conduct-degeneracy” expanded from ninety-six to 756. *Id.*

After a local court overturned the 1882 statute as inconsistent with due process, the State, in 1923, re-enacted a disorderly conduct provision specifically targeted at the regulation of same-sex intimacy. The new law, applicable only in New York City, made it a crime for “[a]ny person who, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned . . . [to] [f]requent[] or loiter[] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness.” *Id.* (citing 1923 N.Y. Laws. Ch. 642); *People v. Lopez*, 7 N.Y.2d 825 (1959) (applying the statute to loitering by gay men); *People v. Liebenthal*, 5 N.Y.2d 876 (1959) (same). “The criminalization of male homosexual conduct implicit in the wording of the law was made explicit in its enforcement,” as New York City police applied the statute exclusively to men they deemed “degenerate.” Chauncey, *Gay New York*, *supra*, at 172. Specifically, police enforced the statute by visiting bars dressed in plainclothes, propositioning men to go home with them, and arresting those who acquiesced. *Id.*

at 341. Between 1923 and 1966, when Mayor John Lindsay finally ordered police to stop using such methods of entrapment to apprehend gay men, more than 50,000 men in New York City were arrested on this spurious charge. George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 10 (2004) [hereinafter Chauncey, *Why Marriage?*]; George Chauncey, *A Gay World, Vibrant and Forgotten*, N.Y Times, June 26, 1994, at E17.

## **B. World War I and the Great Depression.**

The 1923 disorderly conduct provision reflected the fierce determination among New York's moral-reform societies and police officers to suppress all forms of gay and lesbian visibility during and immediately following World War I.

### **1. Driving Gay and Lesbian Visibility out of the Public Sphere.**

World War I increased the scale and visibility of gay life in New York City. The military mobilization and more general societal dislocation caused by the war led to the influx of hundreds of thousands of people to New York, including gay men and lesbians. Removed from the constraints of families, many of these new arrivals elected to remain in New York—and particularly New York City, which was a major port of embarkation for soldiers—after the war. Chauncey, *Gay New York, supra*, at 141-45.

Troubled by the increase in the gay population, New York's anti-vice leagues began to focus on homosexuality for the first time as a major social problem, distinct from their other reform efforts. The Committee of Fourteen, an anti-vice league, devoted unprecedented resources to placing gay meeting establishments under sustained surveillance. *Id.* at 132, 145-47. The Society for the Suppression of Vice was even more vigilant: Along with the police, the Society participated in the arrest of two hundred men on charges of degenerate disorderly conduct in 1920 and 1921 alone. *Id.* at 146.

Restrictions on gay life intensified with the onset of the Great Depression in 1929.

Across the nation, Americans responded to the threat to traditional values posed by the devastating unemployment and radical political agitation of the Depression era by clamping down on sexual minorities. In New York, the backlash was particularly severe. Whereas, before the Depression, the policing of gay life was generally spearheaded by private anti-vice societies, during the 1930s the State itself took a leading role by launching a massive campaign to exclude gay men and lesbians from all realms of the public sphere. John Loughery, *The Other Side of Silence: Men's Lives and Gay Identities: A Twentieth-Century History* 58 (1998) [hereinafter Loughery, *The Other Side of Silence*]; Chauncey, *Gay New York*, *supra*, at 331; Lawrence Historians' Brief, *supra*, 14.

This onslaught began with a police crackdown on clubs featuring so-called pansy acts—male entertainers who dressed in drag or mimicked stereotypical gay mannerisms to titillate club patrons. Chauncey, *Gay New York*, *supra*, at 331-32. On January 28, 1931, police raided two such clubs, charging both with liquor violations. *Id.* at 332. During the following months, the Police Commissioner sent plainclothes officers to “pansy clubs” to scrutinize their paperwork and stationed uniformed officers at the doors of the clubs to enforce a 3 a.m. curfew and to harass club patrons. These measures quickly accomplished the demise of the pansy shows. *Id.* Later the same year, the police turned their attention to the City’s drag balls. Police officers forced organizers to cancel a drag ball planned for that September in Harlem, and prevented a smaller ball from being held in its stead. *Id.* Although the Harlem drag balls eventually resurfaced, the police crackdown successfully drove the balls from the City’s center. *Id.* at 332-33.

As part of this purifying effort, the police also strove to eliminate gay men themselves—or at least “apparent homosexuals”—from the streets of Times Square. Police rounded up a group of such men in September 1931, and over the course of several years, managed to reduce the visibility of “obvious” gay men throughout most of the Square. *Id.*

## **2. Regulatory Devices Targeted at Gay Life.**

The repeal of Prohibition in 1933 ironically advanced the State’s campaign to eliminate homosexuality from the public sphere. Repeal enabled the State to use its new, exclusive power to license the sale of alcohol to marginalize and segregate gay socializing. On the pretext that the mere presence of lesbians and gay men rendered establishments “disorderly,” the New York State Liquor Authority issued regulations prohibiting bars, restaurants, cabarets, and other establishments with liquor licenses from employing, serving, or even tolerating lesbians and gay men. Any restaurant or bar that gained a reputation for permitting access to lesbians and gay men faced harassment, police raids, and ultimately the revocation of its license. Chauncey, *Gay New York*, *supra*, at 173, 334-35, 337. New York’s bars responded by posting exclusionary signs warning potential gay customers: “If You Are Gay, Please Stay Away,” or more explicitly, “We Do Not Serve Homosexuals.” Chauncey, *Why Marriage?*, *supra*, at 8; Lawrence Historians’ Brief, *supra*, at 14; Loughery, *The Other Side of Silence*, *supra*, at 59.

In 1939, for example, the Liquor Authority shut down the Gloria Bar & Grill, an openly gay bar in Manhattan, for “permitting homosexuals, degenerates and other undesirable people to congregate on the premises.” Chauncey, *Gay New York*, *supra*, at 338 (quoting Liquor Authority notice to licensee, dated Dec. 13, 1939). When the bar challenged the revocation of its license in court, the Liquor Authority took the position, among others, that it had the power to close the bar simply for serving “lewd and dissolute” people such as homosexuals. *Id.* (citing Liquor

Authority brief). The Appellate Division unanimously affirmed the Liquor Authority's decision. *Gloria Bar & Grill, Inc. v. Bruckman*, 259 A.D. 706 (1st Dep't 1940). Although the court did not explain its reasoning, its decision effectively sanctioned the Liquor Authority's policy of revoking the liquor licenses of bars that served lesbians and gay men.

### **3. Anti-Gay Censorship.**

New York State also tried to curtail representations of lesbians and gay men, and even discussions of sexual orientation, in the popular media. The government first targeted New York City's theatres. On February 9, 1927, the police raided two Broadway productions: *The Captive*, a French play that dealt with lesbian relationships; and *Sex*, a campy play written by and starring Mae West. The raids appear to have been connected with Ms. West's intent to release *The Drag*, a farcical play about transvestites. Chauncey, *Gay New York, supra*, at 311-13; Eskridge, *Gaylaw, supra*, at 47-48. Two months after the raids, the State passed the so-called padlock bill, which amended the public obscenity code to prohibit any play from "depicting or dealing with the subject of sex degeneracy, or sex perversion." Chauncey, *Gay New York, supra*, at 313, 352. In other words, New York State expressly forbade the portrayal or discussion of homosexuality in any theatrical production.

Not content with the removal of homosexuality from the stage, the government next sought to purge the subject from literature. At the national level, the Customs Service suppressed importation of several popular novels that favorably depicted same-sex intimacy. And where the federal government turned a blind eye, state and local officials acted to fill the gap. In 1929, New York City police seized 800 copies of Radclyffe Hall's lesbian romance, *The Well of Loneliness*, which had made it past the United States Customs Service, and charged the book's distributors with violating New York's criminal obscenity law. Eskridge, *Gaylaw, supra*,

at 47. The Magistrate's Court of New York denied the distributors' motion to dismiss the charges against them. The court observed:

The book 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. . . .

The theme of the novel is not only anti-social and offensive to public morals and decency, but the method in which it is developed, in its highly emotional way attracting and focusing attention upon perverted ideals and unnatural vices and seeking to justify and idealize them, is strongly calculated to corrupt and debase those members of the community who would be susceptible to its immoral influence.

*People v. Friede*, 133 Misc. 611, 613 (N.Y. Mag. Ct. 1929). Although the court's ruling was eventually reversed by an appellate panel, the State did not abandon its efforts to suppress expression by lesbians and gay men through censorship. For example, the State subsequently attempted (though again unsuccessfully) to ban the sale of André Gide's, *If It Die*, a book that dealt with same-sex intimacy. *People v. Gotham Book Mart*, 158 Misc. 240 (N.Y. Mag. Ct. 1936); Eskridge, *Gaylaw, supra*, at 47-48.

Due to a Supreme Court decision exempting movies from First Amendment protection, *Mut. Film Corp. v. Indus. Comm'n*, 236 U.S. 230 (1915), overruled by *Joseph Bustyn Inc. v. Wilson*, 343 U.S. 495, 502 (1952), New York State's efforts to discourage the treatment of homosexuality in films met with greater success. The State's film licensing law, adopted in 1921, banned "obscene, indecent, immoral" and "sacrilegious" movies. Applying this statute, New York's censors brutally edited Alla Nazimova's *Salome* (1927), a film with an all-gay cast, and denied a license to the original version of *Mädchen in Uniform* (1931), a movie depicting lesbian relationships. Eskridge, *Gaylaw, supra*, at 48. Nationally, Hollywood's infamous Production Code, adopted in the 1930s, followed suit and prohibited films from including lesbian

or gay male characters, discussing gay themes, or even implying the existence of homosexuality.

*Id.*; Chauncey, *Why Marriage?*, *supra*, at 5-6; Lawrence Historians' Brief, *supra*, at 15.

### C. World War II and its Aftermath.

World War II once again took men from their families and also offered unprecedented opportunities to women. In the period after the war, the government vigorously sought to reestablish traditional family structures and gender norms. This backlash increased the dangers faced by New York's gay community. Indeed, the State's post-war—in contrast to its pre-war—anti-gay campaign sought not only to drive lesbians and gay men from the public sphere, but also to expose and punish private same-sex intimacy. Eskridge, *Gaylaw*, *supra*, at 58-60; Chauncey, *Gay New York*, *supra*, at 360.

#### 1. Homosexuality-Related "Crimes" and Their Social Consequences.

During the postwar period, the government utilized even more aggressive and invasive techniques than those used in the pre-war era for enforcing the State's sodomy, public decency, and disorderly conduct statutes to penalize a wide range of consensual same-sex intimacy. These tactics included spying (by, for example, peering into parked cars and bedroom windows), undercover operations, stakeouts of places frequented by lesbians and gay men, and police raids. Eskridge, *Gaylaw*, *supra* at 63-64.

Lesbians and gay men arrested on these spurious charges often faced dire consequences. In addition to fines and jail time, arrestees were sometimes forcibly institutionalized, fired from their jobs, deported if they were not citizens, or discharged from the armed services. Eskridge, *Gaylaw*, *supra*, at 43. Such consequences flowed in large part from a widely held belief that being gay was tantamount to being unstable and even disloyal.

Indeed, during the McCarthy era, anticommunist crusaders considered “sexual perverts” to be almost as dangerous as Communists. In May 1950, New York’s governor, Thomas E. Dewey, accused the Truman Administration of tolerating the employment of sex offenders in the federal government. John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970*, at 41 (2d ed. 1983) [hereinafter D’Emilio, *Sexual Politics*]. Shortly thereafter, the United States Senate authorized an investigation into the government’s alleged employment of lesbians and gay men “and other moral perverts.” *Id.* at 42. A Senate committee recommended excluding lesbians and gay men from all government service on the unsupported ground that they posed security risks and also that homosexual acts violated the law. *Subcomm. on Investigations, Comm. on Expenditures in the Executive Dep’ts, Employment of Homosexuals and Other Sex Perverts in Gov’t*, S. Doc. No. 81-241, at 3, 5 (1950). Between 1947 and 1950, the FBI denied government employment to 1,700 applicants because they had “a record of homosexuality or other sex perversion.” Eskridge, *Gaylaw, supra*, at 69. Beginning in 1950, the FBI compared morals arrests everywhere in the country against lists of government employees. *Id.*

New York followed the federal government’s lead in targeting lesbians and gay men in public service. Even through the 1960s, the New York City civil service commission retained discretion to exclude lesbians and gay men from many city jobs, refusing to hire “an admitted homosexual, when the acts are frequent and recent,” for such positions as a corrections officer, children’s counselor, or playground attendant. D’Emilio, *Sexual Politics, supra*, at 208.

## **2. State Regulatory Agencies and Anti-Gay Discrimination.**

Harassment of gay bars by the police and the State Liquor Authority, common during the Depression, escalated during the postwar years. Chauncey, *Gay New York, supra*, at 342. As in

prior years, undercover police investigators frequented gay bars with the goal of entrapping gay men and charging them with solicitation. *Id.* at 343. Police also conducted raids in which they humiliated the bars' patrons through sexual threats and made random arrests and detentions. Eskridge, *Gaylaw, supra*, at 80. These arrests resulted in fines or jail terms for the individual arrested and severe consequences for the bar, including a Liquor Authority investigation—a warning and possible license revocation or suspension—or a designation as a “raided premises.” Chauncey, *Gay New York, supra*, at 343. In 1952, the Court of Appeals held that the Liquor Authority had the power to close bars that became regular resorts of lesbians and gay men. *See Lynch's Builders Rest. v. O'Connell*, 303 N.Y. 408 (1952) (per curiam).

Under this regime, mere expressions of same-sex affection were considered sufficiently “disorderly” to merit sanction and the revocation of a bar’s liquor license. Indeed, in *Fulton Bar & Grill, Inc. v. State Liquor Authority*, 11 A.D.2d 771 (2d Dep’t 1960), the court upheld the Liquor Authority’s revocation of the liquor license of the Fulton Bar in Brooklyn. That revocation was based on a report which stated that the owner had permitted the bar to “be used as a gathering place for homosexuals and degenerates who conducted themselves in an offensive and indecent manner,” *id.* at 771, because “the majority of the patrons were . . . wearing tight fitting trousers. . . . 3 male patrons walk[ed] to the rear of the premises with a sway to their hips, . . . [and two of them spoke] in high pitched effeminate tones and . . . gesture[d] with limp wrists.” Chauncey, *Gay New York, supra*, at 344 & n.36 (citing State Liquor Authority Hearing Officer’s Report, Feb. 16, 1960).

If police reported such incidents to a bar’s landlord, the bar faced the loss of its lease. Chauncey, *Gay New York, supra*, at 343. As a result, most gay bars lasted only a few months or years before police activity effectively closed them down. *Id.* at 347. Between the enactment of

the Liquor Authority's anti-gay regulations in 1933 through the mid-1960s, the police closed hundreds of bars that served gay customers in New York City. Chauncey, *Why Marriage?*, *supra*, at 8. The Liquor Authority closed 30 bars in 1960 alone. Eskridge, *Gaylaw*, *supra*, at 80. By virtue of these enforcement mechanisms, New York effectively prohibited licensed premises from serving liquor to lesbians and gay men. *Id.* at 78.

Frustration at these repeated acts of harassment culminated in the Stonewall riots of June 1969. Like most gay bars, The Stonewall Inn, located in Greenwich Village, was raided approximately once a month. During such raids, police would typically check patrons' identification, issue insults, arrest several individuals, and shut the bar down for the night. Loughery, *The Other Side of Silence*, *supra*, at 314. A police raid in the early hours of June 28, 1969, ignited a confrontation between police and bar patrons that spilled into the surrounding streets and continued with varying intensity over the next few nights. *Id.* at 315. Although the specific event that triggered the riot is not known for certain, some have reported that the crowd turned on the police after a cross-dressing lesbian was struck in the head by a police officer. *Id.* at 316. By the time the chaos ended near daybreak, five police officers were injured, thirteen people from the Stonewall Inn were jailed, and an unknown number of people had been beaten by police. *Id.* at 317. Over the next few days and nights, demonstrators flocked to the streets surrounding the Stonewall Inn and clashed with police. *Id.* at 318. Despite the significance of the event, the *New York Times* waited several days before publishing a short article with the headline, "Four Policemen Hurt in Village Raid," while the *Daily News* ran a sarcastic piece titled, "Homo Nest Raided, Queen Bees Stinging Mad." *Id.* at 319.

Although the Stonewall riots have achieved near-mythic status and are credited with launching the modern gay rights movement, the riots did little immediately to transform the day-

to-day lives of lesbians and gay men in New York, who continued to suffer from officially sanctioned discrimination and harassment.

## **II. Contemporary Social Science Research Demonstrates That the Legacy of State-Sanctioned Discrimination Continues to Affect the Public and Private Lives of Lesbians and Gay Men in New York and Nationwide.**

While the lengthy history of discrimination based on same-sex orientation is indisputable,<sup>1</sup> such discrimination is not a distant relic of history. Indeed, until relatively recently, being gay was considered a mental disorder by medical professionals—it was not until 1973 that the American Psychiatric Association removed homosexuality's classification as a mental illness. *See Am. Psychiatric Ass'n, Position Statement on Homosexuality and Civil Rights* (Dec. 15, 1973), printed in 131 Am. J. Psychiatry 497 (1974).

In recent decades, the pervasive societal acceptance of sexual-orientation discrimination has continued to affect all aspects of the lives of gay men and women. In 2001, a national survey found that three-quarters (74%) of lesbians, gay men, and bisexuals report having experienced prejudice and discrimination based on their sexual orientation, including 23% who have experienced “a lot” of discrimination. *See The Kaiser Family Foundation, Inside-OUT: A Report on the Experiences of Lesbians, Gays, and Bisexuals in America 3,* (2001) [hereinafter, Kaiser Report].

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<sup>1</sup> *See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (observing that “homosexuals have suffered a history of discrimination”); *Ben Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) (same); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (reviewing FBI’s history of sexual-orientation discrimination in hiring); *see also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*) (“[H]omosexuals have historically been the object of pernicious and sustained hostility . . .”).

The New York State legislature itself recognized this sordid record of continuing discrimination when it enacted the Sexual Orientation Non-Discrimination Act three years ago:

The legislature further 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. Despite the progress exemplified by this legislative effort to recognize the effects of sexual orientation discrimination, such discrimination continues to injure and stigmatize lesbians and gay men in New York and nationwide.

#### **A. Hate Crimes.**

According to the 2003 Report of the Coalition of Anti-Violence Programs (“AVP”), there were 648 incidents of anti-lesbian, gay, bisexual, and transgender violence reported in New York State in 2003, a 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 nine suspected anti-gay murders. *Id.* at 58. In its 2003 report, AVP reported a 22% increase in the incidence of anti-gay assaults with weapons. *Id.*

Nearly three quarters of lesbians, gays, and bisexuals report having been the target of verbal abuse, such as slurs or name-calling, because of their sexual orientation. *See* Kaiser Report, *supra*, at 3. About one third say they have been the target of physical violence, either against their person or property, because someone believed they were gay or lesbian. *See id.* at 4.

Perhaps even more alarmingly, those who complain of sexual-orientation-related bias crimes are sometimes treated with hostility. In 2001, AVP reported that, of 756 bias incidents

reported to local police in the previous year, 12% of victims reported being verbally or physically abused by police officers when the incident was reported. *See Empire State Pride Agenda Foundation, State of the State Report 2001*, at 15 (2001) [hereinafter Empire State Pride 2001 Report].

Particularly illuminating is the spike in anti-gay violence that occurred following the Supreme Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), which invalidated a Texas statute prohibiting same-sex sodomy. Following the decision, during the last six months of 2003, New York City experienced a 53% increase in the number of lesbian and gay hate victims and a 43% increase in the number of anti-gay incidents, compared with the same period one year earlier. *See The New York City Gay & Lesbian Anti-Violence Project, Post-Lawrence Rise in Anti-Gay Hate Never Abated* (2004). The New York City Police Department also reported an 82% increase in reports of anti-gay and lesbian incidents in the six months following the *Lawrence* decision. *Id.* This backlash following a perceived advancement in the rights of lesbians and gay men underscores the deep anti-gay sentiment that continues to pervade much of society.

## **B. Access to Health Care.**

The majority of lesbians and gay men in New York State have also faced discrimination in the health care system that interferes with their access to effective health care. *See Empire State Pride 2001 Report, supra*, at 9. A national survey of physicians found that nine out of ten lesbians and gay men had witnessed anti-gay bias in health care. *Id.* at 9. More than two-thirds knew patients who had received poor health care or had been denied care because they were gay. *Id.*

One manifestation of this discrimination is the tendency to organize primary care for women based on the assumption that women are heterosexual. As a result, lesbians are less likely to believe that health messages concerning routine care apply to them, are more likely to feel unwelcome in the health care setting, and are less likely to seek care. *Id.* at 7.

### **C. Special Populations.**

Anti-gay discrimination affects certain populations of the gay community living in New York State in unique ways, including lesbian and gay senior citizens and adolescents.

#### **1. Lesbian and Gay Seniors.**

Lesbian and gay seniors, the vast majority of whom live alone, report experiencing hostile treatment and discrimination in nursing homes, senior centers, and other senior facilities. Empire State Pride 2001 Report, *supra*, at 6. Lesbian and gay seniors are also at increased financial risk because they are denied the economic safety net that automatically applies to heterosexuals. For example, gay seniors are not eligible for survivor's benefits from Social Security after the death of a life partner. They are denied automatic inheritance and succession rights and have no legal guarantee of benefits from insurance, health care, and pension plans—thereby placing additional barriers to living into old age without financial worries. *Id.*

#### **2. Lesbian and Gay Youth**

Sexual orientation discrimination also reaches lesbian and gay youth, who face intolerance in their schools.

A 2003 study revealed that 90% of lesbian and gay youth reported that they either frequently or often hear homophobic remarks in school. See Joseph G. Kosciw, *The 2003 National School Climate Survey: The School-Related Experiences of Our Nation's Lesbian, Gay, Bisexual and Transgender Youth at 15* (2004) [hereinafter National School Climate

Survey]. Almost 20% of students reported hearing homophobic remarks from faculty or school staff. *Id.* at 6. Eighty-four percent of students experienced verbal harassment because of their sexual orientation, while over a third were physically assaulted as a result of their sexual orientation. *Id.* at 14-15. Similarly, in an earlier study of 500 New York City youth, 40% of respondents reported that they had experienced a violent physical attack. *See* J. Hunter, *Violence Against Lesbian and Gay Male Youth*, 5 J. Interpers. Violence 295-300 (1990). The effects of school-based discrimination and fears for safety are reflected in the aspirations of lesbian and gay youth for advanced education. When compared to a national sample of high school students, twice as many lesbian and gay students indicated that they did not plan to pursue any secondary education. *See* National School Climate Survey, *supra*, at 23. These diminished aspirations were correlated to incidents of harassment relating to sexual orientation. *Id.*

Sexual orientation discrimination also adversely impacts the mental health of lesbian and gay youth. Between 20% and 42% of lesbian and gay youth attempt suicide, compared to 8–13% of high school students in general. Higher rates of depression and attempted suicide among gay and lesbian youth correlate with the lack of social support and the stress of being different in a biased and hostile environment. *Id.* at 6. Yet, a recent survey shows that nationwide, very few schools offer counseling, information, staff training, or protective policies for gay and lesbian students. *See* PFLAG, *Safe Schools Assessment 2004—Summary*, available at <<http://www.pflag.org/index.php?id=116>> (accessed May 13, 2005).

#### **D. Housing and Workplace Discrimination**

Lesbians and gay men are also subject to substantial discrimination—both overt and covert—in the areas of employment and housing.

Because New York's Sexual Orientation Non-Discrimination Act is fairly new, lesbians and gay men have only recently become eligible to register workplace discrimination complaints with the State government. Nationwide, in states with a longer history of such laws, a government study of state-kept statistics shows that thousands of complaints of sexual orientation employment discrimination are made annually in the twelve states keeping such records. *See* United States General Accounting Office, *Sexual-Orientation Based Employment Discrimination: States' Experience with Statutory Prohibitions*, GAO-02-878R, (July 9, 2002). A study of the effects of sexual orientation discrimination on wages showed that gay male workers earn 11–27% less than heterosexual male workers with the same occupation, education, and experience. *See* M. Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 Indus. & Lab. Rel. Rev. 726, 726-39 (1995).

The results of a 2001 New York-specific survey reveal substantial workplace discrimination in New York State: 54% of respondents had experienced discrimination based on their sexual orientation in employment matters in the previous five years. *See* Empire State Pride Agenda, *Anti-Gay/Lesbian Discrimination in New York State* 1 (2001). The survey results indicate that within the previous five years, 8% of respondents believed they were fired because of their sexual orientation, 27% reported being verbally harassed, and 7% reported being physically harassed. *Id.* at 2. In addition, 43% of survey respondents indicated that they feel they must conceal their sexual orientation on the job.<sup>2</sup> *Id.*

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<sup>2</sup> The survey also found that 49% of respondents faced discrimination in public accommodations, including stores, hotels, and doctors' offices, and 68% of gay New Yorkers conceal their sexual orientation in public to avoid discriminatory treatment.

Same-sex couples also experience discrimination in their efforts to acquire housing. *See Developments in the Law: Sexual Orientation and the Law*, 102 Harv. L. Rev. 1584, 1613 (1989) (documenting effect of gay marriage ban on housing rights). Landlords seeking to exclude same-sex couples may simply claim that they have better offers or that the dwelling has already been sold or rented to another person. *See* Robert R. Stauffer, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 Harv. J. Legis. 239, 264 (1987) (demonstrating landlords' discriminatory use of private information about prospective tenants).

Viewed against the historical background of invidious discrimination against lesbians and gay men in New York State, these recent statistics demonstrate that anti-gay discrimination persists today and continues to harm the well-being and quality of life of gay New Yorkers.

## **CONCLUSION**

The lengthy and pernicious history of discrimination against lesbian and gay New Yorkers, and the continuing legacy of that discrimination, justify searching judicial scrutiny of New York State's refusal to recognize marriage rights without regard to sexual orientation. Because the State's actions simply cannot withstand such scrutiny, *amici curiae* support reversal of the decision below.

Dated: New York, New York  
May 17, 2005

Respectfully Submitted,

*AMICI CURIAE PARENTS, FAMILIES & FRIENDS OF LESBIANS AND GAYS, INC., FAMILY PRIDE COALITION, HUMAN RIGHTS CAMPAIGN, HUMAN RIGHTS CAMPAIGN FOUNDATION, AND THE NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT IN SUPPORT OF PLAINTIFFS-APPELLANTS*

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**ADDENDUM**

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: THIRD DEPARTMENT

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SYLVIA SAMUELS and DIANE GALLAGHER, :  
HEATHER McDONNELL and CAROL SNYDER, AMY :  
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MONTEL CHERRY-SLACK, :  
Plaintiffs-Appellants, :  
-against- :  
THE NEW YORK STATE DEPARTMENT OF HEALTH :  
and THE STATE OF NEW YORK, :  
Respondents-Appellees.

-----x

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Albany County  
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1967/04

**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO [ ]**

The foregoing brief of *amici curiae* was prepared in the word processing system Microsoft Word 2000. A proportionally spaced typeface was used, as follows:

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