Oral Argument Requested:
30 Minutes

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

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, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

Index No. 98084

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Preliminary Statement

Ignoring the record of concrete harms that result from the State's discrimination in marriage, the State's brief does not point to a single legitimate governmental interest, much less a compelling one, that is rationally furthered by excluding these thirteen couples from the critical protections and benefits that come with civil marriage. As the undisputed record shows, such benefits pervade everyday life, affecting healthcare, inheritance, parenting, home ownership and taxation, among others.

Rather than addressing this undisputed record of pervasive, unjustified discrimination, the State's brief boils down to a single point: that near-total deference should be paid to the DRL's marriage provisions and that judicial review of the marriage statute would somehow usurp the legislative function. This argument ignores not only the reality of the lives of these plaintiffs and thousands of other gay and lesbian New Yorkers, but disregards one of the most fundamental principles of our form of government. It has been the law since at least Chief Justice Marshall's opinion in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that it is the primary duty of *the courts,* not the legislature or the executive branch, to review legislative enactments for compliance with the Constitution. The State gives no compelling reason for this Court to abdicate that constitutionally mandated function here.

Instead, the State relies on what it asserts is the weight of authority, pointing to cases from other states denying claims similar to those advanced here. (Resp. Br. at 11-12.) But the trend in the case law is changing, with more courts agreeing that there is no rational justification for excluding same-sex couples from civil marriage. *See Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993); *Baker* v. *Vermont*, 744 A.2d 864 (Vt. 1999); *Hernandez* v. *Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005); *In re Coordination Proceeding re: Marriage Cases*, No. 4365, 2005 WL 583129 (Cal. Super. Ct.

Mar. 14, 2005); *Castle* v. *Washington*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004); *Anderson* v. *King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004); *Brause* v. *Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

This appeal thus poses a critical choice – to apply the constitutional doctrine dispassionately (which would lead to reversal of the decision below) or to follow the courts that have ruled the other way, thereby distorting basic principles of due process and equal protection. Ultimately, plaintiffs contend, history will see one choice – ending discrimination against gay men and lesbians – as principled (not to mention obvious), and the other as lacking in vision. As the Supreme Court has recognized, "times 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).

Contrary to the State's arguments, plaintiffs do not ask the Court to devise a new constitutional right to "same-sex marriage." Rather, plaintiffs merely ask this Court to do what courts often do in deciding due process cases: to recognize that a right already identified as fundamental – the right to marry – cannot be denied to a particular group of citizens unless a compelling state interest justifies the denial of the right.

Nor does the State address the well-established three-part test under which classifications based on sexual orientation meet all of the criteria for heightened judicial scrutiny. Indeed, the exclusion of gays and lesbians from marriage cannot be justified even under the lowest level of judicial scrutiny – rational basis review. Under bedrock principles of equal protection analysis, a classification cannot be maintained merely for its own sake. *See Romer* v. *Evans*, 517 U.S. 620, 635 (1996). Yet that is precisely what the State attempts to do by

purporting to justify the exclusion of same-sex couples from marriage on the basis of "history" or "tradition." In other words, a history or a tradition of discrimination – no matter how longstanding that tradition may be – does not make the discrimination constitutional.

Argument

I.
THE STATE CANNOT EVADE THE DUE PROCESS CLAUSE BY NARROWLY REDEFINING THE FUNDAMENTAL RIGHT TO MARRY

The State does not contest that the right to marry is a fundamental right subject to the most heightened protections of the New York State Constitution. (App. Br. at 16-20.) And it is indisputable that far from remaining static over time, marriage has evolved from a gender-based property right to a largely gender-neutral partnership, and the constitutional right to marry has been recognized as applying to numerous groups of people who historically did not have the right, including mixed-race couples, prison inmates, and divorcees. (*Id.* at 17-26.)

Rather than engage with these arguments, the State side-steps them by asserting that "[w]hat plaintiffs really seek is not to enforce the right to marry, but rather to acquire the right to marry a person of the same sex, something they have never had before." (Resp. Br. at 12-13.)[1] As plaintiffs have demonstrated, however, even a tradition of excluding a minority group from participation in a fundamental right cannot justify continued abridgment of that right.

The analytical flaw in the State's reasoning is evident in its reading of *Loving* v. *Virginia*, 388 U.S. 1 (1967). The State asserts that in *Loving*, the United States Supreme Court merely addressed an already existing right of "opposite-sex marriage." (Resp. Br. at 13.) *Loving,* however, does not identify the liberty interest in question as the right to enter into

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[1] It is telling that the State cites *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), in support of its argument that plaintiffs are seeking the establishment of a new fundamental right. Unlike the right to marry, that case *did* present a novel liberty interest, the right to die.

"opposite-sex" marriage. Instead, the Supreme Court recognized the fundamental right in question as the ability of an individual to *choose one's life partner*. *See Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."). *See also Lawrence*, 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy [for the reasons] heterosexual persons do."). The Court recognized that that fundamental right applied to mixed-race couples, despite this country's undeniable history and tradition of excluding mixed-race couples from marriage.[2]

Just as the right to marry in New York does not presently extend to same-sex couples, the traditional right to marry did not extend to interracial couples before *Loving* was decided. The conception of marriage as inherently race-based was even more ingrained in our culture in 1948, when the California Supreme Court first recognized the right of interracial couples to marry. *Perez* v. *Lippold*, 198 P.2d 17 (Cal. 1948). In other words, the courts have understood the right in question to be a broader right to marry – which historically <u>has</u> been protected – and the courts have repeatedly struck down restrictions on <u>who</u> can access the right, no matter how long-standing the prohibition may have been. (App. Br. at 21-26.)

In *Lawrence,* the Court held that the liberty interest in question was not, as the defendant claimed, a "fundamental right [of] homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 576 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986)). Rather, the correct inquiry was whether two loving adults had the right to engage in inherently private, consensual conduct. *Id.* at 574. By analogy, the question here is not whether plaintiffs have a right to

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[2] Nor was *Loving* merely about race. The Court expressly rested its holding on due process, as well as equal protection, grounds, *see Loving*, 388 U.S. at 12, and the Court later characterized *Loving* as the "leading" case on the right to marry, *see Zablocki* v. *Redhail*, 434 U.S. 374, 383 (1978).

"same-sex marriage," but rather, whether they may exercise their fundamental right to marry the person of their choice.

II.
THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE DOES NOT SATISFY THE RATIONAL BASIS TEST

The State argues that appellants bear the burden under the rational basis test of negating "every conceivable basis which might support" the State's limitation of marriage to same-sex couples. (Resp. Br. at 26.) But while the State is correct that it "has no obligation to produce evidence to sustain the rationality of a statutory classification" (Resp. Br. at 27), the Court must evaluate whether the classification rationally furthers a legitimate state interest based on facts in the real world, rather than on mere speculation or theory. *See Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County,* 488 U.S. 336, 343 (1989); *Heller* v. *Doe*, 509 U.S. 312, 321 (1993).

People v. *Liberta*, 64 N.Y.2d 152 (1984) demonstrates that when courts conduct a rational basis review, they must do so based on facts and circumstances in the real world, rather than on conjecture or hypothesis. In that case, the Court of Appeals, applying the rational basis test, struck down the marital exclusion in New York's rape law, which did not cover the rape of a wife by her husband. In reaching that result, 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," the Court of Appeals concluded that there is no rational connection between allowing a husband to rape his wife and a potential invasion of 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 the rape itself caused the disruption, 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 of Appeals. *Id.* at 166. What *Liberta* shows, then, is that while the State does not have to submit "evidence" supporting the exclusion of same-sex couples from marriage, it still must point to some *rational, logical* connection between the exclusion and a *legitimate* State interest.

Here, the State offers only two conceivable justifications for excluding same-sex couples from marriage: (1) doing so follows a line adopted by other states and the federal government (Resp. Br. at 28-31), and (2) doing so preserves the "historic legal and cultural understanding of marriage" (*id.* at 31-34).

"Everyone Else Does It". The State asserts that excluding same-sex couples from marriage is "rational" because it is consistent with the approach taken by the Federal government and other states. (Resp. Br. at 28-31.) But this is hardly a legitimate purpose. First, the State cannot survive an equal protection challenge to its discriminatory marriage laws merely by asserting that other states and the federal government discriminate as well. Second, the State does not explain how following the lead of other states advances some legitimate New York interest. Indeed, given the many differences in marriage laws between New York and other states (*see* App. Br. at 33-35 (noting, for example, that New York allows first cousins to marry)), New York cannot credibly assert an interest in maintaining uniformity in its marriage laws.

History/"Tradition". The State's "tradition" rationale doesn't work either. This is so because the classification (excluding same-sex couples from marriage) is the same as the objective (maintaining the historic exclusion of same-sex couples from marriage). (App. Br. at

30-31.) A state interest that is not independent of the classification is simply not legitimate. *See Romer* v. *Evans*, 517 U.S. 620, 635 (1996); *see also Heller* v. *Doe*, 509 U.S. 312, 326 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.").

In an attempt to dress up its "tradition" rationale, the State refers to the "significance" of heterosexual marriage "as a social institution in which procreation occurs." (Resp. Br. at 31-32.) But the State fails to address the lack of any logical connection between keeping same-sex couples from marrying and encouraging other people to procreate. (App. Br. at 35-37.) *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.").

Indeed, the State's decision to exclude same-sex couples from marriage is such an ill-fitting means of promoting procreation that it is "impossible to credit." *Romer*, 517 U.S. at 635. In other words, it is inconceivable that the State would choose to exclude same-sex couples from the vast range of protections that come with marriage – protections primarily focused on the adult couple – in order to encourage procreation, since, as the State itself concedes (Resp. Br. at 36), many people procreate outside of marriage and neither the ability nor the intention to procreate is a prerequisite to marriage. (App. Br. at 39-40.)[3]

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[3] Some of the *amici* suggest 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. But the State cannot discriminate against people who choose to 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 governmental purpose of discouraging the exercise of 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).

Although the State argues that this "disconnect" between marriage and procreation raises no constitutional concerns (Resp. Br. at 35-36), the courts have repeatedly struck down laws on rational basis review because the fit between means and ends was "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *see also Romer*, 517 U.S. at 633; *Eisenstadt* v. *Baird*, 405 U.S. 438, 448 (1972); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 537 (1973).

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While the State asserts that the decisions from other states whose highest courts have found that the principle of equal protection requires that same-sex couples be granted the rights afforded by marriage are "inapplicable," "of no utility" or "not persuasive" (Resp. Br. at 37, 39 and 40), the State fails to acknowledge that these decisions directly addressed the sufficiency of the same rationales for excluding same-sex couples from marriage and found them entirely inadequate.

In *Baker* v. *Vermont*, 744 A.2d 864 (Vt. 1999), for example, the Vermont Supreme Court held that Vermont's Common Benefits Clause required that same-sex and opposite-sex partnerships be treated equally. The State argues that this decision sheds no light on plaintiffs' claims because Vermont's Common Benefits Clause differs from the U.S. Constitution's Equal Protection Clause and because the court did not "follow the traditional three-tiered scrutiny applicable to equal protection claims." (App. Br. at 38.) However, while the Vermont Supreme Court noted differences between state and federal constitutional jurisprudence, it is far from clear that the court applied a substantially more searching standard than federal "rational basis review." The court asked simply whether the proffered justifications for Vermont's marriage law "reasonably relate[d]" to the statute itself. *Baker*, 744 A.2d at 883. Furthermore, the Vermont court's language – stating that the "extreme logical disjunction"

between the classification and the purpose meant the exclusion fell "far short" of the applicable standard, and that Vermont's claimed interest in maintaining uniformity with other jurisdictions "[could] not be reconciled" with the remainder of Vermont's marriage laws – suggest that the justices would have struck down the denial of marital rights to same-sex couples under *any* standard of review. *Id.* at 884-85.

Similarly, in *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Judicial Court examined each of the purported justifications for excluding same-sex couples from marriage and found them to be insufficient. The State attempts to distinguish this decision by arguing that it was decided under the *Massachusetts* equal protection clause, which may, in certain circumstances, afford broader protections than the federal Constitution. (Resp. Br. at 40.) Again, however, in articulating the rational basis standard, the Massachusetts court quoted a *U.S.* Supreme Court case, suggesting that it engaged in precisely the same review as courts would perform under the federal constitution. *Goodridge*, 798 N.E.2d at 960. Moreover, the Massachusetts court found that the government's claimed interests bore "*no* rational relationship" to the exclusion of same-sex couples from marriage – again, suggesting that the law could not withstand *any* level of scrutiny. *Id.* at 963-64 (emphasis added).

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

As the Supreme Court has explained, classifications affecting a particular group should receive aggressive judicial review if that group: (1) has "experienced a history of purposeful unequal treatment;" or (2) has been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities;" or (3) has been "relegated to

such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Bd. of Retirement Sys.* v. *Murgia*, 427 U.S. 307, 313 (1976).

In our brief, we recounted in great detail the history of purposeful unequal treatment that has affected gay men and lesbians in New York, and we explained that sexual orientation is so unrelated to an individual's merit or ability to contribute to society that a court should be suspicious whenever government uses it as a basis for decision-making. The State fails to respond to either of these arguments; this is hardly surprising given the extensive record of discrimination against gay men and lesbians and the obvious disconnect between an individual's sexual orientation and his or her ability to contribute to society. Plaintiffs' uncontested showings, standing alone, are sufficient to support the conclusion that sexual orientation meets the Supreme Court's definition of a "suspect class."[4]

The sole factor that the State does address – the ability of gay men and lesbians to obtain relief through the political process – it examines in a superficial way, distorting its importance. The recent passage of certain non-discrimination measures in New York does not foreclose heightened scrutiny because, as we have pointed out (App. Br. at 51), both race and gender were identified by the Supreme Court as suspect classifications *after* federal non-discrimination statutes were passed protecting women and racial minorities. Thus, the showing

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[4] A careful reading of the Supreme Court and New York case law reveals that if any of the factors take on more significance than the others, it is the relationship between the classification itself and an individual's merit/ability to contribute to society. When the Supreme Court has declined to establish a suspect class, it has typically done so not because the group in question has not faced a history of discrimination, but because the characteristic in question is in fact related to an individual's ability. *See Cleburne*, 473 U.S. at 442-43 (mentally retarded "have a reduced ability to cope with and function in the everyday world"); *Murgia*, 427 U.S. at 313 (age is related to ability to perform certain functions); *Fox*, 669 N.Y.S.2d at 473 (same concerning mental illness).

of political powerlessness that the State argues is required would prevent *any classification*, including those based on race and alienage, from qualifying for suspect class status.[5]

The only other response by the State to plaintiffs' arguments is to cite a number of cases in which courts have declined to review classifications based on sexual orientation with heightened scrutiny. However, all but one of those cases were decided before the Supreme Court's landmark overruling of *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in 2003. *Lawrence*, 539 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."). *See Schroeder* v. *Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002); *Equality Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997); *Baker* v. *Vermont*, 744 A.2d 864, 878 n.10 (Vt. 1999).[6] Accordingly, the cases cited by the State (Resp. Br. at 19), including the Court of Appeals' observation in 1985 that courts had declined to apply strict scrutiny to classifications based on sexual orientation, *see Under 21* v. *City of New York*, 65 N.Y.2d 344, 364 (1985), provide little, if any, support for its effort to oppose heightened scrutiny for classifications based on sexual orientation.

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[5] Although first proposed as early as 1971 and passed by the State Assembly every year since 1993, the Sexual Orientation Non-Discrimination Act (2002 N.Y. Laws ch. 2) did not reach the floor of the Senate until 2002. *Sexual Orientation Non-Discrimination Act Chronology, at* http://www.prideagenda.org/sonda/SONDA Chronology.PDF. During the Senate debate on the Hate Crimes Act of 2000 (also cited by the State as evidence of gay men and lesbians' purported political power), one legislator noted, "It's no secret that for years we could have passed a hate-crimes bill if we were willing to take out gay people, if [we] were willing to take out sexual orientation." *Hate Crimes Act: N.Y.S. Deb. Transcripts on S. 4691A*, at 4603 (2000) (New York Legislative Service, Inc. Ch. 107) (Statement of Sen. Eric Schneiderman); *id.* at 4542-43 (same) (Statement of Sen. Martin Connor).

[6] The State also cites *Lewis* v. *Harris*, 2003 WL 2319114, at *21 (N.J. Super. Ct. Nov. 5, 2003), in which the court held that sexual orientation was not a suspect class. However, the *Lewis* court dismissed *Lawrence* in two sentences, without explaining why the logic of the Supreme Court's decision was inapplicable: "Finally, the recent decision by the United States Supreme Court in *Lawrence* v. *Texas* does not alter the determination by this court. In *Lawrence,* the Court held that a same-sex couple's right to liberty under the Due Process Clause gives them a right to engage in consensual sexual activity in the home without government intervention." *Id.*at 23 (citations omitted).

Finally, contrary to the State's argument (Resp. Br. at 16-17), this Court's decision in *Matter of Valentine* v. *American Airlines*, 17 A.D.3d 38 (3d Dept. 2005) does not foreclose the argument that heightened scrutiny applies to New York's marriage laws because those laws discriminate on the basis of sexual orientation. First, the *Valentine* court's application of the rational basis standard was based on the federal Equal Protection Clause, not on the New York Constitution, because the Court of Appeals has held that the statutes at issue in *Valentine* (New York's workers' compensation statutes) may not be challenged under any provisions of the State Constitution. *See id.* at 41. Second, the *Valentine* court, without independently analyzing the issue, applied rational basis review to the classification on the basis of sexual orientation because other courts had done the same. *See id.* at 42. But the cases on which *Valentine* relied either do not specifically establish that rational basis review applies[7] or, like the cases cited by the State, precede or rely upon cases decided before the Supreme Court's landmark overruling of *Bowers* in *Lawrence*. Rather than relying on other courts' application of outdated law, this Court should conduct its own analysis, applying well-established principles of constitutional jurisprudence, to determine whether, under the New York Constitution, heightened scrutiny should apply to discrimination on the basis of sexual orientation.

IV.

HEIGHTENED SCRUTINY APPLIES BECAUSE THE DRL CREATES A CLASSIFICATION BASED ON GENDER

In contending that the DRL does not contain a discriminatory gender-based classification. (Resp. Br. at 22-23), the State attempts to distinguish *Loving* v. *Virginia*, 388 U.S.

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[7] *See, e.g.*, *Romer*, 517 U.S. at 632 (Supreme Court did not need to apply any greater scrutiny than rational basis review to strike down a law classifying individuals on the basis of sexual orientation, and, accordingly, did not consider whether heightened scrutiny would be appropriate); *Under 21*, 65 N.Y.2d at 364 ("We need not decide now whether some level of 'heightened scrutiny' would be applied to governmental discrimination based on sexual orientation.").

1, 8 (1967), by arguing that the Court applied heightened scrutiny there because the challenged statute classified based on race, rather than sex. (Resp. Br. at 24.)[8]

But the State misses the point: the significance of *Loving* is not the level of scrutiny that the Court applied; its significance is the Court's recognition that the anti-miscegenation statute contained a racial *classification* notwithstanding its "equal application" to multiple races. The *Loving* court concluded that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race," even though they applied equally to whites and non-whites. *Loving*, 388 U.S. at 11. In other words, "[j]udicial inquiry under the Equal Protection Clause...does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964).

Just as the Virginia statute contained a classification on the basis of race, regardless of its "equal application" to multiple races, so too does the DRL contain a classification on the basis of gender, regardless of its "equal application" to both sexes.[9] Because the DRL classifies on the basis of gender, the Court must apply the heightened level of scrutiny appropriate under the New York Constitution.[10]

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[8] The State does not address the other Supreme Court cases cited in our brief that rejected the very argument that the State advances here – namely, that a race- or sex-based classification is not discriminatory when it applies equally to all races or sexes. (App. Br. at 59.)

[9] The fact that this is a gender case rather than a race case does not affect the use of the "equal application" theory. In *Califano* v. *Westcott*, 443 U.S. 76, 83-84 (1979), the Supreme Court rejected the argument that an unemployment benefits law did not contain a gender classification because the "denial of aid based on the father's unemployment necessarily affects, to an equal degree, one man, one woman, and one or more children." *Id.* at 84.

[10] The State errs in stating that that the "great weight of authority" rejects the *Loving* analogy (Resp. Br. at 26). A number of courts have found that a state law denying same-sex couples the right to marry is a gender-based classification. *See Marriage Cases*, 2005 WL 583129, at *9 ("The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-

V.
DENYING SAME-SEX COUPLES THE ABILITY TO MARRY VIOLATES THE FREE EXPRESSION PROVISION OF THE NEW YORK CONSTITUTION

In response to plaintiffs' free expression claim, the State argues that marriage is "legal status, not speech." (Resp. Br. at 42.) In part, plaintiffs agree – marriage is far more than speech, it is also a contractual relationship and a set of mutual commitments. But, as the State acknowledges (Resp. Br. at 41), when a marriage is solemnized, the parties "declare" that they take each other as spouse. DRL § 12 (McKinney 2004). Such a declaration is *per se* an expressive event. And, of course, most married couples, by telling others that "they are married," perpetuate that public expression of love and commitment throughout their lives.

Alternatively, the State argues that "[e]ven if entry into marriage has an expressive component, New York's prohibition of same-sex marriage does not infringe free-speech protections." (*Id.* at 43.) For the same reasons that the discrimination here fails both rational basis and heightened scrutiny, the State's suppression of expressive conduct does not further an important or substantial government interest.

Finally, the State argues that the institution of marriage should not be regarded as a medium of expression eligible for protection under the public forum doctrine. (Resp. Br. at 44-45.) But that argument is the same as saying that "broadcasting cannot be both expressive conduct and the medium through which the broadcasting occurs." In both situations, it is important to separate the words that are conveyed over the airwaves or at the marriage ceremony (i.e. the message) from the medium itself. In the case of broadcasting, the medium is the electromagnetic spectrum. In the case of marriage, the medium is the ceremony at which the parties declare their commitment. As the Supreme Court made clear in *Rosenberger* v. *Rector &*

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based classifications. As such, for the purpose of an equal protection analysis, the legislative scheme creates a gender-based classification."); *Brause*, 1998 WL 88743, at *6; *Baehr*, 852 P.2d at 64.

Visitors of the Univ. of Virginia, 515 U.S. 819 (1995), and as the State effectively concedes here (Resp. Br. at 44), free speech equality principles apply even where the medium to which selective access is granted is not "spatial or geographic," but instead is "metaphysical." *Rosenberger*, 515 U.S. at 830.

Conclusion

For all the foregoing reasons, as well as those stated in our opening brief, we respectfully submit that this Court should reverse the judgment below, and remand this action with instructions to enter judgment for Plaintiffs-Appellants.

Dated: New York, New York
September 6, 2005

Respectfully submitted,

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