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

BRIEF OF PLAINTIFFS-APPELLANTS

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Preliminary Statement

Plaintiffs-Appellants are thirteen gay and lesbian couples 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 state assembly member, a public school teacher, a nurse, a police officer and a lawyer. They volunteer with local community organizations and are active in their churches. They are young and old; Catholic, Protestant, Jewish and non-religious; African-American, white, Latino and Asian. In other words, they are truly representative of the melting pot that is New York.

Appellants' relationships — which range in duration from four to forty years — bear all the familiar hallmarks of committed adult family relationships. Several of the couples have nursed each other through critical illnesses, while others have shared the joys (and anguish) of childrearing. Many of them own homes together. One couple ran a small business together. All of them love one another and look forward to spending the rest of their lives together. It is beyond question that appellants are in every practical sense identical to the countless married couples whom we know as our neighbors, co-workers, friends and family.

Unfortunately, however, the legal status afforded these thirteen same-sex couples, and thousands of others like them across the State, differs dramatically from that of heterosexual married couples. 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 privileges that come with civil marriage.

The consequences of that exclusion are profound and reach into nearly all important aspects of appellants' lives. The institution of marriage brings with it enormous

private, social and economic advantages. 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, for example, generally reflect the understanding that married people function not as separate individuals, but as a unit. Laws about decisionmaking in a crisis demonstrate the understanding that when an adult is incapacitated, it is usually a spouse who is best suited to make the appropriate medical decisions. Marriage is also the structure through which two people typically raise children together. Even laws about death and dying reflect the understanding that the person most central in a married person's life is his or her spouse. In short, the protections that marriage brings touch nearly every aspect of life and death.[1]

New York has a unique interest in enforcing its own Constitution particularly vigorously here given New York's history as a home to gay men and lesbians from across the nation, as well as New York's strong commitment to diversity and pluralism and its tradition of respect for personal autonomy and equality. The State's exclusion of appellants from the protections — both dignitary and practical — that come from civil marriage violates the New York Constitution in several respects.

First, the fundamental nature of the right to marry a person of one's choice is part of the personal autonomy protected by the Due Process Clause of the New York Constitution, which the Court of Appeals has held is more protective of individual rights than its federal counterpart. Over time, the courts have recognized that decisions related to

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[1] Many of the appellants have sought to establish elaborate legal protections in an attempt to approximate marriage. Those arrangements are cumbersome, expensive and incomplete. Even worse, they leave appellants with a well-founded fear that the protections that they have tried to put in place are not complete and may not work when tested in times of crisis, or may be undone in the future.

the most intimate aspects of life — marriage, sexuality, and childrearing, among others — constitute a protected sphere of personal autonomy that cannot be constrained by the State. As a result, any law that significantly limits access to a fundamental right, much less one which, like the New York Domestic Relations Law ("DRL"), denies access to it entirely, is unconstitutional unless it is necessary to advance a "compelling state interest." *In re K.L,* 774 N.Y.S.2d 472, 477 (2004). The State identifies no compelling interest in excluding same-sex couples from civil marriage.

Second, the denial of civil marriage to gay men and lesbians violates the Equal Protection Clause, which guarantees equal treatment under the law. Not only is the State unable to offer a "compelling" justification for the disparate treatment of same-sex couples, but the State cannot even offer a "legitimate" justification under the lowest standard of rational basis review. None of the justifications proffered by the State support excluding same-sex couples from civil marriage. To say that such discrimination is "traditional" is simply to say that the unlawful discrimination has existed for a long time. To justify the exclusion of gay men and lesbians from marriage on the basis of "uniformity" with other states, like Alabama or Virginia, is simply to justify discrimination because others do it too. Neither "tradition" nor "uniformity" is a neutral explanation of why such discrimination is legitimate. Nor is it rational to think that excluding gay people from marriage will encourage *others* to procreate, or that it will improve the security of children. Indeed, the many statutes, regulations and court decisions in New York according equal treatment to gay men and lesbians make it clear that denying New Yorkers the fundamental right to marry simply by virtue of their sexual orientation is contrary to the public policy of this State and therefore cannot be a proper governmental objective in any event.

Moreover, under sdwell-established principles of equal protection jurisprudence, lesbians and gay men, like women, constitute a specially protected class. Because classifications based on sexual orientation are not related to an individual's merit, and because there exists a history of discrimination based on sexual orientation, classifications based on sexual orientation, like classifications based on gender, should be scrutinized by the courts with special care. Under this heightened standard of review, prohibiting same-sex couples from marrying passes constitutional muster if — and only if — the State can show that there is a need for excluding gays and lesbians from civil marriage in order to further a "compelling" or "important" State interest. Again, the State did not even attempt to satisfy a more rigorous standard of review in the trial court.

Finally, there is, of course, one desire that all of the appellants share — they all wish to tell the broader communities in which they live that they love and care for each other as only a life partner can. In our State and in our society, marriage and only marriage is the medium that allows couples in committed adult relationships to make that statement. Because the DRL prohibits appellants, all of whom seek to express their commitment to each other through marriage, from doing so, the statute also impermissibly burdens their rights guaranteed by the Free Expression Clause of the New York Constitution.

For all of these reasons, and the reasons set forth below, appellants submit that the DRL's exclusion of same-sex couples from civil marriage violates the New York Constitution.

Questions Presented

1. Does the Due Process Clause of the New York Constitution, which is more expansive than its federal counterpart and must be interpreted to advance the public policy of the State of New York, require that the fundamental right to civil marriage apply to couples of the same sex?

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

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 gender and sexual orientation?

4. Does the Free Expression Clause of the New York Constitution require that same-sex couples be permitted to marry?

Statement of the Case

A. The Protections of Marriage

By reflecting legally the reality of life as a committed couple, the institution of marriage creates vitally important protections, rights and obligations:

Healthcare 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. Ins. Law § 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.

Appellant Kathleen Tuggle, who works as a nurse in a chemical plant, already pays extra for "family health insurance coverage" for Sean, the eight-year old son whom she and her partner, Tonja Alvis, are raising together. (R. 380-81) Tonja, who works as a shipping clerk, isn't yet eligible for her employer's plan. (*Id.*) But because it is a contributory plan, even when Tonja does become eligible, they won't be able to afford to pay for a second plan. (*Id.*) And although the extra premium that they already pay for Sean under Kathleen's plan would cover Tonja if she and Kathleen were married, because they cannot get married, they have no choice but to leave Tonja uncovered. (*Id.*)

Similarly, 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. 285-83) 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 two 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.*)

Medical Decisionmaking. Appellants also 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 lack that important protection as well.

Appellants Ellen Dreher, who is 68, and Laura Collins, who is 60, 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 Sylvia Samuels was injured in a bicycle accident that rendered her unconscious, her partner Diane Gallagher rushed to the emergency room,

frightened and concerned. The hospital staff, however, refused to let Diane see Sylvia because they were not married. Although Diane tried to convince the hospital staff that she and Sylvia were partners, her pleas were to no avail. One staffer said that he was not convinced that they were family because Diane, who is white, didn't "look like" Sylvia, who is African-American. (R. 361)

When appellant John Banta had back surgery in 1996, he and his partner, Assemblymember Danny O'Donnell, told the doctor that Danny was the person to call when the procedure was over. Danny, however, did not receive a phone call, and so he finally went to the hospital to see how John was doing. When Danny arrived at the hospital, rather than apologizing, the doctor instead asked, "Who are *you*?" The hospital simply did not understand that, although Danny was not John's spouse, he was his primary caretaker. (R. 361)

Perhaps the most troubling story of all is that of appellants Carol Snyder and Heather McDonnell. When Carol was diagnosed with breast cancer 11 years ago, she and Heather tried to head off any problems by finding a "gay friendly" surgeon. (R. 325) Even so, the hospital staff constantly raised suspicious 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 only recognized Carol's children as her "next of kin." (*Id.*)

Family and Medical Leave. Other benefits available only to married persons include qualification for bereavement or medical leave to care for individuals

related by blood or marriage, *see* 5 U.S.C. § 6307(d); 5 C.F.R. Parts 630(D)-(E). The deprivation of this right is a serious issue to appellants as well.

For instance, Paul Muhonen's parents are very sick. (R. 316-17) His mother has late-stage Alzheimer's disease and his father is 91 years old. Paul and his partner Michael Hahn are both very concerned about Paul's parents. However, because they cannot marry, Michael's ability to support Paul through a difficult time is severely hampered because Michael is not "entitled to take family medical or bereavement leave on [Paul's] account," which he would be able to do if Paul were legally recognized as his spouse. (*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 state and federal programs that come with the presumption of parentage.

These protections are very important for appellants as well. 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 plan to apply 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 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.*)

Property and Financial Issues. Marriage confers a number of property rights, including entitlement to a marital tax deduction. *See* N.Y. Tax L. § 601 (McKinney 2004). Marriage brings with it as well 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 descent 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 County 1996).

Appellants seek these rights as well. For instance, Regina Cicchetti and Susan Zimmer, who have been in a committed relationship for 34 years, jointly own their own home. (R. 301-02) When they applied for a loan, the Farmers Home Administration said that they could not apply as a couple would have been. (R. 302) Instead, they put only Susan's name on the deed so they could qualify, yet ended up with a loan that was much more expensive than a comparable loan for a married couple. (*Id.*) They also had to hire a lawyer to get an unrecorded deed indicating that they both owned the property, a step that would have been unnecessary if their committed relationship were classified by the state as a civil marriage. (*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 Hospital*, 202 N.Y. 959 (1911); *Fromm* v. *Fromm*, 117 N.Y.S.2d 81 (3d Dep't 1952); *Beller* v. *City of New York*, 58 N.Y.S.2d 112 (1st Dep't 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).

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:

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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. *Southeastern Elevator Co.*, 293 N.Y.S.2d 305 (N.Y. 1968); *Wheaton* v. *Guthrie*, 453 N.Y.S.2d 480 (4th Dep't 1982); and entitlement to benefits under crime victim compensation statutes, *see* N.Y. Exec L. § 624(1)(b)(i) (McKinney 2004).

- may request an absentee ballot or provide registration assistance to the other spouse. N.Y. Elec. L. § 5-216 (McKinney 2005); N.Y. Election 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. C.P.L.R. 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. SS 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.[3] 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.

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 among 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)

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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. Although none of the appellants currently contemplate separation

Appellees cross-moved for summary judgment. (R. 394) On December 7, 2004, the Albany County Supreme Court (Teresi, J.) denied appellants' motion and granted the State's cross-motion in a brief, six-page opinion. (R. 60-66)

Specifically, the lower court rejected appellants' equal protection claims, finding that the DRL does not contain a gender classification. (R. 60-61) The trial court then determined that the DRL's classification of persons on the basis of sexual orientation should be examined using the lowest form of equal protection scrutiny, "rational basis review," declaring that it was bound in that regard by the Second Department's decision in *Matter of Cooper*, 187 A.D.2d 128 (Dep't 1993), and that the State's interest in "tradition" and "uniformity" were legitimate reasons for the challenged discrimination. (R. 61-62) The trial court also rejected appellants' due process claims, again stating that it was required to follow *Cooper* in holding that there is no fundamental right to marry for same-sex couples. (R. 64-65) Finally, the lower court rejected appellants' free expression claims, holding that any infringement of appellants' rights of free expression is no greater than essential to the furtherance of the State's interests. (R. 65)

Appellants timely noticed an appeal to the Court of Appeals pursuant to CPLR § 5601 (R. 6, 27), which was subsequently transferred to this Court. (R. 3)

Argument

I. NEW YORK'S MARRIAGE LAW DEPRIVES SAME-SEX COUPLES OF THEIR FUNDAMENTAL RIGHT TO MARRY

The New York Constitution protects the right to marry as an element of the larger sphere of personal autonomy guaranteed by the expansive provisions of the Due

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(indeed, they seek just the contrary), the future is impossible to predict, and there is no good reason why a same-sex couple who has pooled its assets for many years should not be afforded these protections as well.

Process Clause, N.Y. Const., Art. I, § 6. That right belongs to *everyone* who wishes to marry, including same-sex couples. The DRL excludes same-sex couples from that basic right and thus violates the Constitution, because the State cannot show that the exclusion is necessary and narrowly tailored to advance a compelling government interest.

In rejecting appellants' due process arguments, the court below relied almost exclusively on its view that it was bound by *Matter of Cooper*, 592 N.Y.S.2d 797187 A.D.2d 128 (2d Dep't), *appeal dismissed*, 82 N.Y.2d 801 (1993). (R. 60-61) The *Cooper* decision, however, fails to address the due process analysis set out below, relies on cases that are no longer good law and, in any event, is not binding on this Court. *See Mountain View Coach Lines, Inc.* v. *Storms*, 102 A.D.2d 663 (2d Dep't 1984) (each Appellate Division is "free to reach a contrary result").

A. The New York Constitution Provides Greater Due Process Protection Than the U.S. Constitution

Prior to the passage of the Fourteenth Amendment, the federal Due Process Clause offered "virtually no protections of individual liberties." *Sharrock* v. *Dell Buick-Cadillac*, 45 N.Y.2d 152, 160 (1978). By contrast, "[s]tate Constitutions in general, and the New York Constitution in particular, have long safeguarded any threat to individual liberties." *Id.* (citing, *inter alia*, *Wynehamer* v. *People*, 13 N.Y. 378, 383, 418-21 (1856)). 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 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." *Id.* at 159, 160. *See also People* v. *LaValle*, 3 N.Y.3d 88, 129 (2004) (in invalidating the deadlock provision of New York's death penalty statute, holding that

"the Due Process Clause of the New York Constitution requires a higher standard of fairness than the Federal Constitution").

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," an approach based upon "a judicial perception of sound policy, justice and fundamental fairness." *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*, -- N.Y.3d --, 2005 WL 1017662 (N.Y. May 3, 2005). Applying this approach, in order to determine whether a provision of the New York Constitution reaches beyond the lesser federal guarantees, 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." *P.J. Video*, 68 N.Y.2d at 302-03.

Here, there can be no question that when it comes to issues of individual liberty, autonomy and protecting gays and lesbians from discrimination, the "distinct attitudes" of New Yorkers as well as the "history and traditions" of this State dictate that the Due Process Clause of the New York Constitution should be read more broadly than its federal counterpart. After all, New York has historically been the symbolic — as well as practical — center of the nation's gay population. And New York has served as a point of gathering and refuge for millions of gay and lesbian Americans who, over the course of the last century, fled smaller towns and villages to move to New York where they believed they could live and prosper. *See* George Chauncey, Jr., *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 1890-1940*, at 28 (1994) (hereinafter Chauncey,

"*Gay New York*").[4] The term "Stonewall," which serves as the symbolic rallying cry of the modern gay rights movement, is derived from the name of the New York City bar that served as the backdrop for a historic protest by the gay community in 1969. *See generally* Martin Duberman, *Stonewall* (1993). Today, from the lesbian communities in Buffalo to gay male enclaves in the West Village, New York State is the home of one of the largest gay communities in the United States. *See generally* Chauncey, *Gay New York*; Charles Kaiser, *The Gay Metropolis* (2001); Elizabeth Lapovsky Kennedy & Madeline Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (1993).

Moreover, the courts have repeatedly held that the protections of the New York Due Process Clause exceed those under the federal constitution, particularly in matters of family life and personal relationships. In other words, the Court of Appeals has "differed with the Supreme Court's view of due process, basing the differentiation on . . . the different purposes served by the Federal and State provisions, [and] the extensive history of due process protections afforded the citizens of this State . . . ." *McMinn* v. *Town of Oyster Bay*, 105 A.D.2d 46, 51-53 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 544 (1985). For example, the Court of Appeals has held that the failure of a prison to provide contact visits to pretrial detainees violated New York's Due Process Clause, even where the federal Constitution

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[4] As early as 1913, one psychiatrist, writing in the *Journal of the American Medical Association*, estimated that there were "many thousands of homosexuals in New York City among all classes of society." *See* Chauncey, *Gay New York* 135 (*quoting* A. A. Brill, *The Conception of Homosexuality*, 61 J. Am. Med. Ass'n. 335 (1913)). By the 1920s and 30s, Greenwich Village, Harlem and Times Square in Manhattan had become important centers of American gay and lesbian life. *See* Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth Century America* 67, 83 (1991); *see also* Lee Hudson, *Lesbians* in The Encyclopedia of New York City, 664 (ed. Kenneth T. Jackson, 1995). These neighborhoods attracted individuals from smaller towns all over the United States because "their local communities frowned upon homosexuality, and New York [seemed to them] to be the capital of the American homosexual world." *See* Chauncey, *Gay New York* 135 (*quoting* George W. Henry and Alfred A. Gross, *Social Factors in the Case Histories of One Hundred Underprivileged Homosexuals*, 22 Mental Hygiene 602 (1938)).

provided no analogous protection. *Cooper* v. *Morin,* 49 N.Y.2d 69, 80-82 (1979). Similarly, a court rejected zoning restrictions regarding occupants as inconsistent with New York's Due Process Clause notwithstanding the fact that the U.S. Supreme Court had rejected a challenge to similar ordinances brought under the U.S. Constitution. *McMinn*, 105 A.D.2d at 58; *compare Village of Belle Terre* v. *Borass*, 416 U.S. 1 (1974).

B. 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 right, the area where it is most jealously protected by New York courts, is with regard to committed adult relationships: decisions concerning marriage, sexual intimacy, and childbearing and child-rearing. *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); *People* v. *Onofre,* 51 N.Y.2d 476 (1980) (right to private sexual intimacy under Art. I, § 6),[5] *Cooper*, 49 N.Y.2d at 78-81 (holding that detainees have a right to intimate association 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 the liberty protected by Article I, § 6 is the fundamental right to marry. New York courts have long recognized that the right to marry goes to the core of

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[5] The Court of Appeals' prophetic decision in *Onofre* was actually grounded in the less protective federal Due Process Clause. In 1986, the U.S. Supreme Court disagreed with the result reached by the *Onofre* court in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), only to recant that decision emphatically in 2003 in *Lawrence* v. *Texas,* 539 U.S. 558 (2003).

individual liberty because the decision to marry is one of the most significant decisions someone 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 County 1983) (quoting *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965)). Similarly, in *Zablocki* v. *Redhail,* 434 U.S. 374, 388-91 (1978), the U.S. Supreme Court explained that the right to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 383 (quoting *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967)).[6]

C. The Right to Marry Protects a Committed Relationship Between Two Adults And the Ability to Choose One's Spouse

Through the right to marry, the Due Process Clause protects consensual relationships of mutual commitment, trust and support between two adults, and ensures that everyone can choose a spouse without interference from the State.

In *Turner* v. *Safley*, the Supreme Court held that the "expression[] of emotional support and public commitment . . . [is] an important and significant aspect of the

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[6] *See, e.g., Cleveland Bd.of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); *Boddie* v. *Connecticut*, 401 U.S. 371, 376 (1971) (holding that "marriage involves interests of basic importance in our society"); *Loving*, 388 U.S. at 12 (1967) ("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 Cooper* v. *Morin*, 49 N.Y.2d 69, 80 (1979) (identifying "the fundamental right to marriage and family life" under Art. I, § 6 as one that endured even as individuals were detained in jail); *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").

marital relationship." 482 U.S. 78, 95-96 (1987). The New York courts have also recognized that emotional and financial interdependence and commitment are at the core of marriage. They have therefore noted that "there is, in a continuing marital relationship, an inseparable mutuality of ties and obligations, of pleasures, affection and companionship, which makes that relationship a factual entity." *Millington* v. *Southeastern Elevator Co.*, 22 N.Y.2d 498, 502 (1968) (citation omitted). *See also Our Lady of Lourdes Mem. Hosp., Inc.* v. *Frey*, 152 A.D.2d 73, 75 (3d Dep't 1989) (describing "the modern view of marriage as an economic partnership") (citation omitted); *Conteh* v. *Conteh*, 117 Misc. 2d 42, 43 n.1 (S. Ct. Monroe County 1982) (describing marriage as "a partnership of equals, ... an emotional partnership and . . . also an economic partnership").

When it comes to gay men and lesbians, the Court of Appeals has already recognized that same-sex couples make lasting commitments to each other of the exact same nature described in the cases above. For example, in *Braschi* v. *Stahl Assocs.*, 74 N.Y.2d 201, 211 (1989), the Court of Appeals held that certain rent control regulations applied not only to married couples, but to "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." *See also Langan* v. *St. Vincent's Hosp.*, 196 Misc. 2d 440, 442-43 (S. Ct. Nassau County 2003) (granting rights to a same-sex couple that had "lived together as spouses" for years).

The interest protected by the right to marry also includes the right to choose *whom* to marry. As courts have recognized for over half a century, "the essence of the right to marry is freedom to join in marriage with the person of one's choice." *Perez* v. *Lippold*, 198 P.2d 17, 21 (Cal. 1948) (striking down anti-miscegenation law under the California Constitution). As other courts have stated, without the right to make such a choice, the right to marry would "mean[] little." *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941, 958

(Mass. 2003); *see also Brause* v. *Bureau of Vital Statistics*, 1998 WL 88743, No. 3AN-95-6562CI, at *6 (Alaska Super. Ct. 1998) (declaring that deciding whom to marry is a fundamental right), *superseded by* Alaska Const. Art. 1, § 25; *Crosby* v. *State of New York*, 57 N.Y.2d 305, 311-12 (1982) (recognizing that due process right to privacy protects "the decision of whom one will marry"); *Cleveland Bd. of Educ.*, 414 U.S. at 639-640 ("This Court has long recognized that freedom of personal choice in matters of marriage . . . is one of the liberties protected by the Due Process Clause.").

These core aspects of marriage — commitment to another adult and individual choice of a spouse — have emerged from a series of significant changes to the legal definition of marriage. Indeed, many of those changes have highlighted why marriage is so important to society. For example, marriage has evolved legally from a gender-based property right to a largely gender-neutral partnership. For a woman, marriage used to mean giving up her independent legal existence and surrendering all control over herself and her property to her husband. Under the doctrine of "coverture," when a woman married her "very being and existence . . . was suspended . . ., or entirely merged or incorporated in that of the husband." *Whiton* v. *Snyder*, 43 Sickels 299 (N.Y. 1882). Over time, New York has abandoned various aspects of coverture; New York first allowed women limited property rights in clothing and other "bona paraphernalia," *Whiton*, 43 Sickels 299, later recognized that a wife, like her husband, can sue someone who seduces her spouse, *see Oppenheim* v. *Kridel*, 236 N.Y. 156, 161 (1923), and most recently struck down what may have been the last vestige of coverture, the marital exemption to the rape laws, *see People* v. *Liberta*, 64 N.Y.2d 152, 162 (1984). Similarly, the "doctrine of necessaries," once considered "one of the most primary and absolute principles" of law, *Medical Bus. Assoc., Inc.* v. *Steiner*, 183 A.D.2d 86 (2d Dep't 1992), obligated husbands, but not wives, to support their families,

Garlock v. *Garlock*, 279 N.Y. 337, 340 (1939). That doctrine has since been found to be violative of the Equal Protection Clause of the New York Constitution. *Medical Bus. Assoc.*, 183 A.D.2d at 91-92.

The abandonment of the traditional restriction of marriage based on race highlights how central choice is to the very concept of marriage. Historically, states urged that limiting marriage by race not only was constitutional, but also served to advance society's overall interests. *See, e.g.*, *Naim* v. *Naim*, 87 S.E.2d 749, 753 (Va. 1955) (upholding Virginia anti-miscegenation law and stating, "We find no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship."); *Green* v. *State*, 58 Ala. 190, 1877 WL 1291, at *4 (1877) ("[I]t is for the peace and happiness of the black race, as well as of the white, that [anti-miscegenation] laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct."). Those limitations were of course stricken as violations of the right to marry, *see Loving*, 388 U.S. at 12, largely because the individual choice of *whom* to marry is the "essence of the right to marry." *Perez*, 198 P.2d at 21.

In short, there is no question that the fundamental right to marry protects committed adult relationships that provide the stability, security, and emotional support that allow adult couples to prosper. The Due Process Clause also protects the freedom to marry the person of one's choice. And there can be no question that gay and lesbian couples, like heterosexual couples, form relationships of mutual trust, commitment and support that deserve to be protected under the law.

D. The Right to Marry Applies to Same-Sex Couples

The State concedes that the Constitution protects the right to marry, but contends that the right does not apply to same-sex couples. The State argues, and trial court held, that due process protects only the right to marry a person of a different sex, relying on "history and tradition." (R. 64) But the State's argument misunderstands the role of history in a due process analysis, is premised on the faulty notion that marriage is an institution that has remained fundamentally unchanged for centuries and repeats an analytical error recently condemned by the Supreme Court.

Of course, history and tradition play an important role when the 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 Loving*, 388 U.S. at 12; *Zablocki,* 434 U.S. at 383-85; *Cooper*, 49 N.Y.2d at 80; *Shepard*, 50 N.Y.2d at 644.

But while courts use history and tradition to identify the *interests* that due process protects, they do not carry forward traditional limitations on *who* may exercise a right once the right is 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 due process jurisprudence. Fundamental rights protected by the Due Process Clause belong to everyone in part because the guarantee of due process itself is a guarantee of equal treatment.[7]

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[7] *See Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (striking down segregation of D.C. public schools under the Due Process Clause of the Fifth Amendment); *Lawrence* v. *Texas,* 539 U.S. 558, 575 (2003) (striking

Two lines of cases make it clear that substantive due process analysis does not limit liberty simply because historically, a given right was enjoyed only by certain classes of individuals, rather than by everyone. First, while the Court initially recognized the fundamental right to privacy only in one specific context (marriage), in later cases, it held that the right belongs not just to individuals who marry, but also to unmarried persons. Second, the Court's cases involving the fundamental right to marriage itself demonstrate that the right to marry applies in many contexts (such as interracial marriage) that actually were *contrary* to history and tradition at the time those cases were decided.

Although the fundamental right to privacy was first recognized as applying to married individuals, the Court soon held that the right was not limited to that context, even though there was no clear history or tradition of protecting privacy rights outside of marriage. In *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965), the Supreme Court held that Connecticut could not make it a crime for married couples to use contraceptives when having sex. The decision rests on a right that the Supreme Court explained is older than the Bill of Rights itself: the right to privacy in marriage. *Id.* Seven years later, in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), the Supreme Court struck down a ban on the distribution of contraceptives to unmarried persons. Importantly, the Court in *Eisenstadt* did not suggest that the country had a history or tradition of protecting the privacy of unmarried people that would prevent the state from regulating their private sexual behavior. Instead, the Supreme Court held that if history and tradition mean that the right exists for married couples, then the right must belong to everyone. *See also Carey* v. *Population Servs. Int'l,* 431 U.S. 678

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down Texas law that made some forms of sexual intimacy a crime only for gay couples on due process grounds because due process "advances both [equality and due process] interests.").

(1977) (holding that teenagers under 16 are protected by the *Griswold* right, despite the fact that there was no history or tradition of protecting teenagers' right to use contraception).

In its now discredited decision in *Bowers* v. *Hardwick*, the Supreme Court suggested that a legal history of controlling the sexual lives of gay people meant that gay relationships were not protected by the due process rights identified in *Griswold* and *Eisenstadt*. 478 U.S. 186, 192-193 (1986). But in 2003, the Court repudiated that decision in the most emphatic terms, not simply overruling *Bowers*, but holding that it was wrong when it was decided. *Lawrence,* 539 U.S. at 578. The Court explained that the right to privacy and autonomy applies to everyone, including gay men and lesbians. It identified *Griswold* as the starting point for the right and placed it squarely in line with *Eisenstadt* and the other cases that followed. *Id.* at 564-66, 570-74.

The same refusal to limit the scope of a fundamental right based on historical exclusions from that right appears in cases addressing the fundamental right to marry. Indeed, virtually none of the due process decisions upholding the fundamental right to marry could have been decided as they were if the right to marry were limited only to those persons who by tradition were allowed to exercise it.

For example, historically, the right to marry 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 by constitutional provision.

Wallenstein, *supra*, at 159-160. Yet the *Loving* Court held that the fundamental right to marry applied to inter-racial couples just as it did to same-race couples. 388 U.S. at 12.[8]

Similarly, the traditional right to marry did not include a right to divorce and marry a second time. England 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 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 Court held that the 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 Court held that the state could not require indigent individuals to pay court fees in order to get a divorce, since doing so burdened their fundamental right to marry.

The traditional right to marry also did not extend to prisoners, yet the Court, in *Turner* v. *Safley*, 482 U.S. 78, 95-97 (1987), 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, which certainly did *not* include prison, *Turner* would have come out the other way.

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[8] The *Loving* decision also struck down Virginia's law as race discrimination in violation of the Equal Protection Clause. But the *Zablocki* decision says that *Loving* is the Court's leading decision on the right to marry, and stresses that although it *could* have been decided solely on the basis that Virginia's antimiscegenation statute discriminated on the basis of race, it *also* struck down the law as a violation of "a fundamental liberty protected by the due process clause." *Zablocki,* 434 U.S. at 383-84.

Framing the issue by asking whether our history includes marriage for same-sex couples, as the State does, avoids any meaningful constitutional review and fails to appreciate the scope of the right to marry, thus repeating an error recently condemned by the Supreme Court. Specifically, in *Bowers* v. *Hardwick*, the Court held that there was no "fundamental right [for] homosexuals to engage in sodomy." 478 U.S at 190. Almost two decades later, in *Lawrence* v. *Texas*, the Court reversed *Bowers*, holding "[t]hat statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." 539 U.S. at 567.

In other words, the issue here is no more whether there is a fundamental right to "same-sex marriage" than the issue in *Bowers* or *Lawrence* was whether there was a fundamental right to engage in "same-sex sodomy." In both instances, the right *already* protected by due process (in *Lawrence* the right to privacy, here the right to marry) cannot be circumscribed based simply on our nation's history of excluding gay people from its scope. Phrasing the inquiry in terms of *who* can exercise the right mis-understands the role of history in due process analysis, as set forth above. It also serves to avoid the appropriate constitutional question. *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941, 972-73 (Mass. 2003) (Greaney, J., concurring) ("To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it has never been accessible, is conclusory and bypasses the core question . . ."); *Halpern* v. *Attorney General of Canada*, 172 O.A.C. 276 ¶ 71 (2003) ("[A]n argument that marriage is heterosexual because it 'just is' amounts to circular reasoning. It

sidesteps the entire . . . analysis."); *Baehr* v. *Lewin*, 852 P.2d 44, 61 (Haw. 1993) (declaring "circular and unpersuasive" the contention that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman.").

In sum, as a number of courts have ruled, the fundamental right to marry, long established under the Constitution and central to our way of life, belongs to everyone, including same-sex couples. *See Hernandez* v. *Robles*, — N.Y.S.2d —, 2005 WL 363778, at *13 (S. Ct. N.Y. County Feb. 4, 2005) (holding that the fundamental right to marry extends to same-sex couples); *In re Coordination Proceeding re Marriage Cases*, No. 4365, 2005 WL 583129, at *12 (Cal. Super. Ct. Mar. 14, 2005) (same); *Castle* v. *Washington*, No. 04-2-00614-4, 2004 WL 1985215 slip op. at 26-29 (Wash. Super. Ct. Sept. 7, 2004) (same); *Anderson* v. *King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *5-7 (Wash. Super. Ct. Aug. 4, 2004) (same).

E. ***Matter of Cooper*** **Does Not Preclude Appellants' Claims**

The trial court held that *Matter of Cooper*, 187 A.D.2d 128 (2d Dep't), *appeal dismissed*, 82 N.Y.2d 801 (1993), compelled it to rule that the fundamental right to marry does not cover same-sex couples. (R. 64-65) But *Cooper* is not binding on this court for several reasons. Indeed, as the Attorney General and other courts have already concluded, *Cooper* is of "limited utility" in addressing the issues presented here. *See Hernandez*, 2005 WL 363778, at *7 (citing Attorney General's Opinion).

First and most importantly, as a decision from a different Appellate Division, *Cooper* is not binding on this Court. *Mountain View Coach Lines, Inc.* v. *Storms*, 102 A.D.2d 663 (2d Dep't 1984).

Furthermore, *Cooper* relies heavily on *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971), a thirty-plus year-old Minnesota Supreme Court decision that rejected a constitutional challenge brought by a same-sex couple to Minnesota's marriage law. However, *Baker*, unlike this case, involved a claim under the federal Constitution, rather than under the independent and more protective New York Constitution. The U.S. Supreme Court dismissed the *Baker* appeal for want of a substantial federal question, 409 U.S. 810 (1972).[9] Finally, the *Cooper* court also relied upon *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), the Supreme Court's 1986 decision upholding the constitutionality of sodomy laws. *Cooper*, 187 A.D.2d at 133-134. As discussed above, however, the Supreme Court soundly overruled *Bowers* in *Lawrence,* and as a result, the reasoning in *Cooper* has been disavowed. For all of these reasons, *Cooper* is of no bearing on the questions raised here.

F. The Exclusion of Same-Sex Couples from the Fundamental Right to Marry Triggers Strict Scrutiny

Because the DRL completely excludes same-sex couples from the fundamental right to marry, the exclusion must be subject to strict scrutiny. To meet 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). The State did not even try to meet this exacting standard in the court below. Nor, as we discuss at length below in Section II, can it meet a lower standard of review. *See Igoe* v. *Pataki*, 182 Misc. 2d 298, 310 (S. Ct. N.Y. County 1999) ("The New York courts employ the same rational-basis

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[9] While such a ruling is a determination on the merits, it does not reflect the Court's agreement as to the merits of the constitutional question that was addressed and lacks the precedential value of opinions reached after briefing and oral argument. *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 309 n.1 (1976).

standard to test the validity of statutes against an equal protection and due process challenge.") (citing *Foss* v. *City of Rochester*, 104 A.D.2d 99, 107 (4th Dept.1984)). The DRL therefore violates the Due Process Clause of the New York Constitution.

II. NEW YORK'S MARRIAGE LAW VIOLATES THE NEW YORK CONSTITUTION BECAUSE IT FAILS EVEN THE LOWEST LEVEL OF SCRUTINY, 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 therefore that the State must give the same treatment to all who are similarly situated in terms of a law's purpose.

As the State emphasized at length in the court below, courts are generally very deferential to legislative decisions about whether two groups of people are similarly situated. (R. 419) We do not disagree. The law is clear that if there is a rational basis for thinking that they are not, courts typically sustain the law. *See, e.g., Abberbock* v. *County of Nassau*, 213 A.D.2d 691, 691 (2d Dep't 1995) (upholding economic regulations).[10]

However, because the exclusion of same-sex couples from marriage does not rationally further *any* legitimate state interest, it fails even the lowest form of equal protection scrutiny, much less the heightened scrutiny that rightfully applies here. In other words, there is simply no rational basis to conclude that gay men and lesbians are not similarly situated to heterosexuals when it comes to seeking the protections of civil

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[10] It is equally true that courts must at times abandon this deference to the Legislature, and instead apply suspicion to certain invidious classifications. As shown in Section III below, New York's marriage law triggers heightened scrutiny under the Equal Protection Clause because the DRL discriminates against New Yorkers based on (1) their sexual orientation and (2) their gender. In addition, as explained in Section I above, heightened scrutiny is also warranted because the DRL deprives same-sex couples, and not others, of the fundamental right to marry.

marriage. As we discuss below, the State has asserted that the exclusion advances certain interests, but those interests are either not legitimate or not rationally furthered by excluding same-sex couples from marriage.

A. The Applicable Standard for Rational Basis Review

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); *see also People* v. *Liberta*, 64 N.Y.2d 152, 163 (1984) (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).[11]

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*, 213 A.D.2d at 691. As demonstrated below, the exclusion of same-sex couples from civil marriage in New York fails even this basic test because the

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[11] Under Federal case law, a court applying rational basis equal protection review must similarly assess "the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the Court] ensure[s] that classifications are not drawn for the purpose of

interests identified by the State, and accepted by the trial court, 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.

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

1. Tradition

The most honest explanation of why New York excludes same-sex couples from marriage is simply that New York has always done so. The trial court concluded that the State's interest in "preserving the historic, legal, and cultural understanding of marriage" justifies excluding same-sex couples from marriage. (R. 64) 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.

The most basic principle of equal protection is that the government may not adopt a classification for the purpose of disadvantaging the group that is burdened by it. *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 from this basic principle that a legitimate purpose must be "independent" of the classification itself; a classification justified by a purpose that embodies its distinction would be "a classification

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disadvantaging the group burdened by the law," *id.* at 633, which would violate equal protection. *Id.* at 635.

of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer,* 517 U.S. at 635.

Offering "tradition" as the justification for limiting marriage to heterosexual couples presents the same problem. The classification and the purpose here too are one and the same; keeping gay couples out of marriage is *both* the classification and the tradition. 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. 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.

Of course, to the extent adherence to the traditional definition of marriage is based on the State's desire to express its moral disapproval of same-sex relationships, that purpose cannot be legitimate under the Constitution. *See 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 (same).

2. "Everyone Else Does It"/Uniformity

In a variant on the "tradition" rationale, the trial court held that the State's interest in "ensuring consistency among Federal law and the laws of other States" justifies excluding same-sex couples from marriage. (R. 64) But simply following the discriminatory lead of other states also is 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.

The uniformity argument has several flaws. First, the fact that other states also bar same-sex couples from marriage is irrelevant to a proper constitutional analysis. 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.[12] 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. *See People* v. *P.J. Video*, 68 N.Y.2d 296, 304 (1986) (concluding, in related context of deciding whether state constitutional provisions should be interpreted consistently with the federal constitution, that "the practical need for uniformity can seldom be a decisive factor."). In other words, the State here fails to suggest any legitimate and independent rationale for the laws of other states that prohibit same-sex marriage. Again, the only rationale proffered is tradition itself, which provides no justification at all. Without an independent justification, discriminating

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

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 and New Jersey, provide something much closer to equality for same-sex relationships than does New York.[13] 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 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 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 bans such marriages outright or imposes significant restrictions on them.[14] Furthermore, New York allows marriage at the age of 16 with parental consent and

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[13] 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 will become 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.

[14] *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

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.[15] In other areas of family law such as adoption, New York departs significantly from the law of other states.[16] The State's professed interest in 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.

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* N.Y. Dom. Rel. Law § 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.

[15] 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.

[16] 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).

Baker, 744 A.2d at 885.[17] 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.

3. Procreation

Although the trial court did not rely on this argument in ruling for the State, the State has suggested that restricting marriage to opposite-sex couples promotes its interest in "social continuity" because marriage and procreation "are fundamental to the very existence and survival of the race." (R. 422) (quoting *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). In truth, 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 required connection is lacking both because excluding gay men and lesbians from marriage does not in fact promote procreation, and the exclusion is so attenuated from any possible intent to encourage people to have children that it simply cannot be credited.

(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 them, or it could mandate generous family leave for parents. Any of these devices — and many more

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[17] In addition, the State simply ignores the fact that our federalist 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*,

— might convince people who would not otherwise have children to do so. But it makes no sense to suggest that excluding same-sex couples from marriage will encourage 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"). Indeed, the Court of Appeals already recognized this 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).

Where there a profound lack of connection between a classification and its purported purpose, as there is here, the courts have repeatedly struck down laws under rational basis review. For example, in *McMinn* v. *Town of Oyster Bay*, 66 N.Y. 544 (1985), the Court of Appeals found a town zoning ordinance unconstitutional under rational basis review where the ordinance did not logically further the proffered government interest. The town limited residence in a single-family house to people related by blood, marriage, or adoption, or to a maximum of two unrelated individuals, and sought to justify the restriction by pointing to concerns about traffic congestion and population density. The Court of Appeals held that the ordinance "bears no reasonable relationship" to the identified goals, concluding that "the definition of family employed here is both fatally overinclusive in prohibiting, for example, a young unmarried couple from occupying a four-bedroom house who do not threaten the purposes of the ordinance and underinclusive in failing to prohibit

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413 U.S. at 536-37 (existence of regulations addressing government's concerns "casts doubt upon" state's proffered justification for statute).

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.

Similarly, in *People* v. *Onofre*, 51 N.Y.2d 476 (1980), the Court of Appeals struck down New York's sodomy law under rational basis review because it found "no relationship — much less [a] rational relationship — between [the state's] objectives" and the criminal law. In that case, the State had suggested that the sodomy law protected 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, concluding that "no showing has been made as to how, or even that, the statute banning consensual sodomy between persons not married to each other preserves or fosters marriage. Nor is there any suggestion how consensual sodomy relates to rights accorded to married persons; certainly it is not evident how it adversely affects any such rights." *Id.* at 492. The DRL's exclusion of same-sex couples from civil marriage similarly violates equal protection.

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

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 — with 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." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Similarly, in *People* v. *Liberta*, 64 N.Y.2d 152 (1984), the Court of Appeals struck down the marital exclusion in New York's rape law because it found an insufficient connection between the chosen classification and the asserted purpose. As written, the statute did not cover the rape of a wife by her husband. Applying rational basis review to the classification based on marital status, the Court considered various rationales proffered by the State, including several that were unquestionably "legitimate State interests," *id.* at 165. The court nevertheless concluded that the connection between the classification and those legitimate State interests was too tenuous to satisfy even the rational basis test.

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," and the classification therefore lacks a rational basis. *Romer*, 517 U.S. at 632-35. Marriage 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.

Two facts make clear the arbitrary nature of the State's classification. First, while procreation may occur within marriage, it is not necessarily linked to marriage. People who marry often do not procreate, people who cannot procreate may nevertheless marry,[18] many people (both straight and gay) procreate outside of marriage,[19] and many people in same-sex couples have biological children through artificial insemination, surrogacy, or prior relationships. Indeed, the relationship between marriage and procreation is neither necessary nor particularly close. *See Goodridge*, 798 N.E.2d at 961 ("Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family.").

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 York law are focused on the couple; on recognizing, for example, that when they own property they typically function as

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[18] While New York law provides that a marriage is voidable if either party "is incapable of entering into the marriage from physical cause," N.Y. Dom. Rel. Law § 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 County 1908) (refusing annulment where husband was unable to consummate the marriage because the parties entered marriage based on "desire for support and companionship, rather than the usual motives of marriage").

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

one unit.[20] 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 two facts 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 marriage in order to encourage procreation, which is at best a secondary aspect of the State's interest in marriage. Here, the "sheer breadth" of what same-sex couples are denied is "so discontinuous with the reasons offered for it" that the exclusion "lacks a rational basis." *Romer*, 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.").[21]

4. Child Welfare

Finally, any suggestion by the State that it excludes same-sex couples from marriage in order to promote the welfare of children is simply not credible. The reality is

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[20] 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.

[21] Any argument that the State's purpose in excluding same-sex couples from marriage is to discourage them from having children could not be sustained under any standard of review. Gay men and lesbians, like everyone else, have a fundamental right to have and raise children. *See Hope* v. *Perales*, 83 N.Y.2d 563, 571 (1994); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The State can only use its coercive power in an effort to prevent one group of people from exercising that right if doing so is necessary to achieve a compelling state interest.

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. All of these facts mean there is no rational connection between the exclusion and 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). This is hardly surprising given that 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). In New York, 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 Dep't 1984) ("the mere fact that a parent is a homosexual does not alone render him or her unfit as a parent"); *M.A.B.* v. *R.B.*, 134 Misc. 2d 317, 331 (S. Ct. Suffolk County 1986) (holding it "impermissible as a matter of law to decide the question of custody on the basis of the father's sexual orientation"). And New York has, for more than a decade, had a 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 marriage in order to improve child welfare would be illogical. It is irrational for the State to keep gay people out of marriage in order to keep them away from children 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 that purported interest renders the 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 marriage, such an exclusion certainly cannot promote their welfare. *See Goodridge*, 798 N.E.2d at 964 ("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.'").

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, the Court of Appeals, 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), 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), the Court of Appeals 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 by eliminating those exemptions rather than invalidating the statutes in their entirety. *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

Although the exclusion of same-sex couples from marriage fails the most basic level of equal protection review, in fact, the New York Constitution requires heightened scrutiny of this disparate treatment. Where a court has reason to "suspect" that the government has frequently disadvantaged a group of citizens not because of fair distinctions, but instead out of prejudice or antipathy, it will give the classifications careful scrutiny, demanding that the State's purpose not be simply rational, but compelling, and that the state use the least discriminatory means of achieving its objective. This is necessary to ensure that the Equal Protection Clause serve its intended function — "nothing less than the abolition of all caste-based and invidious class-based legislation." *Plyler* v. *Doe*, 457 U.S. 202, 213 (1982) (striking down discrimination in education against children of illegal immigrants).[23]

Thus, 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

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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.

[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. The Court of Appeals 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 (citing *Cleburne*, 473 U.S. at 439-41). Classifications based on race, alienage and national origin are suspect, and thus sustainable only where narrowly tailored to serve a compelling government interest. *See Brown*, 89 N.Y.2d at 190; *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.

the terms set forth by the United States Supreme Court, which have also been adopted by the New York Court of Appeals in *Brown* v. *New York*, 681 N.Y.S.2d 170, 175 (1998):

> [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 San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973). 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 generally able to protect the class. *See Cleburne*, 473 U.S. at 441; *Frontiero*, 411 U.S. at 686 n.14.

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[24] The 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 Court continues to collapse the top two tiers of the equal protection standard, and whether or not the Court of Appeals follows that lead, it is clear that, at a minimum, sexual orientation classifications should be evaluated under *some form* of heightened scrutiny.

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 evidence 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. Although the State argued below that certain courts have declined to recognize sexual orientation as a suspect classification in the past,[25] those decisions are all grounded squarely in the Supreme Court's decision in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), which has been resoundingly rejected by the Supreme Court. "*Bowers* was not correct when it was decided and it is not correct today. It ought not to remain binding precedent." *Lawrence,* 593 U.S. at 578. The Supreme Court's decisive and historic overruling of *Bowers* thus negates the precedential value of the prior case law indicating that sexual orientation is not a suspect class.

In addition, in holding that New York's failure to permit the marriage of same-sex couples does not trigger heightened scrutiny, the court below erred in following the decision of the Second Department in *Matter of Cooper*, 187 A.D.2d 128 (2d Dep't 1993), which held that classifications based on sexual orientation trigger only rational basis scrutiny. As discussed above in detail, that case relies on cases which are no longer good law, and in any event is not binding on this Court. Examining the issue on the merits —

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[25] *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").

which the trial court 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 — like women and racial and ethnic minorities — 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 distinctive history, the Equal Protection 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") two 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.

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[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 more detailed discussion of this history is found in *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*, filed with this Court on May 17, 2005.

[27] *See, e.g., High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573; *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).

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 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* 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 Comm. 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). In the following two years, more than 800 federal employees resigned or were terminated as a result. *See Gaylaw* 70;

David Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, Washington History, Fall/Winter 1994-95, at 44-63.

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); Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 787 (2002). 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*

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

Transgender Violence in 2003, at 57 (2004). Astonishingly, this number includes 10 murders. *See id.*

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 as well as in 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 Dep't 1996) (describing landlord's verbal harassment of gay tenant, including calling him "faggot punk," "male whore," and "sicko"); *Gomez* v. *Malik*, No. AH-94-006, 1993 WL 856504 at *2 (N.Y.C. Comm. Hum. Rts. 1993) (landlord called a tenant a "faggot" and "homo"); *Quinn* v. *Nassau County Police Dept.*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (police officer sexually harassed because of his sexual orientation). *See also* Robert R. Stauffer, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 Harv. J. on Legis. 239, 264 (1987).

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. *United States Army*, 875 F.2d 699, 724-25 (9th Cir. 1989) (en banc) (Norris, J., concurring) (noting, in concluding that

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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).

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

Being lesbian or gay, like being female, bears no relation to an individual's ability to perform in or contribute to society. Accordingly, the second criteria 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 single 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."). The Court of Appeals 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 School Dist.*, 470 U.S. 1009 1014 (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (*quoting Plyler*, 457 U.S. at 216 n.14)).

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 apparent 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) This argument is simply contrary to established law affecting women, racial minorities and other suspect classes, and thus may readily be dismissed.

Indeed, 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

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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.

prohibiting discrimination against gays and lesbians).[31] And, although a domestic partnership 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 statewide legal protections for same-sex couples in New York. As noted above, this stands in sharp contrast to several other states, such as New Jersey, *see* N.J. Stat. Ann. 26:8A-1, California, *see* 2001 Cal. Legis. Serv. Ch. 893, Vermont, *see* 15 Vt. Stat. Ann. § 1204(a), and Hawaii, *see* Haw. Rev. Stat. § 572C.

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) It undoubtedly will do so again here. But these advances in certain contexts do nothing to detract from the conclusion that laws disadvantaging lesbians and gay men should be subjected to heightened scrutiny.[33] Indeed, today women and most racial, ethnic and religious minority groups are protected from

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[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). Although other cities soon passed their own versions of such statutes, *see Gaylaw* at 130, it took fifteen years for New York City to finally pass a law to protect lesbian and gay New Yorkers against sexual orientation discrimination in employment, housing and public accommodations. Indeed, the proposed legislation became the first bill in the history of the City Council to pass out of committee every year and not be passed, 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: 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*.

[33] In particular, the State may note the enactment last year of a statute affording same-sex couples certain hospital and nursing home visitation rights. *See* N.Y. Public Health L. § 280S-q (McKinney's 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 approximations — such as health care proxies — have either been misunderstood or disrespected in practice.

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 have universally been found to deserve 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 noted that such protections constitute strong evidence that the legislature has 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 be a suspect class, do not preclude strict scrutiny of classifications on the basis of sexual orientation.

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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.

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 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 passed in Colorado and Maine, as well as in Cincinnati and several municipalities in Oregon and California.[36] Some of these initiatives went well beyond repealing existing non-discrimination laws, and prohibited every branch of state and/or local government from adopting any form of civil rights protection for lesbians and gay men. For instance, the Maine legislature twice adopted anti-discrimination statutes protecting gay men and lesbians (not involving marriage rights at all), only for those statutes to be repealed by referendum in 1998 and 2000. Maine once again adopted such a statute — forbidding discrimination in employment, education, credit, housing and public accommodation — in March 2005, and it is widely expected to be challenged on the ballot in November.[37]

Moreover, referenda on state constitutional amendments have proliferated in response to the decision of the Massachusetts Supreme Judicial Court in *Goodridge* v. *Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). Thirteen state constitutional amendments prohibiting marriage for same-sex couples were placed on ballots in 2004 and

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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.

every one was ratified.[38] 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.[39] 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).

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.[40] 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."

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[37] *See* Jeff Tuttle, *Opposing Camps Gear Up For Fight Over Gay Rights*, Bangor Daily News, April 26, 2005, at A1.

[38] 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 one exception, these ballot measures gained the approval of more than 60% of voters, and six such measures were passed with more than 70% of the vote.

[39] *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.

[40] 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,*

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.").

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. The trial court mischaracterized the DRL when it concluded that it is not a classification of "gender per se, but rather of sexual orientation." (R. 61) And because the marriage laws do in fact contain a gender classification, the Court must subject them to heightened scrutiny to determine whether they satisfy the equal protection requirement of the New York State Constitution.

Put plainly, 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 trial court reasoned that because "both genders are equally free to marry and equally restricted," the failure to permit marriage for same-sex

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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

couples is not a classification based on gender. (R. 59) This misses the point entirely — appellants here seek the right to marry the person of their *choice*, and they are precluded from doing so if the person of their choice is of their same gender. They are not precluded from doing so if the person of their choice is 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 In re Coordination Proceeding re Marriage Cases*, No. 4365, 2005 WL 583129, at *9 (Cal. Super. Ct. Mar. 14, 2005); *Goodridge* v. *Department of Public 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. . . . ");[41] *Baker* v. *State*, 744 A.2d 864, 905-06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (same).

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* 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.

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[41] 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 re Coordination Proceeding re Marriage Cases, No. 4365, 2005 WL 583129, at *9. 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).

These decisions reflect the bedrock principle that constitutional rights are individual, not aggregate. As 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).

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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.[42] But in the court

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[42] Although "suspect classifications" are the most familiar trigger for "strict scrutiny" under the Equal Protection Clause, strict scrutiny also applies when a classification gives people different access to a fundamental right protected by the Constitution. *See Golden* v. *Clark*, 76 N.Y.2d 618, 623 (1990). Thus, where a classification burdens the exercise of a fundamental right for some, but not for others, the government must be able to show that the classification serves a compelling interest and is no more discriminatory than necessary to achieve that end. *See Zablocki*, 434 U.S. at 388 ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.") Whether the classification is drawn along "suspect" lines or not makes no difference to this part of the equal protection analysis. As we demonstrated above, the New York Constitution protects the

below, the State did not even try to assert that this exclusion satisfied any form of heightened scrutiny, nor could it. 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. DENYING SAME-SEX COUPLES THE EXPRESSIVE OPPORTUNITY INHERENT IN MARRIAGE VIOLATES THE FREE EXPRESSION PROTECTIONS IN THE NEW YORK CONSTITUTION

Although marriage is undoubtedly a creature of contract, it is also far more than that. It is a vehicle by which people can publicly proclaim their commitment and responsibilities toward one another. As such, marriage is an institution created by the state that, among other things, provides important and unique expressive opportunities. The State's restrictions on access to this expressive opportunity, however, cannot be reconciled with the protection of free expression in the New York Constitution, Art. I, § 8, which is even more protective than the federal Constitution. *O'Neill* v. *Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528 (1988) ("expansive language" of the New York Constitution, along with "its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States," call for particular vigilance in safeguarding Article I, Section 8 guarantees); *see also Arcara* v. *Cloud Books, Inc.*, 68 N.Y.2d 553, 557 (1986) (accord).

A. The Institution of Civil Marriage Provides an Important Expressive Opportunity

Civil marriage is a state-created institution with unique expressive import. David Cruz, "Just Don't Call it Marriage: The First Amendment and Marriage as An

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right to marry as an element of the larger sphere of personal autonomy guaranteed by the expansive provisions of the Due Process Clause, N.Y. Const. Art. I, § 6, and that right belongs to *everyone* who wishes to marry, including same-sex couples. Because the DRL provides same-sex couples with unequal access to that basic right (by excluding them altogether), it also triggers the strict scrutiny protections of the New York Constitution's Equal Protection Clause, Art. I, § 11. *See Golden,* 76 N.Y.2d at 623.

Expressive Resource," 74 *S. Cal. L. Rev.* 925, 933 (2001) ("Civil marriage is a unique expressive resource used by people to express themselves and to constitute their identities."). Specifically, 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 United States Supreme Court has agreed, recognizing that "an important and significant aspect" of marriage is that it provides the opportunity for "*expressions* of emotional support and public commitment." *Turner* v. *Safley*, 482 U.S. 78, 95, 96 (1987) (emphasis added).

Moreover, New York law fully recognizes that marriage serves an expressive purpose. The DRL states that "when a marriage is solemnized . . . the parties must solemnly declare . . . that they take each other as husband and wife." DRL § 12 (McKinney 2004). Such a declaration is, in and of itself, an expressive act. And, of course, most couples use the institution of marriage to engage in a public expression of commitment and love that extends well beyond that initial declaration.[43]

The fact that some couples choose to express this commitment through religious ceremonies as well does not undermine the fact that the civil institution of marriage carries secular expressive import. By accessing a state-sanctioned institution, the parties to a marriage are expressing their willingness to assume the obligations of committed partnership embodied in the laws of the State.

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[43] Moreover, for the many individuals who are unaffiliated with a religion, the choice is a civil marriage ceremony or none at all. Others may be affiliated with a religion that may not approve of same-sex marriage. For these people, civil marriage is the only way to express this level of commitment publicly.

B. The New York Constitution Requires the State to Grant Same-Sex Couples Equal Access to the Expressive Opportunities Presented by the Institution of Civil 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). In other words, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger* v. *Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Although marriage is of course not the same type of physical or geographic forum for expression as is a park or public sidewalk, the equal access principle of the public forum cases such as *Mosley* has been applied to other government-created expressive opportunities. In *Rosenberger*, the Supreme Court held that a state university's refusal to pay the costs of a student magazine with a Christian viewpoint, though it funded similar publications without a religious viewpoint, was impermissible viewpoint discrimination. In reaching this conclusion, the Court found that, although the student activities fund at issue was "a forum more in a metaphysical sense than in a spatial or geographic sense," "the same principles [that govern physical public fora] are applicable." *Id.* at 830.

While a state "may reserve [a designated] forum for its intended purposes, communicative or otherwise," it can do so only if "the regulation on speech is reasonable and not an effort to suppress expression *merely because public officials oppose the speaker's view*." *Perry Educ. Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) (emphasis added). *See also United States* v. *Kokinda*, 497 U.S. 720, 736 (1990) (viewpoint

discrimination involves the "inten[t] to discourage one viewpoint and advance another"); *Gay Activists Alliance* v. *Lomenzo,* 31 N.Y.2d 965 (1973) (per curiam) (Secretary of State acted arbitrarily in refusing to accept certificate of incorporation from gay rights organization); *Gay and Lesbian Students Ass'n* v. *Gohn*, 850 F.2d 362, 362 (8th Cir. 1988) (student senate's denial of funding to gay student organization violated First Amendment because "a public body that chooses to fund speech or expression must do so even-handedly"); *Gay Alliance of Students* v. *Matthews*, 544 F.2d 162 (4th Cir. 1976) (refusal of university to allow gay student organization to register violates First Amendment associational rights of organization members). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989).

Yet here, the government is selectively privileging heterosexual relationships by granting licenses to opposite-sex couples but denying them to same-sex couples, and it is doing so, at least in part, to deny same-sex couples the opportunity to give public expression to the desirability and validity of their relationships.

In sum, by granting civil marriage to heterosexual couples and by excluding same-sex couples, the State is providing differential access to the expressive opportunities presented by the institution of civil marriage. Regulating access to the expressive institution of marriage simply because some may disapprove of the message that same-sex couples communicate by marrying violates the most basic guarantee of free expression contained within the New York Constitution, Art. I, § 8, which is even more protective than the First Amendment to the U.S. Constitution. *O'Neill* v. *Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528 (1988) ("expansive language" of the New York Constitution, along with "its

formulation and adoption prior to the Supreme Court's application of the First Amendment to the States," call for particular vigilance in safeguarding Article I, Section 8 guarantees); *see also Arcara* v. *Cloud Books, Inc.*, 68 N.Y.2d 553, 557 (1986) (accord). Restricting the forum of civil marriage to opposite-sex couples, and thereby privileging the message that only heterosexual relationships are valid in the State's eyes, clearly violates Article I, § 8.

V. THE COURT SHOULD REMEDY THE CONSTITUTIONAL DEFECTS IN NEW YORK'S MARRIAGE LAW BY EXTENDING ITS COVERAGE TO SAME-SEX COUPLES

The only remedy to the constitutional infirmities in the DRL set forth above is to grant to same-sex couples the protections of civil marriage under New York law. Any suggestion by the State that the New York Constitution requires less — such as laws permitting only civil unions or domestic partnerships, but not marriage — should be rejected. Creating a separate status for a group of people when there is no legitimate reason for doing so is inherently unequal, and therefore unconstitutional.

A. Civil Marriage Is the Only Remedy That Can Cure These Defects in New York's Marriage Law

As the 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 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.[44]

This country's history of racial segregation provides the starkest example of how the government can further discrimination and bias through a court-sanctioned stamp of inequality. In *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), Justice Harlan passionately dissented from the Court's endorsement of "separate but equal" in the context of public accommodations on railroad coaches, recognizing that "separate but equal" accommodations "proceeded on the ground that [African Americans] are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.* at 560. As the Court later acknowledged when reversing *Plessy* in *Brown*, the guarantee of equal protection does not permit a state to justify discrimination against a particular group simply by claiming to provide "'equal' accommodations." *Id.* at 562.[45] The U.S. Supreme Court now also recognizes that rules and policies that relegate women to a separate sphere are likewise

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[44] *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").

[45] In *Brown* v. *Board of Education*, the Supreme Court recognized that establishing separate schools for black students "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone." 347 U.S. 483, 493-94 (1954). The recognition of this psychological harm is what led the Court to hold that "separate educational facilities are inherently unequal"– and thus unconstitutional — even when those schools had the same facilities and resources. *Id.*

discriminatory and serve to reinforce stereotypes that women are "innately inferior." *Hogan*, 458 U.S. at 725; *United States* v. *Virginia*, 518 U.S. 515, 547-48, 551-55 (1996)

Concern about the stigma of government discrimination also figured prominently in the 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 Massachusetts Supreme Judicial Court 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 Massachusetts 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, largely homosexual, couples to second-class status."

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at 495. *See also Watson* v. *Memphis*, 373 U.S. 526, 538 (1963) (the sufficiency of separate recreational facilities for African Americans "is beside the point; it is the segregation by race that is unconstitutional").

In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (internal citations omitted).[46]

This understanding that civil unions and domestic partnerships are not equal to civil marriage fully comports with the personal experiences of appellants. 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, which was hugely disappointing to us. . . . .") (R. 370) Similarly, appellant Alice Muniz explains that "[h]aving the title of domestic partners is fine, but only until we can be legally married will Oneida and I truly feel as though society has attached to our relationship the dignity that it deserves." (R. 335) And, as appellant Heather McDonnell so aptly explains of her experience with Carol Snyder, instead of legal documents like health care proxies and phrases like "partner" that are not familiar to many in society, "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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[46] Numerous 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 par. 156. The Court of Appeal for Ontario agreed, explaining that excluding gay couples from marriage "perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships." *Halpern* v. *Toronto*, 172 O.A.C. 276 (2003) at paras. 102-07.

B. This Court Must Cure These Constitutional Defects by Extending the Marriage Laws to Cover Same-Sex Couples

As shown above, the domestic relations laws are unconstitutionally underinclusive because they do not permit same-sex couples to marry. "[W]hen 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 (N.Y. 1984).

Here, the Court is presented with the question whether to strike down the marriage laws in their entirety or expand the reach of those laws to cover same-sex couples. Because the marriage statutes are of "the utmost importance" in allowing the State to create a legal institution in which the rights, privileges, and obligations of marriage are set forth, "to declare such statutes a nullity would have a disastrous effect." *Liberta,* 64 N.Y. 2d at 170. As the Massachusetts Supreme Judicial Court stated in *Goodridge*, "[e]liminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society." *Goodridge*, 440 Mass. at 342-43. Instead, the proper course is for the Court to hold that the marriage laws must be construed to offer the same rights and privileges to same-sex couples that they currently offer to opposite-sex couples.

The State has suggested that it is for the Legislature, and not the courts, to define the scope of the right to marry in New York. (R. 419) But the courts, not the Legislature, are charged with the responsibility of ensuring that the laws of the State of New York satisfy minimum constitutional safeguards. Importantly, "it bears emphasizing that '[it] is emphatically the province and duty of the judicial department to say what the law is." *Andersen* v. *Regan*, 53 N.Y.2d 356, 371 (Cooke, C.J., dissenting) (quoting *Marbury* v. *Madison*, 5 U.S. (Cranch) 137, 177 (1803). While the Legislature is, of course, authorized

to regulate marriage, it is for the judiciary to assure that the Legislature does not overstep its constitutional bounds and deny the right of marriage to certain classes of people without justification.

Conclusion

For all the foregoing reasons, we respectfully submit that this Court should reverse the judgment below, and remand this action with instructions to enter judgment for Plaintiffs-Appellants

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May 19, 2005

Respectfully submitted,

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