SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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,

v.

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

Defendants.

Index No. 1967-04

**MEMORANDUM OF LAW IN SUPPORT OF**
**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

PAUL, WEISS, RIFKIND WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 344-3005

Attorneys for Plaintiffs

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Plaintiffs respectfully submit this memorandum of law in support of their motion for summary judgment.

**Preliminary Statement**

Plaintiffs in this action are thirteen gay and lesbian couples who reflect the rich diversity of New York State. They 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 and a public school teacher; a nurse, a police officer, a lawyer. Some are retired, others are just beginning their careers. Plaintiffs 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. They are truly representative of the melting pot that historically has been and continues to be New York.

Plaintiffs' relationships – which range in duration from four to forty years – bear all the familiar hallmarks of committed adult family relationships. Several of the plaintiff couples have steadfastly nursed each other through critical illnesses, while several have shared the joys (and anguish) of childrearing. Yet another couple looks forward to starting a family in just a few months. Many of them own homes together. One started and ran a small business together. And all of them love one another, and look forward to spending the rest of their lives together. In other words, these couples are in every practical sense identical to the countless opposite-sex married couples that we all know as our neighbors, co-workers, friends and family.

Unfortunately, however, the legal status afforded these thirteen same-sex couples, and thousands more like them across the State, differs dramatically from that of heterosexual married couples. Despite the fact that these thirteen gay and lesbian couples

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

The consequences of that exclusion are profound and reach into nearly all important aspects of these plaintiffs' lives. Several of the plaintiffs, for example, have been separated from their partners during times of medical crisis; others have fears that such traumatic events will take place as they get older. Unlike married couples, none of these plaintiffs take healthcare benefits for granted — some of them cannot obtain health insurance through their partner's employer and simply go without coverage in circumstances under which joint coverage would automatically be available if they were married. Others have responded to the problem by making sacrifices in their careers; one of the plaintiffs had to quit a job she had held for 17 years in order to get coverage for her partner, who was seriously ill, through a different employer.

In addition, because they cannot marry, many of the plaintiff couples have been forced to establish elaborate legal protections for their relationships in an attempt to approximate marriage. Those arrangements are cumbersome and expensive. Even worse, they leave the plaintiffs with a well-founded fear that the protections they have tried to put in place are not complete and may not work when tested in times of crisis.

There is at least one desire that all of these plaintiffs have in common – 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 vehicle that provides the structure and the vocabulary for committed adult relationships such as these. But these plaintiffs are unable to obtain the benefits – both dignitary and practical – that flow from civil marriage, solely because they are

couples of the same sex. That deprivation violates the Constitution of this State in several ways.

First, and most obviously, the denial of civil marriage to these plaintiffs discriminates against them on the basis of their sexual orientation and gender. Under well-established principles of equal protection jurisprudence, lesbians and gay men, like women, constitute a protected class. In other words, because classifications based on gender and sexual orientation are so rarely related to individual merit, and because there exists a history of discrimination based on gender and sexual orientation, they are scrutinized by the courts with special care. Under such a heightened standard of review, prohibiting same-sex couples from marrying in this State may pass constitutional muster only if it is "substantially related to the achievement of an important governmental objective." *People* v. *Liberta*, 64. N.Y.2d 152, 168 (1984).

In addition, 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. Over time, the courts have recognized that decisions related to 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 Relactions Law ("DRL"), denies access to it entirely, is unconstitutional unless it advances a "compelling state interest." *In re K.L,* 774 N.Y.S.2d 472, 477 (2004).

But far from being able to meet these "strict scrutiny" standards, the State cannot offer a legitimate, rational justification for the exclusion of gay men and lesbians

from civil marriage under even the lowest standard of "rational basis" review. None of the justifications that the State may proffer supports excluding same-sex couples from marriage. To say that such discrimination is "traditional," or that "others states do it too" is simply to say that our State has discriminated for a long time, or that other states have done so as well. Neither is a neutral explanation of why such discrimination is legitimate government activity. Nor is a desire to encourage people to procreate or to give children the security of marriage a legitimate reason for excluding same-sex couples from civil marriage. Not in any scheme of things is it rational to think that excluding gay people from marriage will encourage procreation or increase the security of children.

Indeed, the myriad 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 thus is not a proper governmental objective, much less an important or compelling one. New York's history as a home to gay men and lesbians from across the nation demonstrates that this State has a distinct interest in enforcing the equal protection and due process guarantees of the New York Constitution particularly vigorously in the face of a past history of discrimination, as well as a strong tradition of respect for personal autonomy and freedom in this State.

Finally, marriage is also a unique form of personal expression through which each member of a committed couple can express publicly the integrity and depth of the commitment one has for the other. Because the DRL prohibits plaintiffs, all of whom seek to express their commitment to one another through marriage, from doing so, the statute impermissibly burdens their rights guaranteed by the Free Expression Clause

of the New York Constitution as well. The DRL's prohibition of same-sex marriage is constitutionally deficient in particular because marriage itself is a State-created form of speech that is impermissibly made available to some groups, but not others.

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

**Background**

The institution of marriage brings enormous private, social and economic advantages to those who seek its protection. Marriage, after all, is the universally recognized social structure for two people who have committed to build a life together. At heart, it is both a personal and a very public commitment of two people to each other. 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 her or his spouse who is usually best suited above all, even above parents and siblings, to know how he or she would choose to act. 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 adult's life is his or her spouse. In short, the protections that marriage brings touch nearly every aspect of life and death.

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

plaintiffs in this action seek to secure for themselves those social benefits and legal rights that come with civil marriage.

**Healthcare Benefits**

For example, marriage typically provides a couple with a number of health and medical benefits; for instance, it is common practice of employers to make insurance available to the spouses of 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. *See also* Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 95-588, § 302, 92 Stat. 2497, 2508 (1978) (providing access to veterans' spousal benefits and preferences). Health insurance, including the opportunity to share in the medical policy of a spouse, is one of the issues that is of particular concern to the plaintiffs who very much worry about their ability to take care of each other. For many in New York, the inability to qualify as a family for health insurance is more than an inconvenience.

Plaintiff Kathleen Tuggle, for example, who works as a nurse in a chemical plant, already pays extra for "family health insurance coverage" for Sean, the eight year old son who she and her partner Tonja Alvis are raising together. (Tuggle Aff. ¶¶ 3, 8) 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 becomes 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, plaintiff 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. (Bink Aff. ¶ 7) 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. (*Id.* ¶¶ 4-5) But when Ann was diagnosed with breast cancer two years ago, Cynthia and Ann became concerned that Ann would not be able to continue the work that enabled her to afford health insurance. (*Id.* ¶6) After Cynthia had switched jobs, however, she and Ann realized that the coverage afforded by Cynthia's new plan, which now covered both of them, was inferior to their previous coverage. (*Id.* ¶9) Among other things, the new insurance plan provides access to fewer doctors and medical resources. 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**

Plaintiffs in this lawsuit also care deeply about the right to make medical decisions for each another. Under the law of this State, a married person is entitled to an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy. *See* N.Y. Comp. Codes R. & Regs., tit. 14, Part 27. Plaintiffs Ellen Dreher and Laura Collins, who have been together for more than 30 years, are concerned about whether they will be able to make medical decisions for each other should an emergency occur. (Dreher Aff., ¶ 11) Because Ellen is 68 and Laura is 60, these are very real concerns. (*Id.*) As Ellen explains, "Laura is the person who knows me best and whom I trust more than anybody

else, and she feels the same way about me." (*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 lives of other plaintiffs show, their fears are well founded.

When plaintiff Sylvia Samuels was injured in a bicycle accident that rendered her unconscious, her partner Diane Gallagher rushed to the emergency room, understandably frightened and concerned. The hospital staff, however, refused to let Diane in to 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. (Samuels Aff. ¶ 4) Because Sylvia has Hepatitis C, a life-threatening illness, they know that in the coming years, they'll spend much of their time in hospitals and clinics, and that they can never assume that medical staff will understand or respect their relationship. (*Id.* ¶ 3)

When plaintiff 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 just 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. (O'Donnell Aff. ¶ 15)

Perhaps the most troubling story of all is that of plaintiffs Carol Snyder and Heather McDonnell. When Carol Snyder was diagnosed with breast cancer 11 years

ago, she and her partner Heather McDonnell tried to head off any problems with recognition of their relationship by finding a "gay friendly" surgeon. (McDonnell Aff. ¶ 8) 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 at times when a spouse would have been permitted to stay in the room to provide vital comfort and assurance. (*Id.*) After this experience, they went to a lawyer and signed health care proxies. (*Id.* ¶ 11) But when Carol later had an emergency cardiac event, hospital staff once again tried to separate them and at one critical moment demanded to inspect their "papers." (*Id.* ¶ 12) At another point only last year, medical staff demanded that the couples' daughters be contacted with respect to a critical medical decision because only Carol's children would be recognized by the hospital as her "next of kin." (*Id.* ¶¶ 12-13)

**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 matter of great concern to the plaintiffs here as well.

For instance, Paul Muhonen's parents, who reside in Florida, are very sick. (Hahn Aff. ¶ 9) 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 he 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 Michael's spouse. (*Id.*)

**Children**

In addition, certain protections tied to marriage concern children. When a married couple has children, those children receive the social and legal protections of marriage, such as the presumptions of legitimacy and parentage, *see* NY Jur. 2d § 345, as well as numerous parental obligations and rights, *see generally* N.Y. Soc. Serv. L. (McKinney 2004). Furthermore, marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based state and federal programs that come with the presumptions of parentage.

Those concerns are very real for these plaintiffs. For example, Amy Tripi is currently seven months pregnant with their first child, whom she plans on raising jointly with her partner Jeanne Vitale. (Tripi Aff. ¶ 5) After the baby is born, 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. (*Id.* ¶ 9) 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.* ¶¶ 9-10)

**Property and Financial Issues**

Marriage confers a number of property rights, including entitlement to a marital tax deduction. *See* N.Y. Tax Law § 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*, 645 N.Y.S. 2d 269 (Sup. Ct. 1996); *Kozyra* v. *Goldstein*, 550 N.Y.S.2d 229 (Sup. Ct. 1989).

Plaintiffs in this case 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. (Cicchetti Aff. ¶¶ 2-3) But when they applied for a loan, the Farmers Home Administration said that they could not apply as a couple. (*Id.* ¶ 4) Instead, they put Susan's name alone on the deed so they would qualify, yet wound up with a loan which 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. (*Id.*)

**Survivorship and Inheritance**

Upon the death of a spouse, marriage confers a variety of important financial benefits on the surviving spouse. These include the automatic right to inherit the property of a deceased spouse who does not leave a will, *see* N.Y. Est. Powers & Trusts L.§ 4-1.1 (McKinney 2004); the right to exempt certain assets from the estate of the deceased spouse, *see id.* § 5-3.1; entitlement to decedent's bank accounts, etc., *see*

N.Y. Surr. Ct. Proc. Act § 1310 (McKinney 2004); the right to administer the estate of a deceased spouse who dies intestate, *see* N.Y. Surr. Ct. Proc. Act § 1001(1) (McKinney 2004); the right to interment in the lot or tomb owned by one's deceased spouse, *see* NY Gen. Mun L. § 163 (McKinney 2004); and the right to possess the body of a deceased spouse, make funeral arrangements, etc., *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).

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).

These rights matter to the plaintiff couples as well. For example, plaintiffs 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. (Wessel Aff. ¶¶ 5-9) 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." (*Id.* ¶ 9) Although John and Billy have named each other the exclusive beneficiaries of each other's will, (*id.* ¶ 11), they will be subject to substantially higher inheritance taxes than if they were married. *See* N.Y. Tax L. § 601 (McKinney 2004).

* * *

In addition to these and other tangible financial, social and legal benefits,[1] marriage also confers on its participants numerous intangible benefits. Equally as important as any of the benefits described above, denying two people in a loving, committed relationship the right to marry one another denies that couple the opportunity to express their commitment in the most serious way that society provides — to be able to call one's partner "my spouse." The prohibition of same-sex couples from marrying denies them the opportunity to enter into a relationship that is universally respected and recognized as a symbol of their love and commitment. Being excluded from this institution thus brands same-sex couples as inferior and unworthy.

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[1] 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, *see* Parental Kidnapping Prevention Act of 1980, Pub.L. 96-611, 94 Stat. 3568, 96th Cong.2d Sess. (1980); DRL § 369. Although none of the plaintiff couples currently contemplate separation (indeed, they seek just the contrary), life, as we all know, is impossible to predict, and there is no good reason why a same-sex couple who has pooled their assets for many years should not be afforded these protections as well.

## Argument

## I.

## HEIGHTENED SCRUTINY APPLIES TO THE DRL'S EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE BECAUSE IT DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION AND GENDER AND DEPRIVES ONE GROUP OF NEW YORKERS OF THE FUNDAMENTAL RIGHT TO MARRY

New York's DRL unquestionably creates a classification of the State's citizens on the basis of sexual orientation. Quite simply, gay and lesbian couples in committed relationships of mutual support and protection in New York are not permitted to marry, while heterosexual couples in relationships of equal commitment are permitted to do so. The DRL also creates a classification based on gender because it permits two individuals of the opposite sex to marry, but does not permit two individuals of the same sex to marry. Because these obvious and facial classifications involve suspect classes, the marriage provisions of the DRL should be reviewed under New York's equal protection clause with heightened scrutiny.

In addition, the exclusion of same-sex couples from marriage requires heightened scrutiny from this Court because that exclusion is a classification that burdens a fundamental right protected by the Due Process Clause of the New York Constitution. That is, because New York has excluded a group of people from the right to marry — a right that is part of a larger sphere of personal autonomy guaranteed by the Due Process Clause of the New York Constitution. That unequal access to a fundamental right must be rigorously reviewed by the courts.

### A. Heightened Scrutiny Applies To Classifications Based on Sexual Orientation

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 principles developed both by the New York and federal courts, to which the New York courts look when interpreting Article I, § 11, *see Dorsey* v *Stuyvesant Town Corp.*, 299 N.Y. 512, 530-31 (1949), make it clear that sexual orientation classifications should receive the strictest scrutiny under the Equal Protection Clause.[2]

The basic command of equal protection is that the State must give the same treatment to all who are similarly situated in terms of a law's purpose. And, as the State will undoubtedly emphasize here, courts are generally very deferential to legislative decisions about whether two groups of people are similarly situated. 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*, 624 N.Y.S.2d 446, 447 (2d Dep't 1995) (upholding economic regulations).

But courts review some classifications not with deference, but with suspicion. 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 the those in the burdened class are not as "worthy or deserving as others." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Frontiero v. Richardson* 411 U.S. 677 (1973). In the

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[2] "Federal cases, including Supreme Court cases. . . can act as a source of guidance for State courts in formulating State law." *Immuno AG* v. *Moor-Janowski*, 77 N.Y. 2d 235, 251 (1991). Accordingly, although we contend that the DRL violates the Equal Protection, Due Process and Free Expression Clauses of the New York Constitution, Art. I, §§ 6, 8, 11, it is appropriate to look to precedents of the United States Supreme Court for guidance, even though the analogous provisions of the U.S. Constitution offer less expansive protections than those of the New York Constitution.

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

> [A] suspect class is one "saddled with such disabilities, or 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)).[3]

Where a court has reason to "suspect" that the government has frequently disadvantaged a group of citizens not because of fair distinctions but out of 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 it. Indeed, this is necessary to ensure that the equal protection cause serve its

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[3] The United States Supreme Court 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 Cleburne,* 473 U.S. at 440; *Brown*, 89 N.Y.2d at 190. 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,* at 440-41. However, the Supreme Court appears to be moving away from this three-tiered framework, 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.

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).

The courts have used several factors to identify classifications about which they ought to be skeptical. First, they look to see if society has a history of subjecting the group to purposeful unequal treatment, or saddling it with disabilities 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, they look to see if the trait used to define the class 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 686-687. Finally, they look to see whether the group is nonetheless generally able to protect itself without the courts through the political process. *See Cleburne*, 473 U.S. at 441; *Frontiero*, 411 U.S. at 686 n.14.[4]

For the reasons discussed below, lesbians and gay men have all of the traditional indicia of a suspect class and therefore the courts have every reason to be suspicious when the state disadvantages them. Although, as the State will undoubtedly point out, courts have declined to recognize sexual orientation as a suspect classification in the past,[5] those decisions are all grounded squarely in the Supreme Court's decision in

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[4] Instead of specifying a rigid checklist, the Supreme Court has identified "several formulations" that "might explain [its] treatment of certain classifications as 'suspect.'" *Plyler*, 457 U.S. at 217 n.14.

[5] *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"); *Baker* v. *Vermont*, 744 A.2d 864, 878

*Bowers* v. *Hardwick*, 478 U.S. 186 (1986), which has been resoundingly rejected by the Court. "*Bowers* was not correct when it was decided and it is not correct today. It ought not to remain binding precedent." *Lawrence* v. *Texas*, 123 S.Ct. 2472, 2484 (2003). The Supreme Court's decisive and historic overruling of *Bowers* last year thus negates the precedential value of the prior case law indicating that sexual orientation is not a suspect class.

### 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.[6] Although the forms of this discrimination have changed over time, group-based animosity toward lesbians and gay men in New York has remained constant.[7] Because of this distinctive history both in New York and across the nation, the Equal Protection Clause of the New York Constitution requires heightened scrutiny for classifications based on sexual orientation.

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n.10 (Vt. 1999) (relying on cases from the U.S. Courts of Appeals which, in turn, rely on *Bowers*, to support the proposition that the "overwhelming majority" of courts have refused to treat homosexuality as a suspect classification) (citing, inter alia, *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Equality Found.*, 128 F.3d at 292-93; *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990)); *Lewis* v. *Harris*, No. MER-L-15-03, 2003 WL 23191114 at *7 (N.J. Super. Ct.).

6 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.

7 Every court to have addressed the question has concluded that gay men and lesbians have been subject to a history of discrimination. *See, e.g., High Tech Gays*, 895 F.2d at 573; *Ben Shalom* 881 F. 2d at 465, *cert. denied*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987); *see also Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari;* joined by Marshall, J.).

The New York State Legislature itself recognized this record of discrimination in passing the Sexual Orientation Non-Discrimination Act ("SONDA") two years ago, *see* 2002 N.Y. Laws ch. 2; N.Y. Exec. Law §§ 291–296 (McKinney 2004); N.Y. Civ. Rights Law § 40-c (McKinney 2004); N.Y. Educ. Law § 313 (McKinney 2004):

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

2002 N.Y. Laws ch. 2, § 1.

The passage of SONDA in 2002 was an attempt to prohibit discrimination that had been ongoing in this State for more than a century. At least as early as the late nineteenth century, the laws were used to aggressively regulate homosexual identity and activity. *See* William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 26-31 (1999) (hereinafter "*Gaylaw*"). An 1882 New York City law that empowered magistrates to punish "disorderly conduct" as a criminal offense, Consolidation Act §1459, for example, was widely used to police gay men. *See Gaylaw* at 31. Many of the arrests made under this law were orchestrated not by police authorities, but by the New York Society for the Suppression of Vice, a citizen group founded by the "moral" crusader Anthony Comstock. *See id.* at 30; *see also Encyclopedia Britannica* v. 3, at 509 (15th ed. 1992). After that statute's punitive scope limited in 1922, *see People ex rel. Potter v. Bd. of Managers*, 196 N.Y.S. 887 (Spec. Term 1922), a coalition of citizen groups and prosecutors swiftly obtained passage of a revised, broader disorderly conduct

law that made it illegal to loiter "for the purpose of committing a crime against nature or other lewdness." 1923 N.Y. Laws ch. 642; *see also Gaylaw* at 30.

In the area of popular culture, statutes and regulations were passed to censor novels, plays or films with gay or lesbian characters or discussions of homosexuality. For instance, in 1929, a New York City judge held that possession of Radclyffe Hall's novel *The Well of Loneliness* violated New York's criminal obscenity statute. *See People v. Friede*, 233 N.Y.S. 565 (Mag. Ct. 1929). In reaching that result, the court noted that:

> The characters in the book who indulge in these vices are described in attractive terms, and it is maintained throughout that they be accepted on the same plane as persons normally constituted, and that their perverse and inverted love is as worthy as the affection between normal beings . . . . The book can have no moral value since it seeks to justify the right of a pervert to prey upon normal members of a community and to uphold such relationships as noble and lofty.

*Id.* at 567. In the theater, the backlash started even earlier, after the appearance of a lesbian love scene on Broadway in 1923 and Mae West's threat to stage a farce about transvestites called "The Drag." *See Gaylaw* at 33. As a result, a state statute prohibiting the representation or discussion of homosexuality (referred to as "sex degeneracy or sex perversion") on the stage was passed in 1927. *See* 1927 N.Y. Laws Ch. 690, *codified at* N.Y. Penal Law § 1140a(2).

Until as late as the 1970's,[8] being gay was considered to be a mental disorder by medical professionals. In the nineteenth century, doctors began to diagnose same-sex sexual conduct and desires as evidence of a pathological condition, and first

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[8] It was not until 1973 that the American Psychiatric Association removed homosexuality's classification as a mental illness. *See* Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* 40 (1981)

affixed the label "homosexual," "sexual degenerate," or "sexual invert" to people who engaged in such conduct. By the early twentieth century, most medical researchers believed that same-sex sexual conduct was based on a mental disorder that required medical treatment, which included electric shock, drug treatment, aversion therapy, and even lobotomy. *See* 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).

With the increased size and visibility of the gay community after World War II came the "criminalization" of homosexuality. During the 1950s, most gay bars remained in operation only a short time before being closed by the police or the State Liquor Authority, which prohibited bars and restaurants from serving homosexuals. *See Lynch's Builders Rest.* v. *O'Connell*, 103 N.E.2d 531 (N.Y. 1952).

During the same period, national magazines and local papers campaigned against "sexual deviants," claiming that lesbians and gay men threatened the nation's children and urged that they be incarcerated or put under police surveillance. These stories fomented demonic stereotypes of lesbians, gay men, and bisexuals that were then used to justify draconian legislation. *See, e.g.*, George Chauncey, *The Postwar Sex Crime Panic,* in *True Stories from the American Past* (William Graebner, ed., 1993) [hereinafter *Postwar*]. The threats of arrest, public disclosure and constant harassment faced by lesbians and gay men forced many to go underground. Local newspapers often published the names and addresses of men and women arrested on charges relating to their sexual orientation; many of those arrested lost their employment and housing and were subjected to other forms of harassment as a result. *See id.*

Public employees were particularly targeted for anti-gay persecution, as "witch hunts" at every level of government became common. *See Gaylaw* at 67. In 1950, following Senator Joseph McCarthy's denunciation of the employment of gay people in the State Department, the Senate conducted a special investigation into the employment of gay people and "other sex perverts" in government. The Senate investigation report concluded that gay men and lesbians were "outcasts," unsuitable for government service, and recommended that they be excluded from all federal employment. *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, in 1953, President Eisenhower issued an executive order 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* at 70; David Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, Washington History, Fall/Winter 1994-95 at 44-63.

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. Discrimination remains a reality today for many lesbians and gay men in New York City and throughout New York State. 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 (LGBT) violence reported in New York State in 2003, an unprecedented 26% increase over the previous year. *See* National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2003*, at 57 (2004). Astonishingly, this number includes 10 anti-LGBT murders. *See id.*

In addition, lesbian and gay youth face intolerance in schools. A 2003 study revealed that 90% of LGBT youth reported that they either frequently or often hear homophobic remarks in school.[9] Almost 20% of students reported hearing homophobic remarks from faculty or school staff. *See* Kosciw at 6. 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).

In sum, gay men and lesbians face discrimination in education,[10] medical and mental health care,[11] in their gathering places,[12] and on the streets.[13] Gay and lesbian

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[9] *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) (hereinafter "Kosciw").

[10] *See* Kosciw at 15 (84% of LGBT youth in national survey report sexual-orientation-based verbal harassment, 39% report physical harassment).

New Yorkers also experience discrimination – both overt and covert – in their attempts to acquire housing as well as in the workplace. *See, e.g., 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); *119-121 E. 97th St. Corp.*, 642 N.Y.S.2d at 640 (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").[14] S*ee 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 demonstrates why sexual orientation is the paradigmatic example of 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 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.").

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[11] *See, e.g.*, Martin Duberman, *Cures* (1991) (memoir of conversion therapy).

[12] *See* William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 80 (1999).

[13] *See* National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2003*, at 57 (2004).

[14] Of course, employment discrimination against gays and lesbians is not limited to New York State. *See, e.g, DeSantis v. Pacific Tel.*, 608 F.2d 327 (9th Cir. 1979) (California telephone company discriminated against lesbian and gay operators); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (lesbian high school coach in Utah fired from job because of her sexual orientation); *Miguel v. Guess,* 51 P.3d 89 (Wash. App. 2002).

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

Clearly, being lesbian or gay bears no relation to an individual's ability to perform in or contribute to society. Accordingly, an individual's sexual orientation should play little or no role in government decisionmaking, and this Court should view classifications based on sexual orientation with great skepticism.

The Supreme Court explained in *Frontiero* that government classifications based on sex should receive heightened scrutiny in part because of the irrelevance of an individual's sex to his or her ability to contribute to society:

> [W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the 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.

*Frontiero*, 411 U.S. at 686-87. The same holds true of sexual orientation.

Various myths about sexual orientation have long prevailed in our society and have contributed greatly to the invidious discrimination that lesbians and gay men experience. These myths link homosexuality with mental illness, child molestation and a compulsive interest in sex, rather than loving, family-centered relationships. The evidence disputing these pernicious stereotypes is overwhelming. In point of fact, both the American Psychiatric Association and the American Psychological Association have

adopted resolutions stating that homosexuality is not correlated with any "impairment in judgment, stability, reliability or general social and vocational capabilities."[15]

The State of New York, through a number of its policies, has conclusively demonstrated 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 individual 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).[16]

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

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[15] *See* American Psychiatric Association, *Fact Sheet: Homosexual and Bisexual Issues* (February 2000), *available at* http://www.psych.org/news_stand/homosexual12.pdf; Bayer, *supra*.

[16] There exists no evidence that being raised by a gay or lesbian parent has any negative effect on a child's healthy development. To the contrary, the scientific research uniformly shows that children who have lesbian or gay parents are no different from other children with respect to their healthy development. *See, e.g.,* Judith Stacey and Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 161 (2001) (surveying the research); Child Welfare League of America, CWLA Standards Regarding Sexual Orientation of Applicants, and CWLA Policy Regarding Adoption by Lesbian and Gay Individuals, available in Ann Sullivan (ed.), *Issues in Gay and Lesbian Adoption: Proceedings of the Fourth Annual Pierce-Warwick Adoption Symposium* (1995); Ellen C. Perrin, M.D. and the Committee on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *Policy Statement: Coparent or Second Parent Adoption by Same Sex Parents*, 109 Pediatrics 339, 339 (Feb. 2002).

education, the use of places of public accommodation, and the use and enjoyment of housing and commercial space, *see id.* § 291(b).

Moreover, the idea that being lesbian or gay is only about sex, whereas being heterosexual is a much more multi-faceted identity, stems from erroneous prejudice, not from any true difference between lesbians and gay men, on the one hand, and heterosexuals, on the other. Most gay people, like most heterosexuals, desire stable, loving relationships. In a 2000 survey, 74% of lesbians and gay men said they would get legally married if they could, and more than one quarter were living with a partner as if they were married.[17]

In sum, sexual orientation has no bearing on a person's ability to perform in or contribute to society, and sexual orientation is not an accurate or appropriate proxy for anything else.[18] Therefore, "discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'" *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (*quoting Plyler*, 457 U.S. at 216 n. 14)).

### 3. Lesbians and Gay Men, As a Group, Are Disadvantaged in the Political Process

Applying the third and final factor that the courts look to when determining if a group constitutes a suspect class, it is apparent that gays and lesbians

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[17] The Kaiser Family Foundation, *Inside-OUT:A Report On The Experiences Of Lesbians, Gays And Bisexuals In America And The Public's Views On Issues And Policies Related To Sexual Orientation* (Nov. 2001), available at www.kff.org/content/2001/3193/LGBSurveyReport.pdf (hereinafter "KFF Survey") at 4.

[18] This fact distinguishes sexual orientation from certain classes deemed non-suspect by the courts. *See, e.g., Cleburne*, 473 U.S. at 442 (mentally retarded not suspect class because, *inter alia*, they "have a reduced ability to cope with and function in the everyday world"); *see also Murgia*, 427 U.S. at 313 (individuals 50 or older not suspect class because, *inter alia*, they "have not...been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.").

face significant obstacles in the political process, and thus represent precisely the type of minority group that the Equal Protection Clause of the New York Constitution is designed to protect. *See Cleburne*, 473 U.S. at 441; *Plyler*, 457 U.S. at 216 n.14.

In a rational response to the history of irrational homophobia, many gay men and lesbians attempt to conceal their sexual orientation in a variety of contexts in order to avoid stigma, discrimination and violence.[19] Accordingly, as Justices Brennan and Marshall observed, "[b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari;* joined by Marshall, J.); *see also* Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 97-98 n. 51 (1991) (noting that "a minority . . . can sometimes only engage in the political process by identifying itself in ways that are physically or economically dangerous for it. The position of homosexuals in many parts of the country and that of blacks in the South for many years are obvious examples.").

Moreover, lesbians and gay men are woefully underrepresented in this country's political branches. A comparison to the situation of women in 1973, when the Supreme Court first found gender classifications to warrant heightened scrutiny, is particularly instructive here. The plurality in *Frontiero v. Richardson*, 411 U.S. 677, 686 n. 17 (1973), premised its conclusion that "classifications based upon sex . . . are

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[19] 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* KFF Survey at 2.

inherently suspect" on the fact that women were "vastly underrepresented." At the time, as the *Frontiero* plurality noted, there had never been a woman president, there had never been a woman on the United States Supreme Court, there was not a woman in the United States Senate (although there had been in the past), and there were only 14 women in the House of Representatives.

If women were *under*represented in 1973, lesbians and gay men are virtually *un*represented in 2004. There have been no known lesbians or gay men on the Supreme Court; and the first and only openly gay jurist to sit on the bench in *any* federal courthouse was appointed in 1994 to sit on a district court.[20] There has never been an openly gay president or member of the Senate. Today, more than half (26) of the state legislatures lack an openly gay or lesbian member.[21] The only one of the elected offices mentioned in *Frontiero* that has ever been held by an openly gay person is that of member of the House, where only 5 have ever served, and only three currently serve — none representing New York.

The state of affairs is no different in New York, where there has been no gay or lesbian person elected as Governor or to any other statewide office. There has been just one openly gay New York State Senator in the State's history, who was elected in 1998.[22] And, there have been just two openly gay members of the Assembly — the

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[20] *See* Frances A. McMorris, *Judge Batts is Bringing Diversity in New Way to Federal Bench*, Wall St. J., Sept. 13, 1994, at B16 (noting that United States District Judge Deborah Batts was the "first publicly acknowledged homosexual" to serve as a federal judge.)

[21] *See* Out and Elected Officials Nationwide, available at http://www.victoryinstitute.org/outofficials/stateofficials/?cState=All.

[22] *See* Home Page of Senator Thomas K. Duane, *available at* http://www.senate.state.ny.us/Docs/members/Duane.html; O'Donnell Aff. ¶ 9.

first of whom was elected in 1990, and the second of whom, Daniel O'Donnell, was elected two years ago and is a plaintiff in this action. *See* O'Donnell Aff., ¶ 9. Notably, no major city in New York has elected a gay or lesbian mayor, nor has an openly gay or lesbian person served on the Appellate Division or the Court of Appeals.

Indeed, the pronounced lack of political power of gays and lesbians in New York is perhaps best demonstrated by the fact that SONDA was not passed until 2002, although it was first introduced thirty-one years earlier in 1971, only to languish in the legislature.[23] Even in New York City, where the largest concentration of gays and lesbians in the nation reside, it took 15 years to get a civil rights statute protecting gays and lesbians through the City Council. *See Under* 21 v. *City of New York*, 65 N.Y.2d 344, 356 (1985) (discussing failure to pass legislation prohibiting discrimination against gays and lesbians).[24] And, although a domestic partnership statute exists in New York City and other municipalities throughout the State, including the cities of Albany, Ithaca and Rochester, as well as Westchester County,[25] unlike in several other states, such as

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

[24] 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).

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

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, there are still no statewide legal protections for same-sex couples in New York.

Not only are openly gay office holders virtually absent from the critical decisionmaking bodies that make, interpret and enforce laws that affect them, but they also are notoriously shunned by other constituencies. Non-gay individuals may avoid forming visible alliances with gay people – or even voting for legislation protecting the rights of lesbians and gay men – for fear of being perceived as homosexual. *See* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 U.C.L.A. L. Rev. 915, 973 (1989) ("These legal and social prohibitions hobble everyone's discourse about gay rights, producing a process failure of constitutional magnitude."). This poses a particular problem for political organizers who "somehow . . . must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may involve." Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 731 (1985).

And, despite the State's arguments to the contrary (*Shields* Br. at 20-21),[26] the recent passage of SONDA, and the existence of legislation in some local jurisdictions

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[26] In another challenge to the DRL's exclusion of same-sex couples from marriage raising some of the same claims asserted in this action, the State recently filed a lengthy memorandum of law attempting to justify the exclusion of same-sex couples from civil marriage. *See* Memorandum of Law in Support of the Answer of the New York State Department of Health, filed in *Shields, et al.* v. *Madigan, et al.*, No. 1458-04 (N.Y. Sup. Ct., Rockland Cty), dated May 24, 2004, at 23-26. Given the relevance of those arguments here, we respectfully reference the positions articulated by the State in that brief here, (hereinafter "*Shields* Br."), which is annexed to the Declaration of Roberta A. Kaplan, dated June 29, 2004.

protecting against sexual orientation discrimination in certain contexts does not mean that laws disadvantaging lesbians and gay men should not be subjected to strict scrutiny. Indeed, today women and most racial, ethnic and religious minority groups are protected from discrimination through state and federal laws. *See, e.g.,* N.Y. Exec. L. § 290 *et seq.*; 42 U.S.C. § 2000e. The existence of such protections does not alter the equal protection analysis.

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* Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963 and other federal laws prohibiting sex discrimination were passed. *See, e.g., Frontiero*, 411 U.S. at 687-88 (plurality opinion). 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, 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).[27] It follows, then, that the far more limited protections for lesbians and gay men that now exist do not preclude strict scrutiny of classifications on the basis of sexual orientation.

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[27] In sharp contrast to these protections, no federal law expressly prohibits employment discrimination 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.

Even worse, 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.[28] 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.[29] Some of these initiatives went well beyond repealing existing non-discrimination laws, and prohibited every branch of state and local government from adopting any form of civil rights protection for lesbians and gay men. Moreover, in Hawaii, Alaska and Nebraska, voters by referenda enacted state constitutional amendments precluding judicial review of discrimination in marriage against lesbians and gay men.[30] This extraordinary use of the political process to strip the government of the power to protect an unpopular minority mirrors the backlash against the civil rights laws of the 1960s, which took the form of state constitutional amendments that prohibited, or created barriers to the enactment of, laws barring racial discrimination in housing. *See Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969).

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28 *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.

29 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.

30 *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.

New York is no exception. Indeed, plaintiff Daniel O'Donnell, who serves as a New York State Assemblymember, attests to the fact that he has encountered animus towards lesbians and gay men even in the halls of the State Capitol. Not only did the State question O'Donnell's naming of his partner, John Banta, as the beneficiary of his life insurance and retirement funds (O'Donnell Aff., ¶ 12), but he has been forced to respond to extremely hostile views about homosexuals expressed on the floor of the Assembly. (*Id.* ¶ 10).[31]

As a result of the foregoing, as Justices Brennan and Marshall concluded, lesbians and gay men "are particularly powerless to pursue their rights openly in the political arena." *Rowland*, 470 U.S. at 1014. In short, the inability of gays and lesbians to pursue their constitutional rights in the political process demands judicial intervention to enforce the bedrock guarantees of Article I, § 11.

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

New York State's domestic relations laws also classify individuals on the basis of gender. Because the marriage laws 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.

New York's marriage laws explicitly classify individuals on the basis of gender. They permit two individuals of the opposite sex to marry, but do not permit two

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[31] Consider the following statement made on the floor of the Assembly last June: "There are men who I respect who are homosexual, and in my rural upstate district, I live in the zip code that is most friendly to homosexuals. In fact, a block away from my house is a wonderful restaurant, my mother's favorite restaurant, owned by two gentlemen who are homosexual. . . But those are all adults I'm speaking of, and this bill pertains to children . . ." O'Donnell Aff., Ex. A at 2.

individuals of the same sex to marry. Thus, the gender of the individuals determines whether and whom they 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.

In a similar case, one state supreme court considering the issue of same-sex marriage 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 same-sex marriage "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.* Another court deciding the issue 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 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. . . . ");[32] *Baker* v. *State*, 744 A.2d 864, 905-06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (same).

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[32] The majority in *Goodridge* did not reach this issue because it struck down the ban on same-sex marriage under a rational basis review. The Court stated: "Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case

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.

New York's restriction on same-sex marriage, by analogy, constitutes a sex classification because the DRL proscribes generally-accepted conduct, *i.e.*, marriage, if engaged in by members of the same sex. Under the Virginia law struck down in *Loving*, a white person could marry another white person, but a black person could not marry a white person. Under New York's domestic relations laws, a man can marry a woman, but a woman cannot marry another woman. Just as Virginia's prohibition of interracial marriage classified individuals on the basis of race, 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* and *Baker,* the states insisted that their use of race and gender in their marriage laws was not constitutionally suspect. The states argued 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. But the United States Supreme Court has repeatedly rejected the idea that a race- or sex-based classification is not discriminatory merely because it applies

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merits strict judicial scrutiny." *Goodridge* v. *Department of Public Health*, 798 N.E.2d at 961.

equally to all races or sexes. *See 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).

In sum, because New York's domestic relations laws classify individuals on the basis of gender, those laws are subject to heightened judicial scrutiny.

### C. Heightened Scrutiny Also Applies Because New York Gives Same-Sex Couples Unequal Access to the Fundamental Right to Marry

Although "suspect classifications" are the most familiar trigger for "strict scrutiny" equal protection, strict scrutiny also applies when a classification gives people different access to a fundamental right protected by the Constitution. *See Shapiro v. Thompson,* 394 U.S. 618 (1969); *Cleburne,* 473 U.S. at 441. 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."); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) (applying strict scrutiny to equal protection challenge to denial of welfare benefits to new state residents because the policy was a "classification which serves to penalize the exercise of [the constitutional right to travel interstate]"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying strict scrutiny to equal protection challenge to law mandating sterilization of some habitual criminals because it impinged on fundamental right to procreate); *Golden* v. *Clark,* 76 N.Y.2d 618, 623 (1990) (if a "challenged provision establishes a classification which burdens [fundamental] rights[,] . . . it must withstand strict scrutiny and is void unless necessary to promote a compelling State interest and narrowly tailored to achieve that purpose").

This fundamental rights prong of equal protection analysis thus focuses on the infringed right, rather than on the nature of the targeted class. If there is a fundamental right, and if the government makes that right available to some but not others, then strict scrutiny applies. Whether the classification is drawn along "suspect" lines or not makes no difference to this part of the equal protection analysis.

As set forth below, 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 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 triggers the strict scrutiny protections of the New York Constitution's Equal Protection Clause, Art. I, sec. 11.

### 1. The New York Constitution Protects Personal Autonomy In Matters Concerning Intimate Association and Family Life

The New York Constitution protects every individual's right to autonomy — that is, the right of every individual to make certain fundamental decisions about how to live with as little interference from the government as possible. *See, e.g., Cooper* v. *Morin* 49 N.Y.2d 69 (1979); *Planned Parenthood of Southeastern Pa.* v. *Casey* 505 U.S. 833, 851 (1992). *See also Lawrence,* 123 S.Ct. at 2475 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."). Accordingly, laws that constrain the exercise of that autonomy are scrutinized by the courts with the utmost care.

The core of that autonomy right, the area where it is most jealously protected, is in decisions that adults make about how to live their lives: decisions about sexual intimacy, marriage, child bearing and child rearing. *See, e.g., People* v. *Onofre,* 51 N.Y.2d 476 (1980) (private sexual intimacy),[33] *Lawrence*, 123 S.Ct. at 2474-75 (same), *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) (right to marry); *see also People ex rel Portnoy* v. *Strasser*, 303 N.Y. 542 (1952) (right of capable parents to raise children as they see fit), *Troxel* v. *Granville*, 530 U.S. 57 (2000) (same).

The Court of Appeals and the United States Supreme Court have used the strongest possible words to describe the importance of the right to autonomy and the breadth of its scope. In *Rivers* v. *Katz,* 67 N.Y. 2d 485, 493 (1986), the Court of Appeals explained that "[i]n our system of a free government . . . notions of individual autonomy

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[33] 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,* 123 S.Ct. 2472.

and free choice are cherished," and that government should "insure that the greatest possible protection is accorded [an individual's] autonomy and freedom." Six years later, the United States Supreme Court noted that:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 851 (1992).

As the Court of Appeals and the Supreme Court have both explained, the substantive rights to individual autonomy embodied in the state and federal Due Process Clause are not static; they are flexible and evolve over time: "[a]s the constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence,* 123 S.Ct. at 2480-2483. *See also id.* (tracing the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"); *Cooper* v. *Marin*, 49 N.Y.2d 69, 79 (1979) ("The requirements of due process are not static; they vary with the elements of the ambience in which they arise" (quoting *Wilkinson* v. *Skinner*, 34 N.Y.2d 53, 58 (1974)); *Matter of Paul X.*, 393 N.Y.S.2d 1005, 1007-08 (1st Dep't 1977) (discussing the "expanding concepts of due process" underlying fundamental rights of child-rearing); *cf. Baker*, 744 A.2d at 885-86 (holding that recent legislation giving legal protections to same-sex relationships informs an evolving view of the state constitution).

It is important to recognize that the Due Process Clause of the New York Constitution provides greater protection that does the Due Process Clause of the U.S. Constitution. As the Court of Appeals has explained, the federal due process clause "defines the minimum level" of constitutional rights to which an individual is entitled.

This means that New York is free to provide greater constitutional protection through the its own constitution. *See Cooper*, 49 N.Y.2d at 79.

The Court of Appeals has not hesitated to do so when appropriate. In *Cooper*, the Court of Appeals held that the failure of a prison to provide contact visits to pretrial detainees impermissibly interfered with the fundamental right to marriage and family life under New York's Due Process Clause. *Id.* at 80-82. Indeed, in the recent case invalidating the deadlock provision of New York's death penalty statute, the Court of Appeals reiterated that Art. I section 6 of the New York Constitution provides significantly greater protection for individual freedom than does the Due Process Clause of the U.S. Constitution. *See People* v. *LaValle*, -- N.Y.3d --, available at 2004 WL 1402516 (N.Y. Ct. of Appeals June 24, 2004) ("We hold that in this case the Due Process Clause of the New York Constitution requires a higher standard of fairness than the Federal Constitution . . . .").

### 2. The Right to Marry Is a Fundamental Aspect of the Individual Freedoms Guaranteed By the Due Process Clause of the New York Constitution

New York courts have long recognized that the right to marry goes to the core of individual liberty, and that the decision to marry is one of the most significant decisions that an individual can make. As one New York court 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*, 467 N.Y.S.2d 506, 513 (Suffolk County 1983) (quoting *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965)).

In *Zablocki v. Redhail,* 434 U.S. 374, 388-391 (1978), the Supreme Court struck down a Wisconsin law which provided that in order to remarry, a noncustodial parent had to be current on support payments and also obtain a court order permitting the marriage. The Supreme Court took pains to demonstrate that the right to marry is not simply protected by the Due Process Clause, but 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)).

The *Zablocki* opinion traces a steady line of cases from 1888 to 1977 that established that "the right to marry is of fundamental importance for all individuals" and is vigilantly protected by the Due Process Clause. *Zablocki,* 434 U.S. at 383-87. For instance, *Loving* used the Due Process Clause to strike down laws that limited who could marry by race. In *Boddie v. Connecticut,* 401 U.S. 371 (1971), the Supreme Court held that the Due Process Clause invalidated laws that did not waive divorce filing fees for the indigent. What these cases show, according to the *Zablocki* Court, is that the Due Process Clause requires rigorous scrutiny of all but insignificant limitations on the ability to marry. *See Zablocki* 434 U.S. at 386.

The modern due process analysis extends this fundamental right to marry to same-sex couples, not just opposite-sex couples. To identify the rights protected by the Due Process Clause, courts look for rights "which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations omitted). Marriage, no

doubt, qualifies on both counts. *See Loving*, 388 U.S. at 12; *Zablocki,* 434 U.S. at 383-385.

Of critical importance here, 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 it has been decided that it is protected by due process. "'[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process analysis.'" *Lawrence,* 123 S.Ct. at 2480 (quoting *County of Sacramento* v. *Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). That critical distinction — that history guides the *what* of due process rights but not the *who* of which individuals have them — is central to modern due process jurisprudence. *Compare Griswold* v. *Connecticut*, 381 U.S. 479 (1965) with *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Lawrence* v. *Texas,* 123 S.Ct. 2472 (2003).

*Griswold* represents the cornerstone of the modern due process clause cases. In *Griswold*, 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. *Griswold,* 381 U.S. at 486. Seven years later, in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), the Supreme Court struck down a Massachusetts ban on the distribution of contraceptives to unmarried persons. Importantly, the Court in *Eisenstadt* did not suggest that unmarried people had a traditional right to privacy that prevented the state from regulating their private sexual behavior since such a holding would have been inconsistent with the history of American law at that time. Nevertheless, the Supreme Court ruled in *Eisenstadt* that if history and tradition hold that the right exists for married

couples, then the right must belong to everyone. *See also Carey* v. *Population Services Int'l,* 431 U.S. 678 (1977) (holding that teenagers under 16 are protected by the *Griswold* right).

In *Bowers v. Hardwick*, the Supreme Court seemed to suggest that a legal history of controlling the sexual lives of gay people meant they were not protected by the due process rights identified in *Griswold* and *Eisenstadt*. *Bowers,* 478 U.S. at 192-193. But only last year, the Court repudiated that decision in the most emphatic terms, not simply overruling *Bowers*, but, in an extraordinary step, holding that it was wrong when it was decided. *See Lawrence,* 123 S.Ct. at 2484. Lesbians and gay men, *Lawrence* holds, have the same right to autonomy that heterosexual persons do. The Court identified *Griswold* as the starting point for the right, and placed it squarely with *Eisenstadt* and the other cases that followed *Griswold*. *See Lawrence*, 123 S.Ct. at 2480-82, 2476-78.[34]

Indeed, virtually none of the modern decisions upholding the fundamental right to marry could have been decided as they were if the right to marry were limited to persons who by tradition were allowed to exercise it. After all, the traditional right to marry historically did not extend to persons of different races. Marriage was completely forbidden to African-Americans as slaves, and just 19 years before miscegenation laws

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[34] Sexual privacy is not the only aspect of autonomy in which a right found in tradition has not been limited to those who traditionally were allowed to exercise it. *See Stanley* v. *Illinois*, 405 U.S. 645 (1972) (due process right extends to relationship between unwed father and his children, even though "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage."); *Weber* v. *Aetna* 406 U.S. 164, 175 (1972) (same); *Meyer* v. *Nebraska*, 262 U.S. 390, 399-401 (1923) (due process protects the traditional right of people "to marry, establish a home and bring up children")

were struck down in *Loving v. Virginia,* 388 U.S. 1, 12 (1967), 38 states banned interracial marriage, 6 of those 38 by constitutional provision.[35]

Moreover, the traditional right to marry did not include a right to marry a second time. England was a divorceless society 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 ground. *See* Lawrence Friedman, *A History of American Law* 179-186 (1973). By tradition then, the fundamental right to marry did not apply to persons who had already married once. But it was precisely the right to marry of those who had already been married that was vindicated in *Zablocki* v. *Redhail,* 434 U.S. 374 (1978) and *Boddie* v. *Connecticut,* 401 U.S. 371 (1971).

In sum, the protection of basic rights through due process is accompanied by an explicit guarantee of equal protection of the law. *See* N.Y. Const Art. I, §§ 6, 11; U.S. Const, Amend 14. Indeed, the guarantee of due process itself is a guarantee of equal treatment. *See Bolling v. Sharpe* 347 U.S. 497 (1954) (striking down segregation of D.C. schools under the due process clause of the 5th Amendment); *Lawrence,* 123 S.Ct. at 2482 (striking 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

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[35] The *Loving* decision also struck down Virginia's law as race discrimination in violation of the Equal Protection Clause, a ruling that might have stood even if the Court said the right to marry was limited to the single race couples who traditionally had the right. But the *Zablocki* decision says that *Loving* is the Court's leading decision on the right marry, and stresses that although it could have been decided solely on the basis that Virginia's antimiscegenation 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 US at 383-84.

process] interests."). It is for this reason that classifications that touch on fundamental rights must be subject to such rigorous scrutiny.

### 3. The Distinctive History and Tradition of New York Provides Further Support for Applying Heightened Scrutiny to the Right to Marry

Given New York's distinctive history, it would be particularly inappropriate to read same-sex couples out of the fundamental right to marry guaranteed by the New York Constitution.

New York in particular has a strong interest in not leaving lesbians and gay men out of the protections of the New York Constitution. From the lesbian communities in Buffalo to gay male enclaves in the West Village, New York is and has been the home of one of the largest gay communities in the United States. *See generally* George Chauncey, *Gay New York* (2001); Charles Kaiser, *The Gay Metropolis* (2001); Elizabeth Lapovsky Kennedy & Madeline Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (1993). Indeed, since the Stonewall Riot of 1969, New York has been the symbolic — as well as practical — center of the country's gay population.

New York's special and unique gay and lesbian history suggests that the Due Process Clause of the New York Constitution should be applied with particular stringency against an interpretation that would act to deny this population a fundamental constitutional right that has, in all events, been interpreted to guarantee *all* citizens a broad sphere of individual autonomy in matters of family and intimate association.[36]

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[36] Indeed, the Court of Appeals has already recognized that committed same-sex couples have relationships that deserve the protection of the law. In *Braschi* v. *Stahl Assoc.*, 74 N.Y.2d 201 (1989), the Court of Appeals concluded that important protections for a family, including in that case protection against sudden eviction, "should not rest on fictitious legal distinctions

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The right to marry under the New York Constitution is fundamental and belongs to everyone. Because the exclusion in the DRL gives same-sex couples different access to that right than it gives to opposite-sex couples, the exclusion in the DRL must be subject to strict scrutiny. *See, e.g.*, *Shapiro,* 394 U.S. at 634; *Cleburne,* 473 U.S. at 441; *Golden,* 76 N.Y.2d at 623.

## II.

## THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE CANNOT BE JUSTIFIED UNDER EVEN RATIONAL BASIS REVIEW UNDER THE EQUAL PROTECTION CLAUSE OF THE NEW YORK CONSTITUTION

As we have shown, the exclusion of same-sex couples from marriage requires heightened judicial scrutiny, both because that exclusion is a classification based on sexual orientation and gender, which are inherently suspect, and because it gives same-sex couples differential access to the fundamental right to marry. Heightened scrutiny is an exacting standard: A classification subject to strict scrutiny "is void unless necessary to promote a compelling State interest and narrowly tailored to achieve that purpose." *Golden v. Clark,* 76 N.Y.2d 618, 623 (1990). For gender classifications, the burden is on the state to show that "the classification is substantially related to the achievement of an important governmental objective." *People* v. *Liberta*, 64 N.Y.2d 152, 168, 170 (1984) (the state must show "both the existence of an important objective and the substantial relationship between the discrimination in the statute and that objective";

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or genetic history, but instead should find [their] foundation in the reality of family life." The Court held that families worthy of protection included "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." *Id.* at 211. *See also Matter of Jacob,* 81 N.Y.2d 651 (1995) (allowing a same-sex partner in a committed relationship with a parent to adopt the parent's child).

it must "set forth an 'exceedingly persuasive justification' for the classification.") (internal quotation marks omitted).

But far from passing any form of heightened scrutiny, New York's exclusion of same-sex couples from marriage fails even the most basic level of "rational basis" review under the Equal Protection Clause because it does not rationally further *any* legitimate state interest. The State has asserted that the exclusion advances several interests, but either those interests are not legitimate or they are 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) (classification "must be reasonable and must be based upon some ground of difference that rationally explains the different treatment.") (internal quotation omitted).[37]

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[37] Federal cases use an analysis that places a similar focus on the connection between the classification and the state's objective: a court applying rational basis equal protection review must 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

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." *Countryman v. Schmitt*, 176 Misc. 2d 736, 747 (Sup. Ct., Monroe Cty 1998) (brackets in original) (citing *Abberbock* v. *County of Nassau*, 213 A.D.2d 691 (2d Dep't 1995)).

As demonstrated below, the exclusion of gay and lesbian couples from marriage in New York fails even this basic test because the interests identified by the State either are not legitimate in the first place or are not rationally furthered by the exclusion. *See People v. West*, No. 04030054, Slip Op. at 2 (Justice Court, County of Ulster) (June 10, 2004) (dismissing prosecution against Mayor of New Paltz, New York for solemnizing same-sex marriages) (attached as Ex. B to the Declaration of Roberta A. Kaplan).

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

### 1. Tradition

The most honest answer to why New York excludes same-sex couples from marriage is simply that it has always done so. The State in fact has argued that "[t]he State has legitimate interests in preserving th[e] historic and cultural understanding of marriage[,]" emphasizing "the tradition of heterosexual marriage as a social institution . . . ." (*Shields* Br. at 25-26) But that answer — tradition — does not explain the

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

classification, it simply repeats it, and thereby fails to identify a state interest "independent" of the classification, as the Equal Protection Clause requires. *See Romer* v. *Evans*, 517 U.S. 620, 635 (1996) (state interest that is not independent of the classification is not legitimate).

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. *U.S. 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); *see also Romer,* 517 U.S. at 633, 635. 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 of persons undertaken for its own sake, something the Equal Protection clause does not permit." *Romer,* 517 U.S. at 635.

As a result, the State cannot justify the classification here — excluding same-sex couples from marriage — by asserting that doing so would advance the State's interest in limiting marriage to heterosexual couples. In that case, the classification and objective would be the same thing and the purported justification would not be independent at all.

However, offering tradition — the fact that same-sex couples have long been excluded from marriage — as the justification for limiting marriage to heterosexual couples has precisely the same problem. The classification and the purpose are one and the same; keeping gay couples out of marriage is both the classification and the 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.[38] To say that New York has had a classification for a long time does not explain *why* it has it (or has had it). Since the classification does not advance an independent state interest, it is simply a prohibited "classification for its own sake." *Romer*, 517 U.S. at 635.

Far from reinforcing the past, the Equal Protection Clause is designed to root out discrimination, including discrimination that has endured for centuries. Unlike due process analysis, which focuses in part on whether a particular right is part of our history and tradition, equal protection analysis looks to history, if at all, only when that history suggests that courts should apply a higher level of scrutiny and be less deferential to the state's decision to discriminate. As one commentator has explained,

> The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure."

Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 *U. Chi. L. Rev.* 1161, 1163 (1988). The

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[38] *See also Goodridge*, 798 N.E.2d at 972-73 (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 never has been accessible, is conclusory and bypasses the core question we are asked to decide.").

Equal Protection Clause is therefore aimed at protecting "disadvantaged groups from discriminatory practices, however deeply engrained and longstanding" they may be. *Id.*[39] Thus, it is no answer to claim tradition as a justification under the Equal Protection Clause for a difference in treatment. *See, e.g., Mass. Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976). *See also Perez* v. *Lippold*, 198 P.2d 17, 27 (Cal. 1948) ("Certainly the fact alone that . . . discrimination has been sanctioned by the state for many years does not supply justification.").

**2. "Everyone Else Does It"**

In a variant on the "tradition" rationale, the State has suggested that excluding same-sex couples from marriage is "rational" because other states do it too. But the childhood excuse of "he does it, so can I," absent a separate explanation of why it is legitimate for "him" to do it, does not meet the basic equal protection requirement. Unless the State can offer some explanation of how being "part of the pack" advances a legitimate goal, the exclusion of gay couples is simply adherence to a tradition of exclusion and is unjustified and unconstitutional.

The State insists that if New York allowed same-sex couples to marry, other states and the federal government would not respect those marriages and suggests that this "reality" justifies excluding same-sex couples from marriage. (*Shields* Br. at 24-25.) First of all, it is far from clear that the State's premise is correct; only one of the laws to which the State points (*id.* at 24 n.7) has been upheld by an appeals court under

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[39] Courts have noted this distinction as well. *See, e.g., Watkins* v. *U.S. Army*, 837 F.2d 1428, 1440 (9th Cir. 1988) (discussing difference between a due process claim, which is based on tradition, and an equality claim, which "simply requires that the majority apply its values evenhandedly"), *aff'd on other grounds*, *Watkins* v. *U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (en banc).

the relevant state constitution after *Lawrence v. Texas*,[40] several others are being challenged in court,[41] and most of them may fail for lack of any nondiscriminatory justification.[42] So marriages from New York may well be respected in other states.

More to the point, however, it is inconceivable that the New York Constitution would allow the 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

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[40] *See Standhardt* v. *Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003), *rev. denied*, May 25, 2004. Most of the rest of the state appellate cases upholding the constitutionality of restricting marriage to opposite-sex couples are several decades old, *see, e.g.*, *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer* v. *Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones* v. *Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973), and all of them were decided prior to the United States Supreme Court's decision in *Lawrence v. Texas*, which affects the constitutional analysis in two ways. First, *Lawrence* recognized that gay people, just like heterosexuals, have a constitutionally protected liberty interest in forming intimate relationships with other adults. That liberty interest is at the heart of plaintiffs' fundamental rights claim. Second, as noted above, by overruling *Bowers v. Hardwick*, *Lawrence* removed the primary impediment to a proper analysis of equal protection claims involving lesbians and gay men. After *Bowers*, courts routinely dismissed equal protection claims brought by gay people; now that it is gone, courts must consider these claims under a proper equal protection analysis.

Finally, the other state courts to address the constitutionality of restricting marriage to different-sex couples have all found violations. *See Goodridge* v. *Dep't of Public Health*, 440 Mass. 309, 332, 798 N.E.2d 941, 961 (2003) (restriction on marriage violated state constitution); *Baker* v. *Vermont*, 744 A.2d 864 (Vt. 1999) (same); *Brause* v. *Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1990 WL 88743 (Alaska Super. Feb. 27, 1998) (restriction on marriage constituted sex discrimination), *superseded by state constitutional amendment*, Alaska Const. art. I, § 25; *Baehr* v. *Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct., Dec. 3, 1996) (same).

[41] Challenges to discriminatory marriage laws are pending in the following states: California, Florida, Indiana, New Jersey, North Carolina, Oregon, and Washington; others may well follow shortly.

[42] *See, e.g.*, *Li* v. *Oregon*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct., Multnomah County Apr. 20, 2004) (declaring Oregon's ban on marriage of same-sex couples violates the Oregon Constitution), *appeal pending*.

New York Constitution.[43] The State fails to suggest any legitimate and independent rationale for those laws. The only reason that the State even hints may have led the federal government and other states to refuse to recognize same-sex marriage is a long-standing desire to exclude same-sex couples from marriage. As explained with respect to the tradition argument, that desire, standing alone, does not provide an acceptable justification under the New York Constitution because it amounts to a "classification . . . for its own sake," or a desire to disadvantage the group that is in fact disadvantaged, which is not legitimate. *Romer*, 517 U.S. at 634-35.

Without an independent justification for these other federal and state laws, disadvantaging same-sex couples at home because the State expects them to be disadvantaged elsewhere is nothing more than impermissible deference to the prejudice of others. As the Supreme Court explained in *Cleburne,* the State "may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes or objections of some fraction of the body politic. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Cleburne*, 473 U.S. at 448 (quoting *Palmore* v. *Sidoti,* 466 U.S. 429, 433 (1984)). The State's assertion that it excludes same-sex couples from marriage in order to spare them from further harm also fits squarely into this country's otherwise discarded history of treating a group of people badly, while declaring that it is somehow for the group's "own good." *See, e.g.*, *Naim* v. *Naim*, 87 S.E.2d 749 (Va. 1955) (upholding Virginia's anti-miscegenation law and observing that "it is for the peace and happiness of the colored race, as well as of the

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[43] *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.").

white, that laws prohibiting intermarriage of the races should exist."); *State* v. *Hall*, 187 So. 2d 861, 863 (Miss. 1966) (upholding exclusion of women from juries in order to insulate them from the "filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a trial.").

The State also suggests that it has some independent interest in ensuring that its marriage and family law is consistent with those laws in other states, but, when the exclusion of same-sex couples from marriage is viewed in the context of the body of New York family law, it is simply impossible to credit the state's asserted interest in uniformity.

To begin with, uniformity in the treatment of same-sex couples is simply not possible. Massachusetts, which recognizes marriage for same-sex couples, is far from alone in providing something much closer to equality for same-sex relationships than New York does. Vermont,[44] California,[45] Oregon,[46] Hawaii,[47] and New Jersey[48] all

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[44] Vermont recognizes "civil unions," which for in-state purposes provide "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." 15 Vt. Stat. Ann. § 1204(a).

[45] The California legislature has established state-recognized domestic partnerships that provide many of the protections and obligations of marriage. California domestic partners currently have the following protections, among others: (1) the right to sue for infliction of emotional distress or for wrongful death in the event of a partner's injury or death; (2) the ability to make medical decisions for an incapacitated partner; (3) the right to act as a conservator to tend to an incompetent partner's medical and financial needs; (4) the ability to use sick leave to care for a partner or a partner's child; (5) the ability to use existing stepparent adoption procedures to adopt a partner's child; and (6) the right to cover dependents under employer health plans without additional taxation. *See* 2001 Cal. Legis. Serv. Ch. 893 (A.B. 25). Starting on January 1, 2005, California domestic partners will have additional protections, including: (1) the right to make decisions on death and burial issues for a partner; (2) the right to child custody and visitation, and the ability to authorize medical treatment for a partner's children; (3) access to family court and to support obligations; (4) shared responsibility for each other's debts, and consideration of a partner's income for determining eligibility for state governmental assistance programs and for

recognize same-sex relationships in significant ways that New York does not. Refusing to provide any significant protection to same-sex couples does not make New York law consistent with the law of other states since other states have no single rule.

Moreover, it could not be clearer that New York has no general policy of following the family law of other states as closely as it possibly can. 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*

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student aid; (5) the ability to bring legal claims dependant on family status, such as victim compensation claims, and the right not to be forced to testify in court against a partner; (6) the ability to avoid probate of jointly owned property; (7) the presumption of parenthood of a child born to one partner during the partnership; (8) the right to obtain death benefits for surviving partners of firefighters and police; (9) the ability to request and obtain an absentee ballot for a partner; and (10) access to housing protections, including family-student housing, senior citizen housing, and rent control. *See* 2003 Cal. Legis. Serv. Ch. 421 (A.B. 205).

[46] A state trial court has declared that Oregon's discriminatory marriage law violates the Oregon Constitution and has ordered the legislature to determine how to remedy that violation. *Li* v. *Oregon*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct., Multnomah County Apr 20, 2004).

[47] Hawaii legislatively created a status called "Reciprocal Beneficiary," which allows same-sex couples, among others, to gain certain protections for their relationship that would otherwise come only through marriage. Those protections include hospital visitation privileges, intestate succession, and the ability to sue for wrongful death. *See generally* Haw. Rev. Stat. § 572C.

[48] New Jersey recently created a state-wide Domestic Partnership system that provides same-sex domestic partners protections including joint state tax status, exemption from state inheritance tax, and hospital visitation and medical decision- making rights. N.J. Stat. Ann. 26:8A-1.

*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*, 538 N.Y.S.2d, 441 (1st Dep't 1989) (Asch, J., concurring).

If New York truly wanted to be sure that New York marriages would be accepted in all the rest of the states, it would hardly allow first cousins to marry, *see* DRL § 5, while a majority of states (29) either ban such marriages outright or impose significant restrictions on them.[49] And a state interested in universal acceptance would not allow marriage at the age of 16 with parental consent and at the age of 18 without, *see* DRL §§ 23, 15(2), when other states have set the ages at 17 and 19, and some even higher.[50] New York's professed interest in uniformity is thus belied by the body of New York 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).

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

> The State's argument that [its] marriage laws serve a substantial government interest in maintaining uniformity

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[49] *See, e.g.*, N.H. Rev. Stat. Ann. § 457:2 (banning outright); Me. Rev. Stat. Ann. tit. 19-A § 701 (allowing with proof of genetic counseling); Ind. Code Ann. § 31-11-1-2 (allowing if both parties are over 65 years of age). 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 consanguity, *See* Wyo. Stat. Ann. § 20-2-101, or where the parties are related by marriage only, *see* Okla. Stat. Ann. tit. 43 § 2.

[50] 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.

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

*Baker*, 744 A.2d at 885.

### 3. Procreation/Parenting

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." (*Shields* Br. at 25 (quoting *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942.)) Others have suggested that keeping same-sex couples from marrying will promote parenting. While the State's interests in encouraging procreation and parenting is legitimate, the classification it has chosen to advance those interests — excluding same-sex couples from marriage — does not rationally further them and is therefore unconstitutional.

As noted above, finding the connection between "the classification adopted and the object to be attained" is what "gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. Even under rational basis review, an abstract or merely theoretical connection is not sufficient; the classification must have a "fair and substantial relationship" to the proffered government purpose. *Countryman* v. *Schmitt*, 176 Misc. 2d 736, 747 (Sup. Ct., Monroe Cty 1998). The rationality of the connection must be assessed in light of the factual context as it actually exists, rather than as it might be imagined. *See Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County,* 488 U.S. 336, 343 (1989) (rational relationship must exist in reality not just in theory; striking down property valuation system that "theoretically" might be equitable, but that

in fact resulted in widespread disparity); *Heller v. Doe*, 509 U.S. 312, 321 (1993) ("even the standard of rationality as we so often have defined it must find some footing in the realities of the subject matter addressed by the legislation"). Where such a connection is lacking, the classification violates equal protection.

For example, 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, but nevertheless concluded that the connection between the classification and those legitimate State interests was too tenuous to satisfy even the rational basis test.[51]

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[51] Although some cases suggest that New York follows the federal equal protection analysis, New York has in fact 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 exmption in New York's rape statute and found that the gender exemption *did not* violate the Equal Protection Clause of the United States Constitution. *Id.* at 83. Because the rape statute was found to violate the New York Equal Protection Clause, but not the federal Equal Protection Clause, it is clear that the New York Constitution's equal protection provisions are broader than those of the federal Constitution.

As in *Liberta*, excluding same-sex couples from marriage simply does not rationally advance the purposes of encouraging procreation or parenting. The required connection is lacking both because the classification simply does not advance the avowed purpose and because the classification sweeps so far beyond that purported purpose that as a justification, it cannot be credited.

**a. The Exclusion Does Not Advance the Purported Goal**

Keeping gay people out of marriage quite simply has no logical relationship to encouraging either procreation or parenting.

Various government actions could promote procreation or parenting. The government could give tax breaks to couples who have or care for children, it could subsidize child care for them, or it could mandate generous family leave for those who parent. Any of these devices — and many more — might convince people who would not otherwise have children to do so. But even at its most creative, the State cannot suggest that excluding same-sex couples from marriage will encourage heterosexual couples to have children. It simply does not make any sense at all. No one rationally decides to procreate or to parent because gay people are excluded from marriage. Indeed, the Court of Appeals already recognized this when it stated in *Matter of Jacob* that "[a]ny proferred 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 is such a profound lack of connection between a classification and the purported purpose, the courts have repeatedly struck down laws as violative of equal protection. For example, in *Hooper* v. *Bernadillo County Assessor*, 472 U.S. 612 (1985), the state of New Mexico enacted a tax exemption for veterans in 1981, but

limited it to veterans living in New Mexico before May 8, 1976. The state argued that the limitation to veterans who arrived before 1976 rationally furthered the state's interest in encouraging people to move to New Mexico. But the Court rejected New Mexico's argument, concluding that the law could hardly have encouraged anyone to move to New Mexico in 1981 since the deadline had long passed when the law took effect. *Id.* at 619-20.

Similarly, in *Countryman* v. *Schmitt*, 176 Misc. 2d at 747, a town ordinance required that public lands get first priority for the placement of privately owned telecommunications towers (and the fees that came with them). When required to justify the preference for public lands in an equal protection challenge, the town argued that such a preference furthered its interest in promoting aesthetics. Because nothing about the priority for public land placements related to aesthetics (the public lands were spread throughout both residential and commercial areas of the town), the classification was struck down on rational basis review. *Id.*

Given the utter lack of logical connection between the exclusion of same-sex couples from marriage and the legitimate desire to encourage procreation or parenting, the DRL's exclusion of same-sex couples from civil marriage similarly violates equal protection.

**b. The Exclusion Sweeps Far Beyond the Proffered Interest**

In addition to the lack of any logical connection between excluding gay couples from marriage and promoting procreation and parenting, the State has chosen a classification that sweeps so far beyond those purported interests and is so disconnected from them that the interests are "impossible to credit." *Romer*, 517 U.S. at 635.

In *Romer*, the Court invalidated a 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. Colorado had amended its state constitution to say that the state lacked the power to deprive gay people — and only gay people — of protection from discrimination in any sphere, public or private. *See Romer*, 517 U.S. at 623. The state said 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 "is so discontinuous with the reasons offered for it," *id.* at 632, that those reasons are "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).

Here, New York has chosen a classification — keeping same-sex couples out of marriage — that is "so far removed from" and "so discontinuous with" the reasons offered for it — procreation or parenting — that they are "impossible to credit" and the classification lacks a rational basis. *Romer*, 517 U.S. at 632-35. Marriage is about much more than parenting or producing children, yet the State has chosen to exclude gay

couples from the entire spectrum of protections that come with marriage simply in order to encourage other people to procreate or parent.

Two facts make clear the arbitrary nature of the State's classification. First, while procreation and parenting may occur within marriage, neither is not necessarily linked to marriage. People who marry often do not procreate, people who cannot procreate may nevertheless marry,[52] many people (both straight and gay) procreate outside of marriage,[53] and many people in same-sex couples have biological children through artificial insemination, surrogacy, or prior relationships or parent through foster care or adoption. So while marriage, procreation, and parenting are certainly related in a general sense, the relationship is not particularly close. *See Goodridge* v. *Dep't of Public Health*, 440 Mass. 309, 332, 798 N.E.2d 941, 961 (2003) ("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

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[52] 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").

[53] *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).

parents. Many of the protections that married couples enjoy under the New York law are focused on the couple; on recognizing, for example, that when they own property they typically function as one unit, and they share a unique emotional intimacy that means a spouse is typically the most important person in your life.[54] 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." *Goodridge*, 798 N.E.2d at 961.

These two facts mean that if we take the State at its word, it has chosen to exclude gay couples from the vast range of protections that come with marriage in order to encourage procreation, a secondary aspect of the State's protection of 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 v. Texas*, 123 S. Ct. 2472, 2498 (2004) (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.").

In short, the "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. *Goodridge*, 798 N.E.2d at 960-62. Doing

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[54] A non-complete description of the protections offered by civil marriage — the majority of which are unrelated to procreation — are discussed at pp. 6-14 above.

so "identifies persons by a single trait and then denies them protection across the board," *Romer*, 517 U.S. at 633, something that the Equal Protection Clause of the New York Constitution forbids.

### c. Keeping Gay People Out Of Marriage In Order To Keep Them Away From Children Is Illogical When New York Officially Sanctions Parenting By Gay People

Given the reality that gay people do parent, and the State's wide-ranging approval of parenting by gay people, it is simply not credible that the proffered interest in procreation is actually behind the exclusion of gay people from marriage.

Gay couples are raising children all across both New York State and the entire country. *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);[55] *id.* at 45 (figure is 27.5% nationally). New York supports parenting by lesbians and gay men in many ways and the State has conceded as much: "petitioners and their families are entitled to dignity and respect, . . . children raised in those families can thrive, and . . . same-sex couples can be as committed, stable, loving and nurturing as opposite sex couples." (Shields Br. at 1).

For example, as noted earlier, New York approves adoption by lesbians and gay men, whether individually or 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"); *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227, 228 (4th Dep't 2004) (same-sex couples may adopt jointly), and the same-sex partner of a legal parent may adopt that parent's child, *see*

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[55] The census data did not track the number of single lesbians or gay men who are raising children. Gary J. Gates & Jason Ost, *Gay & Lesbian Atlas* 45 (2004).

*Matter of Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995).[56] New York recognizes that a parent's sexual orientation is not relevant to decisions about custody or visitation. *See, e.g., Guinan v. Guinan*, 102 A.D. 2d 963, 964, 477 N.Y.S.2d 830, 831 (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, 510 N.Y.S.2d 960, 969 (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"). New York also places foster children with lesbians and gay men. *See Matter of Commitment of Jessica N.*, 601 N.Y.S.2d 215, 218 (N.Y. Fam. Ct. 1993).

Given New York's official approval, and indeed promotion, of parenting by same-sex couples, excluding such couples from marriage in order to keep them from parenting is simply illogical. It is completely 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. And how could it be a rational goal of the State to encourage parenting only by straight married couples when the State actually approves and encourages parenting by gay people as well?

When assessing the rationality of the connection between classification and purpose, the reality of how the State has treated gay people is a necessary part of the picture. As noted above, the rationality of the classification must be judged based on the factual reality that actually exists. *See Allegheny Pittsburgh Coal Co.*, 488 U.S. at 343; *Heller*, 509 U.S. at 321. In *Liberta*, where the Court of Appeals evaluated the

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[56] New York respects adoptive parents by acknowledging that "adoptive parents stand in the same legal position as natural parents." *People ex. rel. Sibley* v. *Sheppard*, 54 N.Y.2d 320, 327, 445 N.Y.S.2d 420, 423 (1981).

constitutionality of the marital exemption to the rape statute, the State argued that excluding husbands from liability for rape of their wives furthered its interest in distinguishing among crimes of different severity, noting that the State considered marital rape a less serious offense that could be "adequately dealt with" through a prosecution for assault. 64 N.Y.2d at 166, 485 N.Y.S.2d at 214. The Court of Appeals rejected this asserted interest by pointing out that it conflicted with factual reality in the form of New York's own laws on the subject: "[t]he fact that rape statutes exist, however, is a recognition that the harm caused by forcible rape is different, and more severe, than the harm caused by an ordinary assault." 64 N.Y.2d at 166.

Similarly here, the State's suggestion that excluding same-sex couples from marriage promotes its interest in parenting cannot be squared with the reality that New York approves and endorses parenting by lesbians and gay men. Such a profound inconsistency between the State's actual practices and its asserted interest renders that interest "impossible to credit." *Romer*, 517 U.S. at 635; *see also Liberta*, 64 N.Y.2d at 166.

**4. Child Welfare**

The State's suggestion that it excludes same-sex couples from marriage in order to promote the welfare of children is simply incredible. In light of the State's approval and promotion of parenting by same-sex couples, any suggestion that such parenting is bad for children is simply untenable. As the Court of Appeals has held in permitting second-parent adoption by gay and lesbian couples, to not permit same-sex couples to adopt children "would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them." *Matter of Jacob,* 81 N.Y.2d 651, 656 (1995).

Furthermore, denying the protections that come with marriage to same-sex couples raising children harms not only those couples, but also their children. *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.'"); *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999) (acknowledging that "the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against."). If, as it has been found, children are harmed by the exclusion of same-sex couples from marriage, such exclusion certainly cannot promote their welfare.

## III.

## THE DRL VIOLATES THE DUE PROCESS CLAUSE OF THE NEW YORK CONSTITUTION BECAUSE IT IMPERMISSIBLY DENIES PLAINTIFFS THEIR FUNDAMENTAL RIGHT TO MARRY

As explained above in Point I(C), in New York the right to marry is a fundamental right protected by Art. I, § 6 of the New York Constitution. Laws that restrict a fundamental right are subject to searching scrutiny: a fundamental right may only be burdened by the most compelling of state interests. *See, e.g., Rivers*, 67 N.Y.2d at 495. To sustain such a law, the government must be able to show that the restrictions on the right are necessary to achieve a compelling state interest and that the law in question is drawn narrowly so that it restricts the right no more than necessary to achieve those interests. *See Carey* v. *Population Services Int'l*, 431 U.S. 678, 686 (1977) ("[Where] a decision [is] fundamental . . . regulations imposing a burden on it may be

justified only by compelling state interests, and must be narrowly drawn to express only those interests."); *In re K.L.*, 1 N.Y.3d 362, 369-70 (2004).

The couples before this Court have not only been burdened in exercising their right, they have been prevented from exercising it altogether. So long as petitioners seek to marry those that they love, the denial is absolute and without exception. Such a restriction is tantamount to a ban on marriage — a complete denial of the ability to exercise a fundamental right inherent in the individual liberty protected by Art. I, § 6. *See, e.g.*, *Loving*, 388 U.S. at 12.

There is no compelling justification for denying same-sex couples the fundamental right to marry. Obviously, neither tradition nor following the law in other states can be a compelling state interest. If they were, the courts could never have struck down laws that reflect the country's tradition of restricting some people's access to fundamental rights. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (strking down anti-miscegenation law as a violation of the fundamental right to marry; 16 states still had such laws); *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (striking down sodomy law as violation of fundamental right to form intimate relationships and noting that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice"; 13 states still has such laws). Moreover, as shown above, *see supra* Point II(B)(3), it is not even rational to think that excluding same-sex couples from marriage would cause heterosexuals to procreate or raise children.

Since the exclusion in the DRL cannot survive even rational basis review under the Equal Protection Clause, it cannot survive the much more exacting standards required to justify denial of a fundamental right.

## IV.

## DENYING SAME-SEX COUPLES THE ABILITY TO MARRY VIOLATES THE FREE EXPRESSION PROTECTIONS OF THE NEW YORK CONSTITUTION

Marriage does not just involve practical or tangible benefits. It also offers a form of personal expression through which each member of a committed couple may express publicly the integrity and depth of their commitment to one another. It is, of course, the case that couples can proclaim their love and commitment without being married. But declarations of love and commitment, no matter how sincerely professed nor deeply felt, simply do not convey the same force and authority if unaccompanied by the public recognition that the declarants are married. Statements that are part of the marriage ceremony coupled with the ongoing expression of commitment that one conveys with the public acknowledgment of one's married status simply present a different and more durable message than that offered by unmarried persons.

So understood, marriage involves a unique expressive opportunity. And the State of New York operates as the gatekeeper to that opportunity. New York confers access to this expressive opportunity to heterosexual couples, but denies such access to same-sex couples.

By prohibiting plaintiffs from expressing their commitment to one another through marriage and in its differential privileging of expressive opportunity, the DRL impermissibly burdens plaintiffs' rights to free expression protected by Art. I, § 8 of the New York Constitution.

### A. The New York Constitution Provides Uniquely Broad Protection to Expressive Conduct, Beyond That of the U.S. Constitution

"New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting [expression] which in other States would be found offensive to the community." *Arcara* v. *Cloud Books, Inc.*, 68 N.Y. 2d 553, 557 (1986). For this reason, the Court of Appeals has consistently read Art. I, § 8 broadly and has made it clear that New York protects the freedom of expression beyond the bounds of the First Amendment to the United States Constitution. *See Matter of Beach* v. *Shaley*, 62 N.Y. 2d 241, 255 (1984) (Wachtler, J. concurring) ("This State has long provided one of the most hospitable climates for the free exchange of ideas."); *Arcara* v. *Cloud Books, Inc.*, 68 N.Y. 2d 553, 557 (1986) ("In determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.") (*citing People* v. *Barber*, 289 N.Y. 378, 384 (1943), *People* v. *P.J. Video*, 68 N.Y.2d 296 (1986)); *O'Neill* v. *Oakgrove Construction, 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 safe-guarding article I, section 8 guarantees).

It is in light of these principles of New York constitutional law that the Court must examine the DRL's prohibition on same-sex marriage.

## B. New York Domestic Relations Law Impermissibly Constrains the Expressive Aspects of Marriage

### 1. The DRL Directly Regulates Expression

Civil marriage is, quite simply, a symbol with unique expressive import. Ceremonial and religious marriages undoubtedly also hold expressive content, but "[c]ivil marriage takes social priority." David Cruz, "Just Don't Call it Marriage; The First Amendment and Marriage as An Expressive Resource," 74 *S. Cal. L. Rev.* 925, 928 (2001).

Plaintiffs may partake in meaningful ceremonies that permit them to state the words that constitute the rituals of marriage, as did Michelle and Montel Cherry-Slack. (Cherry Slack Aff. ¶ 9) But marriages that are merely ceremonial and not recognized legally by the State are widely viewed not to be real marriages. As plaintiff Michelle Cherry-Slack has stated, "[e]ven though our wedding ceremony was deeply important to us, we know that we will not be widely viewed as married by the world until we are considered to be married by the state" (Cherry-Slack Aff. ¶ 11).

The Supreme Court has explicitly recognized and protected access to the expressive component of civil marriage. *See Turner* v. *Safley*, 482 U.S. 78 (1987). In *Turner*, the Court overturned a law that denied to prison inmates the right to enter into civil marriages because marriages involving prison inmates "like others," were "expressions of emotional support and public marital relationship," and "constitutionally protected." *Id.* at 95-96.

In fact, the manner in which the Vermont legislature crafted that state's civil union statute demonstrates the unique symbolic and expressive power of the term marriage. The statute provides for identical benefits for "civil unions" between same-sex

couples as are provided for opposite-sex couples under the label of "marriage." *See* 15 V.S.A. 1201 (2002). The only logical reason for the Vermont scheme, which differentiates between same and opposite-sex couples only in the name by which their union is labeled, is to reserve the unique expressive power of the word "marriage" exclusively for opposite-sex couples.

Well-settled law bars the State from "denying the unique expressive resource of civil marriage to same-sex couples, handicapping their communication and identity formation and skewing public debate, in order to preserve the current symbolic meaning of marriage." Cruz, *supra*, at 928. *See also Cohen* v. *California*, 403 U.S. 15, 26 (1971) ("Words are not always fungible, and . . . the suppression of particular words 'run[s] a substantial risk of suppressing ideas in the process.'").

Because no adequate alternative means exists for plaintiffs to express the importance of their relationships, and their love and commitment to their partners, plaintiffs can not be constitutionally denied access to civil marriage. As plaintiff Heather McDonnell puts it, "[i]n place of legal documents and phrases unfamiliar to many in society, one word, 'married,' would define our relationship and the way that others are required to treat us under the law in a way that everyone understands." (McDonnell Aff., ¶ 15).

### 2. There Is No Compelling State Interest In Limiting the Expressive Meaning of Marriage to Opposite-Sex Couples

Excluding same-sex couples from marriage unquestionably restricts the expression of the idea that same-sex couples may share loving, committed relationships, just like opposite-sex couples. A law imposing a significant restriction on the freedoms of expression and association guaranteed under the New York Constitution cannot be

upheld unless it is narrowly tailored to serve a compelling governmental interest. *See Eu* v. *San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989).

Moreover, under New York law, if a given regulation even "incidentally burden[s] free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose." *Arcara* v. *Cloud Books, Inc.*, 68 N.Y.2d 553, 558 (1986); *Time Square Books, Inc.* v. *City of Rochester*, 645 N.Y.S. 2d 951, 956 (4th Dept. 1996); *see also O'Brien,* 391 U.S. at 377 (1968) (laws impacting expression require a "compelling; substantial; subordinating; paramount; cogent; strong" state interest). The DRL's limits on the expressive aspect of marriage violate the New York Constitution.

The Supreme Court's freedom of expression cases addressing laws that ban flag burning are analogous here, in part because both actions are so controversial among different segments of the population. *See United States* v. *Eichman*, 496 U.S. 310 (1990); *Texas* v. *Johnson*, 491 U.S. 397 (1989). Like flag-burning, participation in civil marriage is conduct "sufficiently imbued with elements of communication to implicate the First Amendment." *Texas* v. *Johnson*, 491 U.S. at 414. The arguments in favor of limiting marriage to opposite-sex couples are remarkably similar to those in favor of laws prohibiting flag burning in that proponents of each would like to restrict the messages conveyed by a given symbol. Although the State may assert that it has a purported interest in preserving marriage as a symbol of the union between one man and one woman, just as the government in *Eichman* professed an interest in "safeguarding" the flag and preserving "the flag's status as a symbol of our nation and certain national ideals," *Eichman*, 496 U.S. at 316, the Supreme Court has soundly rejected such

arguments. *Id.* at 312; *Johnson,* 491 U.S. at 399. "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Id.* at 413. Just as a state may not ban flag burning to limit the symbolism of the flag to one message, it may not use the institution of marriage to convey the symbolic commitment only of opposite-sex couples.[57]

The State unquestionably has legitimate goals in creating and protecting the the institution of marriage. But the exclusion of plaintiffs from the institution of marriage, and the resultant burden on their rights to free expression, is not narrowly tailored to advance those goals. The Court of Appeals' decision in *Arcara* is directly on point. *Arcara* dealt with the closing of an adult bookstore as a nuisance because patrons were "using the premises to commit illegal acts." *Id.* at 555. The Court held that the closing violated the guarantee of freedom of expression under the New York Constitution, despite the State's argument that it closed the bookstore to prevent non-expressive, illegal acts. "The crucial factor in determining whether State action affects freedom of expression is the impact of the action on the protected activity and not the nature of the activity which prompted the government to act." *Id.* at 558. New York's

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[57] *United States* v. *O'Brien*, 391 U.S. 367 (1968) provides a useful contrast. In finding that the government had a sufficient interest to sustain a prosecution for draft card burning, the Court provided an exhaustive list of practical, bureaucratic reasons why non-destruction of draft cards was crucial. The Court stressed that *O'Brien* was "unlike [a case] where the alleged governmental interest in regulating conduct arises *in some measure* because the communication allegedly integral to the conduct is itself thought to be harmful." Even though marriage serves non-expressive ends, the motivation to exclude same-sex couples is the belief that the mere act of labeling a same-sex couple as married – "the communication integral to the conduct" – is, as the *O'Brien* court put it, "itself thought to be harmful." *Id.* at 382

test for whether a violation of free expression has occurred focuses "not [on] who is aimed at but who is hit." *Id.* at 558; *See also Golden* v. *Clark*, 563 N.Y.S.2d 1, 6 (1990); *Rogers* v. *New York City Transit Authority*, 89 N.Y.2d 692, 698 (1997).

The infringement on plaintiffs' right to free expression — the parties "hit" by the DRL — violates the New York Constitution. Excluding same-sex couples from marriage serves no purpose other than to restrict the expression of the idea that same-sex couples may share loving, committed relationships, just like opposite-sex couples. Limiting marriage to opposite-sex couples is not sufficiently narrowly tailored, or even rationally related, to the legitimate goals of New York law.

### C. In Providing Differential Access to the Unique Expressive Opportunity Offered by Civil Marriage, the DRL Violates the Equal Access Principle of Article I, § 8 of the New York Constitution.

Under the First Amendment of the U.S. Constitution and Article I, § 8 of the New York State Constitution, "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." *Mosley*, 408 U.S. at 96. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 829. *See also R.A.V.* v. *St Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

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 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." *Rosenberger,* 515 U.S. at 830.

The DRL specifically denies to same sex-couples the use of marriage as an expressive resource. That only opposite-sex couples can participate in civil marriage "seriously disadvantages same-sex couples and distorts public discourse." Cruz, *supra*, at 929. Clearly, this sort of discriminatory access to expressive opportunity raises serious constitutional concerns.

In other words, while a state "may reserve [a designated] forum for its intended purposes, communicative or otherwise," it can only do so if the regulation on speech is reasonable and not an effort to suppress expression *merely because public officials oppose the speaker's view.*" *Perry Education Ass'n* v. *Perry Local Educators Ass'n.*, 460 U.S. 37, 62 (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,* 341 N.Y.S.2d 108 (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 "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).

As discussed above, denying same-sex couples access to civil marriage is, often explicitly but certainly impliedly, a rejection of the view that same-sex marriages should be afforded the same status as opposite-sex ones. The DRL, by restricting the forum of civil marriage to opposite-sex couples, thus privileges the message that only heterosexual relationships are valid, or, at least, that they are uniquely valid in the State's eyes. This is clearly in violation of Art. I, § 8. For instance, in *R.A.V.* v. *St. Paul*, the Supreme Court struck down as impermissible viewpoint discrimination an ordinance that prohibited public displays of messages that communicated racial, gender or religious intolerance. 505 U.S. 377, 378 (1992). The *R.A.V.* Court, finding the law unconstitutional because it invalidly burdened speakers opposed to tolerance and equality, stated that "[s]electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." *Id.* at 394.

Similarly here, the government's "selective" sanctioning of opposite-sex unions by granting licenses to opposite-sex couples but denying them to same-sex couples "handicaps" plaintiffs from expressing their "particular ideas" about the desirability and validity of same-sex marriage. "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 US 397, 414 (1989).

Moreover, the DRL also violates the Equal Protection Clause on free expression grounds. In *Chicago Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972), the Court held that content-based restrictions (specifically the exclusion of labor picketers, but not picketers generally) on expression in a limited public forum were impermissible.

Approaching the case in terms of both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, the Court held that "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Id.* at 101. Here, as we have already demonstrated, the State is discriminating based on gender and sexual orientation. Exclusion from the public forum of marriage on the basis of gender and sexual orientation is thus constitutionally unacceptable not only under the equal protection clause of the New York Constitution, but also under free expression analysis, and must also be deemed unconstitutional under the broad protections of Article I, § 8.

## V.

## THE COURT SHOULD REMEDY THE CONSTITUTIONAL DEFECTS IN NEW YORK'S DOMESTIC RELATIONS LAW BY EXTENDING ITS COVERAGE TO SAME-SEX COUPLES

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

The only remedy to the constitutional infirmities in the DRL set forth above is to grant to same-sex couples the rights and privileges of civil marriage under New York law. Any suggestion by the State that the New York Constitution requires less – such as laws permitting civil unions or domestic partnerships – 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.

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 members of society. 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 and 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.*

Unjustified government discrimination is inherently injurious, diminishing the sense of self-worth of those against whom it discriminates. It invites and justifies private discrimination, and denies whole classes of citizens full participation in civic life. *See, e.g., id.*; *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*, 123 S.Ct. at 2482 (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"). 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.

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 in *Brown* and subsequent cases, 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.[58]

Furthermore, in contexts other than race, the Supreme Court has rejected forms of government discrimination that send the message that some members of our community are not as worthy as others. For example, the Court now recognizes that rules and policies that relegate women to a separate sphere are discriminatory and serve to reinforce stereotypes that women are "innately inferior." *Hogan*, 458 U.S. at 725; *United*

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[58] 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.* 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").

*States v. Virginia*, 518 U.S. 515, 547-48, 551-55 (1996) (rejecting Virginia's attempt to justify its categorical exclusion of women from the Virginia Military Institute on the ground that the State had provided a separate and allegedly "equal" facility for women, and noting that the "parallel" institution did not replicate the numerous benefits provided by the established institution, including intangible benefits such as its "standing in the community, traditions and prestige").

Concern about the stigma of government discrimination also figured prominently in the Court's decision last term striking down a law that criminalized private, consensual same-sex sexual intimacy. *Lawrence v. Texas*, 123 S. Ct. 2472 (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 2478, 2482. As the Court recognized, this kind of stigmatization is an affront to our constitutional system. *Id.* at 2484; *see also id.* at 2486 (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 Judicial Supreme 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 the 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." *In re Opinions of the Justices to the Senate,* 802 N.E.2d 565, 570 (Mass. 2004) (internal citations omitted).

The 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 pars. 102-07.

This understanding that civil unions and domestic partnerships are not equal to civil marriage fully comports with the personal experiences of the plaintiffs in this action. For example, as plaintiff 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. . . . .") (Tripi Aff. ¶ 7)

Similarly, plaintiff 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." (Muniz Aff. ¶ 8) And, as plaintiff 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." (McDonnell Aff. ¶ 14) (emphasis added).

### 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,* 485 N.Y.S.2d at 218. 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 may suggest that it is for the Legislature, and not the courts, to define the scope of the right to marry in New York. (*Shields* Br., at 24 n.8) But the courts, not the Legislature, are charged with the responsibility of ensuring that the laws of the State of New York satisfy the 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.' It is therefore the court's role to interpret [the New York] constitution . . . ." *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, the Court should grant plaintiffs' motion for summary judgment.

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Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: 

Roberta A. Kaplan
Andrew J. Ehrlich
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

- and –

James D. Esseks
Matthew Coles
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004-2400
(212) 549-2500

- and -

Arthur Eisenberg
New York Civil Liberties Union Foundation
125 Broad Street, 17th Floor
New York, New York 10004
(212) 344-3005

Attorneys for Plaintiffs