

1458/04

To be Argued by:
STEVEN J. HYMAN
(Time Requested: 30 Minutes)

New York Supreme Court

Appellate Division—Second Department

ORIGINAL
WITH PROOF OF
SERVICE

Docket No.:
2004-10100

In the Matter of the Application of:

JOHN SHIELDS, ROBERT MICHAEL STREAMS, JACQUELINE
AXT-OHANNESYAN, LISA AXT-OHANNESYAN, JOHN ADE,
JOHNNIE FARMER, ELIZABETH INSON, THERESA APUZZO,
JOE HICKEY, ROBERT BRAY, CHRISTINA LOMBARDI,
RACHEL MCGREGOR RAWLINGS, ABIGAIL MILLER, MELANIE
SUCHET, CLAIRE BONDE, TONI BONDE, GEORGE DELANCEY,
JOEL EALY, DEIRDRE BERNARD-PEARL and LISA BERNARD-PEARL,

FILED NA

OCT 17 2006

Petitioners-Appellants
**ROCKLAND COUNTY
CLERK'S OFFICE**

For a Judgment Pursuant to Article 78 of the CPLR and other relief,

— against —

CHARLOTTE MADIGAN, Town Clerk, Town of Orangetown, New York,
and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents-Respondents.

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Rockland County Clerk's Index No. 1458/04

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PRELIMINARY STATEMENT

This case raises the question of whether, under New York State law, Petitioners, who applied for marriage licenses as members of committed same-sex couples but saw those applications denied, have the same right to join in the benefits and responsibilities of civil marriage as opposite-sex couples. Respondents do not dispute that Petitioners were denied marriage licenses even though their relationships reflected the common elements and the variety that married New Yorkers would recognize in their own relationships: they had established homes together, supported each other in schools and jobs, nursed each other in sickness, and shared everyday joys. Indeed, the Department of Health concedes that “petitioners and their families are entitled to dignity and respect, that children raised in those families can thrive, and that same-sex couples can be as committed, stable, loving and nurturing as opposite-sex couples.” *See* Memorandum of Law in Support of the Answer of the New York State Department of Health at 1. Respondents excluded Petitioners from civil marriage simply because they sought to marry someone of the same sex.

Respondents bear the burden of coming forward with a sufficiently important governmental interest to justify this disparate treatment, and of showing that the denial of marriage licenses to same-sex couples is appropriately tailored to further that interest. Much of the Brief for Respondent Department of Health

(“DOH Brief”) is devoted to the proposition that the denial of marriage licenses to Petitioners solely on account of their being members of same-sex couples should be subject only to the least exacting standard of judicial review. But although wrong, that argument is also beside the point. No legitimate purpose is served by depriving same-sex couples and their children of the protections, security, respect and sense of worth that come with civil marriage.

Respondents have built their entire argument on the proposition that prohibiting same-sex marriage is necessary for the preservation of national “uniformity” and “tradition.” But, as the case law amply demonstrates in numerous contexts, these are not valid justifications for the selective denial of a fundamental right to millions of New York State residents, and the unjustified denial of such a right violates the New York State Constitution. These justifications are also based on false assumptions: that the hallmarks of civil marriage in New York were fixed at the framing of the State Constitution and have remained unchanged—and consistent with the marriage laws of other states—ever since. In fact, New York marriage law already differs in substantial ways from the laws of other jurisdictions. And the so-called “traditional” legal understandings of marriage and family, of husband and wife, have evolved dramatically in New York over the years. A myth of an unbending “tradition” provides no basis for denying

New Yorkers the right to marry the person they love simply because that person is someone of the same sex.

This case is not about creating new types of marriages or families. It is about treating same-sex couples (to whom New York State law otherwise extends rights comparable to the rights it extends to opposite-sex unions) on an equal footing with other couples. Whether this result is reached by construing the State's marriage statute to encompass same-sex marriage (a construction Petitioners believe is merited, and which would also fulfill the canon of constitutional avoidance) or by holding that excluding same-sex couples from the marital franchise violates state constitutional norms (as is clearly the case under New York State case law), the law of this State can only be fairly construed to extend the right to marry to Petitioners and other members of same-sex unions.

ARGUMENT

I. RESPONDENTS HAVE FAILED TO IDENTIFY ANY LEGITIMATE, MUCH LESS COMPELLING, STATE INTEREST TO JUSTIFY DENYING SAME-SEX COUPLES THE RIGHT TO MARRY

The Department does not dispute that its decision to deny marriage licenses to same-sex couples is subject to constitutional review. *See* DOH Brief at 26. Petitioners and Respondents disagree, however, on the standard of review that should apply. For the reasons given below and in the opening Brief of Petitioners-Appellants (“App. Brief”), this Court should apply heightened scrutiny in reviewing the denial of marriage licenses to Petitioners. But even if this Court were to consider Petitioners’ due process and equal protection claims under a more lenient standard, the refusal to grant marriage licenses simply because the applicants are same-sex couples is unconstitutional. The proffered state interests do not qualify as “legitimate,” and the denial of marriage licenses to same-sex couples bears no connection—rational or otherwise—to those claimed interests.

Even applying the lowest level of scrutiny, the ban on marriage by same-sex couples fails because it does not at least “rationally further some legitimate, articulated state purpose.” *Doe v. Coughlin*, 71 N.Y.2d 48, 56 (1987) (citation omitted). The Department relies so heavily on the presumption of validity of a statute as to render constitutional scrutiny virtually meaningless. Rational review, though deferential, is no rubber-stamp. Consistent with the constitutional

obligation to guard individual autonomy in matters of personal and family life against undue government interference, the courts' review of the fit between legislative purpose and classification is especially rigorous where, as here, laws "inhibit[] personal relationships." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J. concurring).

The Department offers two arguments to support its claim that the denial of marriage rights to same-sex couples is supported by a rational basis. First, it "avoids...issuing licenses that would give the misleading impression that same-sex couples would uniformly have the same rights as opposite-sex married couples" under federal law or under the laws of the majority of other states. DOH Brief at 40. Second, the Department claims that "the State has a legitimate interest in preserving the historic legal and cultural understanding of marriage[.]" and emphasizes "the tradition of heterosexual marriage as a social institution in which procreation occurs." *Id.* at 45-46. Neither of these claims withstands scrutiny.

A. Mimicking The Laws Of The Majority Of Other States Is Not A Legitimate State Interest

The Department advances the startling proposition that New York should deny same-sex couples equal access to marriage licenses because the majority of *other* states as well as the federal government explicitly prohibit same-sex marriages and/or deny recognition to such marriages performed elsewhere, and

“[t]hese substantive differences in legal status make it rational to call the license issued to opposite-sex couples alone a ‘marriage license.’” DOH Brief at 42-45.

The Department cites no authority whatsoever to support its suggestion that the demands of the New York Constitution must be held hostage to the statutory regimes of other jurisdictions, or that doing so represents a legitimate New York state interest; and there is none. Indeed, the Court of Appeals has concluded the opposite. In *New York v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986), the Court of Appeals explained that “[w]hen weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor.” *Id.* at 304. And, in *People v. Scott*, 79 N.Y.2d 474 (1992), the Court of Appeals “decline[d] to adopt any rigid method of analysis which would, except in unusual circumstances, require us to interpret provisions of the State’s Constitution in ‘[l]ockstep’ with the Supreme Court’s interpretations of . . . the Federal Constitution.” *Id.* at 490. *See also Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (“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.”).¹

¹ Respondents urge this Court to ignore decisions from other states that have determined that denying same-sex couples the right to marry (Massachusetts), or access to the same rights and

Furthermore, New York marriage law already is demonstrably not harmonized with the laws of other jurisdictions. First, as the Attorney General has recognized (and as the only New York court to have addressed the issue has concluded), “New York law presumptively requires that parties to [same-sex] unions [celebrated outside of New York] must be treated as spouses for purposes of New York law.” Op. Att’y Gen., March 3, 2004 at 28. In *Langan v. St. Vincent’s Hospital*, 196 Misc.2d 440, 455 (Sup. Ct. Nassau County 2003) the court held that parties to a Vermont civil union must be treated as “spouses” for purposes of New York’s wrongful death statute under the New York Constitution’s Equal Protection Clause. If New York had a genuine interest in harmonizing its practice with the practices of the majority of states, New York would refuse to give legal effect to such unions.

Similarly, New York permits first cousins to marry notwithstanding the fact that such marriages are explicitly prohibited in thirty states, *see* DRL § 5 (excluding first-cousin marriages from the list of incestuous marriages), and “New

benefits as married couples (Vermont), is unconstitutional, arguing that the protections of the Massachusetts and Vermont state constitutions are broader than the protections afforded under the federal constitution. *See* DOH Brief at 52-54. Even if it were not the case that New York, Vermont, and Massachusetts law were similarly protective of constitutional rights, Respondents misunderstand Petitioners’ reliance on extra-jurisdictional case law. These cases robustly support the notion—common and crucial to analysis under the precedents of those states and New York case law—that the justifications for denying marriage rights or benefits to same-sex couples are not rational. *See Baker v. State*, 744 A.2d 864, 881, 886 (Vt. 1999); *Goodridge*, 798 N.E.2d at 968. The conclusion of irrationality is one of logic; it does not turn on the niceties of the legal formulae guiding the courts’ analyses.

York is the only jurisdiction which does not have a true no-fault divorce,” *Melnick v. Melnick*, 146 A.D.2d 538, 542 (1st Dep’t 1989) (Asch, J., concurring). It is simply impossible to reconcile these aspects of New York practice with the notion that the State has an overriding interest in bringing the DRL in line with the laws of other jurisdictions. *See Baker v. State*, 744 A.2d 864, 885 (Vt. 1999) (“[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 governmental purpose”).

B. The Asserted Interest in Preserving the “Traditional” Definition of Marriage Is Not a Constitutionally Adequate Justification for Denying Same-Sex Couples the Right to Marry

The Department also attempts to justify the denial of marriage licenses to Petitioners by asserting that “[o]pposite-sex marriages have been recognized to provide long-standing societal benefits.” DOH Brief at 46. The Department, however, fails to identify a single societal benefit *unique* to opposite-sex marriage. As a result, the asserted interest boils down to promoting tradition for tradition’s sake. This argument fails because: (1) New York has not in fact recognized preserving “traditional marriage” as a state interest; (2) “traditional marriage” is a red herring, since marriage in New York and across the country is a continually evolving concept; (3) the concept of marriage already encompasses the possibility

of two spouses of the same sex; and (4) regardless, preserving “traditional marriage” is not a legitimate interest under the reasoning of *Lawrence v. Texas*.

First, the Department is wrong to contend that “New York judicial decisions have consistently recognized the significance of the tradition of heterosexual marriage” DOH Brief at 46. The Department musters only two cases from the entire history of the decisional law of this State to support its claim, and the two cases upon which it relies provide scant support for the proposition it seeks to advance. *Storrs v. Holcomb*, 168 Misc. 2d 898 (Sup. Ct. Tompkins County 1996), *action dismissed*, 245 A.D.2d 943 (3d Dep’t 1997), was dismissed by an appellate panel on procedural grounds and therefore has no precedential effect whatsoever. And, as Petitioners have already explained, *Matter of Cooper*, 187 A.D.2d 128 (2d Dep’t 1993), is inapposite, because the petitioner in *Cooper* did not claim the right to marry under the DRL. See App. Brief at 42; *see also*, Op. 102, Op. Att’y Gen., Mar. 3, 2004, at 14 (acknowledging that *Cooper* is of “limited utility,” for that reason). The *Cooper* court’s passing reference to the “institution of marriage as a union of man and woman” did not recognize a state interest—legitimate or not—in preserving a traditional view of marriage; rather, it was a simple observation—in dicta—of how marriage was popularly viewed at that time.

Notably, the Department says nothing about the body of New York case law cited in the Brief of Petitioners-Appellants which (1) explicitly rejects the notion

that traditional practices and sensibilities are somehow immune from constitutional challenge, and (2) demonstrates that the “traditional” definition of family has evolved dramatically over the years, including through recognition of the legitimacy of same-sex relationships (App. Brief at 49-52). Nor does the Department acknowledge—as the Attorney General previously has—that the facets of New York law “recogniz[ing] the legitimacy of committed same-sex relationships . . . draw[] into question the State’s interest in maintaining the historical understanding of marriage as confined to opposite-sex partners.” Op. Att’y Gen. March 3, 2004, at 19.

Second, Respondents are wrong to suggest that New York has recognized a constant form of “traditional marriage” unchanged since the framing of the State Constitution. *See* DOH Brief at 40, 45-48. In fact, far from being static, the concept of what it means to be a husband or a wife under New York law has evolved to meet developing social mores and understandings. *See* App. Brief at 23, n. 5. Similarly, the Court of Appeals has acknowledged that interpretation of the term “family” as used in a provision of the EPTL, must “find [a] foundation *in the reality of family life*.” *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211 (1989) (emphasis added). *See also Langan*, 196 Misc. 2d at 452-453 (holding that same-sex couples qualify as “spouses” under EPTL 4-1.1, while “acknowled[ing] that at

the time the wrongful death statutes were written, the use of the term spouse did not envision inclusion of a same-sex marital partner.”);

Third, Respondents cling to the false notion that marriage is universally understood to be a union only between a man and a woman. DOH Brief at 10; Brief of Respondent Town Clerk for the Town of Orangetown (“Town Clerk Brief”) at 14. They cite to the definition of “marriage” in the Seventh Edition of *Black’s Law Dictionary* as the “[t]he legal union of a man and a woman as husband and wife.” *Id.* at 986 (1999). Respondents fail to note that the Eighth Edition of *Black’s Law Dictionary* specifically includes “same-sex marriage” under the “marriage” entry as “[t]he ceremonial union of two people of the same sex; a marriage or marriage-like relationship between two women or two men.” *Id.* (8th ed. 2004). The entry notes the growing body of cases, such as *Goodridge*, recognizing same-sex marriage. Even the definition of the term “wife” as “a woman united to a man by marriage,” which Respondents pulled from the 1979 Fifth Edition of *Black’s Law Dictionary* (DOH Brief at 11; Town Clerk Brief at 14), has been given a new definition in the Eighth Edition as simply “a married woman.” *Black’s Law Dictionary* (8th ed. 2004).

Popularly-used English-language dictionaries consistently contain a definition of marriage which expressly includes marriages between same-sex spouses or is completely gender-neutral. *See, e.g., Merriam-Webster Online*

Dictionary (“the state of being united to a person of the same sex in a relationship like that of traditional marriage”); *Oxford English Dictionary* (listing as a definition of marriage, “the relation between persons married to each other,” and explicitly noting that “[t]he term is now sometimes used with reference to long-term relationships between partners of the same sex”); *MSN Encarta Dictionary* (“a legally recognized relationship...between two people who intend to live together as sexual and domestic partners”); and *The American Heritage Dictionary* (4th ed.) (“[a] union between two persons having the customary but usually not the legal force of marriage: *a same-sex marriage*”). The popular conceptualization of marriage therefore has evolved to include unions between same-sex spouses, and there is no factual support for Respondents’ claim that marriage is universally understood to be limited to a man and woman. DOH Brief at 10.

Fourth, even if the New York courts had acknowledged an interest in preserving the “traditional” definition of marriage as limited to opposite-sex couples, the reasoning in the Supreme Court’s recent decision in *Lawrence v. Texas* signals that any such interest is not constitutionally cognizable. *Lawrence* holds that “the fact that the governing majority in a State has *traditionally* viewed a particular practice as immoral *is not a sufficient reason for upholding a law prohibiting the practice.*” 539 U.S. at 577 (citation omitted) (emphases added); 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.”). The passage of time cannot legitimate a practice of denying a group equal protection of the laws.

The Department struggles to distinguish *Lawrence* by insisting that “[t]he State’s interest in preserving the traditional definition of marriage cannot be equated with moral disapproval of homosexuality.” DOH Brief at 48. But the Department offers no account of what, exactly, the “traditional” prohibition against same-sex marriage is if not an expression of moral disapproval of such unions. *See* App. Brief at 12, 54-55. Petitioners are not asking this Court to impair the ability of opposite-sex couples to marry. Those citizens for whom marriage holds a particular cultural or religious significance may continue to hold that view and to approach marriage in such a way that comports with their cultural or religious beliefs. But such traditions and religious and cultural beliefs are far from universal, and denying same-sex couples a marriage license only strips them of a fundamental right and runs roughshod over the equally-deserving traditions and religious and cultural beliefs of a large segment of the population of New York State.

C. Existing New York Case Law Does Not Support A Link Between Marriage And Procreation, And Promoting Procreation Does Not Provide A Basis For Denying Same-Sex Couples The Right To Marry

The Department suggests, with understandable ambivalence and ambiguity, that perhaps opposite-sex marriage is uniquely linked to procreation. To the extent that the Department relies on this supposed “link,” it belies an inaccurate view of both same-sex couples and of heterosexual marriage. First, New York case law has not tied marriage to procreation.² As the Attorney General has already noted, New York courts have held that “incapacity to bear children” is not a grounds for voiding a marriage under the DRL and, hence, the existence of a State interest in using the marriage laws as a lever for promoting procreation is highly questionable. Op. Att’y Gen. March 3, 2004, at 17. Indeed, save the inapposite decision in *Matter of Cooper*, the Department fails to cite even a single New York case supporting either the narrow claim that the procreation interest can justify a prohibition on same-sex marriage or the more general notion that New York’s laws pertaining to marriage are at all related to an interest in promoting procreation. Second, same-sex couples are having children in abundance, sometimes by adoption, sometimes by birth. New York State law unambiguously recognizes joint adoption by same-sex couples as well as second-parent adoption, regardless

² The Department does not challenge Petitioners’ claim that other state courts have rejected parallel arguments on precisely this ground (App. Brief at 58-59 (citing *Goodridge*, 798 N.E.2d at 961; *Baker*, 744 A.2d at 881)).

of the sexual orientation of the adoptive parent. *See, e.g., Matter of Adoption of Carolyn B.*, 6 A.D.3d 67 (4th Dep't 2004); *Matter of Jacob*, 86 N.Y.2d 651, 668 (1995). These children are fortunate to be raised in two-parent households, but are bereft of the additional protections and stability they would enjoy if their legally-recognized parents were permitted to marry.

The Department suggests that even though procreation is frequently not an option or goal of opposite-sex marriages, this does not render "procreation" ineligible as a legitimate basis for denying same-sex couples their right to marry.³ But the Department fails to point out any connection between the denial of marriage licenses to same-sex couples and furthering a procreation interest. The Department also fails to address the State's legitimate interest in considering the welfare of the children of same-sex couples and promoting the stability and legal predictability of marriage in such families. Even if this Court were to find that promoting "procreation" may possibly be a legitimate interest of the State, it cannot escape the fact that denying same-sex couples the right to marry does not further this interest and actually undermines it, and it certainly undermines the broader State interest in providing for the welfare of children in stable family units.

³ The Department seems to acknowledge that, in practice, denying marriage rights to same-sex couples does not further a procreation interest: "[t]hat the State's generalization proves to be an inadequate proxy in any individual case is irrelevant." DOH Brief at 50. *See also* App. Brief at 57-58.

* * * * *

Despite Respondents' protestations, their construction of the DRL serves only animus. Petitioners are not seeking to deprive opposite-sex couples of their opportunity to marry, or to place any restrictions thereon, or in any way to alter the marriage process for opposite-sex couples. All Petitioners are challenging is the denial of this fundamental right to the gay and lesbian citizens of this State. Respondents have failed to set forth any way in which the proper extension of this marriage right to same-sex couples would interfere with any legitimate state interest. The only conceivable reason for the denial of same-sex couples of their right to marry would seem to be a distaste or disapproval of these relationships, and that is not a legitimate state interest. *See Romer v. Evans*, 517 U.S. 620, 632-36 (1996); *Lawrence*, 539 U.S. at 580 ("When a law exhibits such a desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws.") (O'Connor J., concurring) (citing cases).

II. THE DENIAL OF MARRIAGE LICENSES TO SAME-SEX COUPLES SHOULD BE SUBJECT TO HEIGHTENED CONSTITUTIONAL SCRUTINY

A. The Department Evades The Question Of Whether Same-Sex Couples Have A Fundamental Right To Marry

The Department concedes that the right to marry is fundamental, DOH Brief at 25, and that where a "statutory scheme . . . burdens a fundamental

right, . . . strict scrutiny will apply[.]” *Id.* at 22. It seeks to escape the logical application of these propositions with a simple assertion: “what [Petitioners] propose is not a marriage.” *Id.* at 26 (quoting *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973)). This is both wrong, because common definitions of marriage include unions between same-sex couples, *see* pp. 11-12, *supra*, and entirely circular; both the premise and the conclusion of the Department’s argument is that same-sex couples are not permitted to marry. *See Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993) (“[Appellee] proposes that the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman. We believe [appellee’s] argument to be circular and unpersuasive.”); *Goodridge*, 798 N.E.2d at 961 n.23 (“[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.”). Petitioners’ claims cannot be disposed of through this exercise in definitional fiat; instead, they require this Court to consider whether Petitioners’ relationships bear the hallmarks—the *fundaments*—of the long-recognized right to marry. Petitioners’ relationships do, indeed, bear these hallmarks. *See* App. Brief at 28-31.

The essence of marriage rests in the character of a couple’s relationship, not in the gender or sexual orientation of those who choose to marry. And once it is conceded—as it has been in this case—that committed same-sex relationships bear

all of the emotional and interpersonal hallmarks our society associates with the unions we label “marriages,” the justifications for excluding same-sex couples from this vital institution collapse. As the Attorney General has explained, “New York law has recognized the legitimacy of committed same-sex relationships in numerous ways, [and this draws] into question the State’s interest in maintaining the historical understanding of marriage as confined to opposite-sex partners.” Op. Att’y Gen. March 3, 2004, at 19.

The Department, however, rejects the notion that the fundamentality of marriage is rooted in the nature of the relationship rather than the gender of its members. They ask this Court to focus its fundamental rights analysis not on whether committed same-sex relationships are qualitatively similar to traditional marriages, but on whether marriage, traditionally, has included same-sex couples. *See* DOH Brief at 23.

This approach to analyzing the fundamental right to marry is inconsistent with the Supreme Court’s reasoning in *Loving v. Virginia*, 388 U.S. 1 (1967). In the course of deciding that Virginia’s anti-miscegenation law violated appellants’ fundamental right to marry, the Court did not inquire whether civil marriage of *interracial couples* is a right so rooted in the Nation’s history and tradition as to be fundamental. Instead, the Court identified the “freedom to marry[.]” *id.* at 12, as fundamental and assessed whether there was adequate justification for denying this

freedom to the couple before it. It is no answer to say that “what [Petitioners here] propose is not a marriage[,]” while the appellants in *Loving* sought to vindicate “a fundamental right to opposite-sex marriage that already existed.” DOH Brief at 26. This is an anachronistic reading of *Loving*. At the time the decision in *Loving* was rendered, sixteen states prohibited interracial marriage and, only fifteen years earlier, the laws of thirty states included such a prohibition. *See Loving*, 388 U.S. at 6 n. 5. Hence, Virginia might easily have argued that “what [the Lovings] propose is not a marriage[,]” for what the Lovings sought unmistakably was *not* a marriage in the many states (including Virginia) in which interracial unions were forbidden and in which the very term “interracial marriage” was legally meaningless. Yet the lack of an established tradition of interracial marriage proved not to be dispositive in *Loving*, just as the lack of an established tradition of same-sex marriage cannot be dispositive here. *See also, Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998) (“The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one’s own life partner is so rooted in our traditions.”).

Respondents’ argument gains no traction from their catalogue of several states’ constitutional amendments limiting the right to marry. *See* DOH Brief at 24-25. In fact, these amendments suggest, at a minimum, ambiguity regarding the

scope of the relevant states' constitutional protection of same-sex marriage rights absent such rights-restricting amendments. Respondents' reliance on case law from other jurisdictions to support their narrow conception of the fundamental right to marry is also misguided. *See id.* at 25-26. In three of these cases, the contours of the States' fundamental right to marry is inextricably linked to the states' interests in fostering procreation. *See Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. Ct. App. 1995); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). As discussed earlier, *see supra* pp. 14-16, the interest in procreation provides an inadequate foundation for limiting the fundamental right to marry to opposite-sex couples. Finally, reliance on cases from other jurisdictions to argue for a narrow conception of the right to marry is particularly inappropriate because New York courts have long recognized that the protections for individual rights and liberties provided under this State's Constitution are even broader than those provided under the federal Constitution. *See, supra*, n. 1.

Respondents are effectively trying to mirror the logic of the Supreme Court in the now-discredited *Bowers* decision: defining the alleged right so narrowly as to answer the question. In *Lawrence*, the Court said that it had been wrong in *Bowers* to define the liberty at stake as whether there was a fundamental right to engage in homosexual sodomy, and that doing so disclosed "the Court's own

failure to appreciate the extent of the liberty at stake.” 539 U.S. at 566-567. Likewise, it would be wrong to redefine the fundamental right to marry as a fundamental right to marry only someone of the opposite sex.

B. The Department’s Efforts To Avoid Heightened Scrutiny Under The New York Constitution’s Equal Protection Clause Are Unpersuasive

1. Respondents Offer No Sound Basis for Rejecting Petitioners’ Claim that Classifications based on Sexual Orientation Are Suspect

The Department presents two arguments in support of its claim that statutory classifications based on sexual orientation ought not to be subjected to heightened scrutiny. *First*, the Department asserts that “[t]he overwhelming majority of federal courts and courts in other states have...declined to accord suspect class status to homosexuals.” DOH Brief at 32. But the published cases upon which the Department relies for this proposition were grounded squarely in the Supreme Court’s discredited decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See* App. Brief at 41-42. The Supreme Court’s decisive overruling of *Bowers* in *Lawrence v. Texas* drains these cases entirely of their precedential value. At present, then, the only case cited by the Department in connection with this question that remains on solid precedential ground is *Tanner v. Oregon Health Sciences University*, 971 P.2d 435, 447 (Or. Ct. App. 1998), in which the Oregon Court of Appeals concluded that statutory classifications on the basis of sexual orientation *are* suspect and, hence, subject to heightened scrutiny.

Second, the Department infers from the growing body of laws designed to prevent discrimination on the basis of sexual orientation, that homosexuals cannot be deemed “politically powerless” in the constitutionally relevant sense and therefore cannot qualify as a “suspect” class. DOH Brief at 34. This is simply wrong; securing the passage of rights-protective legislation does not disqualify a group from suspect-class status. Statutory classifications predicated on race or gender were first deemed by the U.S. Supreme Court to be suspect long *after* the passage of significant legislation safeguarding the civil rights of these groups. *See* App. Brief at 40-41. The Department does not challenge Petitioners’ claims that (1) homosexuals have been subjected to a long history of purposeful unequal treatment because of their sexual orientation (App. Brief at 38-39), (2) sexual orientation has no relevance to an individual’s ability to function in or contribute to society, *id.* at 39-40, and (3) sexual orientation is an immutable characteristic, *id.* Thus, the Department effectively concedes that all of the doctrinal prerequisites for suspect classification status—save political powerlessness—are satisfied in this case.

Moreover, notwithstanding more recent progress by both racial minorities and women in securing increased political power and, with it, the passage of further legislation designed to eradicate race and sex discrimination, courts continue to apply heightened scrutiny to statutes that classify on either of these

bases. See, e.g., *People v. Liberta*, 64 N.Y.2d 152, 167-73, (1984) (applying heightened scrutiny to sex-based classification); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (same); *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (applying heightened scrutiny to race-based classification).

Hence, the relevant question, for constitutional purposes, is not whether homosexuals are entirely devoid of access to the political process (a standard which would surely disqualify both racial minorities and women from the protections of heightened scrutiny); rather, the question is whether homosexuals are sufficiently disadvantaged in the political process such that laws singling them out are likely to be predicated on prejudice, ignorance, or antipathy. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that “laws grounded in [suspect classifications] are deemed to reflect prejudice and antipathy”). Respondents cannot seriously argue that homosexuals are not subject to continuing prejudice and antipathy likely to create a disadvantage in the political process, and *this* is the touchstone of constitutionally cognizable “political powerlessness.”

2. The Department’s Claim That Its Construction of the DRL Does Not Entail Classification on the Basis of Sex Cannot Be Reconciled with the Reasoning of *Loving v. Virginia*

The interpretation of the DRL advanced by Respondents and adopted by the trial court rests the permission of who may marry whom on a gender classification: only a man may marry a woman, and only a woman may marry a man.

Respondents insist that this interpretation does not amount to a “discriminatory gender-based classification” because “both men and women are subject to the same restriction.” Petitioners have demonstrated, Pet. Br. at 43-45, that this argument relies on the exact same fallacy as the one presented by Virginia authorities in their unsuccessful attempt to defend an antimiscegenation statute in *Loving v. Virginia*. But in this case, as in *Loving*, “the fact of equal application does not immunize the statute” from the mandates of equal protection. *Id.* at 8-9.

Respondents’ only argument in reply is that *Loving* involved race, and this case does not. DOH Brief at 37-38.⁴ That distinction is so weak as to approach a concession of the argument. Respondents, surely, do not suggest that racial discrimination violates equal protection but sex discrimination does not.⁵ Certainly, race-based classifications are generally subject to stricter scrutiny than are sex-based classifications. But the function of the parallel to *Loving* is to

⁴ Respondents no longer contest, as they attempted to do in the trial court, that the equal protection analysis does not require a showing of discriminatory intent. Nor do they contest Petitioners’ argument that the denial of marriage rights to same-sex couples nevertheless exhibits discriminatory intent because it is rooted in stereotypes relating to “proper” sex roles. App. Brief at 46-47.

⁵ Respondents do assert that “[t]he Fourteenth Amendment specifically prohibits racial discrimination.” DOH Br. at 38. If they mean that the Fourteenth Amendment *specifically refers to* and forbids racial discrimination, they are incorrect: the Amendment nowhere mentions race. If they mean that the Fourteenth Amendment’s Equal Protection Clause has been *interpreted* to prohibit racial discrimination, they are of course correct—but so has it been interpreted to prohibit sex discrimination. *E.g., United States v. Virginia*, 518 U.S. at 531-534.

demonstrate that a discriminatory classification exists, despite the putative “equal application,” not to fix the applicable standard of scrutiny.

Respondents vastly overstate the support for their reading of *Loving* that they claim is provided by cases from other jurisdictions. Both *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003), and *Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 23119998 (Ind. Super. Ct. May 7, 2003), are unpublished opinions; neither is binding precedent *even in its state of origin*.⁶ *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. A.D. 2005), does not undermine Petitioners’ reliance on *Loving* to demonstrate that the DRL classifies on the basis of sex, because no sex-discrimination-based objection was at issue in that case.⁷ And, the analysis of *Loving* in *Dean v. District of Columbia*, 653 A.2d 307, upon which the Department misleadingly relies, is actually from a concurring opinion, *not* the opinion of the court. *See id.* at 363 n.2 (Steadman, J., concurring). Finally, the discussion in *Baker v. State*, 744 A.2d at 880 n.13, of whether the state’s exclusion of same-sex couples from the benefits of civil marriage constituted

⁶ See N.J. R. GEN. APPLICATION R. 1:36-3 (unpublished opinions lack precedential value); *Indiana High Sch. Athletic Ass’n v. Durham*, 748 N.E.2d 404 (Ind. Ct. App. 2001) (unpublished trial court opinions should not be cited as precedent).

⁷ The *Lewis* plaintiffs brought an equal protection claim under the New Jersey Constitution, a claim that is analyzed not, like those under the U.S. and New York Constitutions, in terms of suspect classifications and levels of scrutiny, but through a “balancing test that considers ‘the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.’” *Lewis*, 875 A.2d at 271 (citation omitted).

impermissible sex-based discrimination is dicta. That court ultimately held that there was no “reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law[,]” and it determined that such couples were constitutionally entitled to these benefits. *Id.* at 886. The Department also relies on the decision of Minnesota Supreme Court in *Baker v. Nelson*, 191 N.W.2d 185. However, as the Attorney General has already acknowledged, the decision in *Baker* “no longer carries any precedential value with respect to the federal Equal Protection Clause” because it predates the evolution of modern equal protection doctrine under which heightened scrutiny is applicable to sex-based classifications. Op. Att’y Gen. March 3, 2004, at 21.

All that is left, then, of the Department’s survey of case law exploring the applicability of *Loving*’s methodology to statutes restricting marriage rights to opposite-sex couples is a division of authority between *Singer v. Hara*, 522 P.2d at 1191-92 (concluding that such statutes do not merit heightened scrutiny), and *Baehr v. Lewin*, 852 P.2d at 64 (deeming heightened scrutiny applicable to Hawaii’s statutory scheme). And it is therefore hardly the case, that “the great weight of authority” supports the Department’s reading of *Loving*. To the contrary, most of this “support” is no authority at all.

III. RESPONDENTS IGNORE THIS COURT'S DUTY TO AVOID A STATUTORY CONSTRUCTION THAT RAISES SERIOUS CONSTITUTIONAL QUESTIONS AND VASTLY OVERSTATE THE STATUTORY AND PRECEDENTIAL SUPPORT FOR THEIR READING OF THE DRL

A. The DRL Does Not Prohibit Issuing Marriage Licenses to Same-Sex Couples

According to the Attorney General, “the text of the DRL does not expressly bar marriage of same-sex couples....” Op. Att’y Gen. March 3, 2004, at 4. The DRL sets forth only two qualifications for marriage, neither of which concerns the gender of either spouse. *See* DRL § 10 and § 15-a (requiring that parties to a marriage be capable of entering a contract at law and be over fourteen years of age, respectively). The DRL enumerates those relationships that constitute “void” or “voidable” marriages—and same-sex marriages are nowhere to be found on this list. According to the plain language of the DRL and the Attorney General’s interpretation thereof, New York State would have no basis for denying recognition of same-sex marriages performed outside the state. As petitioners have noted, and respondents cannot dispute, the core provisions of the DRL regarding marriage are replete with gender-neutral language. Consequently, there is no statutory bar to granting same-sex couples their right to marry under the DRL as it is currently written.

Respondents rely on allegedly “gender-specific” terms contained in peripheral sections of the DRL and various other statutes referencing marriage as the only basis for their position that the legislature did not contemplate same-sex couples when crafting the DRL a hundred years ago. *See* DOH Brief at 11-15. The fact remains, however, that the legislature made the choice *not* to define marriage in the statute. This enabled the concept of marriage to evolve over time, rather than locking subsequent generations of New York residents into an antiquated conceptualization of marriage in which, for example, a female spouse was little more than the property of her husband. Respondents cling to the idea that marriage is universally understood to be a union only between a man and a woman. DOH Brief at 10; Town Clerk Brief at 14. But that is no longer true. Evolution of both our legal language and our culture demonstrate that our conceptualization of marriage is no longer so confined. *See supra* pp. 11-12; *see also, e.g.,* Empire State Pride Agenda Press Release, April 6, 2005, <http://www.prideagenda.org/pressreleases/pr-04-06-05.html> (“poll found that 51 percent of [New York] state residents support marriage for same-sex couples”).

B. The DRL Should Be Interpreted To Avoid Constitutional Concerns

When a statute admits of multiple constructions, well-established principles of interpretation require that the Court select one that avoids constitutional concerns. *See* App. Brief at 21-24.

Respondents fail to address the avoidance canon and its implications for this case. They do so notwithstanding the New York Attorney General's prior acknowledgment that "[t]he exclusion of same-sex couples from eligibility for marriage . . . presents serious constitutional concerns[,]” and that a court might wish to “construe the DRL to permit same-sex marriages in order to avoid declaring relevant portions of the statute unconstitutional.” Op. Att’y Gen. March 3, 2004, at 6, 15. *See also id.* at 15 (“It is well-settled that a ‘statute should be construed when possible in a manner which would remove doubt of its constitutionality.’”). Hence, though Respondents decline to address this firmly embedded interpretive principle in their submissions to this Court, the applicable standard remains clear: once Petitioners have demonstrated that the DRL admits of a construction that elides the “serious constitutional concerns” deemed by the Attorney General to be implicit in the interpretation now advanced by Respondents, the Court should favor Petitioners’ reading.

IV. THIS COURT CANNOT AVOID ITS MANDATE TO DECIDE CONSTITUTIONAL QUESTIONS

Respondents’ suggestion that it is for the Legislature, and not the courts, to define the scope of the right to marry in New York is baseless. “Where the validity of a legislative act is challenged it is the duty of the courts to determine its constitutionality.” *Defiance Milk Products Co. v. Du Mond*, 133 N.Y.S.2d 216, 218 (Sup. Ct. 1954); *see also* Op. Att’y Gen. March 3, 2004, at 27 (the

constitutional questions at issue in this case are “best resolved by the courts of this State.”) While the Legislature is authorized to regulate marriage, it is for this Court to assure that the Legislature does not overstep its constitutional bounds.

CONCLUSION

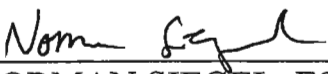
The Court should order the Town Clerk to issue the marriage licenses to which Petitioners are entitled.

Dated: New York, New York
August 29, 2005

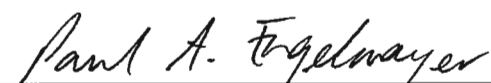
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CERTIFICATE OF COMPLIANCE

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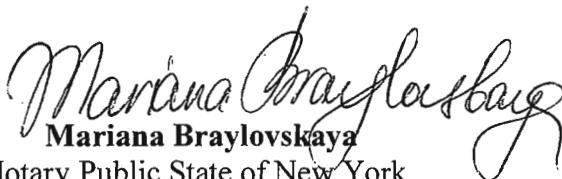
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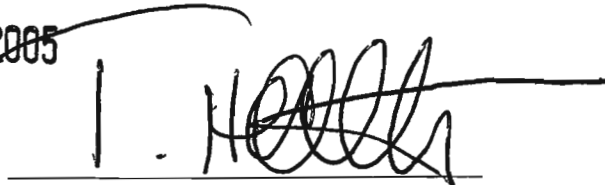
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