

Court of Appeals
State of New York

DANIEL HERNANDEZ and NEVIN COHEN,
LAUREN ABRAMS and DONNA FREEMAN-TWEED,
MICHAEL ELSASSER and DOUGLAS ROBINSON,
MARY JO KENNEDY and JO-ANN SHAIN, and
DANIEL REYES AND CURTIS WOOLBRIGHT,

Plaintiffs-Appellants,

-against-

VICTOR L. ROBLES, in his official capacity as CITY CLERK
of the City of New York,

Defendant-Respondent.

**BRIEF OF THE NEW YORK STATE CATHOLIC CONFERENCE
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-RESPONDENT**

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Interest of the *Amicus*

The New York State Catholic Conference (the Conference) has been organized by the Roman Catholic Bishops of New York as the institution by which the Bishops speak cooperatively and collegially in the field of public affairs. The Conference promotes the social teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigration, civil rights, criminal justice and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and to the people of the State of New York.

Whether this Court should mandate recognition of same-sex marriage presents an issue of profound importance to the Catholic Church and the citizens of New York State. Consistent with the Judeo-Christian moral heritage upon which Western Civilization is based and the longstanding tradition of Western law, the Conference affirms the understanding that marriage, as a natural and social institution, is reserved for opposite-sex couples in which they may procreate and raise children. Plaintiffs have provided this Court with no principled basis on which it could declare that understanding unconstitutional under the New York Constitution. Accordingly, the judgment of the Appellate Division, First Department, upholding the marriage laws of this State should be affirmed.

SUMMARY OF ARGUMENT

Plaintiffs, five same-sex couples, brought an action against defendant, Victor L. Robles, the City Clerk of the City of New York, seeking declaratory and injunctive relief against enforcement of the provisions of the New York Domestic Relations Law that reserve marriage to opposite-sex couples. The trial court entered judgment in favor of plaintiffs, *see Hernandez v. Robles*, 7 Misc.3d 459, 468-70 (Sup. Ct. New York County 2005), and defendant appealed. On appeal, the Appellate Division, First Department, reversed. *See Hernandez v. Robles*, 805 N.Y.S.2d 354 (1st Dep't 2005). Plaintiffs have appealed.

Plaintiffs have provided this Court with no principled basis on which it could conclude that the reservation of marriage to opposite-sex couples violates either the due process guarantee of the New York Constitution, *see* art. I, § 6, or the equal protection guarantee, *see* art. I, § 11.

First, with respect to plaintiffs' due process claim, the issue is *not*, as plaintiffs have framed it, whether homosexuals may exercise the fundamental liberty interest in entering into a marriage, which interest is protected by art. I, § 6, of the state constitution. Unquestionably they may, but only on the same terms and conditions as other persons in New York. Rather, the issue is whether the substantive due process interest in marriage extends to same-sex unions. In light

of the history and traditions of our Nation and this State, it clearly does not.

Second, plaintiffs' equal protection claims are foreclosed by the United States Supreme Court's dismissal for want of a substantial question of the appeal in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). Assuming that *Baker* is not controlling, those claims are meritless. The reservation of marriage to opposite-sex couples does not discriminate either on the basis of a person's sex or sexual orientation. Although the marriage statutes may have a disproportionate *impact* on homosexuals, that impact cannot be traced back to a discriminatory *purpose* or *intent* on behalf of the legislature. Even assuming, however, that the classification between opposite-sex and same-sex couples does classify on the basis of sexual orientation, that classification must be reviewed under the rational basis standard. The marriage statutes are reasonably related to multiple legitimate state interests, including the preservation of traditional marriage, providing an appropriate social structure in which procreation (intended or unintended) occurs and affording the children so procreated the benefits of dual gender parenting. None of those interests would be promoted by recognition of same-sex marriage. *Amicus* fully concurs with the appellate division's explanation of the *raison d'être* underlying the marriage laws:

. . . Marriage, defined as the union between one man and one woman, is based upon important public policy considerations and has been recognized as a fundamental constitutional right. [Citations omitted]. These considerations are based on innate, complementary, procreative roles, a function of biology, not mere legal rights. The reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth. [Citation omitted].

The legislative policy rationale is that society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing. It systematically regulates heterosexual behavior, brings order to the resulting procreation and ensures a stable family structure for the rearing, education and socialization of children. [Citation omitted]. Marriage promotes sharing of resources between men, women and the children that they procreate; provides a basis for the legal and factual assumption that a man is the father of his wife's child via the legal presumption of paternity plus the marital expectations of monogamy and fidelity; and creates and develops a relationship between parents and child based on real, everyday ties. It is based on the presumption that the optimal situation for child rearing is having both biological parents present in a committed, socially esteemed relationship. [Citation omitted]. The law assumes that a marriage will produce children and affords benefits based on that assumption. It sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depend on a health marriage culture for this latter, critical, but presently undervalued, benefit. Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision. Thus, society and government have reasonable, important interests in encouraging heterosexual couples to accept the recognition and regulation of marriage.

Hernandez v. Robles, 805 N.Y.S.2d at 360.

ARGUMENT

I.

NEW YORK LAW DOES NOT AUTHORIZE SAME-SEX MARRIAGE.

New York law does not authorize marriages between members of the same sex, as plaintiffs acknowledged below. *See* First Amended Complaint, ¶¶ 1-5, 27, 31, 36-37, 40-41. The trial court determined that such marriages are *not* permitted. *See Hernandez v. Robles*, 7 Misc.3d 459, 468-70 (Sup. Ct. New York County 2005).¹ As this argument demonstrates, that determination was unquestionably correct. Moreover, for the reasons set forth in the next argument, the historical and traditional understanding of marriage that supports that determination is particularly relevant in properly evaluating plaintiffs' claim that the reservation of marriage to opposite-sex couples violates the liberty language of the due process guarantee of art. I, § 6, of the New York Constitution.

New York law does not expressly prohibit same-sex marriages. *See* N.Y. DOM. REL. LAW § 10 (McKinney 1999) ("Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable

¹ Presumably, the court addressed this issue, although not raised by plaintiffs, because of its obligation not to decide constitutional issues unnecessarily. *See, e.g., Matter of Storar*, 52 N.Y.2d 363, 376-77 (1981) (declining to decide right to refuse unwanted medical treatment cases on constitutional grounds where the cases could be disposed of on common law and statutory grounds), *cert denied*, 454 U.S. 858 (1981).

in law of making a contract is essential”). Nevertheless, such prohibition is clearly implied in multiple provisions of the Domestic Relations Law referring to “husband” (or “groom”) and “wife” (or “bride”),² as well as in provisions barring

² See, e.g., §§ 12 (solemnization of marriage requires parties to declare that they take each other “as husband and wife”); 15(1)(a) (requiring town or city clerk to obtain verified statement or affidavit “[f]rom the groom,” including the “[f]ull name of [the] husband,” and “[f]rom the bride,” including the “[f]ull name of [the] bride”); 50 (right of married woman to own property not subject “to her husband’s control or disposal”); 73(1) (deeming any child born to a married woman by means of artificial insemination and with the written consent “of the woman and her husband” to be “the legitimate, natural child of the husband and his wife for all purposes”); 140(a) (authorizing action to declare the nullity of a void marriage upon the ground that “the former husband or wife of one of the parties was living, the former marriage being in force”); 140(b) (prohibiting annulment of marriage on the ground of nonage where the underage party “freely cohabited with the other party as husband and wife” after he or she reached the age of consent); 140(c) (prohibiting annulment of marriage of a mentally ill person by that person upon his or her restoration to a sound mind, “if it appears that the parties freely cohabited as husband and wife after the mentally ill person was restored to a sound mind”); 140(e) (prohibiting annulment of marriage on the ground that the consent of one of the parties thereto was obtained by force or duress “if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife”); *id.* (prohibiting annulment of marriage on the ground that the consent of one of the parties was obtained by fraud “if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud”); 170 (authorizing either the “husband or wife” to maintain an action for divorce); 170(5) (authorizing action for divorce where “[t]he husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment”) 170(6) (same with respect to “husband and wife” who “have lived separate and apart pursuant to a written agreement of separation . . . for a period of one or more years after the execution of such agreement”); 175 (determining legitimacy of children born or begotten before commencement of action for divorce brought “by the wife” or “by the husband”); 200 (authorizing “husband or wife” to bring an action against the other party to the marriage for separation); 221 (establishing procedure for dissolution of marriage on ground of absence of the “husband or wife”); 230(2) (authorizing an action to annul marriage, declare the nullity of a void marriage or for divorce or separation when “[t]he parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding”); 248 (authorizing termination of support obligations in final judgment of divorce or final judgment annulling marriage or declaring it nullity, without regard to whether the action for divorce or for annulment or for a declaration of the nullity of a void marriage was brought by “a husband or wife”) (McKinney 1999 & Supp. 2005).

incestuous marriages between certain specified male and female relatives. *See* N.Y. DOM. REL. LAW §§ 5(2) (McKinney 1999) (prohibiting marriage between “[a] brother and sister of either the whole or the half blood”), 5(3) (prohibiting marriage between “[a]n uncle and niece or an aunt and nephew”).

The unmistakable import of these provisions—that marriage is a legal relationship between a man and a woman—is consistent with the understanding of marriage as “the voluntary union of one man and one woman as husband and wife.” General Commentary, Art. 2, DOMESTIC RELATIONS LAW (McKinney 1999) at 18, citing *Fisher v. Fisher*, 250 N.Y. 313, 320 (1929) (the “law of marriage” regards as valid “all consensual marriages between a man and a woman who are . . . competent to marry”).³ *See also Storrs v. Holcomb*, 168 Misc. 2d 898, 900 (Sup. Ct. Tompkins County 1996) (concluding that “New York does not recognize or authorize same sex marriage”), *transferred*, 88 N.Y.2d 1063 (1996), *dismissed on other grounds*, 245 A.D.2d 943 (3rd Dep’t 1997). “The law makes no provision for a ‘marriage’ between persons of the same sex. Marriage is and always has been a contract between a man and a woman.” *Anonymous v.*

³ The marriage relationship has been defined as “the civil status of one man and one woman united in law for life under the obligation to discharge to each other and to the community those duties which the community by its laws imposes.” 45 N.Y. JUR.2D, DOMESTIC RELATIONS, § 1, at 95 (1995), quoted in *In re Estate of Jenkins*, 133 Misc.2d 420, 422 (Surrogate’s Ct. Queens County 1986). *See also Francis B. v. Mark B.*, 78 Misc.2d 112, 116-17 (Sup. Ct. Kings County 1974) (same).

Anonymous, 67 Misc.2d 982, 984 (Sup. Ct. Queens County 1971).⁴

Every court to have considered the question has agreed with the appellate division's conclusion below that "the relevant provisions of the DRL, despite the absence of an express prohibition against same-sex marriage, clearly do not contemplate such unions." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 359 (1st Dep't 2005). See *Matter of Shields v. Madigan*, 5 Misc.3d 901, 906 (Sup. Ct. Rockland County 2004), appeal docketed, No. 2004-10100 (2nd Dep't); *Samuels v. New York State Dep't of Health* (Sup. Ct. Albany County, Dec. 7, 2004), Index No. 1967-04, Decision and Order at 3, *aff'd*, No. 98084 (3rd Dep't Feb. 16, 2006); *Matter of Kane v. Marsolais* (Sup. Ct. Albany County, Jan. 31, 2005), Index No. 3473-04, Decision, Order & Judgment at 3-5, *aff'd*, No. 98151 (3rd Dep't Feb. 16, 2006); *Seymour v. Holcomb*, 7 Misc.3d 530, 533-34 (Sup. Ct. Tompkins County 2005),

⁴ See also *Matter of Cooper v. Kelly*, 187 A.D.2d 128, 131 (2nd Dep't 1993) (same) (citing *Anonymous*), appeal dismissed, 82 N.Y.2d 801 (1993); *Raum v. Restaurant Associates, Inc.*, 252 A.D.2d 369, 370-71 (1st Dep't 1988) (only a "husband or wife" in a valid marriage, and not the same-sex partner of the deceased, qualifies as a "surviving spouse" for purposes of the wrongful death statute); *Langan v. St. Vincent's Hospital of New York*, 802 N.Y.S.2d 476, 477 (2nd Dep't 2005) (same); *Matter of Valentine v. American Airlines*, 17 A.D.3d 38, 40-41 (3rd Dep't 2005) (the term "surviving spouse," as used in the Workers' Compensation Law, refers only to a person who was a spouse in a legally valid marriage, and not an unmarried domestic partner); *Greenwald v. H. & P. 29th St. Associates*, 241 A.D.2d 307, 308 (1st Dep't 1997) (spousal testimonial privilege does not apply to couple in a same-sex relationship); *Matter of Adoption of Robert P.*, 117 Misc.2d 279, 281 (Fam. Ct. New York County 1983) (noting that "the Legislature has not granted homosexuals the right to marry"), *aff'd. without opinion sub nom. Matter of Pavlik*, 97 A.D.2d 991 (1st Dep't 1983), *aff'd sub nom. Matter of Robert Paul P.*, 63 N.Y.2d 233 (1984); *Levin v. Yeshiva University*, 96 N.Y.2d 484, 503 (2001) (Kaye, C.J., concurring in part and dissenting in part) ("State law permits only heterosexual marriage").

aff'd, No. 98204 (3rd Dep't Feb. 16, 2006). That New York does not allow (and never has allowed) marriages between members of the same sex is of special relevance to plaintiffs' claim that the reservation of marriage to opposite-sex couples violates a fundamental liberty interest protected by the due process clause of the New York Constitution. *See* Argument II, *infra*.

II.

RESERVING MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT VIOLATE THE DUE PROCESS GUARANTEE OF ARTICLE I, § 6, OF THE NEW YORK CONSTITUTION.

Plaintiffs initially contend that the reservation of marriage to opposite-sex couples violates the liberty language of the due process guarantee of the New York Constitution. *See* Plaintiffs' Br. at 25-58. Article I, § 6, provides, in part, that "No person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. I, § 6 (McKinney 1998). The appellate division properly rejected this contention. *See Hernandez*, 805 N.Y.S.2d at 360, 361-62; *id.* at 363-68 (Catterson, J., concurring).

The central error in plaintiffs' due process analysis is their failure to define the precise nature of the liberty interest they have asserted. The issue before this Court is *not* whether the liberty language of the due process guarantee of the state

constitution confers a fundamental right to marry,⁵ but whether that right extends to same-sex unions.⁶ Plaintiffs, proceeding from the assumption that the right to marry embraces same-sex, as well as opposite-sex, unions, not surprisingly arrive at the conclusion that the marriage statutes interfere with their right to marry and, therefore, that those statutes may be justified only by a compelling state interest.⁷

⁵ See Plaintiffs' Br. at 27-33. See also *Hernandez*, 805 N.Y.S.2d at 379 (Saxe, J., dissenting) (state due process clause protects fundamental right to marry). For purposes of this brief, *amicus* assumes that the liberty language of the due process guarantee of art. I, § 6, of the New York Constitution confers a fundamental right to marry, separate from and independent of the corresponding right under the United States Constitution. That such a right exists is not as obvious as plaintiffs suggest. See Plaintiffs' Br. at 27-33. Most of the references to a right to marry in New York opinions were *obiter dicta* in cases involving other issues decided on federal, not state, constitutional grounds, and the *dicta* themselves cited only Supreme Court precedents. See, e.g., *Matter of Doe v. Coughlin*, 71 N.Y.2d 48, 52-53 (1987); *Crosby v. State of New York, Workers' Compensation Board*, 57 N.Y.2d 305, 312 (1982); *People v. Onofre*, 51 N.Y.2d 476, 486 (1980); *People v. Shepard*, 50 N.Y.2d 640, 644 (1980) (*per curiam*); *Delan v. CBS, Inc.*, 91 A.D.2d 255, 261-62 (2nd Dep't 1983); *Matter of Berger v. Adornato*, 76 Misc.2d 122, 123 (Sup. Ct. Onondaga County 1973). See also *Cooper v. Morin*, 49 N.Y.2d 69, 80 (1979) (referring, in *dicta*, to "the fundamental right to marriage and family life"); *Levin v. Yeshiva University*, n. 4, *supra*, 96 N.Y.2d at 500 (Smith, J., concurring) (citing Supreme Court cases in support of proposition that "marriage is a fundamental right"); *People v. De Stefano*, 121 Misc.2d 113, 121 (County Ct., Suffolk County 1983) (citing only federal precedent for the proposition that marriage is "a recognized fundamental right"); *Cherry v. Koch*, 129 Misc.2d 346, 349 (Sup. Ct. Kings County 1985) (citing only federal precedents and *De Stefano* for the same proposition). *Amicus* has identified only one reviewing court opinion that unambiguously recognizes a state, in addition to a federal, due process right to marry. See *Matter of Mary of Oakknoll v. Coughlin*, 101 A.D.2d 931, 932 (3rd Dep't 1984) (referring to petitioners' "State and Federal constitutional rights to marriage and freedom of religion").

⁶ "Ultimately, the question facing this Court is *not* the question articulated by the court below: whether homosexuals have a fundamental right to marry. It is whether the State or Federal Constitution recognizes a right to enter into a same-sex marriage." *Hernandez*, 805 N.Y.S.2d at 367 (Catterson, J., concurring).

⁷ See Plaintiffs' Br. at 4, 26. See also *Hernandez*, 805 N.Y.S.2d at 383 (Saxe, J., dissenting) (infringement of plaintiffs' fundamental right to marry required a compelling governmental interest).

But that is to assume what is to be proved, to wit, that the fundamental right to enter into a marriage includes the right to enter into a *same-sex* marriage. Question begging is no substitute for proper legal analysis.⁸ The evaluation of substantive due process claims calls for a different and more principled methodology.

In determining whether an asserted liberty interest (or right) should be regarded as “fundamental” for purposes of substantive due process analysis under the Fourteenth Amendment (infringement of which would call for strict scrutiny review), the Supreme Court applies a two-prong test. First, there must be a “careful description” of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted). Second, the interest, so described, must be firmly rooted in “the Nation’s history, legal traditions, and practices.” *Id.* at 710.⁹ In *Glucksberg*, the

⁸ “[O]nly by assuming that ‘marriage’ includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes upon the ‘right’ of same-sex couples to ‘marry.’” *Goodridge v. Dep’t of Public Health*, 440 Mass. 306, 366, 798 N.E.2d 941, 984 (2003) (Cordy, J., dissenting). “The same semantic sleight of hand could transform every other restriction on marriage into an infringement of a right of fundamental importance. For example, if one assumes that a group of mature, consenting, committed adults can form a ‘marriage,’ the prohibition on polygamy . . . infringes on their ‘right’ to marry.’ In legal analysis as in mathematics, it is fundamentally erroneous to assume the truth of the very thing that is to be proved.” *Id.* at 366 n. 2, 798 N.E.2d at 984 n. 2

⁹ Contrary to plaintiffs’ argument, *see* Plaintiffs’ Br. at 35, 37-41, nothing in the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), changes the appropriate analysis for evaluating whether a right should be deemed “fundamental” under the liberty language of the Due Process Clause. First, in striking down the Texas sodomy statute, “the Court applied without explanation the rational basis test, rather than the strict scrutiny review utilized when fundamental rights are impinged,”

Supreme Court characterized the asserted liberty interest as “a right to commit suicide which itself includes a right to assistance in doing so,” *not* whether there is “a liberty interest in determining the time and manner of one’s death,” “a right to die,” “a liberty to choose how to die,” “[a] right to choose a humane, dignified

Standhardt v. Superior Court, 206 Ariz. 276, 282, 77 P.3d 451, 457 (Ct. App. 2003), *review denied*, 2004 LEXIS 62 (May 25, 2004). The Court concluded that the Texas statute “furthers no legitimate state interest which can justify the intrusion into the personal and private life of the individual.” *Lawrence*, 539 U.S. at 578. Thus, *Lawrence* did not employ a fundamental rights analysis. Second, the Court never modified or even mentioned the many cases in which it has emphasized the need to define carefully an asserted liberty interest in determining whether that interest is “fundamental.” Those cases should not be regarded as having been overruled *sub silentio*. See *Lofton v. Secretary of Dep’t of Children & Family Services*, 358 F.3d 804, 816 (11th Cir. 2004) (“We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis”), *cert. denied*, 125 S.Ct. 689 (2005). Third, notwithstanding the vague language used at one point to describe the liberty interest at stake, *i.e.*, to form “a personal bond” with another person that includes “overt expression in intimate conduct,” 539 U.S. at 567, the Court later focused on *sexual* activity. See *id.* at 572 (identifying “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters *pertaining to sex*”) (emphasis added). This “awareness,” in turn, was based upon an examination of “our laws and traditions in the past half century.” *Id.* at 571. There is no “emerging awareness” that the right to marry extends to same-sex couples. If anything, the spate of recent state and federal laws (including nineteen state constitutional amendments, fifteen of which have been adopted since August 2004) reinforcing the traditional understanding of marriage as a relationship between members of the opposite sex suggests precisely the opposite. See *Goodridge*, n. 8, *supra*, 440 Mass. at 374, 798 N.E.2d at 990 (Cordy, J., dissenting) (“No State Legislature has enacted laws permitting same-sex marriages; and a large majority of States, as well as the United States Congress, have affirmatively prohibited the recognition of such marriages for any purpose”) (citations omitted). Finally, in overruling *Bowers*, *Lawrence* determined that *Bowers* had misread the history (see *id.* at 567-71), observing that “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.” *Id.* at 568. If the history of the legal treatment of the specific conduct at issue were not relevant, then why did the Court deem it important to reevaluate the historical record relating to homosexual conduct? The history of societal approval or disapproval of specific conduct alleged to fall within the scope of the liberty language of the Due Process Clause still matters. Nothing in *Lawrence* suggests that the Supreme Court’s fundamental rights analysis has been changed or abandoned.

death” or “[a] liberty to shape death.” *Id.* at 720-23 (citations and internal quotation marks omitted).¹⁰

In an effort to evade *Glucksberg*’s emphasis on our history, legal traditions and practices, none of which supports a right to enter into a same-sex marriage, plaintiffs argue that “[w]hile past and current history are regularly consulted in the process of determining *what* substantive liberties are sheltered as fundamental rights by due process, they do not dictate *who* may exercise a right once that right is accorded protection.” Plaintiffs’ Br. at 41. But, as the trial court itself

¹⁰ *Glucksberg* was not an anomaly in demanding precision in defining the nature of the interest (or right) being asserted. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing alleged right as “the . . . right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than that of a government-operated or government-selected child-care institution,” not whether there is a right to “freedom from physical restraint,” “a right to come and go at will” or “the right of a child to be released from all other custody into the custody of its parents, legal guardians, or even close relatives”); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125-26 (1992) (describing asserted interest as a government employer’s duty “to provide its employees with a safe working environment”); *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 115, 125-26 (1992) (declining to decide whether there is a “right to die,” but assuming that the Constitution grants competent persons “a constitutionally protected right to refuse lifesaving hydration and nutrition”). *See also Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989) (plurality opinion) (focusing on “historical traditions specifically relating to the rights of an adulterous natural father,” rather than on whether “parenthood,” “family relationships,” “personal relationships” or “emotional attachments in general” are interests that have historically been recognized and protected) (citations and internal quotation marks omitted). Plaintiffs correctly note that a majority of the Court did not join in the quoted language from *Michael H.* *See* Plaintiffs’ Br. at 40 n. 13. Plaintiffs, however, fail to cite or distinguish the opinions in *Reno*, *Collins* or *Cruzan*, all of which, along with *Glucksberg*, commanded a majority of the Court. And, although plaintiffs cite *Glucksberg*, *see* Plaintiffs’ Br. at 34, 39, 40, they clearly misapprehend its significance for determining whether an asserted liberty interest (or right) may be deemed “fundamental” for purposes of the Due Process Clause.

recognized, “the right to enter into a marriage is not at issue here” because the Domestic Relations Law “does not bar any of the 10 plaintiffs from entering into a civil marriage.” *Hernandez*, 7 Misc.3d at 479. Plaintiffs are free to marry on the same terms as any other citizens. The reservation of marriage to opposite-sex couples is not a limitation on *who* can marry, but is the principal defining characteristic of *what* marriage is—the union of a man and a woman.¹¹

In determining whether an asserted right or interest is protected by the liberty language of art. I, § 6, of the New York Constitution, the courts of this State follow a mode of analysis similar to that set forth in *Glucksberg*.¹² See *People v. Bell*, 3 Misc.3d 773, 779-82 (Sup. Ct. Bronx County 2003) (quoting the two-pronged *Glucksberg* test for evaluating substantive due process claims in the

¹¹ See *Samuels v. New York State Dep’t of Health*, No. 98084 (3rd Dep’t Feb. 16, 2006), slip op. at 8: “To remove from ‘marriage’ a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state . . . would, to a certain extent, extract some of the deep roots that support its elevation to a fundamental right.” Citation and internal quotation marks omitted.

¹² Three of the other four trial courts to have considered the issue of same-sex marriages, as well as the appellate division’s opinion in this case, see *Hernandez*, 805 N.Y.S.2d at 362; *id.* at 364-65 (Catterson, J., concurring), and the Third Department’s recent opinion upholding the State’s marriage laws, see *Samuels v. New York State Dep’t of Health*, n. 11, *supra*, slip op. at 5-6 & n. 5, have cited *Glucksberg* in the course of deciding that such marriages are *not* protected by the state constitution. See *Matter of Shields v. Madigan*, 5 Misc.3d 901, 907 (Sup. Ct. Rockland County 2004); *Matter of Kane v. Marsolais* (Sup. Ct. Albany County, Jan. 31, 2005), Index No. 3473-04, Decision, Order & Judgment at 8; *Seymour v. Holcomb*, 7 Misc.3d 530, 537 (Sup. Ct. Tompkins County 2005). The fourth court held that it was bound by the Second Department’s decision in *Matter of Cooper*, n. 4, *supra*, that same-sex couples do not have a fundamental right to marry. See *Samuels v. New York State Dep’t of Health* (Sup. Ct. Albany County, Dec. 7, 2004), Index No. 1967-04, Decision and Order at 4-5.

course of an opinion recognizing that under both the state and federal due process clauses, defendant had a protectable liberty interest in not being improperly stigmatized as a sexually violent predator); *see also People v. Isaacson*, 44 N.Y.2d 511, 520 (1978) (“[d]ue process of law guarantees respect for personal immunities ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’”) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), in deciding case under art. I, § 6).¹³

In determining whether a provision in the state constitution affords greater rights than a similarly worded provision in the federal constitution, a “noninterpretive analysis attempts to discover, for example, any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.” *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303 (1986), *cert. denied*, 479 U.S. 1091 (1987).¹⁴ As Justice Catterson noted

¹³ Significantly, in quoting from *Isaacson*, plaintiffs omit this critical language. *See Plaintiffs’ Br.* at 35.

¹⁴ *See also People v. Vilardi*, 76 N.Y.2d 67, 80 (1990) (Simons, J., concurring) (“[e]ven if the language of the two provisions is the same, the Court may conclude that a different construction is in order because of noninterpretive considerations [including] whether the right has historically been accorded greater protection in New York than is presently required under

in his concurrence, plaintiffs have *not* argued that “New York statutory or common law has defined the scope of the right to marry to include same-sex unions; that the history and traditions of this State protect a right to enter into a same-sex marriage; that the drafters and ratifiers of the New York Constitution intended to confer such a right distinct from and in addition to whatever right to marry exists under the United States Constitution; or that the citizens of this State have ever taken issue with the definition of the right to marry as one that exclusively involves one man and one woman or have sought to expand the scope of that right to protect same-sex, as well as opposite-sex, marriages.” *Hernandez*, 805 N.Y.S.2d at 366 (Catterson, J., concurring).¹⁵ “Plaintiffs’ failure to allege, much less prove, that any of these factors supports a right to enter into a same-sex marriage,” Justice Catterson concluded, “is fatal to their due process claim under

the Federal Constitution, whether it is ‘of peculiar State or local concern’ and whether the State citizens have distinctive attitudes toward the right”); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN’S L. REV. 399, 418 (1987) (“Sound policy considerations have . . . been cited as the basis for different interpretations of common provisions—such considerations as statutes or common law, traditions of the state, and distinctive public attitudes towards the scope, definition and protection of the right in question”).

¹⁵ In adding “sexual orientation” to the Human Rights Law, *see* N.Y. EXEC. LAW § 290 *et seq.* (McKinney 2001 & Supp. 2005), the New York legislature was careful to state that “Nothing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state.” 2002 N.Y. Laws ch. 2, § 1 (4th par.). In their references to this act, plaintiffs never cite or quote this provision. *See* Plaintiffs’ Br. at 66, 67 n. 39, 68.

the State Constitution.” *Id.*¹⁶

Moreover, contrary to plaintiffs’ view, *see* Plaintiffs’ Br. at 34-35, “New York courts have focused on the specific interest being asserted, rather than on a more general and vague formulation of that interest.” *Hernandez*, 805 N.Y.S.2d at 365 (Catterson, J., concurring). Thus, this Court has held that under art. I, § 6, a person has a liberty interest in refusing unwanted medical treatment. *See Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986) (recognizing right of involuntarily committed patient to refuse unwanted administration of anti-psychotic medication); *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993) (acknowledging state liberty interest in refusing unwanted medical treatment). Although this interest has been broadly described as a “right . . . to hasten death,” *Quill v. Vacco*, 80 F.3d 716, 727 (2d Cir. 1996), *rev’d*, 521 U.S. 793 (1997), it clearly does *not* include a right to attempt or commit suicide, *see Fosmire v. Nicoleau*, 75 N.Y.2d 218, 227 & n. 2 (1990) (distinguishing refusal of life sustaining treatment from

¹⁶ Plaintiffs cite *P.J. Video* without even referring to, much less discussing, the very factors this Court has identified that *must* be considered in determining whether a provision in the state constitution confers greater rights than a comparably worded provision in the federal constitution. *See* Plaintiffs’ Br. at 27. It is difficult to extract from plaintiffs’ brief any discernable methodology for evaluating state substantive due process claims, other than one driven by a desire to achieve a given result. But, “An argument for a broader construction under a state constitution than that established under the federal Constitution requires more than merely urging that some other result is preferred.” Kaye, *Dual Constitutionalism*, n. 14, *supra*, 61 ST. JOHN’S L. REV. at 418.

suicide),¹⁷ or to enlist the aid of another in attempting or committing suicide.¹⁸ So, too, in evaluating state and federal privacy claims, state courts have focused on the specific nature of the interest being asserted and have not attempted to resolve such claims at the level of generality urged by plaintiffs.¹⁹

The trial court cited two cases purportedly holding that specificity in defining the nature of an asserted state due process (or privacy) claim is unnecessary. *See Hernandez*, 7 Misc.3d at 477, citing *People v. Onofre*, 51 N.Y.2d 476 (1980), and *Cooper v. Morin*, 49 N.Y.2d 69 (1979), *cert. denied sub. nom. Lombard v. Cooper*, 446 U.S. 984 (1980). As Justice Catterson observed, *see Hernandez*, 805 N.Y.S.2d at 366-67 (Catterson, J., concurring), neither

¹⁷ *See also Matter of Storar*, n. 1, *supra*, 52 N.Y.2d at 377 n.6 (State has interest in preventing suicide); *Von Holden v. Chapman*, 87 A.D.2d 66, 69-70 (4th Dep’t 1982) (distinguishing “the right to decline medical treatment” from “the right to take one’s life”); N.Y. MENTAL HYG. LAW § 9.01 *et seq.* (McKinney 2002 & Supp. 2005) (authorizing involuntary psychiatric commitment of persons who have threatened or attempted suicide).

¹⁸ *See* N.Y. PENAL LAW §§ 120.30 (prohibiting, *inter alia*, aiding a person in attempting suicide); 125.15(3) (prohibiting, *inter alia*, aiding a person in committing suicide) (McKinney 2004). *See also, id.* at § 35.10(4) (McKinney 2004) (authorizing use of “physical force” to prevent another person from committing suicide or inflicting serious physical injury upon himself).

¹⁹ *See People v. Shepard*, n. 5, *supra*, 50 N.Y.2d 640 (there is no state or federal substantive due process right to possession and cultivation for personal use quantities of marijuana within the privacy of the home); *id.* at 648 n.* (Gabrielli, J., concurring) (no “fundamental freedom is involved . . . in the legislative decision to prohibit the possession and use of marijuana”); *Matter of Zorn v. Howe*, 276 A.D.2d 51, 57 (3rd Dep’t 2000) (tenant had “no legitimate privacy interest in the possession or use of illegal drugs in his apartment”); *Matter of Dora P.*, 68 A.D.2d 719, 731 (1st Dep’t 1979) (“statute criminalizing prostitution is not an invasion of any constitutionally protected rights of privacy”).

decision so holds. *Onofre* was decided on *federal*, not *state*, constitutional privacy grounds. See 51 N.Y.2d at 483 (“whether the provision of our State’s Penal Law that makes consensual sodomy a crime is violative of rights protected by the United States Constitution”).²⁰ *Cooper* was based on state due process grounds, but the holding, that “pretrial detainees are entitled to contact visits of reasonable duration,” 49 N.Y.2d at 73, was quite narrow. Neither *Onofre* nor *Cooper* should be given an overly broad reading. *Onofre* did *not* hold that there is a fundamental right to engage in “nonmarital sexual intimacy,” as the trial court suggested. *Hernandez*, 7 Misc.3d at 477. “If it had, New York’s laws against adultery, incest and prostitution, as well as its laws allowing divorce or separation on the ground of adultery, would all be presumptively *unconstitutional* because, on the [trial] court’s reading of *Onofre*, those laws infringe upon a fundamental constitutional right.” *Hernandez*, 805 N.Y.S.2d at 366-67 (Catterson, J., concurring). See N.Y. PENAL LAW §§ 255.17, 255.25, 230.00 (McKinney 2000 & Supp. 2005); N.Y. DOM. REL. LAW §§ 170(4), 200(4) (McKinney Supp. 2005). The limited nature of the holding in *Cooper* is evident from the later decision in *Matter of Doe v. Coughlin*, 71 N.Y.2d 48 (1987), where this Court held that prison inmates have no

²⁰ In *People v. Scott*, 79 N.Y.2d 474, 487 (1992), this Court referred to *Onofre* and *Matter of Doe v. Coughlin*, n. 5, *supra*, as cases “vindicating a broader privacy in areas other than search and seizure.”

state or federal constitutional right to conjugal visits.²¹ When the issue is properly framed in terms of the right being asserted (*i.e.*, to enter into a same-sex marriage),²² it is apparent, as the appellate division held,²³ and plaintiffs tacitly admit,²⁴ that there is no such right under either the federal or state constitution.²⁵

The Supreme Court has recognized a substantive due process right to marry.

²¹ In addition to *Onofre* and *Matter of Doe v. Coughlin*, see Plaintiffs' Br. at 36, 42, plaintiffs also cite *Rivers v. Katz*, 67 N.Y.2d 485 (1986), and *Matter of Raquel Marie X.*, 76 N.Y.2d 387 (1990), in support of their argument that specificity in the description of an asserted liberty interest is not necessary. See Plaintiffs' Br. at 42. Neither decision supports plaintiffs' argument. *Rivers* is discussed above. *Raquel Marie X.*, a pre-*Glucksberg* decision, was based entirely on federal, not state, precedents. See *Raquel Marie X.*, 76 N.Y.2d at 396-403.

²² In rejecting a state privacy challenge to the state law reserving marriage to opposite-sex couples, the Hawaii Supreme Court stated that "the precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, *we are being asked to recognize a new fundamental right.*" *Baehr v. Lewin*, 74 Haw. 530, 555, 852 P.2d 44, 56-57 (1993) (second emphasis added). Plaintiffs should have shown the same candor and acknowledged that they too are seeking, as in *Baehr*, recognition of "a new fundamental right." See *Hernandez*, 805 N.Y.S.2d at 359 (observing that plaintiffs seek "an alteration in the definition of marriage"). See also *Samuels v. New York State Dep't of Health*, n. 11, *supra*, slip op. at 7 ("this case is not simply about the right to marry the person of one's choice, but represents a significant expansion into new territory which is, in reality, *a redefinition of marriage*") (emphasis added).

²³ See *Hernandez*, 805 N.Y.S.2d at 361-62. The trial court acknowledged that "same-sex marriage is [not] so rooted in our traditions that it is a fundamental right." *Hernandez*, 7 Misc.3d at 486.

²⁴ See Plaintiffs' Br. at 4, 34, 43 n. 16. See also *Hernandez*, 805 N.Y.S.2d at 380 (Saxe, J., dissenting) (acknowledging that there is no "fundamental right to same-sex marriage").

²⁵ Plaintiffs have presented only state, not federal, claims in this action. See Plaintiffs' Brief at 28 n. 11. That is not surprising given that "there has been no binding federal case law holding that same-sex marriage is a fundamental right, that same-sex couples are a suspect or quasi-suspect class, or that marriage laws distinguishing between same-sex and opposite-sex couples cannot pass rational basis review." *In re Kandou*, 315 B.R., 123, 138 (Bankr. W.D. Wash. 2004). Nevertheless, the federal precedents they cite must be carefully examined.

See Loving v. Virginia, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987). But the right recognized in these decisions all concerned *opposite-sex*, not *same-sex*, couples. *See Loving*, 388 U.S. at 12, *Zablocki*, 434 U.S. at 384, *Turner*, 482 U.S. at 94-97.²⁶ That the right to marry is limited to opposite-sex couples is clearly implied in a series of Supreme Court cases relating marriage to procreation and childrearing. *See*

²⁶ Plaintiffs' brief is notable for the number of times it cites the Supreme Court's decision in *Loving* and the California Supreme Court's decision in *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948), and raises the issue of anti-miscegenation laws. *See* Plaintiffs' Br. at 22, 32, 40 n. 13, 45, 46 nn. 18 & 19, 48, 49, 50, 72, 93. Plaintiffs have confused a *restriction* of a right with the *nature* of the right and have ignored the fact that the so-called "tradition" of laws prohibiting interracial marriage "was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value." *Planned Parenthood v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). Whether the understanding of marriage as a union of persons of the opposite sex discriminates on any ground prohibited by the equal protection guarantee of the New York Constitution is discussed in the following Argument. Here *amicus* notes that, unlike the reservation of marriage to opposite-sex couples which, until very recently and then only in one State (Massachusetts) and a handful of foreign countries (Belgium, Canada, the Netherlands and Spain), has been the law at all times in all places, laws barring interracial marriages existed only in a minority of States and were not representative of the laws of the United States generally (or other countries). *See* Amended Memorandum of Law in Support of Defendant's Cross-Motion for Summary Judgment at 23-25 (summarizing history of anti-miscegenation laws). The decision in *Loving* "was anchored to the concept of marriage as a union involving persons of the opposite sex. In contrast, recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage.'" *Standhardt v. Superior Court*, n. 9, *supra*, 206 Ariz. at 283, 77 P.3d at 458. *See also Lewis v. Harris*, Docket No. MER-L-15-03 (New Jersey Superior Court, Mercer County, Law Division), Opinion of Nov. 5, 2003, at 34 (a change in the "basic understanding" of the right to marry as one that applies only to opposite-sex couples "would not lift a restriction on the right, but would work a fundamental transformation of marriage into an arrangement that could never have been within the intent of the Framers of the 1947 [New Jersey] Constitution"), *aff'd*, 378 N.J. Super. 168, 875 A.2d 259 (2005), *appeal pending*, No. 58,389 (New Jersey Supreme Court); *Samuels v. New York State Dep't of Health*, n. 11, *supra*, slip op. at 13 ("the law in *Loving* did not seek to redefine the historical understanding of marriage . . . but instead involved a race-based barrier to a traditional one woman, one man union") (citing *Standhardt* and *Lewis*).

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race”);²⁷ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty language in Due Process Clause includes “the right of the individual . . . to marry, establish a home and bring up children”); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing the institution of marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress”). *See also Baehr*, n. 22, *supra*, 74 Haw. at 555, 852 P.2d at 56 (“the federal construct of the fundamental right to marry . . . presently contemplates unions between men and women”). In a case decided more than 120 years ago, the Supreme Court expressed its unequivocal understanding that marriage is a relationship between a man and a woman. *See Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (“no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take its rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the family, *as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony*”) (emphasis added) (rejecting challenge to statute denying the

²⁷ Referring to this quotation from *Skinner*, the Hawaii Supreme Court said: “Whether the Court viewed marriage and procreation as a single indivisible right, the least that can be said is that it was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental.” *Baehr*, n. 22, *supra*, 74 Haw. at 553, 852 P.2d at 56.

franchise to persons engaging in polygamous cohabitation).²⁸

The Supreme Court has never stated or even implied that the federal right to marry extends to same-sex couples.²⁹ And no court—state or federal—has ever held that marriage, traditionally understood, extends to same-sex couples.³⁰ “Although

²⁸ See *Samuels v. New York State Dep’t of Health*, n. 11, *supra*, slip op. at 7 (“[t]he cornerstone cases acknowledging marriage as a fundamental right are laced with language referring to the ancient recognized nature of that institution, specifically tying part of its critical importance to its role in procreation and, thus, to the union of a woman and a man”) (citing both state and federal decisions).

²⁹ In *Lawrence v. Texas*, n. 9, *supra*, the Supreme Court overruled *Bowers v. Hardwick*, n. 9, *supra*, and held that Texas could not criminalize homosexual acts of sodomy. *Lawrence* expressly did *not* decide “whether the government must give formal recognition to any relationship that homosexual persons seek to enter,” 539 U.S. at 578, see *Standhardt v. Superior Court*, n. 9, *supra*, 206 Ariz. at 281-82, 77 P.3d at 456-57, and plaintiffs do not contend otherwise. See Plaintiffs’ Br. at 39 (“*Lawrence* did not present or purport to determine whether excluding same-sex couples from marriage violates the federal constitution or can be justified”).

³⁰ See *Standhardt v. Superior Court*, n. 9, *supra*, 206 Ariz. at 282, 77 P.3d at 458 (“marriage traditionally has involved opposite-sex partners”); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (“marriage has always been considered as the union of a man and a woman”); *Goodridge*, n. 8, *supra*, 440 Mass. at 320, 798 N.E.2d at 953 (recognizing “the longstanding statutory understanding, derived from the common law, that ‘marriage’ means the lawful union of a woman and a man”); *Baker v. Nelson*, 291 Minn. 310, 311, 191 N.W.2d 185, 185-86 (1971) (term “marriage” in common usage means “the state of union between persons of the opposite sex”), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); *DeSanto v. Barnsley*, 328 Pa. Super. 181, 186, 476 A.2d 952, 954 (1984) (“common law marriage is limited to two persons of opposite sex”); *Baker v. State*, 170 Vt. 194, 201, 744 A.2d 864, 869 (1999) (referring to the “clear legislative assumption” that marriage under state law “consists of a union between a man and a woman”); *Singer v. Hara*, 11 Wash. App. 247, 253, 522 P.2d 1187, 1191 (1974) (marriage statutes “clearly founded upon the presumption that marriage, as a legal relationship, may exist only between one man and one woman who are otherwise qualified to enter that relationship”); *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1981) (“term ‘marriage’ ordinarily contemplates a relationship between a man and a woman”), *cert. denied*, 458 U.S. 1111 (1982) (immigration case); *Dean v. District of Columbia*, 653 A.2d 307, 315 (D.C. App. 1995) (“the ordinary understanding of the word ‘marriage’—both at the turn of the century when the [District of Columbia] statute was enacted and in modern times when that statute was amended—means the union of two members of the opposite sex”).

same-sex relationships are more open and have garnered greater social acceptance in recent years, same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty.” *Standhardt v. Superior Court*, n. 9, *supra*, 206 Ariz. at 284, 77 P.3d at 459. The federal substantive due process right to marry does not extend to same-sex unions.³¹ Nor, under the methodology set forth by this Court in *People v. P.J. Video*, does any corollary due process right under the state constitution. Plaintiffs have not cited any state court holding that the state right to marry applies to same-sex, as well as opposite-sex, unions. Marriage in New York, as elsewhere, has always been understood as a relationship between a man and a woman. *See Lewis v. Harris*, n. 26, *supra*, 378 N.J.Super. at 186, 875 A.2d at 269 (“marriage between members of the same sex has no historical foundation or contemporary societal acceptance and therefore is not constitutionally mandated”).

Plaintiffs, however, argue that the appellate division’s holding, based on our history and traditions, that the essence of marriage is a State-sanctioned union between members of the opposite sex, *see Hernandez*, 805 N.Y.S.2d at 361-62,

³¹ In addition to the cases from Arizona, Kentucky, Minnesota, Washington and the District of Columbia cited in n. 30, *see also Wilson v. Ake*, 354 F.Supp.2d 1298, 1305-07 (M.D. Fla. 2005), *Smelt v. County of Orange*, 374 F.Supp.2d 861, 872-73 (C.D. Cal. 2005), *appeal pending*, Docket No. 05-56040 (United States Court of Appeals for the Ninth Circuit), and *In re Kandu*, n. 25, *supra*, 315 B.R. at 138-41, all of which rejected due process challenges to the federal Defense of Marriage Act, 1 U.S.C. § 7 (2005), 28 U.S.C. § 1738C (Supp. 2005).

constitutes “circular reasoning.” Plaintiffs’ Br. at 43. But “plaintiffs’ argument proceeds along the same kind of circular path” *Lewis v. Harris*, n. 26, *supra*, 378 N.J. Super. at 187, 875 A.2d at 270:

Plaintiffs start with the premise that there is no difference between a “compelling and definite expression of love and commitment” between members of the same sex and a marriage between members of the opposite sex, and then argue from this premise that the State has failed to carry its burden of justifying the limitation of the institution of marriage to a man and a woman. But the significant difference between these arguments is that the State’s argument is grounded on historical tradition and our nation’s religious and social values, while plaintiffs’ argument is based on nothing more than their own normative claim that society should give unions between same-sex couples the same form of recognition as marriages between members of the opposite sex.

Id., 875 A.2d at 270. The difficulty with this line of argument, the court noted, is that “[t]he same form of constitutional attack . . . could be made against statutes prohibiting polygamy.” *Id.*, 875 A.2d at 270.

Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiffs view same-sex marriages, as “compelling and definitive expression[s] of love and commitment” among the persons to the union. Indeed, there is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex “because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies.” [George W.] Dent, [Jr., *The Defense of Traditional Marriage*,] 15 J.L. & Pol. [581,] 628 (1999). Nevertheless, courts have uniformly rejected constitutional challenges to statutes prohibiting polygamy on the grounds that polygamous marriage is offensive to our Nation’s religious principles and social mores. [Citations omitted].

Id., 875 A.2d at 270. It is no answer to this argument to state, as plaintiffs do, that they are not challenging the exclusiveness of marriage as a “relationship between *two* committed adults,” Plaintiffs’ Br. at 85. Emphasis added.³² “[P]ersons whose religions and cultural traditions condone polygamy, but disapprove of same-sex marriage, could just as easily say that they do not challenge the limitation of marriage to members of the opposite sex, only the requirement that marriage must be binary.” *Lewis, supra*, 378 N.J. Super. at 188, 875 A.2d at 271.

A “core feature” of the institution of marriage, as Judge Parrillo noted in his concurring opinion in *Lewis*, is its “binary, opposite-sex nature,” which arose “precisely because there are two sexes.” *Lewis, supra*, 378 N.J. Super. at 199, 875 A.2d at 277 (Parrillo, J., concurring). Plaintiffs, however, have not articulated a coherent alternative theory of marriage “that would include members of the same sex, but still limit the arrangement to couples, or that would otherwise justify the distinction.” *Id.*, 875 A.2d at 277.

If . . . the meaning of marriage and the right to marital status is sufficiently defined without reference to gender, then what principled objection could there be to removing the binary barrier as well? If, for instance, marriage were only defined with reference to emotional or financial interdependence, couched only in terms of privacy,

³² *See also, id.*, at 44 (“marriage should embrace committed relationships forged between *two* people of the same sex”) (emphasis added); 96 (defining civil marriage to mean “the voluntary union of *two* persons as spouses, to the exclusion of all others”) (quoting *Goodridge*, n. 8., *supra*, 440 Mass. at 342, 798 N.E.2d at 969) (emphasis added).

intimacy, and autonomy, then what non-arbitrary ground is there for denying the benefit to polygamous or endogamous unions whose members claim the arrangement is necessary for their self-fulfillment?

Id., 875 A.2d at 277 (Parrillo, J., concurring).³³ Plaintiffs have provided no answer to this question. Based on the history and traditions of our Nation and this State, the substantive due process liberty interest in marriage is limited to opposite-sex couples. *See Samuels v. New York State Dep't of Health*, n. 11, *supra*, slip op. at 8. Accordingly, this Court should reject plaintiffs' argument based on art. I, § 6, of the New York Constitution.

III.

RESERVING MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTEE OF ARTICLE I, § 11, OF THE NEW YORK CONSTITUTION.

Plaintiffs next contend that the reservation of marriage to opposite-sex couples violates the equal protection guarantee of the New York Constitution

³³ In rejecting a claim that the Indiana Constitution protects a right to enter into a same-sex marriage, the Marion County Superior Court noted that the plaintiffs had not “posited a principled theory of marriage that would include members of the same sex but still limit marriage to couples. There is no inherent reason why their theories, including the encouragement of long-term, stable relationships, the sharing of economic lives, the enhancement of the emotional well-being of the participants, and encouraging participants to be concerned about others, could not equally be applied to groups of three or more.” *Morrison v. Sadler*, Cause No. 49D13-0211-PL-001946, Marion County (Indiana) Superior Court, May 7, 2003, Order on Motion to Dismiss at 13, *aff'd*, 821 N.E.2d 15 (Ind. Ct. App. 2005). By way of contrast, the State’s theory of marriage “focus on the uniqueness of the male-female couple for purposes of procreating and rearing children, and establishing the traditional building blocks of society, and thereby include an inherent limitation on the types of relationships deserving of state recognition as marriage.” *Id.*

because it discriminates on the basis of sex and sexual orientation. *See* Plaintiffs’ Br. at 58-77. Article I, § 11, of the New York Constitution provides, in relevant part, that “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.” N.Y. CONST. art. I, § 11 (McKinney 1998). Plaintiffs’ contention finds no support in the equal protection jurisprudence of this State and was properly rejected by the appellate division. *See Hernandez*, 805 N.Y.S.2d at 360-61; *id.* at 368-77 (Catterson, J., concurring).

A. The Equal Protection Claim Is Foreclosed By Binding Supreme Court Precedent

As a threshold matter, plaintiffs’ equal protection claim is foreclosed by the United States Supreme Court’s summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972), as Justice Catterson correctly observed in his concurring opinion below. *See Hernandez*, 805 N.Y.S.2d at 368-69 (Catterson, J., concurring). In *Baker v. Nelson*, n. 30, *supra*, the Minnesota Supreme Court considered a broad based federal constitutional challenge to a statute which, as interpreted by the trial court and the state supreme court, did not permit the issuance of marriage licenses to same-sex couples. 291 Minn. at 311-12, 191 N.W.2d at 185-86. In *Nelson*, plaintiffs argued, *inter alia*, that the reservation of marriage to opposite-sex couples discriminated against them in violation of the Equal Protection Clause. *Id.* at 312, 191 N.W.2d at 186 (noting plaintiffs’ argument that “restricting

marriage to only couples of the opposite sex is irrational and invidiously discriminatory”). The Minnesota Supreme Court rejected this argument along with plaintiffs’ other claims. *Id.* at 313-15, 191 N.W.2d at 187. Plaintiffs appealed to the Supreme Court, raising the same federal constitutional claims. The Supreme Court dismissed their appeal for want of a substantial federal question. *See Baker v. Nelson*, 409 U.S. 810 (1972). Under well-established precedent, the dismissal of the appeal in *Baker* for want of a substantial federal question constitutes a *holding* that the challenge was considered by the Court and was rejected as insubstantial. *See Hicks v. Miranda*, 422 U.S. 322, 343-45 (1975). The dismissal of the appeal is an adjudication on the merits of the federal constitutional claims raised, including due process and equal protection, which lower courts are bound to follow. *Hicks*.

The summary disposition in *Baker v. Nelson* should control the disposition of the state equal protection claim brought by plaintiffs. This Court has repeatedly held that the equal protection guarantee of art. I, § 11, of the New York Constitution (the first sentence of § 11) is no broader in coverage than the Equal Protection Clause of the Fourteenth Amendment. *See Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344, 360 n. 6 (1985); *Matter of Esler v. Walters*, 56 N.Y.2d 306, 313-14 (1982); *Dorsey v.*

Stuyvesant Town Corp., 299 N.Y. 512, 530-31 (1949), *cert. denied*, 339 U.S. 981 (1950).³⁴ Because of this rule of parallel interpretation, a holding of the Supreme Court rejecting as insubstantial an equal protection claim under the Equal Protection Clause should result in rejection of the same claim brought under art. I, § 11,³⁵ as the Second Department correctly concluded in *Matter of Cooper v.*

³⁴ In *Dorsey*, this Court was emphatic in stating that the first sentence of § 11 “is no more broad in coverage than its [fe]deral prototype [referring to the Equal Protection Clause].” 299 N.Y. at 530. “This conclusion,” the court noted, not only followed “from the plain meaning of the words,” but also was “strongly reinforced . . . by the fact that the chairman of the Bill of Rights Committee of the New York State Constitutional Convention of 1938, at which convention the section in question was approved, stated at the convention that the first sentence of section 11 ‘in effect embodies in our Constitution the provisions of the Federal Constitution which are already binding upon our State and its agencies.’” *Id.* (quoting 2 Rev. Record, N.Y. State Constitutional Convention, 1938, p. 1065). Plaintiffs’ attempt to derive some significance from the *second* sentence of § 11 is singularly unpersuasive. *See* Plaintiffs’ Br. at 59-60 & nn. 33, 35. The second sentence, which prohibits discrimination in civil rights on the basis of “race, color, creed or religion,” obviously has no application to the issues presented here. Thus, for purposes of this case, it is irrelevant that in adding the second sentence of § 11, the 1938 New York State Constitutional Convention intended to provide greater protection against discrimination in civil rights on the basis of “race, color, creed or religion,” than had been provided theretofore by the Equal Protection Clause of the Fourteenth Amendment.

³⁵ Plaintiffs, *see* Br. at 76-77, and the dissenting justice below, *see* 805 N.Y.S.2d at 368 (Saxe, J., dissenting), question the continuing precedential force of *Baker*, despite the fact that the Supreme Court has never overruled *Baker*, modified its holding or revisited the issues decided therein. Although the “cursory consideration” of an issue in a case summarily decided does not foreclose the *Supreme Court* from revisiting the issue after briefing and oral argument on the merits, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 309 n.1 (1976), *lower courts* remain bound by such a disposition. *See Langan, v. St. Vincent’s Hospital of New York*, n. 4, *supra*, 802 N.Y.S.2d at 478 (“it has already been established that confining marriage and all laws pertaining either directly or indirectly to the marital relationship to different sex couples is not offensive to the equal protection clause of either the Federal or State constitutions”) (citing *Baker v. Nelson*); *Morrison v. Sadler*, n. 33, *supra*, 821 N.E.2d at 19, 33 (referring to the dismissal of the appeal in *Baker* for want of a substantial federal question as “binding . . . precedent,” and having “binding effect” on the issues raised); *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1126, 95 P.3d 459, 503-04 (2004) (Kennard, J., concurring in part and dissenting in part) (dismissal of the appeal in *Baker* constitutes a

Kelly, n. 4, *supra*, 187 A.D.2d at 133-34 (relying upon *Baker* in holding that the reservation of marriage to opposite-sex couples does not violate the equal protection guarantee of the state constitution). Entirely apart from the disposition in *Baker*, however, there is no basis on which this Court could conclude that the reservation of marriage to opposite-sex couples violates the equal protection guarantee of art. I, § 11, of the New York Constitution.

B. The Marriage Statutes Do Not Discriminate On The Basis Of Sex

In support of their equal protection claim, plaintiffs argue that reserving marriage to opposite-sex couples discriminates on the basis of sex in violation of art. I, § 11, of the state constitution. *See* Plaintiffs' Br. at 71-75.³⁶ The appellate division found no merit in this argument, *see Hernandez*, 805 N.Y.S.2d at 360, *id.*

determination on the merits of all of the issues raised which continues to bind lower courts); *Wilson v. Ake*, n. 31, *supra*, 354 F.Supp. at 1305 (noting that the Supreme Court “has not explicitly or implicitly overturned its holding in *Baker* or provided the lower courts . . . with any reason to believe that the holding is invalid today” and concluding that *Baker* is “binding precedent upon this Court”); *Adams v. Howerton*, 486 F.Supp. 1119, 1124 (C.D. Cal. 1980) (*Baker* is binding as to whether state laws prohibiting same-sex marriages are constitutional), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *but see Smelt v. County of Orange*, n. 30, *supra*, 374 F.Supp.2d at 872-73 (determining that *Baker* is not controlling on whether the federal Defense of Marriage Act, n. 31, *supra*, is constitutional); *In re Kandou*, n. 25, *supra*, 315 B.R. at 137-38 (same).

³⁶ In advancing this argument here, plaintiffs appear to have backed away from a concession made below that the marriage provisions of the Domestic Relations Law “do not discriminate on the basis of gender” because they “treat[] the members of both genders exactly the same in terms of whom they may marry.” *Hernandez*, 805 N.Y.S.2d at 360. *See also Hernandez*, 7 Misc.3d at 490 (“Plaintiffs acknowledge . . . that the exclusion of same-sex marriage treats men and women in exactly the same way”).

at 369-71 (Catterson, J., concurring), and neither should this Court.

For purposes of both state and federal equal protection analysis, “[a] statute which treats males and females differently violates equal protection unless the classification is substantially related to the achievement of an important governmental objective.” *People v. Liberta*, 64 N.Y.2d 152, 168 (1984), citing, *inter alia*, *Craig v. Boren*, 429 U.S. 190, 197 (1976). *See also People v. Whidden*, 51 N.Y.2d 457, 460 (1980) (same), *appeal dismissed for want of a substantial federal question*, 454 U.S. 803 (1981). The marriage laws, however, do not “treat[] males and females differently.” *Both men and women may marry persons of the opposite sex; neither may marry anyone of the same sex.* There is no discrimination on account of sex. *See Samuels v. New York State Dep’t of Health*, n. 11, *supra*, slip op. at 11 (“Nor are we persuaded by plaintiffs’ contention that the Domestic Relations Law discriminates on the basis of gender”) (citing *Matter of Valentine v. American Airlines*, n. 4, *supra*).³⁷

³⁷ The trial court properly rejected plaintiffs’ argument, reiterated here, that the reservation of marriage to opposite-sex couples reflects “impermissible stereotypes” about “the supposed differences between men and women and their respective ‘proper’ roles in marriage and society.” Plaintiffs’ Br. at 74, 75. *See Hernandez*, 7 Misc.3d at 490 (“with the gradual equalization of the rights of men and women in marriage, it cannot be readily argued that the requirement that a married couple consist of a man and a woman is intended to, or does, reinforce traditional sex roles”). *See also Baker v. State*, n. 30, *supra*, 170 Vt. at 216 n.13, 744 A.2d at 880 n. 13: “It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us.”

The “glaring difficult” with plaintiffs’ sex discrimination argument, as Justice Catterson noted, is that “the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and woman equally from marrying a person of the same sex.” *Hernandez*, 805 N.Y.S.2d at 370 (Catterson, J., concurring), quoting *Baker v. State*, n. 30, *supra*, 170 Vt. at 216 n. 13, 744 A.2d at 880 n. 13. In *Baker*, the Vermont Supreme Court observed that “there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct.” *Id.*, 744 A.2d at 880 n. 13.³⁸ Other courts are in accord in rejecting the claim that “defining marriage as the union of one man and one woman discriminates on the basis of sex.” *Id.* citing *Baker v. Nelson*, n. 30, *supra*, 291 Minn. at 312-15, 191 N.W.2d at 186-87; *Singer v. Hara*, n. 30, *supra*, 11 Wash. App. at 253-55, 522 P.2d at 1191-92 (1974).³⁹ As Justice Cordy noted in his dissent in *Goodridge*, the

³⁸ The Vermont Supreme Court’s decision requiring the State to recognize either marriage or its legal equivalent (civil unions) between members of the same sex was based upon a provision in the Vermont Constitution (the “Common Benefits Clause,” VT. CONST. ch. I, art. 7 (2003)) for which there is no analog in the New York Constitution. *See Hernandez*, 805 N.Y.S.2d at 370 n. 3 (Catterson, J., concurring) (noting different constitutional language).

³⁹ *See also Jones v. Hallahan*, n. 30, *supra*, 501 S.W.2d at 590; *Dean v. District of Columbia*, n. 30, *supra*, 653 A.2d at 363 n. 2 (“[t]he marriage statute applies equally to men and women”). In rejecting federal constitutional challenges to the Defense of Marriage Act (DOMA), n. 31, *supra*, three federal courts have also concluded that reserving marriage to opposite-sex couples does not discriminate on the basis of sex. *See Wilson v. Ake*, n. 31, *supra*, 354 F.Supp.2d at 1307-08 (“DOMA does not discriminate on the basis of sex because it treats women and men equally”); *Smelt v. County of Orange*, n. 31, *supra*, 374 F.Supp.2d at 877 (“DOMA does not treat men and women differently”); *In re Kandu*, n. 25, *supra*, 315 B.R. at

marriage statute “does not subject men to different treatment from women; each is equally prohibited from the same conduct.” *Goodridge*, n. 8, *supra*, 440 Mass. at 376, 798 N.E.2d at 991 (Cordy, J., dissenting).⁴⁰ In rejecting a sex discrimination challenge to New Jersey’s marriage laws, the New Jersey Superior Court, Law Division, made the important point that New Jersey “makes the same benefit, mixed-gender marriage, available to all individuals on the same basis. Whether or not plaintiffs wish to enter into a mixed-gender marriage is not determinative of the statute’s validity. *It is the availability of the right on equal terms, not the equal use of the right[,] that is central to the constitutional analysis.*” *Lewis v.*

143 (“DOMA . . . does not single out men or women as a discrete class for unequal treatment”). In *Kandu*, the bankruptcy court agreed with the Government that “DOMA does not discriminate on the basis of sex because (1) on its face, it makes no detrimental classification that disadvantages either men or women; (2) it cannot be traced to a purpose to discriminate against either men or women; and (3) it does not reflect either the baggage of sexual stereotypes or stigmatization of women.” *Id.* at 142.

⁴⁰ Elaborating on this point, Justice Cordy explained: “The classification is not drawn between men and women or between heterosexuals and homosexuals, any of whom can obtain a license to marry a member of the opposite sex; rather, it is drawn between same-sex couples and opposite-sex couples.” *Id.* at 380, 798 N.E.2d at 994. *See also, id.* at 975 (Spina, J., dissenting) (same). It should be noted that Justice Cordy was addressing an *alternative* argument raised by plaintiffs but not reached by the majority in their opinion invalidating the Commonwealth’s marriage statute, to wit, whether the statute violated the state equal rights amendment. In support of their sex discrimination claim, plaintiffs rely on *Baehr v. Lewin*, n. 22, *supra*. *See* Plaintiffs’ Br. at 74-75. In *Baehr*, a plurality of the Hawaii Supreme Court held that a law reserving marriage to members of the opposite sex constitutes sex-based discrimination, subject to a heightened standard of judicial review. *See Baehr*, 74 Haw. at 561-71, 852 P.2d at 59-63. In reference to the court’s sex discrimination holding, a noted constitutional scholar has described *Baehr* as “an affront to both law and language that well deserves its place on the list of worst decisions.” Bernard Schwartz, *A BOOK OF LEGAL LISTS* at 182 (Oxford University Press 1997). “The *Baehr* decision is so contrary to both established law and common sense that one is almost speechless before this patent reductio ad absurdum of equal protection jurisprudence.” *Id.* at 183.

Harris, n. 26, *supra*, Op. at 55 (emphasis added).

Citing *Loving v. Virginia*, 388 U.S. 1 (1967), and *Perez v. Sharp*, n. 26, *supra*, plaintiffs argue that facial neutrality (“equal application” in plaintiffs’ parlance) does not immunize a statute from constitutional challenge, at least where it can be shown that the statute was enacted with a discriminatory intent. See Plaintiffs’ Br. at 72-73.⁴¹ Unlike the history of the anti-miscegenation statutes struck down in *Loving*, which clearly stigmatized blacks as inferior to whites,⁴² plaintiffs identify nothing in the history of New York’s marriage statutes suggesting that they were “intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender.” *Lawrence v. State*, 41 S.W.3d 349, 358 (Tex. App. 2001, *writ ref’d*) (*en banc*), *rev’d on other grounds*, *Lawrence v.*

⁴¹ Whether a facially neutral law that has a disproportionate *effect* upon a class of persons may be challenged in the absence of evidence of an *intent* to discriminate against that class is discussed in the next section of this Argument.

⁴² The statutes challenged in *Loving* (as in *Perez*) did not prohibit all interracial marriages, but only marriages between “white persons” and “non-white persons.” *Loving*, 388 U.S. at 11 & n. 11. Interracial marriages between “non-whites,” *e.g.*, blacks and Asians, were not banned. Noting that “Virginia prohibits only interracial marriages involving white persons,” the Court determined that “the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” *Id.* That “justification,” the Court concluded, was patently inadequate: “We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” *Id.* at 11-12.

Texas, 539 U.S. 558 (2003).⁴³ “In light of the discriminatory intent with which they were enacted, anti-miscegenation laws could not be legally justified by the fact that they applied equally to whites and blacks. By way of contrast, there is *no* evidence that laws reserving marriage to opposite-sex couples were enacted with an intent to discriminate against either men or women. Accordingly, such laws cannot be equated in a facile manner with anti-miscegenation laws.” *Hernandez*, 805 N.Y.S.2d at 370 (Catterson, J., concurring).⁴⁴ The reservation of marriage to

⁴³ “By contrast, here there is no evidence that limiting marriage to opposite-sex couples was motivated by sexism in general or a desire to disadvantage men or women in particular. Moreover, no one has identified any harm, burden, disadvantage, or advantage accruing to either gender as a consequence of the . . . marriage statute.” *Goodridge*, n. 8, *supra*, 440 Mass. at 376-77, 798 N.E.2d at 992 (Cordy, J., dissenting). As in *Goodridge*, which was decided on other grounds, plaintiffs have presented *no* evidence that in reserving marriage to opposite-sex couples, the legislature was “motivated by sexism in general or a desire to disadvantage men or women in particular.” Nor have they identified “any harm, burden, disadvantage, or advantage accruing to either gender as a consequence” of New York’s marriage statutes.

⁴⁴ Justice Catterson observed that “[t]he *Loving* analogy is inapt on purely logical grounds.” *Hernandez*, 805 N.Y.S.2d at 370 (Catterson, J., concurring). “The statutes struck down in *Loving* (as well as those in *Perez*) prohibited marriages between members of *different* races, not between members of the *same* race. The equivalent, in the area of sex, of an anti-miscegenation statute would not be a statute prohibiting *same*-sex marriages, but one prohibiting *opposite*-sex marriages, an absurdity which no State has ever contemplated. The equivalent, in the area of race, of a statute prohibiting same-sex marriage, would be a statute that prohibited marriage between members of the *same* race. Laws banning marriages between members of the same race would be unconstitutional, not because they would ‘segregate the races and perpetuate the notion that blacks are inferior to white,’ *Lawrence v. State*, 41 S.W.2d at 357, but because there could be no possible rational basis prohibiting members of the same race from marrying.” *Id.* at 370-371. Laws against same-sex marriage, on the other hand, are supported by multiple reasons. See Argument IV, *infra*.

opposite-sex couples does not discriminate on the basis of sex.⁴⁵

C. The Marriage Statutes Do Not Discriminate On The Basis Of Sexual Orientation

Plaintiffs argue further that reserving marriage to opposite-sex couples impermissibly discriminates on the basis of sexual orientation. *See* Plaintiffs' Br. at 62-71. As in the case of plaintiffs' sex discrimination claim, the appellate division found no merit in this alternative equal protection argument, *see*

⁴⁵ With the exception of the isolated decision in *Baehr v. Lewin*, n. 22, *supra*, plaintiffs in their sex discrimination argument have cited *no* decision of *any* state or federal reviewing court holding that a law that "discriminates" against men and women equally violates equal protection principles. *See Smelt v. County of Orange*, n. 31, *supra*, 374 F.Supp. at 876 ("To date, the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently"). In New York, impermissible sex discrimination has been found *only* with respect to statutes, ordinances and common law doctrines and practices that discriminated against one sex in favor of the other. *See, e.g., People v. Liberta*, 64 N.Y.2d 152, 167-70 (1984) (statute that subjected men, but not women, to criminal prosecution for forcible rape discriminated on the basis of gender); *People v. Allen*, 199 A.D.2d 783 (3rd Dep't 1993) (prosecution may not use peremptory challenges to remove men from jury solely on the basis of their sex); *People v. Blunt*, 162 A.D.2d 86 (2nd Dep't 1990) (prosecution may not use peremptory challenges to remove women from jury solely on the basis of their sex); *Medical Business Associates, Inc. v. Steiner*, 183 A.D.2d 86 (2nd Dep't 1992) (common law doctrine of necessities, under which a husband is liable to third parties who furnish his wife with food, clothing, shelter and medical care, but a wife is not liable to third parties for necessities provided to her husband, violates equal protection) (extending doctrine to both spouses to remedy constitutional infirmity found in common law doctrine); *Matter of Carter v. Carter*, 58 A.D.2d 438 (2nd Dep't 1977) (construing support provisions of Family Court Act to be gender neutral to preserve their constitutionality); *Goodell v. Goodell*, 77 A.D.2d 684 (3rd Dep't 1980) (same); *Matter of Lisa M. UU.*, 78 A.D.2d 711 (3rd Dep't 1980) (same); *Matter of Rochelle L. v. Bruce M.*, 89 A.D.2d 765 (3rd Dep't 1982) (same with respect to provision of Family Court Act excusing indigents from paying costs of blood tests to determine paternity); *Matter of Wood v. Wood*, 104 Misc.2d 109, 112 (Fam. Ct. Queens County 1980) (same with respect to provisions of Domestic Relations Law precluding alimony or allowing termination of support under certain circumstances); *People ex rel. Watts. v. Watts*, 77 Misc.2d 178, 182 (Fam. Ct. New York County 1973) (application of "tender years presumption" in child custody disputes to favor mother would deprive father of his right to equal protection of the laws); *Matter of Berger v. Adornato*, 76 Misc.2d 122 (Sup. Ct. Onondaga County 1973) (invalidating statute establishing different ages at which males and females may marry).

Hernandez, 805 N.Y.S.2d at 360-61, *id.* at 371-73 (Catterson, J., concurring), and neither should this Court.

Reserving marriage to opposite-sex couples does not discriminate on the basis of sexual orientation. “Homosexuals *may* marry persons of the *opposite* sex, and heterosexuals may *not* marry persons of the *same* sex.” *Hernandez*, 805 N.Y.S.2d at 371 (Catterson, J., concurring). As the Hawaii Supreme Court noted, “Parties to ‘a union between a man and a woman’ may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.” *Baehr v. Lewin*, n. 22, *supra*, 74 Haw. at 543 n. 11, 852 P.2d at 51 n. 11. *See also Dean v. District of Columbia*, n. 30, *supra*, 653 A.2d at 363 n. 1) (agreeing with *Baehr* that “just as not all opposite-sex marriages are between heterosexuals, not all same-sex marriages would necessarily be between homosexuals”); *Goodridge*, n. 8, *supra*, 440 Mass. at 320 n. 11, 798 N.E.2d at 953 n. 11 (same); *id.* at 975 (Spina, J., dissenting) (same).

Admittedly, reserving marriage to opposite-sex couples may have a greater *impact* upon homosexuals than on heterosexuals. Nevertheless, as Justice Catterson noted in his concurring opinion, “disparate impact alone is insufficient to invalidate a statute, even with respect to suspect or quasi-suspect classifications such as race and gender. Under well-established federal equal protection doctrine,

a facially neutral law (or other official act) may not be challenged on the basis that it has a disparate impact on a particular race or gender unless that impact can be traced back to a discriminatory purpose or intent.” *Hernandez*, 805 N.Y.S.2d at 371 (Catterson, J., concurring). The challenger must show that “the law was enacted [or the policy adopted] *because of*, not *in spite of*, its foreseeable discriminatory impact.” *Id.*, citing *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (rejecting an equal protection challenge to police department’s use of a job-related employment test to evaluate verbal skills of employment applicants which a higher percentage of blacks failed than whites where there was no showing that racial discrimination entered into the establishment or formulation of the test); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-71 (1977) (municipality’s refusal to amend zoning ordinance to allow multi-family, low income housing in village where single family homes predominated did not violate the Equal Protection Clause, even though such refusal to rezone had a disproportionate impact on blacks, where there was no evidence of discriminatory intent); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-80 (1979) (upholding veterans’ hiring preference in state employment despite its disproportionate impact on women where there was no evidence that the statute conferring the preference was enacted with an intent to

discriminate against women, as opposed to non-veterans of either sex).⁴⁶

Equal protection jurisprudence under art. I, § 11, of the New York Constitution fully accords with these principles. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 321 (1995) (“an equal protection cause of action based upon a disproportionate impact upon a suspect class requires establishment of intentional discrimination”) (citing, *inter alia*, *Village of Arlington Heights* and *Washington v. Davis*, *supra*);⁴⁷ *People of the State of New York v. New York City Transit Authority*, 59 N.Y.2d 343, 350 (1983) (“purposeful discrimination is a necessary element” of a state equal protection claim based on disparate impact) (citing, *inter alia*, *Personnel Administrator v. Feeney*, *supra*);⁴⁸

⁴⁶ Contrary to the implications of plaintiffs’ sexual orientation argument, *see generally* Plaintiffs’ Br. at 62-71, nothing in *Lawrence v. Texas*, n. 9, *supra*, overturned this line of authority. In *Lawrence*, the Supreme Court overruled *Bowers v. Hardwick*, n. 9, *supra*, and held that Texas could not criminalize homosexual acts of sodomy committed in private between consenting adults. *Lawrence* was decided on substantive due process grounds, not equal protection grounds. With respect to the due process basis for the decision, the Court in *Lawrence* determined that the Texas same-sex sodomy statute had been enacted with an anti-homosexual animus. Here, “[p]laintiffs have not alleged, much less proved, that the legislators who enacted the New York statutes related to marriage were motivated by a similar animus.” *Hernandez*, 805 N.Y.S.2d at 372 (Catterson, J., concurring).

⁴⁷ In *Campaign for Fiscal Equity*, this Court held that the State’s “educational funding methodology” was not subject to a state equal protection challenge on the basis of its “disparate impact upon African-American and other minority students” where plaintiffs conceded that the funding mechanism had no “discriminatory intent.” 86 N.Y.2d at 321.

⁴⁸ In *New York City Transit Authority*, this Court held that a state equal protection challenge to a facially neutral seniority system that had a disproportionate effect on female employees who had less seniority than male employees was properly dismissed where the complaint contained “no specific allegation of a present intent to discriminate.” 59 N.Y.2d at 350.

Board of Education, Levittown Union Free School District v. Nyquist, 57 N.Y.2d 27, 43-44 (1982) (noting that “[t]he more careful scrutiny standard has been applied when the challenged State action has resulted in intentional discrimination against a class of persons grouped together by reason of personal characteristics, the use of which called into question the propriety of the particular classifications”).

Here, “[p]laintiffs have not proved, or even alleged, that the marriage statutes were enacted with the *purpose* or *intent* to discriminate against homosexuals. Because the marriage statutes are not subject to an equal protection challenge on that basis, it is unnecessary to determine whether a law that did discriminate on the basis of sexual orientation would be subject to a more rigorous standard of judicial review.” *Hernandez*, 805 N.Y.S.2d at 373 (Catterson, J., concurring).⁴⁹

D. Assuming That The Marriage Statutes Classify On The Basis Of Sexual Orientation, That Classification Is Subject To Rational Basis Review

Assuming, as the appellate division majority determined, *see Hernandez*, 805 N.Y.S.2d at 360-61, that the marriage statutes classify on the basis of sexual orientation, such classification is subject to rational basis review. More than

⁴⁹ As the trial court determined, “the Legislature had no experience with [same-sex] marriage at the time of enactment and amendment of the relevant statutes.” *Hernandez*, 7 Misc.3d at 470.

twenty years ago, this Court expressed doubt that discrimination based on sexual orientation requires a rigorous standard of judicial review, noting that “[c]ourts have uniformly refused to apply the same level of scrutiny applied to racial classifications in determining equal protection challenges to classifications based on sexual orientation.” *Under 21 v. City of New York*, 65 N.Y.2d 344, 364 (1985) (citations omitted). That doubt was well founded then and remains so today.⁵⁰

In reviewing classifications based on sexual orientation, the Supreme Court has applied the rational basis standard of review. *See Romer v. Evans*, 517 U.S. 620, 631-36 (1996) (striking down Colorado’s Amendment 2). Although *Romer* did not foreclose the possibility that the Court *might* apply intermediate or strict scrutiny to such classifications in the future, ten of the thirteen federal courts of appeals have expressly held that classifications based on sexual orientation are *not* subject to heightened review. *See Lofton v. Secretary of the Dep’t of Children & Family Services*, n. 9, *supra*, 358 F.3d at 818 & n.16, and the cases cited

⁵⁰ Plaintiffs’ reliance upon *Under 21 v. City of New York*, 108 A.D.2d 250 (1st Dep’t 1985), *modified*, 65 N.Y.2d 344 (1985), in support of their argument that a classification based on sexual orientation is “suspect and warrants heightened scrutiny,” Plaintiffs Br. at 62, *see also, id.* at 69 n. 41, is clearly misplaced. That “suggest[ion],” Plaintiffs’ Br. at 62, was obviously rejected by the same appellate division in this case. Moreover, in modifying the appellate division’s judgment in *Under 21*, this Court “essentially determined that [the appellate division] need not have decided whether discrimination based on sexual orientation is subject to a higher standard of judicial review than rational basis because, on the facts of the case, that discrimination was not chargeable to the City. That being so, [the appellate division’s] discussion of the appropriate standard applicable to sexual orientation discrimination was unnecessary to *how* the case should have been decided.” *Hernandez*, 805 N.Y.S.2d at 373 (Catterson, J., concurring).

therein.⁵¹ Plaintiffs dismiss the significance of these cases, asserting that they were based, in whole or part, on the Supreme Court’s decision in *Bowers v. Hardwick*, n. 9, *supra*, which was overruled in *Lawrence v. Texas*, n. 9, *supra*. See Plaintiffs’ Br. at 62-63. But *Bowers* rejected a *substantive due process* claim, not an *equal protection* claim. Thus, the overruling of *Bowers* in *Lawrence* (on due process, not equal protection grounds) did not affect (and did not purport to affect) the *Romer* Court’s choice of rational basis as the appropriate standard of review for classifications based on sexual orientation. Both *Lofton* and several of the court of appeals decisions cited therein were decided after *Romer* and, consistent with *Romer*, applied rational basis review to such classifications.⁵² Moreover, plaintiffs fail to note that three federal district court decisions and four state reviewing court decisions (in addition to the appellate division’s decision

⁵¹ In its enumeration of the decisions from the other circuits, the Eleventh Circuit misattributed an Eighth Circuit decision, *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), to the Seventh Circuit. See *Lofton*, 358 F.3d at 818 n. 16. In addition to the cases cited in *Lofton*, see *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*), *cert. denied*, 478 U.S. 1022 (1986); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987). See also *Shahar v. Bowers*, 114 F.3d 1097, 1099 n. 2 (11th Cir. 1997) (*en banc*) (“Given the culture and traditions of the Nation, considerable doubt exists that [a woman] has a constitutionally protected federal right to be ‘married’ to another woman”), *cert. denied*, 522 U.S. 1049 (1998). The First, Second and Third Circuits have not addressed this issue.

⁵² *Romer* essentially stands for the proposition that “when all the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis [and] animus *alone* cannot constitute a legitimate government interest.” *Lofton v. Secretary of the Dep’t of Children & Family Services*, 377 F.3d 1275, 1280 (11th Cir. 2004), (Birch, J., specially concurring in the denial of rehearing *en banc*). The marriage statutes, however, are supported by multiple plausible rationales. See Argument IV, *infra*.

under review here), all handed down *after Romer* and *Lawrence*, have held that the federal Defense of Marriage Act and state statutes reserving marriage to opposite-sex couples are subject to rational basis review.⁵³ Plaintiffs cite *no* decisions of any state or federal court holding otherwise, nor have they articulated any principled basis on which to subject classifications based on sexual orientation to a heightened standard of judicial review.

Plaintiffs have identified three factors that have been used to determine whether “a particular group . . . qualif[ies] for heightened scrutiny.” Plaintiffs’ Br. at 64. First, “whether the group historically has been subjected to purposeful discrimination.” Second, “whether the trait used to define the class is unrelated to the ability to perform and participate in society.” And, third, whether the group is “relative[ly] political powerless[.]” *Id.* None of these factors supports plaintiffs’ plea that homosexuals be treated as a suspect (or quasi-suspect) class.

⁵³ See *Wilson v. Ake*, n. 31, *supra*, 354 F.Supp.2d at 1307 (rejecting sexual orientation discrimination challenge to the Defense of Marriage Act); *Smelt v. County of Orange*, n. 31, *supra*, 374 F.Supp.2d at 874-75 (same); *In re Kandau*, n. 25, *supra*, 315 B.R. at 143-44 (same); *Standhardt v. Superior Court*, n. 9, *supra*, 206 Ariz. at 289-90, 77 P.3d at 464-65 (rejecting state and federal equal protection challenge to Arizona marriage statutes); *Morrison v. Sadler*, n. 33, *supra*, 821 N.E.2d at 20 (noting *Lawrence* in course of decision rejecting state constitutional challenge to state marriage statute); *Lewis v. Harris*, n. 26, *supra*, 378 N.J. Super. at 189-94, 875 A.2d at 271-74 (same); *Samuels v. New York State Dep’t of Health*, n. 11, *supra*, slip op. at 9-11 (holding that classifications based on sexual orientation are subject to rational basis review and rejecting state constitutional challenge to marriage statutes). See also *Matter of Valentine v. American Airlines*, n. 4, *supra*, 17 A.D.3d at 42 (same in rejecting state and federal equal protection challenge to provision in Workers’ Compensation limiting the term “surviving spouse” to a person who was a spouse in a legally valid marriage).

With respect to the first factor, plaintiffs have not shown that there is a continuing problem with *public* (in the sense of the law), as opposed to *private* (in the sense of attitudes), discrimination based on sexual orientation. Other than the marriage statutes, which, as *amicus* has argued, do *not* discriminate on the basis of sexual orientation, *see* Argument III(C), *supra*, plaintiffs have pointed to no laws which are even alleged to discriminate on the basis of sexual orientation. Where is the evidence of contemporary discrimination in the law? As plaintiffs have acknowledged, *see* Plaintiffs’ Br. at 33, 67 & n. 39, 87, homosexuals are allowed to adopt, individually, jointly or as second-parents; they may act as foster parents; and they qualify as “family members” for purposes of the state rent control law, to give only a few examples of *nondiscrimination*.

With respect to the second factor, the reservation of marriage to opposite-sex couples is not based on “stereotyped characteristics,” Plaintiffs’ Br. at 63 (citation and internal quotation marks omitted), unrelated to the established purposes of marriage. By definition, same-sex couples are able neither to procreate by themselves nor provide dual gender parenting, just two of the legitimate purposes for which marriage is reserved to opposite-sex couples. *See* Argument IV, *infra*.

With respect to the third factor, homosexuals are not politically powerless,

certainly not in New York State. The Sexual Orientation Non-Discrimination Act, 2002 N.Y. Laws ch. 2, prohibits discrimination on the basis of sexual orientation in employment, education and housing accommodations. And the Hate Crimes Act of 2000, *see* N.Y. PENAL LAW § 485.05(1)(a) (McKinney Supp. 2005), added sexual orientation to the list of hate crimes. In the trial court, plaintiffs identified numerous other legislative and executive acts extending benefits to homosexuals, *see* Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment at 50 nn. 45 & 46. Plaintiffs’ admission that New York has an “evolving history of respect for and protection of same-sex relationships,” *id.* at 47, utterly belies their argument that homosexuals should be treated as a disadvantaged class for purposes of state equal protection analysis. Their impressive record of state and local legislative and executive accomplishments hardly reflects “political powerless[ness],” *i.e.*, an “[in]ability to attract the attention of the lawmakers.” *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 445 (1985).

“Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes” because it is “primarily behavioral in nature.” *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). *See also High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir.

1990) (same); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997) (“any attempted identification of homosexuals by non-behavioral attributes could have no meaning”), *cert. denied*, 525 U.S. 943 (1998). Because it is “primarily behavioral in nature,” homosexuality lacks common elements with those classifications which are based in immutable, observable or legal characteristics. For that reason, it should not be treated as a suspect (or quasi-suspect) basis for classification under either the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or art. I, § 11, of the New York Constitution.⁵⁴

In upholding a city charter amendment repealing existing gay rights’ ordinances and barring the city council from adopting such ordinances in the future, the Sixth Circuit observed that “public discrimination towards persons who are not members of a suspect or quasi-suspect class is permissible as long as such official discrimination is rationally related to the furtherance of some valid public interest.” *Equality Foundation, supra*, 128 F.3d at 297 n. 8. Even assuming that

⁵⁴ Entirely apart from the foregoing, it may be questioned whether a search for evidence of “social and political stereotyping” provides neutral criteria for determining which social classes should be regarded as suspect. In refusing to recognize sexual orientation as a “suspect” classification, the Vermont Supreme Court stated, “It is difficult to imagine a legal framework that could provide less predictability in the outcome of future cases than one which gives a court free reign to decide which groups have been the subject of ‘adverse social or political stereotyping.’” *Baker v. State*, n. 30, *supra*, 170 Vt. at 213 n. 10, 744 A.2d at 878 n. 10 (citations omitted).

the marriage statutes classification between opposite-sex and same-sex couples may be said to “discriminate” on the basis of sexual orientation, such statutes must be upheld if they are rationally related to any legitimate state purposes. For the reasons set forth below, New York’s marriage statutes easily satisfy that standard.

IV.

RESERVING MARRIAGE TO OPPOSITE-SEX COUPLES IS RATIONALLY RELATED TO MULTIPLE LEGITIMATE STATE PURPOSES

Plaintiffs contend further that the reservation of marriage to opposite-sex couples is not rationally related to any legitimate state purpose. *See* Plaintiffs’ Br. at 77-94. The appellate division properly rejected this contention, as well. *See Hernandez*, 805 N.Y.S.2d at 359-61; *id.* at 373-77 (Catterson, J., concurring).

Where, as here, a statutory classification (in this case, between opposite-sex couples and same-sex couples) is not based on a suspect or quasi-suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, “it need only rationally further a legitimate state interest to be upheld as constitutional.” *Affronti v. Crosson*, 95 N.Y.2d 713, 718-19 (2001).

Under this deferential standard of review, a statute is presumed to be constitutional and a challenger has the burden of negating “every conceivable basis which might support it * * * *whether or not the basis has a foundation in the record.*” *Id.* at 719 (citations and internal quotation marks omitted). Plaintiffs “must convince the

court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker.” *Id.* (citations and internal quotation marks omitted). Courts “may even hypothesize the Legislature’s motivation or possible legitimate purpose.” *Id.* (citation omitted). The State “has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is *not subject to courtroom factfinding* and may be based on *rational speculation* unsupported by evidence or empirical data.” *Id.* (citation and internal quotation marks omitted). Plaintiffs failed to demonstrate that the reservation of marriage to opposite-sex couples is not rationally related to *any* legitimate state purpose. Accordingly, the appellate division’s judgment upholding the marriage statutes should be affirmed.

In addition to “preserving the traditional institution of marriage,” *Lawrence v. Texas*, n. 9, *supra*, 539 U.S. at 585 (O’Connor, J., concurring in the judgment),⁵⁵ “reserving marriage to opposite-sex couples is reasonably related to

⁵⁵ In *Samuels v. New York State Dep’t of Health*, n. 11, *supra*, the Third Department, taking note of the enactment of the federal Defense of Marriage Act, the enactment or adoption of dozens of state statutes and constitutional amendments reserving marriage to opposite-sex couples and the Supreme Court’s care in explaining that its decision in *Lawrence v. Texas*, n. 9, *supra*, 539 U.S. at 578, did not involve “whether the government must give formal recognition to any relationship that homosexual persons seek to enter,” concluded that it was not “irrational for the Legislature to preserve the historic legal and cultural understanding of marriage.” Slip op. at 13. The court observed that it is “a long legal road from finding a constitutionally based shield providing protection from criminal prosecution for certain adult consensual conduct carried out in private to using the Constitution as the means to redefine marriage.” *Id.* at 12.

the State’s interests in ensuring a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual-gender parenting for the children so procreated.” *Hernandez*, 805 N.Y.S.2d at 374 (Catterson, J., concurring); *id.* at 359 (the definition of marriage in New York law “expresses an important, long-recognized public policy supporting among other things, procreation, child welfare and social stability—all legitimate state interests”) (majority opinion). *See also Samuels v. New York State Dep’t of Health*, n. 11, *supra*, slip op. at 12-15 (preserving the historic legal and cultural understanding of marriage and recognizing heterosexual marriage as a social institution in which procreation occurs are legitimate state interests in reserving marriage to opposite-sex couples). The legitimacy of these interests cannot be gainsaid.⁵⁶ “Moreover, it is evident,” as Justice Catterson observed, “that same-sex couples cannot procreate by themselves^[57] or provide dual-gender

⁵⁶ Marriage is “the cornerstone of the family and therefore, the foundation of organized society,” 45 N.Y. JUR.2D, DOMESTIC RELATIONS, § 1, at 96 (1995), citing *In re Lindgren’s Estate*, 181 Misc. 166, 169 (Surrogate’s Ct. King County 1943) (marriage “provides for our posterity”), *aff’d without op.*, 267 A.D. 775 (2nd Dep’t 1943), *aff’d*, 293 N.Y. 18 (1944), and *Sweinhart v. Bamberger*, 166 Misc. 256, 260 (Sup. Ct. New York County 1937) (“[m]arriage is the foundation of the family and society, without which there would be neither civilization nor progress”), *aff’d without op.*, 254 A.D. 665 (1st Dep’t 1938). *See also Morris v. Morris*, 31 Misc.2d 548, 549 (Sup. Ct. Westchester County 1961) (“[m]arriage is . . . a foundation upon which society depends for its very survival”).

⁵⁷ *See Singer*, n. 30, *supra*, 11 Wash.App. at 259-60, 522 P.2d at 1195 (“marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race” and “no same-sex couple offers the possibility of the birth of children by their union”); *Dean v. District of Columbia*, n. 30, *supra*, 653 A.2d at 337 (finding

parenting.^[58]” *Hernandez*, 805 N.Y.S.2d at 374 (Catterson, J., concurring).

The appellate division recognized as legitimate the “legislative policy rationale . . . that society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing.” *Hernandez*, 805 N.Y.S.2d at 360. Plaintiffs, however, attack this rationale, arguing that the State’s “categorical ban on

that this “central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples”); *Smelt v. County of Orange*, n. 31, *supra*, 374 F.Supp.2d at 880 (“[b]ecause procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest”); *Adams v. Howerton*, n. 35, *supra*, 486 F.Supp. at 1123 (because “[t]he legal protection and special status afforded by marriage (being defined as the union of persons of different sex) has historically . . . been rationalized as being for the purpose of encouraging the propagation of the race”); *Standhardt v. Superior Court*, n. 9, *supra*, 206 Ariz. at 288, 77 P.3d at 463: “Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could . . . reasonably decide that sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.”

⁵⁸ See *Lofton v. Kearney*, 157 F.Supp.1372, 1383 (S.D. Fla. 2001) (“a child’s best interest is to be raised in a home stabilized by marriage, in a family consisting of both a mother and a father”), *aff’d sub nom. Lofton v. Secretary of the Dep’t of Children & Family Services*, n. 9, *supra*, 358 F.3d at 819 (legislature may reasonably assume that “children benefit from the presence of both a mother and a father in the home”). See also *Wilson v. Ake*, n. 31, *supra*, 354 F.Supp.2d at 1309 (“encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest”) (following *Lofton*); *Smelt v. County of Orange*, n. 31, *supra*, 374 F.Supp.2d at 880 (“[e]ncouraging the optimal union for rearing children by both biological parents is . . . a legitimate purpose of government”); *In re Kandu*, n. 25, *supra*, 315 B.R. at 146 (recognizing authority “that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern”). Remarkably, plaintiffs characterize this interest as “illegitimate and irrational.” Plaintiffs’ Br. at 87 n. 53.

marriage for same-sex couples is so egregiously under- and over-inclusive that it cannot be considered rationally related to these procreative and childrearing purposes.” Plaintiffs’ Br. at 83. The marriage statutes are *over*inclusive, according to plaintiffs, because “the State allows and promotes marriage for different-sex couples that have not had, cannot have, or have no intention of having children,” *Id.* at 85. And the statutes are *under*inclusive, they submit, because “many lesbian and gay couples, including plaintiffs, have and raise children together.” *Id.* at 86.

For purposes of rational basis review under the Equal Protection Clause, which this Court follows in interpreting art. I, § 11,⁵⁹ “[t]he Supreme Court repeatedly has instructed that neither the fact that a classification may be overinclusive or underinclusive nor the fact that a generalization underlying a classification is subject to exceptions renders the classification irrational.” *Lofton v. Secretary of Dep’t of Children & Family Services*, n. 9, *supra*, 358 F.3d 804, 822-23 & n. 20, quoting *F.C.C. v. Beach Communications*, 508 U.S. 307, 315-16 (1993) (noting that defining legislative classes “inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn

⁵⁹ See *Goodwin v. Perales*, 88 N.Y.2d 383, 398 (1996); *People v. Whidden*, 51 N.Y.2d 457, 461 (1980).

differently at some points is a matter for legislative, rather than judicial, consideration”) (citation omitted); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (“Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required”) (citation and internal quotation marks omitted); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (“[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial function.”).

With respect to the marriage statutes’ *overinclusiveness*, the reasonableness of the connection between opposite-sex marriage and procreation and childrearing is not affected by the fact that “the State allows and promotes marriage for different-sex couples that have not had, cannot have, or have no intention of having children,” Plaintiffs’ Br. at 85.

First, if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns. [Citations omitted]. Second, in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may eventually choose to have a child or have an unplanned pregnancy, the State would have a difficult, if not impossible, task in identifying couples who will never bear and/or raise children. Third, because opposite-sex couples have a fundamental right to marry [citation omitted],

excluding such couples from marriage could only be justified by a compelling state interest, narrowly tailored to achieve that interest [citation omitted], which is not readily apparent.

Standhardt v. Superior Court, n. 9, *supra*, 206 Ariz. at 287, 77 P.3d at 462.⁶⁰ The Washington Court of Appeals observed that the reservation of marriage to opposite-sex couples “is based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.” *Singer v. Hara*, n. 30, *supra*, 11 Wash. App. at 259, 522 P.2d at 1195.

This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union.

Id. at 259-60, 522 P.2d at 1195. Thus, “[a]lthough . . . married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the

⁶⁰ See also *Adams v. Howerton*, n. 30, *supra*, 486 F.Supp. at 1124-25 (recognizing that government inquiry about couples’ procreation plans or requiring sterility tests before issuing marriage licenses would “raise serious constitutional questions”); *In re Kandu*, n. 25, *supra*, 315 B.R. at 147 (“if the government attempted to limit marriage solely to those able or desiring to produce children, the government would be required to make such inquiries of couples prior to marriage” which “would implicate constitutionally-rooted privacy concerns” and “would interfere with the fundamental right of opposite-sex couples to marry”); *Goodridge*, n. 8, *supra*, 798 N.E.2d at 1002 n. 35 (Cordy, J., dissenting) (addressing alternative argument).

growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the union of one man and one woman.” *Id.* at 264, 522 P.2d at 1197.⁶¹

With respect to the statutes’ *underinclusiveness*, the reasonableness of the relationship between opposite-sex marriage and procreation and childrearing is not undermined by evidence that “many lesbian and gay couples . . . have and raise children together.” Plaintiffs’ Br. at 86. Plaintiffs’ observation “does not recognize the key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption and assisted reproduction.” *Morrison v. Sadler*, n. 33, *supra*, 821 N.E.2d at 24.⁶²

Becoming a parent using “artificial” reproduction methods is frequently costly and time-consuming. Adopting children is much the

⁶¹ See *Morrison v. Sadler*, n. 33, *supra*, 821 N.E.2d at 27 (“There was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not”); *Baker v. Nelson*, n. 30, *supra*, 291 Minn. at 313-14, 191 N.W.2d at 187 (same); *Dean v. District of Columbia*, n. 30, *supra*, 653 A.2d at 363 n. 5 (following *Baker*).

⁶² As the Indiana Court of Appeals noted, “It is possible, and indeed likely frequently happens, that a same-sex couple may raise a child or children that one or both members had earlier as a result of an opposite-sex relationship.” *Id.* at 24 n. 9. But in challenging the reasonableness of the relationship between the State’s interest in providing a structure for the procreation of children and the reservation of marriage to opposite-sex couples, plaintiffs here, as the plaintiffs in *Morrison*, have focused on “same-sex couples who have children by assisted reproduction and adoption.” *Id.* See Plaintiffs’ Br. at 87 & n. 52. *Amicus* also focuses “on the inability of a same-sex couple to have a child together within the confines of their intimate relationship.” *Morrison*, 821 N.E.2d at 24 n. 9.

same. Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. “Natural” procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.

Id. (footnote omitted). What is the constitutional significance between “natural” reproduction on the one hand and assisted reproduction and adoption on the other?

It means that it impacts the State[‘s] . . . clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproductive or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.

By contrast, procreation by “natural” reproduction may occur without any thought for the future. The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, “accidents” do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the “natural” procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a “change in plans.”

Id. at 24-25 (footnotes omitted).

The State’s interest in supporting opposite-sex marriage is not necessarily “to encourage and promote ‘natural’ procreation across the board and at the expense of other forms of becoming parents, such as by adoption and assisted reproduction; rather, it encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e., a child, to procreate responsibly.” *Id.* at 25. In *Morrison*, the State “identified the protection of *unintended* children resulting from heterosexual intercourse as one of the key interests in opposite-sex marriage.” *Id.* The court of appeals agreed:

The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly. The recognition of same-sex marriage would not further this interest in heterosexual “responsible procreation.” Therefore, the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable inherent characteristic that distinguishes the two classes: the ability or inability to procreate by “natural” means.

Id. (footnote omitted).⁶³

⁶³ *See id.* at 26: “Members of a same-sex couple who wish to have a child . . . have . . . demonstrated their commitment to child-rearing by virtue of the difficulty of obtaining a child through adoption or assisted reproduction, without the State necessarily having to encourage that commitment through the institution of marriage. Conversely, the ‘casual’ intimate acts of a same-sex couple will never result in a child, but those of an opposite-sex couple can and frequently do.” For that reason, recent studies purporting to show that “same-sex couples are at least as successful at raising children as opposite-sex couples . . . are irrelevant to the question of whether the [state] [c]onstitution requires that same-sex couples be allowed to marry.” *Id.* *See*

In his dissent in *Goodridge v. Dep't of Health*, n. 8, *supra*, Justice Cordy

made much the same point, which deserves to be quoted at length:

Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined . . . , but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.

The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.

also, id. at 30 (“opposite-sex marriage is recognized and supported by law in large part to encourage ‘responsible procreation’ by opposite-sex couples, who are the only ones who can, in fact, procreate ‘by accident,’ while those couples, either opposite-sex or same-sex, who must rely on adoption or assisted reproduction technology to have children have already demonstrated a commitment to responsibility without it having to be artificially encouraged by the government”).

440 Mass. at 381-82, 798 N.E.2d at 995-96 (Cordy, J., dissenting) (internal citations and footnote omitted).

The reservation of marriage to opposite-sex couples is also rationally related to the State's interest in providing the benefits of dual-gender parenting.

Taking all . . . available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex partners remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proven itself beyond reasonable scientific dispute as to be as optimal as the biologically based marriage norm.

Id. at 388, 798 N.E.2d at 999-1000 (Cordy, J., dissenting). As Justice Cordy noted, a same-sex family structure “raises the prospect of children lacking any parent of their own gender[:.]”

For example, a boy raised by two lesbians as his parents has no male parent. Contrary to the suggestion that concerns about such a family arrangement is based on “stereotypical” views about the differences between the sexes [citation omitted], concerns about such an arrangement remains rational. It is, for example, rational to posit that the child himself might invoke gender as a justification for the view that neither of his parents “understands” him, or that they “don’t know what he is going through,” particularly if his disagreement or dissatisfaction involves some issue pertaining to sex. Given that same-sex couples raising children are a very recent phenomenon, the ramifications of an adolescent child’s having two parents but not one of his or her own gender have yet to be fully realized and cannot yet even be tested in significant numbers.

Id. at 388 n. 29, 798 N.E.2d at 1000 n. 29.⁶⁴

In light of the foregoing considerations, the legislature could assume that “a recognition of same-sex marriages will increase the number of children experiencing this alternative,” and “conceivably conclude that declining to recognize same-sex marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved.” *Id.* at 388-89, 798 N.E.2d at 1000 (Cordy, J., dissenting).⁶⁵

Amicus fully recognizes that New York law allows homosexual couples to adopt, either jointly or as second-parents. Nevertheless, in reserving marriage to

⁶⁴ Contrary to the suggestion in plaintiffs’ brief (*see* Plaintiffs’ Br. at 87 n. 53), there is no “consensus” of evidence on the impact of same-sex parenting upon children, as several courts have recently noted. In addition to Justice Cordy’s dissent in *Goodridge*, n. 8, *supra*, 440 Mass. at 386-88 & nn. 22-28, 798 N.E.2d at 998-999 & nn. 22-28, *see Lofton v. Secretary of Dep’t of Children & Family Services*, n. 9, *supra*, 358 F.3d at 824-26 & nn. 24-26, and *Morrison v. Sadler*, n. 33, *supra*, 821 N.E.2d at 26 (“it is quintessentially a task for the legislature to consider the weight to be assigned to these various studies, especially in light of the existence of some criticism of them and the relative novelty of the same-sex family structure, in deciding whether civil marriage should be extended to same-sex couples”). *See also Smelt v. County of Orange*, n. 31, *supra*, 374 F.Supp.2d at 880 (upholding the constitutionality of the federal Defense of Marriage Act): “The argument is not legally helpful that children raised by same-sex couples may also enjoy benefits, possibly different, but equal to those experienced by children raised by opposite-sex couples. It is for Congress, not the Court, to weigh the evidence.”

⁶⁵ Plaintiffs’ reliance on this Court’s decision in *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544 (1985), *see* Plaintiffs’ Br. at 79, 80, 81, 83, 84-85, is misplaced. *McMinn* was decided on substantive due process, not equal protection, grounds. Moreover, the definition of “family” in the ordinance invalidated in *McMinn*, which “restricted occupancy of single-family housing based generally on the biological or legal relationships between its inhabitants” was both “fatally overinclusive . . . an underinclusive” because it had “no reasonable relationship to goals of reducing parking and traffic problems, controlling population density and preventing noise and disturbance” *Id.* at 549. For the reasons set forth above, the marriage statutes are not “fatally overinclusive [or] underinclusive.”

opposite-sex couples, the legislature reasonably may have believed that the ideal of dual-gender parenting should be preserved whenever possible.

The fact that the Commonwealth currently allows same-sex couples to adopt . . . does not affect the rationality of this conclusion. The eligibility of a child for adoption presupposes that at least one of the child’s biological parents is unable or unwilling, for some reason, to participate in raising the child. In that sense, society has “lost” the optimal setting in which to raise that child—it is simply not available. In these circumstances, the principal and overriding consideration is the “best interests of the child,” considering his or her unique circumstances and the options that are available for that child. The objective is an individualized determination of the best environment for a particular child, where the normative social structure—a home with both the child’s biological father and mother—is not an option. That such a focused determination may lead to the approval of a same-sex couple’s adoption of a child does not mean that it would be irrational for a legislator, in fashioning statutory laws that cannot make such individualized determinations, to conclude generally that being raised by a same-sex couple has not yet been shown to be the absolute equivalent of being raised by one’s married biological parents.

Id. at 389, 798 N.E.2d at 1000.⁶⁶

⁶⁶ It is irrelevant, therefore, that “the long term union of a man and a woman is no longer the only familial context for raising children” in New York or elsewhere. *Hernandez*, 7 Misc.3d at 482. *See also* Plaintiffs’ Br. at 86 (reporting data on the incidence of homosexual couples raising children in their homes). The legislature reasonably may believe that the ideal of dual-gender parenting should be preferred as a matter of state policy. The majority opinion’s conclusion in *Goodridge* that the reservation of marriage to opposite-sex couples lacks any rational basis, *id.* at 341, 798 N.E.2d at 968, is, in itself, irrational. Moreover, although purporting to decide the case under the rational basis standard of review, in which the *challenger*, not the *defender*, of the statute has the burden of proof, the majority placed the burden of proof on the defendant, not the plaintiffs, as both the dissenters in *Goodridge*, *see id.*, at 359-61, 798 N.E.2d at 980-81 (Sosman, J., dissenting), *id.* at 385 n. 21, 798 N.E.2d at 998 n. 21 (Cordy, J., dissenting), and other courts have noted. *See Morrison*, n. 33, *supra*, 821 N.E.2d at 28-29. In *Morrison*, the Indiana Court of Appeals observed that the majority opinion in *Goodridge* “is

Plaintiffs fundamentally mischaracterize the issue to be decided on rational basis review of the State’s reservation of marriage to opposite-sex couples. The issue is *not* whether “the immeasurable and central role [marriage] plays in the lives of those who marry” would be “diminished . . . because it is exercised between people of the same sex,” Plaintiffs’ Br. at 20, 37, whether “[e]xcluding same-sex couples from marriage has [any] relationship to convincing heterosexuals to procreate and rear children within marriage,” *id.* at 83, or whether recognizing same-sex marriages would “harm” anyone, *id.* at 26, 42 n. 15. Rather, the issue is “whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation. If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable under [the] [state] [c]onstitution.” *Morrison*, 821 N.E.2d at 23. *See Hernandez*, 805 N.Y.S.2d at 376-77 (Catterson, J., concurring (quoting *Morrison*)).⁶⁷ As the foregoing analysis shows, recognition

largely devoid of discussion of why the Commonwealth of Massachusetts might have chosen in the first place to extend marriage benefits to opposite-sex couples but not same-sex couples [to encourage “responsible procreation” by opposite-sex couples].” *Id.* at 29. “The recognition of same-sex marriage,” however, “would not further this interest,” which is “central to governmental recognition and support of opposite-sex marriage.” *Id.*

⁶⁷ Contrary to the opinion of the dissenting justice below, *see Hernandez*, 805 N.Y.S.2d at 387 (Saxe, J., dissenting), “there is no requirement in rational basis equal protection analysis that the government interest be furthered by both those included in the statutory classification and by those excluded from it.” *Id.* at 361 (majority opinion) (citing *People v. Whidden*, *see n.* 59, *supra*, 51 N.Y.2d at 461). *See also Standhardt v. Superior Court*, n. 9, *supra*, 206 Ariz. at 288,

of same-sex marriage would *not* promote the State’s interest in marital procreation, particularly *unintended* procreation from heterosexual intercourse, nor would it promote the State’s interest in dual-gender parenting.

In *Samuels v. New York State Dep’t of Health*, see n. 11, *supra*, the Appellate Division, Third Department, observed that “precluding same-sex couples from marrying does not encourage opposite-sex couples to have and raise children; [that] many same-sex couples currently raise children and both partners are good parents; [that] the adoption of a child is not dependent upon a parent’s sexual orientation or marital status; [that] with the assistance of modern technology, conception of a child is possible outside of sexual intercourse and regardless of the woman’s sexual orientation; and [that] many opposite-sex couples who marry do not have children.” Slip op. at 14. Notwithstanding “the overinclusive and underinclusive nature” of the distinction in the marriage laws between opposite-sex marriage, which is allowed, and same-sex marriage, which is not, the Third Department determined that the reservation of marriage to opposite-sex couples satisfies the rational basis standard of review. *Id.* at 14-15.

77 P.3d at 463: “Petitioners lastly argue that the State’s limitation of marriage to opposite-sex unions is not reasonably related to its interests in procreation, because excluding same-sex couples to marry would not inhibit opposite-sex couples from procreating. We agree with Petitioners that allowing same-sex couples to marry would not inhibit opposite-sex couples from procreating. But the reasonableness of the State’s position is not dependent on the contrary conclusion. Rather, . . . the State does not have the same interest in sanctioning marriages between couples who are incapable of procreating as it does with opposite-sex couples.”

This Court should hold likewise.

In deciding this appeal, this Court must ask the question—what is the essential purpose for which society recognizes and privileges the institution of marriage? In *Goodridge v. Dep’t of Public Health*, the Massachusetts Supreme Judicial Court answered that the exclusive and permanent commitment of the marriage partnership rather than the begetting of children is the *sine qua non* of civil marriage, *see* n. 8, 440 Mass. at 332, 798 N.E.2d at 961-62, and that “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.” *Id.* at 333, 798 N.E.2d at 962.⁶⁸ But, as Justice Cordy noted in his dissent, “The court has it backward.” *Goodridge*, n. 8, 440 Mass. at 391 n. 34, 798 N.E.2d at 1002 n. 34:

Civil marriage is the product of society’s critical need to manage procreation as the inevitable consequence of intercourse between members of the opposite sex. Procreation has always been at the root of marriage and the reasons for its existence as a social institution. Its structure, one man and one woman committed for life, reflects society’s judgment as to how optimally to manage procreation and the resultant child rearing. The court, in attempting to divorce procreation from marriage, transforms the form of the structure into its purpose. In doing so, in turns history on its head.

⁶⁸ Plaintiffs have said much the same in their brief. *See* Plaintiffs’ Br. at 85 (arguing that “the *sine qua non* of marriage is the relationship between two committed adults, not procreation”).

Id., 798 N.E.2d at 1002 n. 34.

Other courts have agreed with this critique of the lead opinion in *Goodridge*. In *Lewis v. Harris*, see n. 26, *supra*, the New Jersey Superior Court, Appellate Division, commented that “[t]he essential premise of the *Goodridge* plurality opinion—that the institution of marriage is simply an ‘exclusive commitment of two individuals to each other,’ [440 Mass. at 312, 798 N.E.2d at 948]—constitutes a normative judgment that conflicts with the traditional and still prevailing religious and societal view of marriage as a union between a man and a woman that plays a vital role in propagating the species and provides the ideal setting for raising children.” 875 A.2d at 273. Elaborating on this point, Judge Parrillo stated in his concurrence:

When plaintiffs, in defense of genderless marriage, argue that the State imposes no obligation on married couples to procreate, they sorely miss the point. Marriage’s vital purpose is not to mandate procreation but to control or ameliorate its consequences—the so-called “private welfare” purpose. To maintain otherwise is to ignore procreation’s centrality in marriage.

Id. at 276 (Parrillo, J., concurring). See also *Morrison v. Sadler*, n. 33, *supra*, 821 N.E.2d at 28-31 (same).

New York’s reservation of marriage to opposite-sex couples is rationally related to multiple legitimate state purposes. Accordingly, the judgment of the Supreme Court, Appellate Division, First Department, should be affirmed.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the New York State Catholic Conference, respectfully requests that this Honorable Court affirm the judgment of the Supreme Court, Appellate Division, First Department.

Respectfully submitted,

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Certificate of Service

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