APPELLATE DIVISION – THIRD DEPARTMENT CASE NO. 98084

Supreme Court of the State of New York

Appellate Division – Third Department

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER MCDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs-Appellants,

- against -

THE NEW YORK STATE DEPARTMENT OF HEALTH and THE STATE OF NEW YORK

Defendants-Respondents.

BRIEF OF AMICI CURIAE

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APPENDIX

TAB

Amici Curiae, the New York County Lawyers' Association ("NYCLA") and the National Black Justice Coalition ("NBJC") submit this brief in support of the appeal of the December 7, 2004 decision and January 11, 2005 judgment of Supreme Court Justice Joseph C. Teresi in favor of Defendants-Respondents the New York State Department of Health and the State of New York (collectively the "State"). For the reasons set forth herein and in the Record, the decision below should be reversed.

STATEMENT OF INTEREST OF *AMICI*

A. The New York County Lawyers' Association[1]

NYCLA is a not-for-profit membership organization of approximately 8,500 attorneys practicing primarily in New York County, founded and operating specifically for charitable and educational purposes. NYCLA's certificate of incorporation specifically provides that it is to do what it deems in the public interest and for the public good, and to seek reform in the law.

In 1907, a group of lawyers gathered in Carnegie Hall to address the prospect of forming a bar group where heritage and politics were not obstacles to inclusion. The bar leaders who met were determined to create, in the words of Hon. Joseph H. Choate, who would become president in 1912, "the great democratic bar association of the City [where] any attorney who had met the rigid standards set up by law for admission to the bar should, by virtue of that circumstance, be eligible for admission." Adherence to professional standards alone would determine eligibility.

Since its founding in 1908, NYCLA has played a leading role in the fight against discrimination both in the profession and under local, state and federal law. Indeed, NYCLA

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[1] *See* Affidavit of Norman L. Reimer, sworn to on May 19, 2005, ¶ 9.

was founded 97 years ago as the first major bar association in the United States of America that admitted members without regard to race, ethnicity, religion or gender. Although various factors contributed to NYCLA's creation, none were as strong as the "selective membership" that other bar associations employed to deny large groups of lawyers the opportunity to participate in bar association activities. Throughout its history, NYCLA's bedrock principle has been the inclusion of all who wish to join and the active pursuit of legal system reform.

Consistent with its founding and sustaining principles of non-discrimination and inclusion, in 1943 NYCLA refused to renew its affiliation with the American Bar Association because it refused to admit African-American lawyers. And in December 2003, the NYCLA Board of Directors adopted a resolution endorsing full equal civil marriage rights for same-sex couples.

NYCLA's endorsement of equal civil marriage rights for same-sex couples grew out of its concern that an entire class of New York couples and their families lack the protections afforded to families led by heterosexual couples. To ensure that all rights, benefits and responsibilities attendant to civil marriage are available to same-sex couples in New York, NYCLA submits that it is necessary to extend civil marriage rights to same-sex couples without diluting them through piecemeal legislation or the ambiguous "civil union" or "domestic partnership." In the absence of state recognized marriage rights, same-sex couples are relegated to second class citizenship when they are denied the equal rights that are available to heterosexual couples and their families.

B. The National Black Justice Coalition

NBJC is a non-profit, civil rights organization of black lesbian, gay, bisexual and transgender people and allies dedicated to fostering equality. NBJC has more than 3,000 members nationwide and advocates for social justice by educating and mobilizing opinion

leaders, including elected officials, clergy, and media, with a focus on black communities. Black communities have historically suffered from discrimination and have turned to the courts for redress. With this appeal, we turn to the courts again. The issue presented by this appeal has significant implications for the civil rights of black lesbians and gay men in this State – whether they will receive equal treatment under the law and the legal recognition and protections of marriage for their relationships and families. NBJC envisions a world where all people are fully empowered to participate safely, openly, and honestly in family, faith and community, regardless of race, gender-identity or sexual orientation.

PRELIMINARY STATEMENT

This Nation has a history of discrimination that was once commonplace and acceptable, but is resoundingly rejected today. Other types of discrimination continue, such as that in issue now before this Court: the prohibition on civil marriage between same-sex couples. The current prohibition on marriage between individuals of the same sex is rationalized today based on its long-standing history and supposed equal application to men and women.

For centuries, these same rationalizations were used to justify the prohibition of interracial marriage—a prohibition that no one today would defend as even arguably constitutional. Thus, in any analysis of today's restrictions on the right to marry for same-sex couples, we must be mindful of this Nation's history of discriminating against couples of different races. At the core of both prohibitions lies the violation of an individual's right to marry.[2] Recently, Supreme Court Justice Doris Ling-Cohan in *Hernandez v Robles* (7 Misc 3d 459, 2005 NY Slip Op 25057 [Sup Ct, NY County Feb. 4, 2005]), rejected New York's

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[2] *Amici* recognize that the long history of racial discrimination in this country extended well beyond restrictions on marriage rights.

prohibition on marriage between same-sex partners as unconstitutional under New York's Constitution. The opinion in *Hernandez* recognized the striking similarity in the nature of the history of racial and sex discrimination in the realm of restrictions on marriage partners:

> "An instructive lesson can be learned from the history of the anti-miscegenation laws and the court decisions which struck them down as unconstitutional. The challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners. . . . [T]he United States Supreme Court was not deterred by the deep historical roots of anti-miscegenation laws [(*Loving v Virginia*, 388 US 1, 7, 10 [1967])]; their continued prevalence [(*id.* at 6 n 5)]; nor any continued popular opposition to interracial marriage. [(*Id.* at 7)]. Instead, the Court held that '[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State,' declaring that 'marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.' [(*Id.* at 12 (quoting *Skinner v Oklahoma ex rel. Williamson*, 316 US 535, 541 [1942])]."

(*Id.*, **2, 3).

This brief provides a detailed historical background of the prohibition on interracial marriage in the United States and an analysis of judicial opinions that ultimately recognized the prohibition as an unconstitutional violation of an individual's fundamental right to marry. Viewed against this background, *Amici* respectfully request that this Court hold that the prohibition on civil marriage between same-sex couples is also unconstitutional.

ARGUMENT

I. HISTORICAL BACKGROUND

A. Interracial Marriage Was Prohibited In This Nation For More Than 300 years

The interracial marriage prohibition is deeply rooted in our Nation's history and tradition. Statutes prohibiting interracial marriage were enforced in American colonies and states for more than three centuries. (*See* Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage & Law—An American History* 253-254 [2002], annexed hereto as Tab A). The first anti-miscegenation law was enacted in Maryland in 1661. (Rachel F. Moran, *Interracial Intimacy: The Regulation of Race & Romance* 19 [2001], annexed hereto as Tab B). Virginia followed suit soon after. (*See id.*).

Interracial marriage was so far outside of the realm of traditional marriage in colonial America that Virginia amended its anti-miscegenation law in 1691 to banish from the community any white person who married a "negro," "mulatto," or Indian. (Wallenstein, *supra*, at 15-16). Couched in "the language of hysteria rather than legalese," the avowed purpose of Virginia's 1691 law was to prevent "that abominable mixture and spurious issue" of whites with blacks or Indians. (*Id.* at 15).

Although the first American anti-miscegenation laws were enacted in the Chesapeake Bay colonies, they quickly spread throughout the country. Massachusetts enacted an anti-miscegenation law in 1705. (Carter G. Woodson, *The Beginnings of Miscegenation of the Whites and Blacks, in Interracialism: Black-White Intermarriage in American History, Literature & Law* 42, 45, 49 [Werner Sollors ed., 2000], annexed hereto as Tab C). Pennsylvania passed its anti-miscegenation law in 1725, and Delaware enacted a similar law in 1726. (Charles Frank Robinson II, *Dangerous Liaisons: Sex & Love in the Segregated South* 4 [2003], annexed hereto as Tab D).

By the time of the Civil War, laws prohibiting interracial marriage covered most of the South and much of the Midwest, and they were beginning to appear in Western states. (*See* David H. Fowler, *Northern Attitudes Toward Interracial Marriage: Legislation & Public Opinion in the Middle Atlantic & the States of the Old Northwest, 1780-1930* 214-219 [1987], annexed hereto as Tab E). The proponents of these laws argued that they were necessary to uphold the law of nature: "Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. The same law which forbids consanguineous amalgamation; forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest." (Henry Hughes, *Treatise on Sociology, Theoretical & Practical* 239-240 [1854], annexed hereto as Tab F).

Although New York State never enacted an anti-miscegenation law, interracial relations were still subject to strong taboo here and vilified in the political arena. Indeed, the term "miscegenation" was first used in an anonymous propaganda pamphlet printed in New York City in 1863. The term was coined from two Latin words meaning "to mix" and "race." The pamphlet advocated the "interbreeding" of the white and black races so that they would become indistinguishably mixed, claiming this was the goal of the Republican Party. The pamphlet was later discovered to be an attempt by Democrats to discredit Republicans. (*See e.g.* Wikipedia: The Free Encyclopedia, *Miscegenation* <en.wikipedia.org/wiki/Miscegenation> [last accessed May 17, 2005]; *The Miscegenation Hoax* <www.museumofhoaxes.com/miscegenation.html> [last accessed May 17, 2005]).

During Reconstruction, southern Democrats adopted the New York-minted term "miscegenation" and insisted on the necessity of preserving the sanctity of marriage by banning interracial marriage. (*See* Moran, *supra*, at 26). A few southern states repealed their anti-

miscegenation laws during Reconstruction, but societal pressure to spurn interracial relationships remained steadfast. (*Id.*). When white southern males regained control of their state legislatures post-Reconstruction, they promptly reinstated anti-miscegenation laws. (*See id.* at 27).

Southern courts rejected challenges to these revived racial restrictions and upheld the laws on the basis of long-standing tradition, "equal" application to the races, and the "logic" of prohibiting interracial marriage. For example, in 1878 the Supreme Court of Appeals of Virginia stated:

> "The public policy of this state, in preventing the intercommingling of the races by refusing to legitimate marriages between them has been illustrated by its legislature for more than a century. . . . The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization . . . all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion."

(*Kinney v Virginia*, 71 Va 858, 869 [1878]).

Despite the proliferation of anti-miscegenation laws, opponents of interracial marriage feared that state laws were insufficient to protect the sanctity of marriage. In December 1912, Representative Seaborn Roddenberry of Georgia proposed an amendment to the United States Constitution stating, "Intermarriage between Negroes or persons of color and Caucasians . . . is forever prohibited." (49 Cong Rec 502 [Dec. 11, 1912]). Leaders from around the country denounced interracial marriage, which Governor John Dix of New York called "'a blot on our civilization'" and "'a desecration of the marriage tie [that] should never be allowed'" and Governor William Mann of Virginia called "'a desecration of one of our sacred rites.'" (*See* Robinson, *supra*, at 79; *see also* Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 Akron L Rev 529, 548 [1999]).

B. Marriage Prohibitions Extended To Numerous Racial Groups

Although the first anti-miscegenation laws targeted whites and blacks, many states expanded their application to other racial groups. (*See* Peggy Pascoe, *Miscegenation Law, Court Cases & Ideologies of "Race" in Twentieth Century America, in Interracialism: Black-White Intermarriage in American History, Literature & Law* 178, 183 [Werner Sollors ed., 2000], annexed hereto as Tab G). Twelve states prohibited marriage between whites and Native Americans. (*Id.*). After the mid-Eighteenth century, when people from the Far East began to immigrate to the United States, states with substantial populations of Chinese and Japanese responded by enacting anti-miscegenation laws prohibiting marriage between whites and "Mongolians." (Moran, *supra*, at 28-36).

As new "nonwhite" immigrant communities formed, states amended their anti-miscegenation laws to prevent marriages between whites and these immigrants. (*Id.* at 31-32). In 1862, Oregon passed its first anti-miscegenation law. (*See* 1862 Or Laws § 63-102). In 1866, Oregon amended the statute to prohibit marriage between "any white person, male or female" and "any negro, Chinese, or any person having one fourth or more negro, Chinese, or Kanaka [Native Hawaiian] blood, or any person having more than one-half Indian blood." (*See* 1866 Or Laws § 23-1010).

In 1850, California enacted a law prohibiting marriages between "white persons" and "negroes or mulattoes." (Leti Volpp, *American Mestizo: Filipinos & Anti-Miscegenation Laws in California, in Mixed Race America & the Law: A Reader* 86 [Kevin R. Johnson ed., 2003], annexed hereto as Tab H). Then, in 1878, California amended its constitution to restrict the intermarriage of whites and Chinese. (*See* Moran, *supra*, at 31). Shortly thereafter, the California Legislature amended the Civil Code to ban the union of "'a white person with a negro,

mulatto, or Mongolian.'" (*Id.* [citation omitted]). Later, it amended the law to include "'members of the Malay race'" as well. (*See id.* at 38 [citation omitted]).

The breadth of anti-miscegenation laws varied from state to state, as specific racial or national groups were singled out for specific statutes reflecting the racial populations of the states. (Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity & Adoption* 220 [2003], annexed hereto as Tab I). Other states enforced their anti-miscegenation policies on the basis of judicial decisions that turned on white/non-white distinctions. For example, Virginia voided a marriage between a white person and a person of Chinese descent on the basis of that state's statute making it "unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian." (*See Naim v Naim*, 197 Va 80, 81, 87 SE2d 749, 750 [citation omitted], *vacated and remanded* 350 US 891 [1955], *adhered to* 197 Va 734, 90 SE2d 849 [1956]). All told, thirty-eight states had anti-miscegenation laws in effect at one time or another. (*See* Wallenstein, *supra*, at 253-254). By the end of World War II, thirty states still had such statutes. (*See id.* at fig. 8).[3]

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[3] Of course, affluent people could avoid certain consequences of the anti-miscegenation laws. For example, John Mercer Langston, the first African American to be elected to public office and the founder in 1868 of the Howard University School of Law, was able to succeed to the wealth of his white father (and the opportunities that such wealth would enable) as a result of his father's capacity to contract around certain consequences of Virginia's anti-miscegenation laws to ensure that his children would inherit his wealth. Upon their parents' deaths, those children, including John Mercer Langston, were taken in by a family friend in a free state -- Ohio. (*See* John Mercer Langston Bar Assn web site <www.jmlba.org/JMLBio.htm> [last accessed May 17, 2005]; Kansas St Hist Soc'y web site <www.kshs.org/publicat/history/1999 winter_sheridan.htm> [last accessed May 17, 2005]). Similarly, same-sex couples of means who are denied the right to marry can, with respect to at least a certain few of the benefits attendant to marriage (*i.e.*, rights of succession), contract for the same, albeit privately and at great expense. This juxtaposition highlights yet another dimension to the inequity that flows from the deprivation of equal marriage rights -- a built-in preference for those affected persons of means.

State anti-miscegenation laws were considered constitutional until 1967, when the U.S. Supreme Court struck down such discrimination as an unconstitutional interference with an individual's fundamental right to marry. (*Loving*, 388 US at 12).

C. Anti-Miscegenation Laws Enjoyed Vast Popular Support

Bans on interracial marriage reflected contemporary public sentiment. In 1958, a Gallup Poll indicated that 96% of all Americans opposed interracial marriage. (*See* Nicholas D. Kristof, *Marriage: Mix and Match*, NY Times, Mar. 3, 2004, at A23). In 1972—five years after the Supreme Court declared bans on interracial marriage unconstitutional—a Gallup Poll reported that 75% of all white Americans still opposed interracial marriage. (*See* Charlotte Astor, *Gallup Poll: Progress in Black/White Relations, But Race is Still an Issue* <usinfo.state.gov/joumals/itsv/0897/ijse/gallup.htm> [last accessed May 17, 2005]). In 2000, Alabama became the last state to repeal its anti-miscegenation law, with 40% of its electorate voting to *keep* the prohibition on the books. (TheFreeDictionary.com, *Miscegenation* <www.encyclopedia.thefreedictionary. com/miscegenation> [last accessed May 17, 2005]).

II. THE STATE'S ARGUMENTS ATTEMPTING TO CIRCUMSCRIBE THE FUNDAMENTAL RIGHT TO MARRY DO NOT WITHSTAND SCRUTINY

The decision below should be reversed. *Amici* urge this Court to keep in mind the history described above in determining whether New York's prohibition on marriages between individuals of the same sex violates the New York State Constitution. The State argues that it has the power to deny same-sex couples the right to enter into civil marriages by defining the right too narrowly and by suggesting that the existence of such a right must somehow become more popularly accepted before it can exist. Taking a cue from the "reasoning" employed by the opponents of interracial marriage before *Loving*, the State also suggests that denying same-sex

couples the right to enter into civil marriage is not discriminatory because it is "equally" applied. This Court should reject these narrow and misleading arguments.

A. Contemporary "Popular Opinion" Cannot Define The Fundamental Right To Be Free From Unwarranted Governmental Intrusion

All parties to this case agree that the right to marry is a constitutionally protected fundamental right. The reason that individuals have a fundamental right to be free from unwarranted governmental intrusion in decisions involving marriage is that the decision to marry is fundamentally personal and private in nature. (*See Griswold v Connecticut*, 381 US 479, 486 [1965] ("We deal with a right of privacy older than the Bill of Rights")). Marriage is among those matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." (*Planned Parenthood v Casey of Southeastern Pa.*, 505 US 833, 851 [1992]).

Although the parties agree that there is a fundamental right to marry, they disagree about the scope of this right. Appellants and *Amici* view the right as the right of one individual to enter into a marriage with any other individual of his or her choice. The State argued below that the right at issue is limited to the right to enter into a marriage with a member of the opposite sex. The State claims that Appellants are seeking a new or extended right to "same-sex marriage" that has never before existed. This narrow interpretation of the right to marry finds no support in constitutional jurisprudence and is inconsistent with decisions striking down anti-miscegenation statutes.

The State has advanced three overlapping arguments in this area to restrict Appellants' rights in this case. First, it claims that courts should always define fundamental rights as narrowly as possible. Second, it claims that a right is fundamental only insofar as it has

been exercised and protected throughout our nation's history. Third, it claims that a right is fundamental only if its exercise is generally accepted in our society. *Amici* respond to each point in turn.

1. Fundamental Rights Should Not Be Defined Narrowly to Incorporate the Challenged Governmental Restriction

The State argues that fundamental rights must be defined narrowly, framing the issue in this case as whether there is a fundamental right to same-sex marriage. This view contradicts a long line of constitutional law and, in particular, cases involving anti-miscegenation statutes.

Challenges to claimed violations of fundamental rights require a two-step analysis: (1) Does the statute at issue restrict or burden the exercise of a fundamental right? If so, (2) is the restriction or burden narrowly tailored to serve a compelling government interest? (*See e.g. Hernandez*, 2005 NY Slip Op 25057, *14; *Zablocki v Redhail*, 434 US 374, 388 [1978]).

The New York Constitution does not contain any of the constraints urged by the State to "narrow" the liberty of New York citizens. Article I, § 11 of the New York State Constitution provides, in pertinent part, that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." (NY Const, art I, § 11). And Article I, § 6 of the New York State Constitution provides, in pertinent part, that "[n]o person shall be deprived of life, liberty or property without due process of law." (NY Const, art I, § 6).

The right to liberty necessarily includes the right to be free from unjustified government interference in one's privacy. (*See People v Onofre*, 51 NY2d 476, 486-89 [1980], *cert denied* 451 US 987 [1981]). Thus, the analysis of Appellants' due process claim begins with the question whether the right to marriage is a fundamental right entitled to due process

protection, both as a general liberty right and as a specific privacy right. *Amici* submit that it is both.

It is critically important to this analysis that the New York Court of Appeals has expressed a willingness to expand State Constitutional protections when individual liberties and fundamental rights are at issue. (*See People v Harris*, 77 NY2d 434, 437-438 [1991] ("Our federalist system of government necessarily provides a double source of protection and State courts, when asked to do so, are bound to apply their own Constitutions notwithstanding the holdings of the United States Supreme Court. . . . Sufficient reasons appearing, a State court may adopt a different construction of a similar State provision unconstrained by a contrary Supreme Court interpretation of the Federal counterpart") [citation omitted]). Here, the State tries to avoid this analytical framework by incorporating the challenged restriction into the definition of the right.[4]

A review of cases in which the U.S. Supreme Court has found government intrusion on fundamental rights in violation of the Fourteenth Amendment's Due Process Clause reveals that, in determining the existence of a fundamental right, the Court considers the general nature of the right at issue rather than the very specific governmental restriction being

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[4] Furthermore, the State's argument should wither here, given that the whole purpose of the New York State Constitution is to secure people's freedom. Indeed, the Preamble of the New York State Constitution proclaims "[w]e, the People of the State of New York, grateful to Almighty God for our [f]reedom, in order to secure its blessings, do establish this Constitution." (NY Const, Preamble). And, to quote the 1992 Supreme Court of Kentucky decision in *Kentucky v Wasson* (842 SW2d 487 [Ky 1992]), which struck down Kentucky's anti-sodomy laws:

> "[g]iven the nature, the purpose, the promise of our Constitution, and its institution of a government charged as the conservator of individual freedom, I suggest that the appropriate question is not '[w]hence comes the right to privacy?' but rather, '[w]hence comes the right to deny it?'"

(*Id.* at 503 [Combs, J., concurring]).

challenged. For example, in *Meyer v Nebraska* (262 US 390, 401-03 [1923]), and in *Pierce v Society of Sisters of Holy Names of Jesus & Mary* (268 US 510, 534-35 [1925]), the Court considered whether parents had a right to be free from unwarranted governmental intrusion in decisions about how to educate their children. The Court did not frame the issue as whether there was a fundamental (and general) right for children to learn the German language or whether there was a fundamental and general right to attend a private school. In *Skinner* (316 US at 541), the Court considered whether there was a fundamental and general right to be free from unwarranted governmental intrusion in decisions about whether to have offspring, not whether a convicted criminal had the fundamental right to bear children. In *Zablocki* (434 US at 384-385, 388), and *Turner v Safley* (482 US 78, 95-96 [1987]), the Court considered whether there was a fundamental and general right to be free from unwarranted governmental intrusion in decisions to marry, not whether deadbeat dads or prison inmates in particular had a specific right to marry. Most recently, in *Lawrence v Texas* (539 US 558, 578 [2003]), the Court considered whether there is a fundamental and general right to be free from unwarranted governmental intrusion into matters of private, consensual sexual conduct, not whether there is a specific right to engage in homosexual sodomy. The very notion of "fundamental and general" rights reserved to all people naturally flows from the nature of a written constitution that defines the limited power of the State. That notion reflects the Liberal view that people are beings possessed of personal dignity and human worth. States exist to preserve that dignity, worth and autonomy. Only totalitarian regimes view themselves as "dispensing" rights to people at the whim of a transitory majority or the favor of a particular faction.

The U.S. Supreme Court's rejection of anti-miscegenation statutes exposes the fallacy of New York State's argument in this case. In *Loving* (388 US at 12), the Supreme Court

did not ask whether there was a specific right to enter into an interracial marriage. Instead, the Court asked more generally whether there was a fundamental and general right to be free from unwarranted governmental interference in decisions regarding marriage. After answering that question affirmatively, the Court considered whether the prohibition on interracial marriage was narrowly tailored to serve a compelling state interest and, of course, concluded it was not.

Significantly, the Supreme Court has since emphasized the broad basis of its decision in *Loving*. The Court has explained that its decision in *Loving* "could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. . . . But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." (*Zablocki*, 434 US at 383 [citation omitted]). The California Supreme Court took a similarly broad perspective when it struck down an anti-miscegenation statute almost twenty years before *Loving*. Justice Traynor wrote:

> "[Marriage] is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means. . . . Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry."

(*Perez v Lippold*, 32 Cal 2d 711, 715, 198 P2d 17, 19 [1948]).

And there is substantial New York Court of Appeals precedent speaking to the breadth of the fundamental right to marry under New York Law. As Justice Ling-Cohan explained in the *Hernandez* decision:

> "New York courts have analyzed the liberty interest at issue in terms that recognize and embrace the broader principles at stake. . . . Indeed, as the Court of Appeals has consistently made clear, '[A]mong the decisions protected by the right to privacy, are those relating to marriage.' ([*Doe v Coughlin*, 71 NY2d 48, 52

> [1987], *cert. denied* 488 US 879 [1988]]; *see also* [*People v Shepard*, 50 NY2d 640, 644 [1980]] (noting courts' willingness 'to strike down State legislation which invaded the "zone of privacy" surrounding the marriage relationship') [citation omitted]; [*Levin v Yeshiva Univ.*, 96 NY2d 484, 500 [2001, Smith, J., concurring]] ('[M]arriage is a fundamental constitutional right'); [*Mary of Oakknoll v Coughlin*, 101 AD2d 931, 932 [3d Dept 1984]] ('[T]he right to marry is one of fundamental dimension')).

(2005 NY Slip Op 25057, **12-13).

2. The State's Focus on the Historical Recognition of the Right to Marry Is Overly Narrow

The State argues that fundamental rights must be deeply grounded in our nation's history and, therefore, the right to marry must be narrowly viewed to include only opposite-sex marriages. Again, this argument is contrary to constitutional jurisprudence and decisions striking down anti-miscegenation statutes.

While the determination of a fundamental right looks to history and the ordered concept of liberty, the State can cite no New York case that requires tying the definition of a fundamental right to the state's "traditional" definition thereof. Indeed, it is hard to imagine that any form of discrimination can be styled as permissible merely because it has been "traditionally pervasive." The United States Supreme Court has never held that it will solely rely on history when evaluating a constraint on fundamental rights. In *Casey*, the Supreme Court stated:

> "[S]uch a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause. . . ."

(505 US at 847-848).

Thus, the Supreme Court's analysis of fundamental rights is grounded in our nation's historical tradition of protecting uniquely personal and intimate decisions from unjustified government intrusion, not in the history of a specific act or decision. "If the question whether a particular act or choice is protected as a fundamental right were answered only with reference to the past, liberty would be a prisoner of history." (Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 Harv L Rev 2684, 2689 [2004]).

> "Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. . . . The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions."

(*Brause v Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, *4 [Alaska Super Ct Feb. 27, 1998], *aff'd sub nom Brause v Alaska Dept. of Health & Soc. Servs.*, 21 P3d 357 [Alaska 2001]).

The history of interracial marriages exposes the fallacy of the State's argument: It was once argued that there is no fundamental right to marry someone of a different race because such marriages had a long history of being prohibited. (*See e.g. Lonas v State*, 50 Tenn 287, 293-295 [1871]; *Britell v Jorgensen (In re Takahashi's Estate)*, 113 Mont 490, 493-494, 129 P2d 217, 219 [1942]; *Perez*, 32 Cal 2d at 747, 198 P2d at 38 [Shenk, J., dissenting] (arguing that the prohibition of interracial marriage had a long history and 29 states continued to have such laws)). In 1948, when the California Supreme Court struck down California's anti-miscegenation statute, Justice Carter acknowledged that "[t]he freedom to marry the person of one's choice has not always existed" but nonetheless concluded that the right was fundamental and that anti-

miscegenation statutes impermissibly violated that right.[5] (*Perez*, 32 Cal 2d at 734-35, 198 P2d at 31 [Carter, J., concurring]).

In *Loving*, the Supreme Court recognized an individual's fundamental right to be free from governmental intrusion in marriage not because interracial marriage was permitted at common law, but because the Constitution required it. (388 US at 12). Likewise, in *Perez*, the California Supreme Court recognized each individual's fundamental right "to join in marriage with the person of one's choice," despite the many historical restrictions imposed upon the exercise of that right. (32 Cal 2d at 717, 198 P2d at 21).

Additionally, as set forth above, until 1967, this Nation had a long and deep-seated history of prohibiting and disapproving of interracial marriages. The statutes were routinely defended as having "been in effect in this country since before our national independence." (*Perez*, 32 Cal 2d at 742, 198 P2d at 35 [Shenk, J. dissenting]). Indeed, anti-miscegenation laws were the most deeply embedded form of legal race discrimination in our nation's history—lasting over three centuries. (Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage is Familiar to This Historian of Miscegenation* [2004] <hnn.us/articles/4708.html> [last accessed May 17, 2005]).

3. The Prevalence of Existing Laws is Irrelevant

The State also suggests that there is no right to marry someone of the same sex because prohibitions on such marriages are nearly universal in the United States. According to

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[5] As a New York court recently stated when holding the prohibition of marriage for same-sex couples to be unconstitutional: "The challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners." (*Hernandez*, 2005 NY Slip Op 25057, *1).

this theory, anti-miscegenation statutes should have remained constitutional as long as they remained prevalent. Such an argument is both historically and legally wrong.

As an initial matter, the sheer prevalence of a law does not determine its constitutionality. For example, the opinion *Lawrence* (539 US at 577-578) quoted from Justice Stevens dissent in *Bowers v Hardwick*, 478 US 186, 216 [1986] -- "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"

Moreover, disapproval of interracial marriage was also once commonplace. When anti-miscegenation statutes were challenged, states relied upon their prevalence and acceptance to defend them. (*E.g. Henkle v Paquet (In re Paquet's Estate)*, 101 Or 393, 399, 200 P 911, 913 [1921] (miscegenation statutes "'have been universally upheld as a proper exercise of the power of each state to control its own citizens'") [citation omitted]; *Kirby v Kirby*, 24 Ariz 9, 11, 206 P 405, 406 [1922]; *Lee v Giraudo (In re Monks' Estate)*, 48 Cal App 2d 603, 612, 120 P2d 167, 173 [Ct App 1941], *appeal dismissed* 317 US 590 [1942]). Prohibitions on interracial marriage remained commonplace at the time those prohibitions were invalidated. As set forth above, when the California Supreme Court struck down an anti-miscegenation statute in 1948, thirty states had similar statutes. And when the Supreme Court struck down anti-miscegenation statutes in *Loving*, sixteen states still had similar statutes, and 75% of white Americans still opposed interracial marriage. (*See* Astor, *supra*).

More importantly, prohibitions on interracial marriage did not become unconstitutional because they were found in fewer states; the laws were always contrary to constitutional principles. (*Perez*, 32 Cal 2d at 736, 198 P2d at 32 [Carter, J., concurring] ("the statutes now before us never were constitutional")). The fact that only sixteen states had such

laws in 1967 may have made the Supreme Court's decision in *Loving* less controversial, but the Court's long-overdue decision was not based on the number of states having anti-miscegenation laws at the time.

Like the prohibitions on interracial marriage, prohibitions on the right of same-sex couples to enter into civil marriage cannot withstand serious constitutional scrutiny based on mere repetition of the claim that there is no fundamental right to "same-sex marriage" or because many states and members of the public continue to support such prohibitions.

B. The State's "Applied Equally" Argument Does Not Support The Prohibitions On Marriage Between Individuals Of The Same Sex

In addition to burdening a fundamental right, prohibitions on marriages between individuals of the same sex are discriminatory. Some argue that the prohibition does not discriminate because it applies equally to men and women. Claims of "equal treatment" were also made to justify prohibitions on interracial marriage. An examination of those claims and the cases that ultimately rejected those "justifications" should inform this case.

Defenders of anti-miscegenation statutes repeatedly argued that the statutes did not discriminate because they applied equally to both black and white people:

> "[The prohibition] was not then aimed especially against the blacks . . . They have the same right to make and enforce contracts with whites that whites have with them, but no rights as to the white race which the white race is denied as to the black. The same rights to contract with each other that the whites have with each other; the same to contract with the whites that the whites have with blacks. . . ."

(*Lonas*, 50 Tenn at 298-299). In 1877, the Alabama Supreme Court relied upon a similar rationale:

> "[I]t is for the peace and happiness of the black race, as well as of the white, that such laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together

> by indelible peculiarities, which declare that He has made the two races distinct."

(*Green v Alabama*, 58 Ala 190, 195 [1877]). The State's argument here echoes the 1883 words of the Missouri Supreme Court holding that "[t]he act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons. . . ." (*Missouri v Jackson*, 80 Mo 175, 177 [1883]). Likewise, in 1921, the Supreme Court of Oregon upheld a ban on marriages between Native Americans and whites, stating simply that "the statute does not discriminate. It applies alike to all persons. . . ." (*In re Paquet's Estate*, 101 Or at 399, 200 P at 913). And, in 1942, the Supreme Court of Colorado stated: "There is here no question of race discrimination. The statute applies to both white and black." (*Jackson v City & Cty of Denver*, 109 Colo 196, 199, 124 P2d 240, 241 [1942]).

In 1948, the California Supreme Court finally rejected this unthinking mantra, explaining the fallacy of "equal application":

> "It has been said that a statute such as section 60 does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race. . . . The decisive question, however, is not whether different races, each considered as a group, are equally treated. *The right to marry is the right of individuals, not of racial groups.* The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals."

(*Perez*, 32 Cal 2d at 716, 198 P2d at 20 [emphasis added; citation omitted]). Thus, the proper analysis of the issue focuses on the individual. Because a black individual was not permitted to marry an individual whom a white individual could marry, the anti-miscegenation statute was found to discriminate on the basis of race. Similarly, the statute discriminated on the basis of

race because a white individual could not marry an individual whom a black individual could marry.

Almost twenty years later, the United States Supreme Court reached the same conclusion: "[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription. . . ." (*Loving*, 388 US at 8; *see also McLaughlin v Florida*, 379 US 184, 191 [1964] ("Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation")). For the same reason, any simplistic "equal application" argument must fail, as its rhetorical appeal is matched only by its legal weakness. Accordingly, the decision below should be reversed.

CONCLUSION

For the reasons set forth above, NYCLA and NBJC, as *amici curiae*, respectfully request this Court to reverse Supreme Court Justice Teresi's decision below that denied same-sex couples the equal right to enter into civil marriages as is enjoyed by the free heterosexual citizens of the State.

Dated: New York, New York
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Respectfully submitted,

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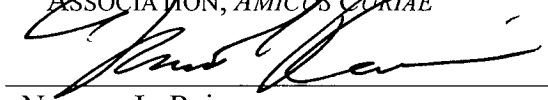

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