No argument requested

Albany County Clerk's Index No. 1967/04 — New York County Clerk's Index No. 103434

Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Appellants,

—against—

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

Defendants-Respondents, and

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

Plaintiffs-Appellants,

—against—

VICTOR ROBLES, in his official capacity as City Clerk of the City of New York,

Defendants-Respondents.

BRIEF FOR AMICUS CURIAE
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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April 19, 2006

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Interest of Amicus Curiae

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. The Supreme Court of the State of New York, Appellate Division, First Department approved LDF's certificate of incorporation on March 15, 1940, authorizing the organization to serve as a legal aid society. Although LDF is known primarily for its involvement in cases involving the civil rights of African Americans, LDF has been committed since its founding to enforcing legal protections against discrimination and to securing the constitutional and civil rights of all Americans. LDF has an extensive history of participation in efforts to eradicate barriers to the full and equal enjoyment of social and political rights and has represented parties or participated as *amicus curiae* in numerous such cases across the Nation, including *Romer v. Evans*, 517 U.S. 620 (1996) and *Loving* v. *Virginia*, 388 U.S. 1 (1967), a case that, as we submit below, has important bearing on the present litigation.

LDF has an interest in the fair application of the Due Process and Equal Protection Clauses of the New York Constitution, which provide

important protections to African Americans and to all New Yorkers and believes that its experience and knowledge will assist the Court in this case.

Preliminary Statement

Consistent with its opposition to all forms of discrimination, LDF believes that this Court should not endorse New York State's discrimination against gay men and lesbians by denying their fundamental right to marry the person they love. Nearly 40 years ago, in *Loving* v. *Virginia*, the United States Supreme Court was faced with a state law imposing significant restrictions on an individual's right to marry the person of his or her choice. In Virginia and fifteen other states, interracial marriage was still a crime more than 100 years after the end of the Civil War. In a step forward—a step that at the time was the subject of bitter controversy, but now seems obvious—the Supreme Court tore down this lasting and notorious vestige of discrimination, holding that anti-miscegenation laws violate the Constitutional guarantees of both due process and equal protection. There is no reason for this Court to treat marriage between persons of the same sex any differently.

Although the historical experiences in this country of African Americans, on the one hand, and gay men and lesbians, on the other, are in many important ways quite different, the legal questions raised here and in *Loving* are analogous. The state law at issue here, like the law struck down

in *Loving*, restricts an individual's right to marry the person of his or her choice. We respectfully submit that the decisions below must be reversed if this Court follows the reasoning of the United States Supreme Court's decision in *Loving*.

Significantly, the Supreme Court decided *Loving* on *both* Due Process *and* Equal Protection grounds, even though either ground would have sufficed to reverse the Virginia court. Moreover, the basic Fourteenth Amendment principles addressed in *Loving* are not and should not be limited to race, but can and should be universally applied to any State effort to deny people the right to marry the person they love. Any argument to the contrary is fundamentally inconsistent with Supreme Court precedent then and now.

Argument

I.

THE FUNDAMENTAL RIGHT TO MARRY EXTENDS TO SAME-SEX COUPLES

The United States Supreme Court's decision in *Loving* demonstrates the fundamental nature of the due process right to marry. As explained more fully in Appellants' briefs in *Samuels* and *Hernandez*, *Loving* is central to this Court's consideration of whether gay men and lesbians are

constitutionally entitled to the economic, social and dignitary benefits and protections that marriage provides.

Twenty years before *Loving*, 38 of 48 states banned interracial marriage, six by constitutional provision. Peter Wallenstein, *Tell The Court I Love My Wife: Race, Marriage, and Law - An American History* 159-60 (2002). And a mere ten years before *Loving*, a Gallup poll found that 96 percent of Americans opposed interracial marriage. Nicholas D. Kristof, *Marriage: Mix and Match*, N.Y. TIMES, Mar. 3, 2004, at A23.

Nevertheless, the Supreme Court unanimously held in *Loving* that Virginia's anti-miscegenation law violated both the Equal Protection and Due Process Clauses of the U.S. Constitution. *Loving*, 388 U.S. at 12. The Court held first that the Virginia law "violates the central meaning of the Equal Protection Clause" because it "proscribe[d] generally accepted conduct if engaged in by members of different races," *Id.* at 11. The Court then held--on a separate and independent basis--that the Virginia anti-miscegenation statute "also deprive[s] the Lovings of liberty without due process of law in violation of the Due Process Clause" because "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12.

The *Loving* Court explicitly recognized that, as a historical matter, interracial marriage had long been prohibited in America, but nevertheless struck down the Virginia anti-miscegenation law by properly focusing on the *substance* of the fundamental right at issue. Simply put, it is wrong to say that *Loving* is solely a race case. While it is undeniable that race was at the heart of the state law at issue in *Loving*, the Supreme Court did not rest its decision in *Loving* solely on equal protection grounds. Rather, the Court's decision also rested on the separate and independent due process ground that all citizens have a fundamental right to marry the person of their choosing. The Court found that the "freedom to marry or not marry[] a person of another race resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12. Accordingly, Virginia's anti-miscegenation law deprived the plaintiffs of "liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.*

In so holding, the Supreme Court explained that the right to marry enjoys significant protection under the Due Process Clause. The Fourteenth Amendment broadly guarantees that: "No state ... shall deprive any person of life, liberty or property without due process of law." Even before *Loving* the Court recognized that the Fourteenth Amendment:

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. *Nebraska*, 262 U.S. 390, 399 (1923). Those rights are rights that apply to all, irrespective of race. For this reason, the *Loving* Court applied its holding that the "right to marry is of fundamental importance for all individuals" to "all the State's citizens." *Loving*, 388 U.S. at 12.

Nevertheless, a concurring opinion in the Appellate Division's (First Department) decision in *Hernandez v. Robles* suggested that reliance on *Loving* for the proposition that a legislative ban on same-sex marriages should be declared constitutionally infirm is "disingenuous," "does little service to the legacy of the civil rights movement and ignores the history of race relations in this country." 805 N.Y.S.2d 354, 371 (Catterson, J., concurring). Similarly, in the Appellate Division's (Third Department) decision in *Samuels* v. *New York State Department of Health*, the court observed that:

> There are, however, critical legal and factual distinctions between *Loving* and the current case.... *Loving* was, in many respects, about racial discrimination. Race-based barriers strike at the heart of the Civil War amendments and are always subject to the strictest scrutiny. *Loving* implicated not only marriage, but did so with a barrier that was clearly subject to the highest level of scrutiny. That barrier was a direct descendant of the abhorrent conduct which was a cause of civil war in this nation and served as an impetus for several amendments to the U.S. Constitution.

811 N.Y.S.2d 136, 144 (App. Div. 3d Dept. 2006) (internal citations omitted). These opinions, however, offer a cramped interpretation of the Fourteenth Amendment, one at odds with the Supreme Court's own jurisprudence.

Although the *Loving* decision was clear, in later cases involving the right to marry, the Supreme Court emphasized that *Loving*'s holding was not based merely on race. In *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), which involved the right to marry of so-called "deadbeat dads," the Court called *Loving* the "leading decision of this Court on the right to marry," and observed:

> The Court's opinion 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.

Id. at 383. Indeed, the Court explicitly stated that "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals." *Id.* at 384. Thus, the Supreme Court itself foreclosed efforts to limit *Loving* to the context of racial discrimination.

Appropriately, the Supreme Court's due process analysis on the right to marry does not turn on whatever historical discrimination may have barred access to that fundamental right. Although the Fourteenth Amendment was ratified in the wake of the Civil War, after a long struggle to eradicate the abomination of slavery, the reach of the Fourteenth Amendment is certainly not limited to discrimination on the basis of race. Throughout this nation's history, the Supreme Court has applied anti-discrimination principles first articulated in cases involving racial discrimination to other cases of discrimination on the basis of gender, age, and disability, as well as sexual orientation. *See, e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558 (2003) (sexual orientation); *United States* v. *Virginia*, 518 U.S. 515 (1996) (gender); *Romer* v. *Evans*, 517 U.S. 620 (1996) (sexual

orientation); *Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) (disability); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (age); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (gender).

For this reason, the Supreme Court recognized in *Lawrence v. Texas* that: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." 539 U.S. at 575. The Supreme Court there continued: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579.

It is undeniable that the experience of African Americans differs in many important ways from that of gay men and lesbians; among other things, the legacy of slavery in our society is profound. But the differences in the historical experiences of discrimination facing these groups is not reason to suggest that constitutional provisions prohibiting discrimination—even those that arose in the context of discrimination on the basis of race—should not fairly be applied to gay men and lesbians who are discriminated against by being denied the right to marry the person of their choice.

II.

NEW YORK'S PROHIBITION ON MARRIAGE FOR SAME-SEX COUPLES DISCRIMINATES ON THE BASIS OF GENDER

Appellants in *Samuels* and *Hernandez* have argued that New York State's domestic relations laws classify individuals on the basis of gender by permitting two individuals of the opposite sex, but not two individuals of the same sex, to marry. Because a man is permitted to marry a woman but a woman is not permitted to marry a woman, New York law classifies on the basis of gender. Again, the Supreme Court's decision in *Loving* is instructive on the strength of this claim. There, the Court rejected the "notion that the mere 'equal application' of a statute containing racial classification is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination." *Loving*, 388 U.S. at 8.

Here, it is just as important to reject the argument that there is no discrimination on the basis of gender because New York law treats each gender equally. *See Hernandez*, 805 N.Y.S.2d 354, 363 (Catterson, J., concurring) ("It is beyond cavil that both men and women may marry persons of the opposite sex; neither may marry anyone of the same sex. Thus, there is no discrimination on account of sex."). The issue in the

contexts of interracial marriage and marriage for same-sex couples is whether the persons who wish to marry are permitted–or not permitted–to exercise the right to marry. Under the regime in place prior to *Loving*, a white person could not marry a black person (because of their race), and today, a man cannot marry another man (because of their gender). The *Loving* court found the law at issue to be a classification on the basis of race; similarly, this Court should find that New York's marriage law is a classification on the basis of gender.

Conclusion

As the Supreme Court stated in *Lawrence v. Texas*, "persons in every generation can invoke [the Fourteenth Amendment's] principles in their own search for greater freedom." *Lawrence*, 539 U.S. 579. The right of same-sex couples to marry is a "greater freedom" that should be afforded constitutional protection, notwithstanding the Fourteenth Amendment's initial and continuing concern regarding issues of race.

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Respectfully submitted,

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