MARK LEWIS, et al.,

Plaintiffs,

v.

GWENDOLYN L. HARRIS, et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY

DOCKET NO. MER-L-15-03

Before:
Honorable Linda R. Feinberg, A.J.S.C.

BRIEF OF PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102-5496
(973) 596-4500
Lawrence S. Lustberg, Esq.
Jennifer Ching, Esq.

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street
Suite 1500
New York, New York 10005
(212) 809-8585
David S. Buckel, Esq.
Susan L. Sommer, Esq.
Adam Aronson, Esq.

ATTORNEYS FOR PLAINTIFFS

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PRELIMINARY STATEMENT

Plaintiffs submit this brief in support of their motion for summary judgment and to respond to questions that have been raised by the Court on issues in this case.

Plaintiffs, seven gay and lesbian New Jersey couples in lengthy committed relationships, many of whom are raising children together, are denied the right to marry the ones they love by the State's exclusionary laws restricting civil marriage to different-sex couples. This legislated limitation on who may marry excludes plaintiffs from a profound and vitally important social and legal institution in our society. Marriage represents a unique public and private commitment between intimately related adults that exclusively provides access to countless legal benefits and protections in this State. Plaintiffs, for whom marriage would be every bit as meaningful and appropriate as it is for different-sex couples, suffer tremendous harm due to their wholesale exclusion from this monolithic institution.

The State-erected barrier to marriage violates Article I, paragraph 1 of the New Jersey Constitution of 1947, which "in a broader way than ever before in American constitutional history" expresses ideals of equality and liberty, including the guarantee of the fundamental right to marry. Right to Choose v. Byrne, 91 N.J. 287, 303 (1982) (citation omitted); Greenberg v. Kimmelman, 99 N.J. 552, 571-72 (1985). Whether viewed as a fundamental constitutional right, a statutory right, or a right of some other dimension, plaintiffs' interest in access to civil marriage, an institution of enormous cultural and legal significance in our society, is an extremely weighty one that is strongly protected under the State Constitution.

The State defendants (the "State") concede that the government's justifications for excluding gay and lesbian couples from marriage are limited to two contentions: 1) that by tradition marriage has been limited to the union of a man and a woman, and 2) that New Jersey's marriage laws should remain uniform with the exclusionary laws that prevail in other states. These contentions merely confirm that same-sex couples are and have been excluded from an institution every bit as meaningful for them as for others, and begs the question whether the State's discriminatory definition of marriage, no matter how longstanding, denies plaintiffs the New Jersey Constitution's protections of liberty and equality for all. The State acts as if the marriage laws, unlike all others, are exempt from constitutional review, rendering courts powerless to correct the discriminatory definition the State has written into law. That is not the case.

As the New Jersey Supreme Court has understood, "many constitutional determinations . . . appl[y] a constitutional provision written many years ago to a society changed in ways that could not have been foreseen." N.J. Coalition Against the War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 366-67 (1994). The living principles embodied in the New Jersey Constitution are not locked in a time past that did not permit and recognize the dignity and richness of gay and lesbian families, and their great need for the commitments and protections that come with marriage. Today's society recognizes the constitutional dimension of "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Lawrence v. Texas, __ U.S. __, 123 S. Ct. 2472, 2481, 156 L. Ed. 2d 508, 523 (2003); see also Greenberg, supra, 99 N.J. at 571-72. Our constitutional legacy of liberty and equality for all dictates that we now recognize that "[p]ersons in a homosexual relationship seek autonomy for these purposes, just as heterosexual persons do." Lawrence, supra, 123 S. Ct. at 2482; 156 L. Ed. 2d at 523. Lesbian and gay families

are as entitled under the New Jersey Constitution as all others in the State to the respect and protections for their profound personal relationships that civil marriage confers.

Nor may the courts abdicate their vital function to protect the rights of all individuals, including minorities in the State, and await instead a political response from the legislature to plaintiffs' exclusion from civil marriage. "When there occurs . . . a legislative transgression of a right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. . . . However delicate that duty may be, [the courts] are not at liberty to surrender, or ignore, or to waive it." Robinson v. Cahill, 69 N.J. 133, 147 (1975) (quotations omitted). Even if the court's "constitutional mandate" may "encroach in areas otherwise reserved to other Branches of government," the court remains the "last-resort guarantor of the Constitution's command, [and] possesses and must use power even to its responsibility." Id. at 154.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on June 26, 2002, in the Superior Court (Law Division, Hudson County). On October 10, 2002, plaintiffs filed an Amended Complaint for Injunctive and Declaratory Relief and In Lieu of Prerogative Writs. Plaintiffs assert two claims, for violation of their rights to equal protection and to marry, guaranteed under the New Jersey Constitution. On November 22, 2003, the Court transferred venue to Mercer County on consent. The State filed a motion to dismiss the amended complaint on February 24, 2003. On March 31, 2003, the Court denied motions to intervene by three movants and instead designated them as *amici*, with leave to file *amicus* submissions. Plaintiffs filed a Brief in Opposition to Defendants' Motion to Dismiss on May 8, 2003 ("Oppos. to Mot. Dismiss").

The Court held argument on the State's motion to dismiss on June 27, 2003. At argument, the State confirmed that it would rely in this litigation only on those purported State interests asserted in its own briefs on the motion to dismiss. (Transcript of June 27, 2003 argument on motion to dismiss ("Tr.") 67)) Thus, the only purported State interests asserted in this litigation are limited to: 1) an "interest in preserving the long-accepted" and "traditional understanding" of marriage as a male-female union, and 2) "an interest in preserving uniformity among the States with respect to the definition of marriage" (State's February 24, 2003 Brief in Support of Motion to Dismiss ("State's 2/24 Br.") 30-31). The State also confirmed at argument, with the Court's concurrence, that the interests asserted by *amici* would not be considered as government interests in this case. (Tr. 67-68) On the basis of this stipulated understanding, plaintiffs agreed that it was appropriate for the Court to proceed to evaluate the State's interests as a matter of law. Id. Accordingly, the parties have agreed to convert the motion to dismiss and new supporting and opposing briefs to cross-motions for summary judgment pursuant to Rule 4:46-2(c), with the understanding that plaintiffs submit here affidavit evidence of the magnitude of the right at stake and of the harms caused them by their exclusion from civil marriage. (See Tr. 68-69)

Plaintiffs respectfully request that their May 8 Brief in Opposition to Defendants' Motion to Dismiss be deemed submitted in support of summary judgment in their favor and against the State's cross-motion. In addition, plaintiffs submit this supplemental brief in support of their motion for summary judgment and in opposition to defendants' cross-motion for summary judgment, and in response to specific issues raised by the Court at the June 27, 2003 argument.

SUMMARY JUDGMENT STANDARD

Rule 4:46-2(c) provides that summary judgment shall be granted when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any," demonstrate that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Rule 4:46-2(c). "If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 537 (1995). Because the material facts are here undisputed, this case is ripe for resolution on summary judgment.

STATEMENT OF MATERIAL FACTS

Plaintiffs are seven same-sex couples who requested and were denied marriage licenses from the appropriate marriage licensing offices for the county or municipality in which they reside. Affidavit of Alicia Toby ¶ 9; Affidavit of Craig Hutchison ¶ 8; Affidavit of Maureen Kilian ¶ 14; Affidavit of Sarah Lael ¶ 15; Affidavit of Dennis Winslow ¶ 8; Affidavit of Marilyn Maneely ¶ 27; Affidavit of Marcye Nicholson-McFadden ¶ 12.[1] When plaintiff couples requested licenses, they had fulfilled all the applicable statutory requirements of New Jersey for the issuance of a license, except for the fact that they were same-sex couples. Id.

Plaintiffs Alicia Toby (age forty) and Saundra Heath (age fifty) live in Newark and have been in a committed relationship for fourteen years. Alicia Toby ¶¶ 2-4; Saundra Heath ¶¶ 2-4. Alicia is an ordained minister, Outreach Coordinator and HIV Educator, and Saundra has worked as a

[1] For the convenience of the Court, affidavits will hereinafter be referenced merely by the full name of the affiant.

dispatcher for Federal Express for seventeen years. Alicia Toby ¶ 6; Saundra Heath ¶ 6. They want to give each other the honor of marriage, communicate to others the extent of their commitment, address the financial burdens imposed by unmarried status, and obtain the peace of mind that if they die their surviving loved one will have the protection of marriage. Alicia Toby ¶¶ 7-8; Saundra Heath ¶¶ 9-13. Without marriage, they have higher costs and less money, and that means thus far they have been unable to afford a lawyer to draw up documents even for the few protections one can take against the penalties of having an unmarried status. Saundra Heath ¶ 13.

Plaintiffs Chris Lodewyks (age fifty-three) and Craig Hutchison (age fifty-two) have been in a committed relationship for thirty-two years, during the last twenty of which they have lived in Pompton Lakes. Chris Lodewyks ¶¶ 2-3; Craig Hutchison ¶ 2. They are active in their community, where Craig is vice-chair of the Camp Speers-Eljabar YMCA Board of Trustees and the chairman of the camp's Capital Campaign, as well as serving as the President of The Downtown Association of Summit, New Jersey. They wish to marry as an expression of their values, to communicate the level of their commitment and attendant respect that is due their relationship, to address their concerns about growing older together, and in general for the same mix of reasons that their married friends entered into marriage. Chris Lodewyks ¶¶ 6-10; Craig Hutchison ¶¶ 4-6.

Plaintiffs Maureen Kilian (age forty-five) and Cindy Meneghin (age forty-five) have lived in Butler for twenty years, just seven blocks from Maureen's father, for whom they do weekly errands. They have been in a committed relationship for twenty-nine years, and have two children, Josh (age 10) and Sarah (age 8). Maureen is a church administrator for Christ Church in Pompton Lakes and Cindy is a director of web services for Montclair State University; they take turns being class moms at their children's school. Maureen Kilian ¶¶ 2-3; Cindy Meneghin ¶¶ 2-3, 6-7, 9, 10.

Their reasons to marry include the desire to fulfill life dreams that originated in their upbringing; to communicate their values and beliefs, including those of spiritual significance; to prevent the recurrence of such frightening episodes as their experience with a medical crisis in an emergency room; to ease the financial and other burdens that undermine family life; and to have both themselves and their children feel more secure about the future. Maureen Kilian ¶¶ 8-12; Cindy Meneghin ¶¶ 4-5, 13-14. Their pastor, and Maureen's father, each identify the need for the family to be more secure through the marriage of the two parents. Lawrence Kilian ¶ 8; Phillip Dana Wilson ¶ 13.

Plaintiffs Suyin Lael (age forty) and Sarah Lael (age forty-one) have lived in New Jersey since early childhood, and for the last ten years in Franklin Park. They have been in a committed relationship for thirteen years, have changed their last names to match, and have three children (ages 6, 4, and 3). Sarah is a speech therapist for special needs children and Suyin an administrator for a non-profit. Sarah Lael ¶ 2; Suyin Lael ¶¶ 2-6. Religion is important to them and their extended families, so Sarah's parents and Suyin's mother all joined a church that was welcoming to Sarah and Suyin's family. Susan Mengers ¶ 5. The reasons that the couple wishes to enter into civil marriage include to demonstrate their values for their children, to help their children feel more secure, to show them that they and their family are just as worthy as the families of their friends, and to ease the financial and other struggles that the family confronts because access to marriage is denied. Sarah Lael ¶¶ 5-10; Suyin Lael ¶¶ 9-12. Sarah's parents are deeply concerned about the lack of support that Sarah and Suyin's family will continue to experience without a marriage. Gunnar Mengers ¶ 6; Susan Mengers ¶ 11.

Plaintiffs Dennis Winslow (age fifty-three) and Mark Lewis (age forty-three) live in Union City and have been in a committed relationship for eleven years. Dennis is pastor at the Episcopal St. Peter's Chelsea in Manhattan, and Mark is pastor at the Episcopal Church of Our Saviour in Secaucus, a Police and Fire Chaplain in the Secaucus departments, and a Trustee of Christ Hospital in Jersey City. Dennis Winslow ¶¶ 2-3; Mark Lewis ¶¶ 1-2. Having officiated at hundreds of legal marriage ceremonies, they would like to legally wed for reasons that include expressing the appropriate level of commitment in their relationship, establishing that they are not second-class citizens, and for the same variety of other reasons that heterosexual couples choose to marry. Dennis Winslow ¶¶ 4-5; Mark Lewis ¶ 10.

Plaintiffs Marilyn Maneely (age 53) and Diane Marini (age 50) live in Haddonfield, and have been in a committed relationship for twelve years. Marilyn is a nurse, and Diane is a small business owner who is also a member of the Haddonfield Planning Board and the Business and Professional Association. When their relationship began, Marilyn had five children, ages six to sixteen, and she and Diane raised the children together, all to college age. Marilyn Maneely ¶¶ 2-3, 7, 10-11; Diane Marini ¶ 2. The youngest child, Mary, just left for college and desires that her parents have the same choice to marry as she and all her siblings have. Mary Sanchez ¶ 9; Marilyn Maneely ¶ 12. Diane and Marilyn wish to marry for reasons that include the support and legitimacy for the family that come with marriage, the fears arising from experiences they have had with health crises like breast cancer and a car accident, and to end the devaluation and invisibility of their relationship. Marilyn Maneely ¶¶ 16-19; Diane Marini ¶¶ 11-165. Diane's mother identifies the need for her daughter to have the advantages she had from being married, including the effect marriage has in helping to hold a couple together through difficult times. Rosella R. Marini ¶¶ 13,16.

Plaintiffs Karen Nicholson-McFadden (age 37) and Marcye Nicholson-McFadden (age 39) have lived in Aberdeen for twelve years, have been in a committed relationship for fourteen years, and have a son Kasey (age 4) and a daughter Maya (newborn). Marcye was the stay-at-home mom for the first year after Kasey was born, and Karen has been the stay-at-home mom ever since. They are small business owners of an executive search firm. Karen Nicholson-McFadden ¶¶ 2-4, 6-7; Marcye Nicholson-McFadden ¶¶ 2. Their wish to marry is based on reasons that include demonstrating their commitment and acting as role models for their children; saving money for the children's college funds that have gone instead to meet the extra costs resulting from the inability to marry (including, e.g., extra health insurance costs), fears about the loss of financial security of the family should one of them die; and avoiding extremely draining experiences such as the painful time they had when Kasey was born and their relationship was challenged. Karen Nicholson-McFadden ¶¶ 8-9, 16; Marcye Nicholson-McFadden ¶¶ 7-9. Karen's parents worry about the effect on their grandchildren from their parents' inability to marry. Carolann McFadden ¶ 3; Joseph McFadden ¶ 5.

The plaintiff couples share the fervent wish to enter into civil marriage with their chosen partners for reasons relating to their personal fulfillment, their desire to express their commitment and values, their wish for the recognition and support that comes with marriage, and their need for the many financial, legal, and other protections and benefits that are provided only through marriage.

ARGUMENT

Point I

Plaintiffs Are Entitled To Summary Judgment On Their Claim To Equal Protection Under the State Constitution

Plaintiffs are entitled to summary judgment on their claim for violation of their right to equal protection under the New Jersey Constitution based on the State's unlawful exclusion of same-sex couples from access to marriage. New Jersey has elected to create a right to civil marriage by statute (see N.J.S.A. Title 37, "Marriages and Married Persons"), and to enforce a particular definition of the term that limits access to this institution to people whose chosen partners are of a different sex. The State, through other statutes, then affords countless protections and benefits to those it permits to marry, most of which can be obtained no other way than through marriage. The State's laws erect an insurmountable bar to marriage and the rights it confers for the plaintiff same-sex couples and countless others.[2] The State concedes that "[e]xcept for the fact that they are of the same gender, each couple is legally qualified to marry under New Jersey law." (State's 2/24 Br. 3)

The facial discrimination against plaintiff same-sex couples thus is admitted and patent. (See

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[2] New Jersey's statutory marriage scheme contains a number of express gender references making explicit that, when enacted, the marriage laws contemplated conferring marital status, and its benefits and protections, only on different-sex couples. For example, N.J.S.A. 37:1-3 specifies that marriage licenses may be issued in the municipality where the "female" party resides, or in the municipality where the "male" party resides if the "female" party is a non-resident of the State. N.J.S.A. 2A:34-2 provides that desertion may be established as a grounds for divorce by "proof that the parties have ceased to cohabit as *man and wife*" for 12 or more months, and for separation "provided that the *husband and wife* have lived separate and apart . . . ." (emphasis supplied). Indeed, "a requirement that marriage must be between a man and a woman . . . is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed." M.T. v. J.T., 140 N.J. Super. 77, 84-85 (App. Div. 1976); Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442, 456 (App. Div. 1997) (same).

Tr. 30-31) The State denies each individual plaintiff the opportunity to marry the one person they love and wish to spend their life with. By statute, same-sex couples are relegated to a second-class status. Their relationships are denied the recognition and protections of civil marriage. Gay and lesbian couples like the plaintiffs here are shut out of the profoundly important social, cultural and legal institution of marriage, an intolerable affront to their rights to liberty and equality.

As described in further detail below, Article I, paragraph 1 of the New Jersey Constitution affords a broad right to equal protection under the laws. Plaintiffs' constitutional claim to equality is evaluated using New Jersey's balancing test, which weighs the magnitude of plaintiffs' interests and the depth of the intrusion upon those interests against the State's justification for the infringement. Here the State relies on circular and conclusory arguments about historic definitions and assumptions that do not establish any legitimate public interest, much less a public interest so important as to outweigh the enormous harms inflicted on the plaintiff couples from their wholesale exclusion from marriage under the State's admittedly discriminatory statutory scheme.

A. Article I, Paragraph 1 Of The New Jersey Constitution Grants A Broad Guarantee Of Equality

New Jersey has evolved a strong and distinctive guarantee of equality under its State Constitution, independent of the federal guarantee of equal protection. The State constitutional right to equality, like the right to privacy, derives from the broad terms of Article I, paragraph 1 of the New Jersey Constitution of 1947, which provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
>
> [N.J. Const. art. I, par. 1.]

Although Article I, paragraph 1 does not "contain the terms 'equal protection' or 'right to privacy,' it is well settled law that the expansive language of that provision is the source for both of those fundamental constitutional guarantees." Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 332 (2003). "[A]rticle 1, paragraph 1 . . . seeks to protect against injustice and against the unequal treatment of those who should be treated alike." Greenberg, supra, 99 N.J. at 568.

The New Jersey Supreme Court has developed a constitutional equal protection doctrine that is distinct from and more protective than its federal counterpart. See, e.g., Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 631-32 (2000); Greenberg, supra, 99 N.J. at 567-68. "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 80 (1978). Despite the similarity in purposes underlying the State and federal equality guarantees, "[the] development of an independent analysis follows basically from [the State Supreme Court's] recognition that the two constitutions contain different texts." Greenberg, supra, 99 N.J. at 567 (citing Right to Choose, supra, 91 N.J. at 300-01; State v. Hunt, 91 N.J. 338, 364 (1982) (Handler, J., concurring)).

> In more expansive language than that of the United States Constitution, *Art. I, par. 1* of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." The state Bill of Rights, which includes that provision, has been described as expressing "'the social, political, and economic ideals of the present day in a broader way than ever before in American constitutional history.'"
>
> [Right to Choose, supra, 91 N.J. at 303 (citation omitted).]

New Jersey has not hesitated to recognize broader state equal protection rights than those recognized under the federal guarantee. See, e.g., Right to Choose, supra, 91 N.J. at 310 (holding

that statute proscribing use of Medicaid funds for an abortion except when required to save the life of the mother violates State equal protection guarantee, though the U.S. Supreme Court reached a contrary conclusion under the federal Constitution in Harris v. McRae, 448 U.S. 297, 326, 100 S. Ct. 2671, 2693, 65 L. Ed. 2d 784, 811 (1980)); Planned Parenthood, supra,165 N.J. at 632.

B. The New Jersey Supreme Court Has Rejected The Federal Tiered Equal Protection Analysis And Instead Adopted A More Flexible Balancing Test To Evaluate Equal Protection Claims Under The State Constitution

1. The Balancing Test Is Nuanced And Recognizes That There Is A Continuum Of Rights And State Interests That Must Be Weighed In Every Case

In interpreting the State Constitution to provide greater protections than the federal Constitution, the New Jersey Supreme Court explicitly has rejected the federal tiered equal protection test. Right to Choose, supra, 91 N.J. at 287. Thirty years ago, in Robinson v. Cahill, 62 N.J. 473, 491-92 (1973), the high Court first eschewed the federal test for interpreting the State's unique guarantees because "[m]echanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it." Id..

Instead, the Court went on to adopt a distinctive three-part balancing test in deciding equal protection claims under the State Constitution. Greenberg, supra, 99 N.J. at 567. Under this balancing test, the court considers (1) the nature of the affected right, (2) the extent to which the governmental restriction intrudes upon it, and (3) the public need for the restriction. Id. at 567 (citing Right to Choose, supra, 91 N.J. at 308-09; Robinson, supra, 62 N.J. at 491-92); see also Planned Parenthood, supra, 165 N.J. at 629; Barone v. Dep't of Human Servs., 107 N.J. 355, 368 (1987).

In staking their independence from the federal standard, the New Jersey courts recognize that

> [t]he ultimate responsibility for interpreting the New Jersey Constitution . . . is ours. By developing an interpretation of the New Jersey Constitution that is not irrevocably bound by federal analysis, we meet that responsibility and avoid the necessity of adjusting our construction of the state constitution to accommodate every change in federal analysis of the United States Constitution.
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> [Greenberg, supra, 99 N.J. at 568.]

New Jersey high court cases are legion confirming that the State's equal protection guarantee is evaluated not under a federal rational basis or other tier of review, but under the State's independent three-part balancing test. Most recently, in Sojourner A., decided subsequent to the June 2003 argument in this case, the Supreme Court again confirmed the vitality of the test and its rejection of rigid formulas in favor of a more flexible "continuum:" "[b]y deviating from the federal tiered model, we are able to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction." Sojourner A., supra, 177 N.J. at 333 (challenge to constitutionality of family cap on welfare benefits). See Planned Parenthood, supra, 165 N.J. at 630 ("[T]he inflexibility of the tiered framework prevents a full understanding of the clash between individual and governmental interests. Rather, we adopted a test that weighed the governmental interest in the statutory classification against the interests of the affected class."). Significantly, "[i]n applying that three-part balancing test, the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." George Harms Constr. Co. v. N.J. Turnpike Auth., 137 N.J. 8, 29 (1994).[3]

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[3] See also McCann v. Clerk of Jersey City, 167 N.J. 311, 326 (2001) (The state equal protection standard is "more stringent. We have rejected the federal multi-tiered approach in favor of a less rigid balancing approach. . . ."); George Harms Constr. Co., supra, 137 N.J. at 29 ("'we rejected two-tiered equal protection analysis and employed a balancing test in analyzing claims under the state constitution.'") (citation omitted); Gardner v. N.J. Pinelands Comm'n, 125

The balancing test permits broader protection to be afforded by the State Constitution than by the federal Equal Protection Clause. Barone, supra, 107 N.J. at 368; Sanchez v. Dep't of Human Servs., 314 N.J. Super. 11, 30 (App. Div. 1998). The New Jersey Supreme Court has made clear that the state test is ultimately "a more flexible analytical framework for the evaluation of equal protection and due process claims." Sojourner A., supra, 177 N.J. at 333.

As the Court observed at argument, courts adjudicating state equal protection claims sometimes continue to invoke the familiar federal "suspect classification," "strict scrutiny," or "rational basis" terminology. (Tr. 10-11, 40-41) Though occasional cases, often involving tandem federal and state equal protection claims, have blurred the analytical lines between federal and state equal protection claims without clear adherence to the distinctive state balancing test, this approach does not accord, as a matter of law, with the plainly enunciated Supreme Court standard. See, e.g., WHS Realty Co. v. Town of Morristown, 323 N.J. Super. 553, 560-62 (App. Div. 1999); Sojourner A. v. N.J. Dep't of Human Servs., 350 N.J. Super. 152, 174 (App. Div. 2002), aff'd, 177 N.J. 318 (2003); Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442, 453 (App. Div. 1997).[4]

N.J. 193, 219-20 (1991) ("Equal protection analysis under [Article I, paragraph 1] rejects the multi-tiered analysis of federal equal protection doctrine and instead employs a balancing test."); Brown v. Newark, 113 N.J. 565, 573 (1989) ("When conducting equal protection analysis under article I, paragraph 1 of the New Jersey Constitution, we have rejected a multi-tiered analysis and employed a balancing test."); Barone, supra, 107 N.J. at 368 ("[W]e rejected the two tier mode of analysis in favor of a more flexible balancing test."); Greenberg, supra, 99 N.J. at 567 ("[W]e rejected two-tiered equal protection analysis and employed a balancing test analyzing claims under the state constitution.") (citations omitted); Right To Choose, supra, 91 N.J. at 309 ("[T]he Court rejected a rigid equal protection test based either on mere rationality or strict scrutiny. . . . [It] employed a balancing test in analyzing equal protection claims under the state Constitution."); Robinson, supra, 62 N.J. at 491-92.

[4] The Appellate Division in Rutgers, supra, 298 N.J. Super. 442 (App. Div. 1997), a state constitutional equal protection challenge, included in dicta a discussion whether sexual orientation gives rise to a suspect classification, a concept appropriate to the federal tiered test

The Court should not be sidetracked by stray case references to terminology from the federal tiered standard in its application of the New Jersey balancing test. While the two tests certainly have parallels, Sojourner A., supra, 177 N.J. at 333, the New Jersey Supreme Court reiterated only weeks ago that courts should "examine each claim on a continuum, . . ." id.[5] Thus, for example, although it would be directly relevant to federal equal protection claims, for purposes of applying the New Jersey balancing test the State courts have not considered whether a classification of pregnant minors, Planned Parenthood, supra, 165 N.J. at 631-33; learning disabled children, Forstrom v. Byrne, 341 N.J. Super. 45, 48-49 (App. Div. 2001); uninsured motorists, Caviglia v. Royal Tours

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but not the state balancing test. Rutgers should not, however, be read to call into question the well-settled balancing test developed by the Supreme Court. (See, e.g., Tr. 20-21) First, notwithstanding its discussion of suspect classifications, Rutgers did acknowledge and purport to apply the three-part state balancing test. Id. at 452-54. In addition, its invocation of suspect classification analysis was accompanied by citations to two cases that simply do not stand for the proposition that New Jersey courts should continue to apply the federal suspect classification criteria in cases under the State Constitution. Robinson, supra, 62 N.J. 473, first enunciated the State's break from the federal tiered test though it did not itself develop the balancing test that subsequently became the settled standard. See Right to Choose, 91 N.J. at 309 ("[s]hortly [after Robinson] the Court rejected a rigid equal protection test based either on mere rationality or strict scrutiny. . . . The following year the Court employed [the] balancing test . . ."). And Tomarchio v. Township of Greenwich, 75 N.J. 62 (1977), was a sex discrimination claim brought under the federal, not the state, equal protection guarantee. See id. at 67-69.

Nor should this Court accord any weight to the dicta in Rutgers discussing New Jersey's marriage statutes and other states' cases addressing marriage claims by same-sex couples. (See, e.g., Tr. 13, 30-31) As the Rutgers court acknowledged, that case did not involve a challenge to the marriage statute, and the court did not consider or apply this State's constitutional standards and analysis to a claim for marriage by same-sex partners. See Rutgers, supra, 298 N.J. Super. at 455. Plaintiffs' action presents a case of first impression in New Jersey.

[5] Indeed, in its decision in Sojourner A., the Supreme Court notably excised the references to a "rational basis" test that had been found in the Appellate Division's opinion below, compare Sojourner A., supra, 350 N.J. Super. at 174 with Sojourner A., supra, 177 N.J. at 332-36, providing strong affirmation that New Jersey's jurisprudence continues to stand independent from the federal. See also Forstrom v. Byrne, 341 N.J. Super. 45, 60-61 (App. Div. 2001) (commenting on lower court's use of phrases from federal equal protection test rather than governing balancing test).

of America, 355 N.J. Super. 1, 12-13 (App. Div. 2002); or low or moderate income families, S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 181-82 (1975), would be suspect. Instead, in applying the balancing test the courts, consistent with the proscribed analysis, have weighed the magnitude of the interests and the disadvantages suffered by the plaintiffs in each case.

Likewise here, the balancing test requires the Court to judge whether the State's claimed interest in perpetuating a discriminatory view of marriage outweighs the profound interest of lesbian and gay people in marrying the persons they love, a right granted to others but completely denied to them by statute. Issues such as whether a sexual orientation or other classification would be considered "suspect" or trigger "rational review" as a federal matter have no bearing here. The balancing test permits the Court to focus directly on the discrimination at the heart of New Jersey's statutory scheme – that some adults are permitted legally to marry the person they love, while others are not – and whether the government has a strong enough reason to interfere to this degree in regulating the private lives of its citizens in this discriminatory manner.

2. All Unequal Treatment By The State Is Subject To The Balancing Test, Whether Infringing On Rights That Are Fundamental Or Derived From Other Constitutional, Statutory Or Additional Interests

The first task under the balancing test is to evaluate the nature of the interests implicated. The court "examine[s] each claim on a continuum that reflects the nature of the burdened right . . . ." Sojourner A., supra, 177 N.J. at 333. The weightier the right or interest, and the greater the infringement, the stronger the interest the State must have to justify the discriminatory burden. Whether plaintiffs' interest in the right to marry the person they love is deemed a fundamental constitutional right or an interest of some other dimension determines not *whether* equal protection

guarantees are implicated, but what correspondingly will be required of the State to justify its unequal treatment of this class of New Jersey families. While the balancing test – and, more essentially, the constitutional guarantee of equal protection the test serves – certainly govern whenever fundamental constitutional rights are concerned, without question the State's citizens are entitled to equal protection and application of the balancing test when non-fundamental rights are at stake as well. (See, e.g., Tr. 27-28)

Thus, the balancing test has been applied repeatedly to interests not deemed fundamental constitutional rights but nonetheless accorded weight and protection in the State. For example, it has been applied to vindicate statutorily-guaranteed rights. In Forstrom, supra, 341 N.J. Super. 45, even though the constitutional right to free public education did not encompass special education services, equal protection was violated where a home-schooled child was denied the same statutorily-conferred right to special education services granted non-public school children. The balancing test also has been applied to safeguard the right to remedies provided at common law against negligent drivers. Caviglia, supra, 355 N.J. Super. at 7-14. Likewise, the State's equal protection guarantee has been applied to a range of other interests that, while not recognized as fundamental, are nonetheless accorded weight in the State. These include an interest in the preservation of health, see Right to Choose, supra, 91 N.J. at 304 ("Although we decline to . . . declar[e] that the New Jersey Constitution guarantees a fundamental right to health, . . . we recognize that New Jersey accords a high priority to the preservation of health"); the right of street peddlers to engage in their business, Brown, supra, 113 N.J. at 574; an interest in casino employment, Greenberg, supra, 99 N.J. at 573; and the interest in housing to "meet the needs, desires and resources of all categories of people," Mt. Laurel, supra, 67 N.J. at 179-82 (holding that, under the equal protection guarantee, "basic

importance of appropriate housing" for low and moderate income families is an interest outweighing municipality's interest in restrictive zoning ordinance; the inherent obligation of the government to further the public's interest in adequate housing requires that the government establish "a valid basis for its action or non-action" bearing on this right). And, of course, the guarantee of equal protection has been applied as well to interests deemed "fundamental" rights guaranteed by the Constitution, see, e.g., Planned Parenthood, supra, 165 N.J. at 631-32 ("a woman's right to control her body and her future" and to make "reproductive decisions"); Right to Choose, supra, 91 N.J. at 310 (the "balancing test is particularly appropriate when . . . the statutory classification indirectly infringes on a fundamental right").

To the extent the State may continue to argue that plaintiffs have no recourse to the equal protection guarantee if the Court finds that their interest in marriage is non-constitutional, non-statutory, or less than fundamental (Tr. 26-27), the State ignores the independent purpose and promise of New Jersey's right to equality. For the right to equal protection is itself a

> fundamental guarantee[] of our Constitution. "[It] means that no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes of persons in their lives, liberty and property, and in the pursuit of happiness, both as respects privileges conferred and burdens imposed."
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> [Peper, supra, 77 N.J. at 79, quoting Washington Nat'l Ins. Co. v. Bd. of Reveiw, 1 N.J. 545, 553 (1949).]

It is a basic tenet of equal protection that any government undertaking cannot benefit only some and discriminate against others without sufficient justification, whether the interest at stake is as prosaic as municipal garbage collection, see, e.g., WHS Realty Co., supra, 323 N.J. Super. at 562-63 ("A municipality is not mandated to provide for municipal garbage removal. . . . However, once the service is provided," it must be without unjustified discrimination), or as consequential as access

to civil marriage with one's chosen partner, Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Quite simply, "[t]here is a denial of equal protection of the laws unless the service [is] available to all persons in like circumstances upon the same terms and conditions. Persons situated alike shall be treated alike." Boulevard Apartments, Inc. v. Mayor & Council of Borough of Lodi, 110 N.J. Super. 406, 411 (App. Div. 1970) (equal protection guarantee applied to require municipal garbage collection for garden apartments). See also Greenberg, supra, 99 N.J. at 562 (equal protection requires that the government treat individuals "evenhandedly"); Right to Choose, supra, 91 N.J. at 306-07 ("Concededly, the Legislature need not fund any of the costs of medically necessary procedures pertaining to pregnancy . . . . [But once] it undertakes to fund medically necessary care attendant upon pregnancy, . . . government must proceed in a neutral manner.").

Plaintiffs are denied the protection of the laws of this State, which confer the rights and privileges of civil marriage and the profound cultural values that flow from it on some committed couples but not on others for whom marriage is equally important. Their exclusion from the statutory marriage scheme withholds from gay and lesbian couples "protections taken for granted by most people" that are basic to "ordinary civic life in a free society." See Romer v. Evans, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855, 865 (1996). The equal protection injury is palpable. The State's argument that New Jersey's guarantee of equality does not, at the very least, require it to justify its differential treatment of gay and lesbian couples under the marriage laws is not only wrong, but threatens the very essence of this Constitutional protection. Rather, the State must demonstrate a sufficiently important government interest to justify its discrimination, no matter

whether the weighty right plaintiffs here assert is deemed "fundamental" or an interest of some other dimension.[6] As set forth below, this the State cannot do.

C. Applying the New Jersey Balancing Test, The State's Refusal To Allow Each Of The Individual Plaintiffs The Same Right To Marry The Unique Person With Whom They Wish To Spend Their Lives, A Right That The State Has Created And Provided To Others, Violates The State Guarantee of Equal Protection

The State's balancing of interests test considers the weight of the interest denied to same-sex couples, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction. See Greenberg, supra, 99 N.J. at 567. Here, the interest at stake is the right to marry the love of one's life, a right permitted by statute to others in the State, and the infringement of that right is absolute. The State's only purported interests – a desire to uphold the tradition of different-

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[6] Even the federal equal protection guarantee, which may be less protective than the New Jersey guarantee, Barone, supra, 107 N.J. at 368, provides far broader protection than would the very limited review the State posits is conferred under Article I, paragraph 1. (Tr. 23-24) At a minimum, even federal rational basis review requires that a legislative classification be subjected to equal protection analysis and sustained only if shown to be "rationally related to a legitimate state interest." Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985).

Moreover, "a more searching form of rational basis review" has been applied by the federal courts, even in the absence of fundamental rights and suspect classifications, to hold a law unconstitutional under the equal protection guarantee, especially when "the challenged legislation inhibits personal relationships." Lawrence, supra,123 S. Ct. at 2485, 156 L. Ed. 2d at 527 (O'Connor, J., concurring). See also Cleburne, supra, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (invalidating zoning restriction on group home for mentally disabled); Eisenstadt v. Baird, 505 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (invalidating law discriminating between married and unmarried individuals in access to contraception); Dep't of Agriculture v. Moreno, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973) (invalidating food stamp law discriminating against households of unrelated individuals, intended to discriminate against hippies). New Jersey's jurisprudence also recognizes that greater weight should be accorded rights within the personal sphere: "[i]n applying that three-part balancing test, the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." George Harms Constr. Co., supra,137 N.J. at 29.

sex marriage and to remain uniform with other states – do not begin to justify the wholesale exclusion of same-sex couples from the profoundly important institution of marriage.

1. The Plaintiffs' Interest In Marrying Their Life Partners Is Extremely Weighty

Turning to the first prong of the test, plaintiffs' interest in marrying their chosen partners is one of the most weighty interests imaginable in our society. For those with access to it, civil marriage is a choice, generally exercised after one forms an enduring bond with a singular person to whom one is emotionally drawn, socially compatible and sexually attracted. The right to marry available to heterosexual adults is the right to marry the person of one's choosing, the *one other person in the world* who will uniquely enrich, attract and sustain a person through the difficult course of life. The emotional, sexual and practical sustenance one partner gives to his or her beloved is irreplaceable and impossible to reproduce with any other person. Gay and lesbian couples form comparable emotional and intimate relationships with one another, forming loving ties that are just as meaningful and irreplaceable and every bit as essential to their health and happiness as they are for heterosexuals. But these couples are denied by New Jersey the right to marry the partner of their choice, not because the relationships are different in character or importance to the individuals involved, but because gay couples are same-sex couples.

Exclusion from marriage has enormous consequences for gay people. The protective cloak of civil marriage, with all its attendant rights and obligations, is designed to help a married couple "in good times and in bad" to reflect on what drew them together and strive to honor their commitments, the more so if children are involved. Marriage is intended and understood as a permanent, lifetime commitment – and, indeed, those who exit via divorce often face high social, emotional and financial costs. To be married is to attain a unique status in our culture, one that is

widely valued and privileged as a social and practical matter and impossible of attainment by any other means. The label "married" sends a clear message that one's commitment is permanent and deserving of respect. While, as is said, marriage "is not for everyone," it must be an option opened on equal terms to all as its vast importance in the intimate, personal and public aspects of American life is pervasive and undeniable.

a. The Centrally Important Choice To Marry Is Among The Most Personal And Intimate Exercises Of Individual Autonomy

The New Jersey Supreme Court has explained that the decision to marry someone is "one of life's most intimate choices" and "a vital part of life in a free society." Greenberg, supra, 99 N.J. at 570-572. "[D]ecisions such as whether to marry are of a highly personal nature; they neither lend themselves to official coercion or sanction, nor fall within the regulatory power of those who are elected to govern." State v. Saunders, 75 N.J. 200, 219 (1977).[7]

Whether gay or heterosexual, the process of deciding whether one wants to spend the rest of one's life with someone else, and, if so, settling on who that partner will be, is a profoundly intimate and life-shaping experience, reflecting the most personal of beliefs and emotions. It typically takes many years as each person first develops emotionally and otherwise in their own lives before even meeting their eventual life partner or spouse. People expectantly try other relationships, explore their interests and friendships, clarify their own emotional, spiritual and sexual needs and their feelings about commitment itself – many all the while desperately hoping the stars will align such that they

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[7] See also Loving, supra, 388 U.S. at 12, 87 S. Ct. at 1824, 18 L. Ed. 2d at 1018 ("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."); Zablocki, supra, 434 U.S. at 384, 98 S. Ct. at 679-80, 54 L. Ed. 2d at 629 (1978) (". . . of fundamental importance for *all* individuals") (emphasis added); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 2d 1042, 1045 (1923) (". . . essential to the orderly pursuit of happiness" by those who are free.)

meet the right person and are able to marry them. As these years unfold, people are commonly badgered as to when – not if – they will "settle down" in marriage. We agonize with friends who highly value marriage as they assess whether to continue to invest in a relationship that may or may not lead to that end and its attendant security, and we speculate intensely about the reasons or circumstances leading people *not* to marry.

This is because we recognize that the decision whether and whom to marry changes one's life forever. It not only is meant to end the search for true love and allow one to "live happily ever after," but to bring supportive community, legal and financial structures and preferences to the aid of the couple in keeping their union intact. It is a uniquely joyous moment when a couple gets engaged, and weddings themselves are vast community celebrations of the couple.

Marriage also has a very public dimension, but beyond matters such as age and existing marital status, government appropriately does not intrude on heterosexuals' choice of marriage partners. One may marry whom one loves, period. One may do so from prison, Turner, supra, 482 U.S. at 96, 107 S. Ct. at 2265, 96 L. Ed. 2d at 83; despite failing the children of a previous marriage, Zablocki, supra, 434 U.S. at 384, 98 S. Ct. at 679-80, 54 L. Ed. 2d at 629; or across any ethnic or racial divide, Loving, supra, 388 U.S. at 12, 87 S. Ct. at 1824, 18 L. Ed. 2d at 1018.

Indeed, as with sexual intimacy between consenting adults, or decisions to procreate, to parent, to use contraception and the like, it is unthinkable that the government would intrude upon or seek to direct a heterosexual adult's choice of marital partners. The government cannot and would not say "here's a list of acceptable partners – pick from column A, not from column B." A man, though socially encouraged, is not even required to marry someone he impregnates. Certain cultures still have "arranged" marriages, but the State would not require a person to follow through

if he or she did not want to. Nor does the government say "*you may marry but only if you marry a person of the same sex*."

Each of the plaintiffs here has traveled the same road of intimate partnering described above as far as they could. Among other things, all discovered along the way that they are sexually oriented toward people of the same sex Each has fallen deeply in love and luckily found that one unique person with whom they have formed an essential bond that cannot be replicated with another human being. The process of forming that bond is, as for heterosexuals, an exercise of personal autonomy in a most intimate arena. Like many heterosexuals, each plaintiff wishes to cement and shelter that bond through marriage.

b. Marriage Is A Profound Expression Of Emotional Support And Dedication To Another Person, And One Of The Strongest Public Expressions Of A Person's Commitment

For those who may access it, marriage fundamentally alters one's life to a degree that is largely unparalleled. There are many basic reasons that different-sex couples who wish to spend their lives together most often make the choice to marry over other choices. One reason is that marriage is widely understood in our culture as the most compelling and definitive expression of love and commitment that can occur between two people. It is an expression of profound "emotional support" and "personal dedication." Turner, supra, 482 U.S. at 96, 107 S. Ct. at 2265, 96 L. E. 2d at 83. Thus, though two people – gay or heterosexual – can make a strong and meaningful lifetime commitment to each other, privately or publicly and without marriage, most who have the option to marry indeed select it over some other option for showing a commitment. Marriage takes that private commitment to a far different and broader level of meaning for the two people who choose it together. For many, marriage is "the ultimate expression of love, commitment, and honor that you

can give to another human being." Alicia Toby ¶ 7. Given the vows and legal responsibilities that attach to marriage, an offer to marry is a distinctive and profound gift in our society of putting another person's needs equal to or ahead of one's own. Chris Lodewyks ¶ 7. That is deeply significant in everyday life, but also for looking ahead to trying times, as in medical crises. Cindy Meneghin ¶ 5 (in emergency room for meningitis); Diane Marini ¶ 12 (undergoing radiation treatments for breast cancer); Rosella Marini ¶ 16 (mother of Plaintiff Diane Marini) ("Marriage, and nothing less, made some of the most difficult moments of my life more bearable.")

Many individuals do not want to intertwine so deeply their life with the life of another person unless there is every reason to believe that each will give the maximum effort to succeed in the relationship. Gunnar Mengers ¶ 8 (father of Plaintiff Sarah Lael) ("I've known a lot of married couples in my life, and in the hard times of any marriage . . . it has helped that those were not just any commitments, but *marriage* commitments"); Mark Lewis ¶ 8 ("Taking marriage vows with legal effect best demonstrates the full extent of one person's commitment to another."); Rosella Marini ¶ 13 (mother of Plaintiff Diane Marini) ("Without marriage to help hold us together, who can say for sure whether our relationship would have lasted through the most difficult times?") The reasons why so many heterosexuals make "one of life's most intimate choices," Greenberg, 99 N.J. at 570-572, and decide to marry, do not differ from the reasons many same-sex couples want the same option. Dennis Winslow ¶ 5 ("I love Mark, and he loves me. We want the same things that straight couples want when they choose marriage, no more and no less.").

Marriage is also a common expression of "*public* commitment," with the deepest of roots. Turner, supra, 482 U.S. at 96, 107 S. Ct. at 2265, 96 L. Ed. 2d at 83 (emphasis added). As the Turner Court recognized in securing the right of prisoners to marry, a legal marriage ceremony is

viewed as an expression of a far more momentous public commitment than other commitments or ceremonies. In part because of the substantial legal responsibilities that attach to marriage, many people believe that choosing to marry uniquely expresses to the world a "deeply held and cherished" belief in commitment. Mark Lewis ¶ 8. See also Dennis Winslow ¶ 7 ("Mark and I have made a commitment for a lifetime, and we want that commitment to be reflected in a marriage, which best expresses the level of our particular commitment."); Marilyn Maneely ¶ 25 ("Marriage and only marriage would immediately solve the problem of our relationship being overlooked and devalued by providing society with the only correct context for understanding our relationship."); Lawrence Kilian ¶ 6 (father of Plaintiff Maureen Kilian)("I suppose Maureen and Cindy could make some kind of public commitment, but if it is not marriage then it is not the strongest and most valued and supported of commitments.")

The language of marriage is unparalleled in its expressive power. No other terms come close in our society as a way of evoking a couple's commitment and values. This is demonstrated by the harm when the State denies access to marriage:

> We also experience the very deep sadness that comes with everyday conversations, such as being in a group and everyone talking about how long they've been married. We are always the outsiders, always having to use a different language. It chips away at your self-esteem and makes us feel like second-class citizens.
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> [Karen Nicholson-McFadden ¶¶ 12, 15.]

See also Carolann McFadden ¶ 4 (mother of Plaintiff Karen Nicholson-McFadden) (not being able to say that her daughter Karen and her partner are married "makes their relationship seem less than what it really is."); Cindy Meneghin ¶ 17 ("Maureen and I might be able to say we've been together for 29 years, but everyone knows we're not married, and we see in their reactions that they think .

. . our 29 years does not mean that much"); Chris Lodewyks ¶ 9 (with a 32-year relationship, "[t]o be denied the choice to marry is to lose . . . one of the most important ways to express the value you place on commitment, and to lose the respect of others for your relationship"); Susan Mengers ¶ 9 (mother of Plaintiff Sarah Lael) ("It is not only frustrating, it is hurtful, to Sarah and Suyin and their children, and to those of us who care about them. I find I want to say more about the importance of their commitment, but the vocabulary is not there, and to struggle to find the words can make matters worse.")

The lack of support in everyday contexts adds up over time and undermines the family. Karen Nicholson-McFadden ¶ 12 ("We are constantly jumping through hoops and over hurdles because we're denied marriage. It takes an emotional toll. It feels like our dignity is always on the line, open for anyone to question rather than assume. It wears me down, and it wears at our relationship."); Mark Lewis ¶ 10 ("When asked "are you married" time and again, I have to answer "no, but…" and launch into a lengthy explanation that can never capture my commitment to Dennis. Only the word "marriage" does that in this culture. Every elaboration invites the reaction that our relationship is of a lesser caliber . . . .")

c. Marriage Is An Expression Of One's Values And Beliefs

Marriage also communicates to the world a message about individual identity and values. Cindy Meneghin ¶ 4 ("[B]eing married would say something very important about who we are, and our beliefs and values"); Chris Lodewyks ¶ 6 ("We lead our lives with the values that were taught to us by our families . . . . Choosing marriage is the most important way to publicly express our values."); Craig Hutchison ¶ 4 ("[W]e share each other's core values of integrity, community, honor, respect, and love. Nowhere are these core values better represented than in the institution of

marriage."); Sarah Lael ¶ 13 ("All the everyday humiliations are bad enough one by one, but the big issue here is something about our identities in the world out there, about who we are in all the different parts of our community. We are responsible and we pay taxes, but we are second-class in the eyes of our government and therefore everyone else, because we cannot say 'we're married.'") Marriage allows individuals to establish that their "actions match the words of their beliefs." Maureen Kilian ¶ 10. See also Saundra Heath ¶ 9 (". . . I want my words to match my life, so I want to say I am married and know that my relationship with Alicia is immediately understood, and after that nothing more needs be explained.").

For some individuals, expressing their beliefs through choosing civil marriage has a "spiritual significance," a dimension of such importance that it remains constitutionally significant even in circumstances of incarceration Turner, supra, 482 U.S. at 96, 107 S. Ct. at 2265, 96 L. Ed. 2d at 83. This is true for same-sex couples as well as different-sex couples. Cindy Meneghin ¶ 4 (the importance of choosing marriage is also "part of our faith"); Maureen Kilian ¶ 10 (marriage is "an incredibly important commitment that has a spiritual side."); Phillip Dana Wilson ¶ 11 (pastor for Plaintiffs Cindy Meneghin and Maureen Kilian) ("By denying Cindy and Maureen the marriage license that I routinely sign for straight couples, the State denies them access to the most significant expression to the rest of the world of their values and their spirituality.").[8]

The expression of one's values can be particularly important for parents who want to be role

[8] Civil marriage should not be confused with religious marriage. Religious groups can refuse any couple's request to be married, or otherwise not recognize a civil marriage, even if the law does. That is currently true with regard to different-sex couples who marry legally, such as with the Catholic Church's refusal to recognize second marriages of Catholics who divorce, or Orthodox Judaism's refusal to perform religious marriages between Jews and non-Jews. Ending discrimination against same-sex couples will not change those refusal rights of religious groups.

models for their children and impart their belief in the importance of marriage. Karen Nicholson-McFadden ¶ 18 ("We have the responsibility to instill self-respect in our son and daughter, and pass on our core values to them, values like the importance of lifetime commitments."); Marcye Nicholson-McFadden ¶ 11 ("We want Kasey and Maya to get the right messages. We want to tell them that their parents are married just like grandmom and grandpop."); Sarah Lael ¶ 5 ("For us, we need to be married to best role-model our values to our children. . . I feel terrible every time I have to check 'single' on a form or have to say that I am single in front of my children.").

d. Only Inclusion In Marriage Makes Possible The Realization Of Widely Held Dreams Many Hold For Their Futures

For many people in our culture, getting married and settling down to raise children is at the core of their dreams for their future. Karen Nicholson-McFadden ¶ 5 ("I dreamed of finding the love of my life, getting married, and having a family together."); Sarah Lael ¶ 4 ("Suyin and I remember the huge importance of marriage from our own childhoods, and as young women, and feel deeply its hold on us to this day."). Indeed, that core dream is often part of what parents foster in raising their children. Cindy Meneghin ¶ 4 ("We were both brought up to value the life goal of settling down by getting married and raising children, and we embraced that dream just as our siblings did."); Maureen Kilian ¶ 6 ("Each time one of the children got married, their wedding photo would go up on [our parents'] wall."); Susan Mengers ¶ 6 (mother of Plaintiff Sarah Lael) ("I had always taken it for granted that my daughters would grow up and get married, because it was a part of everything we all believed in, and a part of the way things should work in this world.")

One part of fulfilling the dream in adulthood is to give parents the joy and peace of mind in seeing their children married and cared for. Marcye Nicholson-McFadden ¶¶ 9, 11 ("One of the

most painful sadnesses in my life is that my parents died and never got to see me married. . . . It would have made both [of my parents' lives] so much more meaningful and complete to know that their daughter and their grandchildren had the stability and security that comes with a legal marriage, and to be a part of the wedding that created the marriage.") Parents view marriage as security for their children, emotional and material. Gunnar Mengers ¶ 6 (father of Plaintiff Sarah) ("I worry about my daughter Sarah and her family and the lack of support for them, and I don't want to leave this world with that worry."); Susan Mengers ¶ 11 (mother of Plaintiff Sarah) ("I hope to see Sarah married to Suyin before I die, so I can worry less about them and feel that they and their children are safer and more secure."). Marriages, like graduations and milestone birthdays, are one of the "celebrations of family that string our lives together with meaning, giving us the opportunity to reinforce the love and support that bind us and make life worth living." Gunnar Mengers ¶ 9.

As children grow up and their gay or lesbian sexual orientation becomes apparent, the dream of marriage in this State is shattered for all concerned. Parents who instill in their children the life dream of choosing marriage realize that this will not be an option.

> Cindy and I share the dreams of many parents and hope our own children [Josh and Sarah] can and will choose marriage for themselves one day, partly because it will mean that someone has chosen to be legally responsible for them, and vice versa, which goes along with caring about and making them happy. If our children are heterosexual, we will know that they can marry if they decide it is right for them. But if they are not heterosexual, and things are the same as now under the law, then they will enter adolescence knowing that they cannot have the dream shared by so many of getting married one day. As a parent, I find that shameful: it sends a message of unworthiness to the young people of this state that is terribly destructive.
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> [Maureen Kilian ¶ 12.]

The official message of exclusion exacts an unacceptable price given the centrality of marriage to the lives of many citizens:

> Once in awhile in discussions with married couples I want to shake them and ask how they would have responded if told that they could not pursue their dream of getting married, while others could freely do so. How would parents respond if their children were told they could not marry when they got older, especially if told as adolescents when they should be full of hope and optimism about building their futures?
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> [Chris Lodewyks ¶ 5.]

For many citizens, the life dream of getting married is deeply instilled not only as an individual family matter, but as a profound social and cultural matter. Alicia Toby ¶ 10 ("Marriage is everywhere in our daily lives, and weddings are commonplace."); Sarah Lael ¶ 3 ("I cannot separate myself from the culture I grew up in, which values marriage so very highly."). The unique pervasiveness of marriage in our social and cultural existence reinforces and deepens its significance as a life dream for many citizens. In everyday conversations with co-workers, neighbors, relatives, clerks, and others, the references to husbands and wives are constant. Craig Hutchison ¶ 5; Maureen Kilian ¶ 9. Marriage is universally celebrated in all its phases: engagements, weddings, anniversaries. Chris Lodewyks ¶ 8; Maureen Kilian ¶ 10. Legal spouses are automatically included in invitations, membership solicitations, and in a myriad of other offers that arrive in the mail or are otherwise conveyed. Maureen Kilian ¶ 9.

The plaintiff couples who are parents have an expanded appreciation of the pervasiveness of marriage in everyday life as they look at the world through the eyes of their children. Children ask about wedding photos in the houses of other families, routinely see the theme of falling in love and getting married in the media, walk by stores devoted entirely to weddings, attend the weddings of friends and family, want to be in those weddings as ring-bearers and flower girls, buy dolls with

wedding attire, play-act weddings, and want to know why their parents are not married. Sarah Lael ¶ 4; Marcye Nicholson-McFadden ¶ 6; Maureen Kilian ¶ 8.

e. Marriage Is A Gateway To A Comprehensive Legal Structure That Helps To Build And Shelter A Family

Another significant attribute of marriage is the related legal structure that honors and protects couples' relationships, helps to build and support the family through a combination of responsibilities and rights, and further promotes it by privileging a married couple as a financial and legal unit. The comprehensive legal structure includes "receipt of government benefits," "property rights," or "other, less tangible benefits (e.g., legitimation of children born out of wedlock.)." Turner, supra, 482 U.S. at 96, 107 S. Ct. at 2265, 96 L. Ed. 2d at 83. This profound legal structure contributes to the pervasiveness of marriage in our culture and society, and accounts in part for why marriage is the most momentous form of two adults' public commitment to each other.

A substantial component of marriage is the wide range of rights and responsibilities that are largely available only through marriage and not through any other means. These include:

1) protections after a spouses' incapacitation or death (e.g., right to priority in guardianship of incapacitated spouse, N.J.S.A. 3B:12-25; survivorship and intestacy rights, N.J.S.A. 3B:5-3, 5-4; ability to file wrongful death suit when spouse is killed, N.J.S.A. 2A:31-4; entitlement to elective share of estate, N.J.S.A. 3B:8-1; compensation for spouses of victims of homicide, N.J.S.A. 52:4B-2, 4B-10; right to priority in disposition and burial of spouse's remains, N.J.S.A. 8A:5-18; Worker's Compensation and disability benefits, and owed wages to surviving spouse, N.J.S.A. 34:11-4.5, 34:15-13f, 43:21-42(b));

2) numerous economic supports for family finances (e.g., tuition credit and scholarships for spouses of those in public service, N.J.S.A. 18A:62-25, 71-78.1, 71B-23; deduction of spouse's medical expenses, N.J.S.A. 54A:1-2, 54A:3-3; exemption from tax on deceased spouse's property transfer, N.J.S.A. 54:34-1, N.J.A.C. 18:26-5.11; and spousal election of joint filing, N.J.S.A. 54A:8-3.1);

3) workplace and private sector safety nets (e.g., coverage under family health insurance plans; family medical leave to care for a spouse; and the ability to make healthcare decisions for and to visit in the hospital with an ill spouse, N.J.S.A. 34:11B-3);

4) protections to care for children and one another (e.g., legitimization of children conceived through alternative insemination, N.J.S.A. 9:17-44; and alimony, maintenance, custody, and division of assets in event of divorce, N.J.S.A. 2A:34-2, 23, 23.1).

The breadth and depth of support for married couples in the legal structure illuminates the familiar demand among heterosexuals that a relationship not continue unless there will be a marriage and its attendant obligations and benefits. It is only through marriage that the vast bulk of support falls into place. Contrary to common misconceptions, there are only a small number of equivalent protections that may be cobbled together by those excluded from marriage (e.g., health care proxies, guardianship papers), and many cannot afford the costs of lawyers to draw these up. Saundra Heath ¶ 13 ("The additional financial pinch from being denied marriage means it is harder to pay for a lawyer to draw up the documents that we're told would help protect us because we are not married. We have not been able to do that yet.") The broad matrix of interlocking rights and responsibilities created through the singular contract of marriage reaches into virtually every dimension of a couple's

life and provides a level of support for the relationship unparalleled in the State's statutory framework.

The legal structure's massive support is further evident in the effect of its absence on gay couples. This is well illustrated by the lack of access to family health insurance that turns on the State's definition of spouse. Without family health insurance, families face far higher costs to meet their insurance needs, Saundra Heath ¶ 11 ("In addition to paying two deductibles, we pay for what my [superior] health plan would cover, if Alicia could be on it."). They may also face painful decisions involving matters such as child-rearing.

> As parents of Josh and Sarah, Cindy and I preferred that one of us continue to stay at home full-time until Sarah was at least through kindergarten. I could have been a stay-at-home mom if we had been married, because we'd have family health insurance through Cindy's workplace, and could afford to have me stay at home. We can't afford private insurance. So I took a job in order to ensure the family had full health care coverage.
>
> [Maureen Kilian ¶ 6.]

The painful decisions could also involve the plans for a career change or addressing the needs of a child in crisis.

> I listen to co-workers planning life changes with the confidence that one spouse can provide health coverage for the other. Those plans include things like taking time off to be with children, maybe during a difficult time for a particular child. Or taking time off to do a career change, or get an advanced degree, so there will be increased income for the family, or increased job satisfaction. These things are so much easier for them to discuss. For Suyin and me, it starts with all the extra costs that my married co-workers don't have to give a second thought. . . . When we decided I would go back to school for an advanced degree, I needed to find full-time work, in part because I did not have the spousal status to go on Suyin's health plan. I had to
>
> > turn down part-time jobs that paid me much higher hourly rates, because those jobs did not offer health insurance.
>
> [Sarah Lael ¶¶ 8-9.]

The extra burdens and costs interfere with important goals, like saving for childrens' educations. Karen Nicholson-McFadden ¶ 8 ("It is maddening that Marcye and I are unable to put that $5000 where it really belongs – in college funds for Kasey and Maya.")

Marriage is also privileged in the tax structure, resulting in serious consequences for couples without a spousal exemption. See, e.g., N.J.A.C. 18:26-5.11 (all jointly held property, including real or tangible or intangible, and including stocks and bank accounts, may be subject to an inheritance tax upon transfer at death, *as if all the property belonged absolutely to the decedent*, unless proven to have belonged originally to the survivor). These types of consequences further drain family finances and can be very disruptive to family life.

> Our only option to pay the enormous inheritance tax on the assets we commonly own would be to sell our house. A surviving spouse from a married couple doesn't pay one penny of inheritance tax. For us the financial repercussions would be crushing, but the emotional and psychological blow would be devastating. We fear that one of us could be a grieving single parent with two children who have to move out of the only home they ever knew, forced to leave a community of friends and neighbors, all because the state refuses to allow us to marry.
>
> [Karen Nicholson-McFadden ¶ 9.]

Cindy Meneghin ¶ 14 ("We're not well off, so [the inheritance tax] means we could lose the house in order to pay the tax on it.")

One last example that illuminates the vast reach of marriage involves securing the bonds between parents and children. Under state law, when a married couple elects to conceive a child through alternative insemination, by completing some forms the parents can ensure that the child at birth has an automatic legal relation to *both* parents by operation of law. N.J.S.A. 9:17-44. But the legal status of such children, when their parents are unmarried same-sex couples, is in abeyance until the process of an adoption is complete.

> Although we did as much advance planning as we could, when our children were born there was no presumption that we were both legal parents. We had to spend a lot of money on cross adoptions, and in the meantime the children's legal status with one parent was up in the air. The process of cross adopting our two children was invasive, putting our family under the microscope even in our own home with the visits by social workers. No matter the outcome of the adoption process, both children were being raised together in our home from birth, but we had to provide all sorts of highly personal information to show that Sarah's legal parent should be a legal parent for her brother Josh and Josh's legal parent should be a legal parent for his sister Sarah. Each of us is now a legal parent to both children, but our older child's legal status with one parent was up in the air for three years from his birth. The state has recognized our relationships to both of our children, but not the relationship between their parents.
>
> [Cindy Meneghin ¶¶ 7-8.]

Karen Nicholson-McFadden ¶ 4 ("we have spent a great deal of time and money on second-parent adoptions, living through home studies by social workers, fingerprinting, and an FBI background check, which felt degrading.")

f. Marriage Also Includes A Vast Web Of Social Support

A committed couple, including those with children, needs to be able to communicate effectively to many people the permanence of and respect due to their family relationship, and that need can arise in diverse and sometimes urgent circumstances, with police officers, doctors, employers, neighbors, teachers, government officials, emergency medical staff, and many others. Having this support strengthens many families. Joseph McFadden ¶ 6 (father of Karen Nicholson-McFadden) ("Having the support and privileges that our marriage afforded us has enabled us to grow into a strong and loving family unit. I would like my daughter and her partner to be able to marry and have the same advantages that we and other married couples have.") The web of support is spun from the start:

> The lack of support for Cindy and Maureen is demonstrated in many ways, and the absence of a legal marriage ceremony is one example. The marriages I have solemnized have several functions, one of which is to clarify for the couples' community, which includes family, friends, co-workers, and others, that from that day forward the couple is to be regarded differently. . . . That life-altering event of a legal marriage ceremony is one that is easily recognized and understood, not only by those who were present, but for the rest of society in learning that the two people are married. The difference it brings in respect for the couple as a couple is very important support for them as they try to live their lives together. As a gay couple, Cindy and Maureen do not have this easily recognized and understood marital relationship and thus, in my view, do not have the support that others take for granted with the automatic respect that attaches to a marriage.
>
> [Phillip Dana Wilson ¶ 13.]

After the legalization of a marriage, phrases that reference that marriage are a social shorthand that instantly communicate the couple is to be privileged:

> With marriage comes immediate and widespread community recognition, support, and legitimacy. Simply by saying "We're married," "He's my husband," "She's my wife," and the like, public and private institutions immediately and automatically recognized my former husband and me as the most privileged and elite family unit, entitled to greater respect, greater accommodation (for example, to ensure that we were seated together on planes, trains, and other transportation, ahead of all nonmarried persons seeking similar accommodation) . . . . Like most married couples, we so took for granted these privileges, rights, benefits, and accommodations that we rarely thought about them.
>
> [Marilyn Maneely ¶¶ 21-22.]

The importance of marriage to support a family and to convey instantly a couple's unique status is brought home with special force when the family experiences a medical crisis.

> Once I came down with meningitis, and required emergency care. I was terrified enough as it was. But then as the medical staff were wheeling me into the emergency room, they were blocking Maureen from being with me. For all I knew, once I lost consciousness, I'd be totally alone, with the doctors assuming they could do anything without talking to the person who mattered the most to me. I called out that she was my partner, and did it again, but it wasn't working. So I finally yelled "she's my power of attorney," and that worked. I'll never forget that feeling of terror on top of terror. It was dehumanizing. Yelling out the name of a legal paper told them that

> there was some bare legal connection to Maureen, when what I needed to be able to say was the magic word "married," which would tell them that Maureen was the key person above all others to help me emotionally and otherwise, the person whose presence and access should never be questioned, so I could better handle the plain old terror of a serious illness without the added terror of not having my soul mate involved in the decision-making. For the hours after my admission, especially when there was a shift change, staff would challenge Maureen's right to be there, so we had to keep re-establishing her importance to me. Without being married, you can be at the mercy of somebody's whim.
>
> [Cindy Meneghin ¶ 5.]

Diane Marini ¶ 12 ("When Marilyn accompanied me for my radiation treatments, each time we had to explain the nature of our relationship and why it was appropriate for Marilyn to be there to support me. We explained over and over again: 'No we are not sisters' and 'She is not my child' and 'We are not just good friends.'"); Marilyn Maneely ¶¶ 18-19 ("Having been a nurse for over 30 years, I know first-hand what a huge difference it makes when people say that they are married. . . . In May 2000, I was in a car accident and had to be brought to the hospital. While in the hospital, I had to worry about whether Diane would be allowed in to see me, and I know that Diane worried too.")

Respect for family relations in health care settings is also of profound importance at moments that hold life's most cherished meaning.

> Kasey's birth was difficult – Marcye was in the hospital for 28 hours and needed a C-section. As the hours wore on and difficulties arose during labor, I had to worry about re-establishing my role each time the nurses changed shifts or a new resident walked though the door. The significance of our relationship would have been plainly obvious and completely understood had I been able to say we were married. Then, after Kasey was born, a nurse challenged my right to be in the newborn nursery. This should have been a moment of pure joy, untainted by this type of questioning. Being with a new baby as he is weighed and measured is a joy for all parents, but some of that joy was taken from me because my relationship to Marcye and to my son was questioned.
>
> [Karen Nicholson-McFadden ¶ 15.]

Everyday support is given to a married couple in the variety of contexts that implicate a couple's relationship, such as in schools, motor vehicle departments, doctors' offices, or for childrens' after-school activities. Cindy Meneghin ¶ 13 ("[W]e spend a lot of time explaining our relationship when we should be focusing instead on the more important things that families do. . . . If we could just check "spouse," or "married," we would instead be focusing on the task at hand, like getting important information or completing errands or helping our kids or each other deal with an anxious medical situation."); Suyin Lael ¶ 10 ("With our kids watching, we've been asked which of us is the legal guardian of the children, which would never happen if we just say 'we're married.'")

Finally, the denial of access to marriage means that parents face the difficulties created for children who see that the State disrespects the parents' relationships and discriminates against their families.

> Our job as parents is to make our children understand that bias is not about who they are, but instead is about who the biased people are. The difference we face when our own government denies us equality is that it is so much harder to explain to children, especially when the discrimination hits so close to their hearts and home, having to do with respect for their parents' relationship, which is the foundation for the family. . . . [W]e do not want [our daughter] to feel that her family is any less than any other family, or that she is any less than another child because her parents are not allowed to marry. . . . We believe that our children, especially as they grow older, would feel more secure knowing that their parents are legally connected as other parents are.
>
> [Suyin Lael ¶¶ 8-9, 12.]

Marcye Nicholson-McFadden ¶ 8 ("As parents, we will find it difficult to explain to our children that our relationship is just as valuable as a married relationship, that our family is just as valuable as others, and that they too should believe in committed relationships, when at the same time the government is sending the exact opposite messages. Explaining this to Kasey and Maya seems

impossible to do without hurting them."); Joseph McFadden ¶ 5 ("I'm concerned about my grandchildren, Kasey and Maya. I would like to be able to tell them that their parents are married, the same as their friends' moms and dads, so they will feel secure. When they are old enough to question whether their parents are married, how can I explain that the law doesn't view Karen and Marcye's relationship in the same way as it sees their friends' moms and dads? We want our grandchildren to be good citizens and to see the law as being fair and equally applied.").

* * *

The enormous importance of marriage is undeniable when viewed as the whole of its many personal, legal, practical, and social attributes. These attributes taken together demonstrate how fundamentally marriage alters the lives of individuals and forms "a vital part of life in a free society." Greenberg, supra, 99 N.J. at 570-72.

g. Regardless Whether Plaintiffs' Interest In Marriage Is Characterized As Fundamental, Statutory, Or Of Some Other Dimension, Its Enormous Weight Cannot Be Denied

The State is wrong in denying the statutory and constitutional origins of marriage and the fundamental character of the right to marry. But regardless whether plaintiffs' interest in being permitted to marry the person they love and to enter into the profoundly important institution of civil marriage is characterized as statutory, constitutionally-derived, fundamental, or of some other dimension, its heavy weight should not be ignored. The New Jersey balancing test measures the interests at issue on a "continuum" that requires the court to assess not some inflexible slot in which rights must fit but rather what really is at stake for the plaintiffs.

Plaintiffs' interest in marriage runs deep, for it bears on the most intimate personal bonds one can form with another adult, with profound constitutional, cultural and statutory dimensions as well.

These relate to recognition by society of the validity and commitment of one's relationship; the formation and nurturing of a family; myriad statutory rights and protections; the sharing of extensive financial benefits and burdens; and support at times of illness, crisis and death. There is no end in our culture to the way civil marriage shapes and sustains the life course of couples who enter into it. Its "basic importance" to countless New Jersey families and our way of life is undeniable. Mt. Laurel, supra, 67 N.J. at 179-80.

Indeed, though the Court need not so find to recognize plaintiffs' extremely weighty interest in marriage, the right to marry the person you love is so central to our liberty and happiness as to be a fundamental constitutional right. That is why Article I, paragraph 1 of the New Jersey Constitution of 1947 guarantees a right to marry rooted in the constitutional guarantee of privacy. Greenberg, supra, 99 N.J. at 571-72. In Greenberg, the Court described the right to marry as invoking "a privacy interest safeguarded by the New Jersey Constitution," and as "one of life's most intimate choices." Id. at 572. It is "a vital part of life in a free society." Id. at 570. (See Point II below, addressing plaintiffs' fundamental right claim.)

In Mt. Laurel, supra, 67 N.J. 151, the Court recognized that the interest in housing to meet the needs of diverse people, though not textually defined in the Constitution or labeled a "fundamental" right, nonetheless has a constitutional dimension and is deserving of significant weight and protection. The profound role marriage plays too has mooring in constitutional values protecting liberty, happiness, safety and property. The State cannot deny the fundamental and constitutional character of the right at issue here only be looking at "who is in" and relying on that very discrimination to pretend, in circular fashion, that there is no constitutional interest in plaintiffs' reach.

Likewise, civil marriage is a very important statutory right, granted by the State, that, in turn determines access to a vast framework of statutory and other rights and societal protections for those who enter into it. Plaintiffs are excluded from statutory marriage with the persons they love, and from the web of civil and cultural benefits structured around it, by New Jersey's discriminatory requirement that they marry only different-sex partners, rather than the partners of their choice. The State's circular contention that plaintiffs seek a "non-statutory" right because the current statute excludes them is patently wrong.

Whatever semantics are used to characterize the interest, the reality of what is at stake for plaintiffs should not be obscured. Plaintiffs' interest in the right to enter into marriage with the persons they love, and to participate in the countless benefits, protections and cultural dimensions of marriage, is of enormous weight.[9]

2. The Infringement On Plaintiffs' Interest In Marriage Is Total; The State Has Erected A Practical Bar To Any Meaningful Exercise Of This Right

The State's limitation on marriage to different-sex couples effectively excludes plaintiff same-sex couples from the right to marry the persons of their choice. For gay and lesbian adults, the gender requirement imposed on access to marriage effectively bars them from any meaningful exercise of the right to marry shared by all persons in the State. Their chosen partners are not "interchangeable as trains," Perez v. Lippold, 198 P.2d 17, 25 (Cal. 1948), to be traded for a

[9] The State's suggestion that plaintiffs' interest in marriage with their chosen partner should not be weighed in the equal protection balance would value their interest in access to civil marriage below even the interest in having municipal garbage collection protected in WHS Realty Co., supra, 323 N.J. Super. at 573; or the interest in pursuing common law tort remedies protected in Caviglia, supra, 355 N.J. Super. 1. Viewed from this perspective, there can be no question that the rights at stake for gay and lesbian couples in this case are entitled to weight under the guarantee of equal protection.

different-sex spouse more to the State's liking. For plaintiffs, the theoretical freedom to marry someone of a different sex is no freedom at all; it is an intolerable edict against marrying the love of their life.

This exclusion from statutory marriage and its vast cultural and practical dimensions cuts plaintiffs off from an institution vital to our way of life. It is a complete denial of an enormous set of rights, protections, and societal values. It is an official relegation to a second-class status. No patchwork of costly private contracts, estate planning, or piecemeal domestic partner measures can overcome the wholesale denial of marriage to the person of one's choice and of entry into this vital institution. See, e.g., Planned Parenthood, supra, 165 N.J. at 635-36 (parental notification requirement operates as "a functional bar" on a minor's right to make her own reproductive decisions, which judicial waiver provisions do not overcome). Nor can the piecemeal measures invoked by the State to argue that plaintiffs suffer no harm from the wholesale exclusion from marriage begin to make up for the insult to the dignity of the plaintiffs and their families from being denied the sanction of civil marriage. (See Tr. 17) The State's restriction on marriage operates as an absolute bar to plaintiffs' exercise of their weighty interest in marriage. The intrusion on plaintiffs' right to marry is complete.

3. The State's Historical And Definitional Justifications For Its Discrimination Are Circular And Legally Insignificant

The State's two purported interests are insufficient to justify shutting gay and lesbian families out of the profoundly important cultural and legal institution of marriage. In essence, the State offers a circular defense – that discrimination is embedded in the meaning of marriage and cannot or should not be removed because it would change the definition of the institution. The State's choice, by

statute and practice, to discriminate in how it "defines" who may marry cannot be treated as immune from judicial review. The courts may not abdicate their responsibility to safeguard our constitutional rights by deferring to legislative definitions that merely perpetuate discriminatory restrictions on the rights of a minority. There is no equal protection exemption in the Constitution for "definitions," or for laws of long standing.

a. A Desire To Preserve A History and Tradition Of Exclusion Is Not A Legitimate Or Sufficient Government Interest To Sustain The Discriminatory Exclusion Here

The State first claims its marital discrimination is justified by an interest "in preserving the long-accepted definition of marriage." (State's 2/24 Br. 30) This is merely a different way of saying that New Jersey should be permitted to continue discriminating because it wants to, that an exclusionary statutory scheme should stay the law because it has been the law. But this is no distinct government interest or purpose at all.

Historic "expectations" and "beliefs" (State's 2/24 Br. 30), without some grounding in a legitimate government purpose, in themselves cannot justify this deprivation. As the New Jersey Supreme Court has made clear, a statute that serves merely "as an official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs . . . is not an appropriate exercise of the police power." State v. Saunders, 75 N.J. 200, 219 (1977) (striking statute "which has as its objective the regulation of private morality"). That in the past homosexuality was condemned by many based on "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family" likewise does "not answer the question" whether discrimination against gay and lesbian families may be permitted to continue. Lawrence, supra, 123 S. Ct. at 2480, 156 L. Ed. 2d at 521. See also Loving, supra, 388 U.S. at 11-12, 87 S. Ct. at 1823-24, 18 L. Ed. 2d

at 1017-18. Rather, the Constitution protects minority rights in part *because* at times in history the majority may not support those rights. Equal protection "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 300, 110 S. Ct. 2841, 2863, 111 L. Ed. 2d 224, 256 (1990) (Scalia, J., concurring). See also Perez, supra, 198 P.2d at 27 ("Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply . . . justification."). Were this not the case, we would live in an era when states could still justify anti-miscegenation laws and gender inequities in marriage merely to avoid "disrupting" the majority's deeply-held "expectations" and "beliefs." (State's 2/24 Br. 30) The wish to do so, however, is not even a valid, much less a weighty, government interest.

i. Analogous Justifications That Marriage Is Simply By Definition Reserved To Same-race Partners, Invoked By Generations Of Courts To Justify Anti-miscegenation Laws, Have Been Rejected

The "definitional defense" to discrimination has been rejected before in the context of marriage equality and other challenges. Laws banning marriage between whites and non-whites, once prevalent throughout this nation, were similarly claimed to be justified by reference to definitions of marriage that embodied historic assumptions about marriage and race.[10] The landmark cases unmasking the illegitimacy and inadequacy of such a justification demonstrate that civil

[10] Anti-miscegenation laws had been firmly entrenched on American soil since colonial days, (see Oppos. Mot. Dismiss 10-11), and by the 1960's, at least 41 states had enacted criminal or civil prohibitions on racial inter-marriage. Laurence C. Nolan, The Meaning of Loving: Marriage, Due Process and Equal Protection (1967-1990) as Equality and Marriage, from Loving to Zablocki, 41 How. L.J. 245, 248 (1998). New Jersey is one of the handful of states never to have adopted a legislative ban on interracial marriage. Kevin Mumford, After Hughe: Statutory Race Segregation in Colonial America, 1630-1725, 43 Am. J. Legal Hist. 280, 300 (1999).

marriage cannot be withheld by invoking historical definitions or unexamined traditions.

Just this term, in Lawrence, supra, 123 S. Ct. 2742, 156 L. Ed. 2d 508, the United States Supreme Court confirmed the powerful analogy between anti-miscegenation laws and laws that discriminate against the relationships of gay and lesbian partners in ruling that Texas's prohibition on same-sex sexual conduct intrudes on the liberty of those couples and violates a fundamental guarantee of liberty. In words that ring equally true here, the Lawrence Court said: "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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." Id., 123 S. Ct. at 2483, 156 L. Ed. 2d at 525 (quoting Bowers v. Hardwick, 478 U.S. 186, 216,106 S. Ct. 2841, 2857, 92 L. Ed. 2d 140, 162 (1986)(Stevens, J., dissenting)).[11]

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[11] A central point in Lawrence was that fundamental rights are held by all, and the same rights of intimacy guaranteed to married and unmarried heterosexuals are also guaranteed to gay men and lesbians. Lawrence, supra, 123 S. Ct. at 2482, 156 L. Ed. 2d at 523; see also Point II. C. below. This helps answer the question that arose at argument on the State's motion to dismiss as to whether the landmark anti-miscegenation cases are relevant here because they involved discrimination against African-Americans, a "suspect classification" under federal equal protection law, in the exercise of the fundamental right to marriage. (Tr. 51) In fact, the U.S. Supreme Court has embraced a broader understanding of its case law, which cannot be limited to racial classifications. Lawrence invoked the lessons of the anti-miscegenation cases in according to gay and lesbian people the same fundamental rights given to married and unmarried heterosexuals. Likewise, Zablocki v. Redhail, supra, 434 U.S. 374, 98 S. Ct. 673, 54 L.Ed. 2d 618, also followed Loving, and struck down a requirement that a parent subject to a child support order first receive court approval before marrying as a violation of equal protection and due process. Unlike in Loving, the challenger in Zablocki was not from a protected class and the discrimination had nothing to do with race or application of a criminal law. As Zablocki observed, "[t]he Court's opinion [in Loving] could have rested solely on the ground that the statutes discriminated on the basis of race. . . ." Id., 434 U.S. at 383, 98 S. Ct. at 679, 54 L. Ed. 2d at 628. But Loving is not so narrowly confined, for it extended far beyond race and held that the anti-miscegenation laws deprived the couple of "the freedom to marry." Id. "Although Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court

As with challenges in the more recent past to the exclusion of same-sex couples from civil marriage, numerous challenges to the exclusion of interracial couples from marriage were defeated in the name of "long-accepted definition[s]" and "deeply-held beliefs" (State's 2/24 Br. 30), until finally anti-miscegenation statutes were declared unconstitutional in the latter half of the twentieth century. In case after case, legislation prohibiting racial inter-marriage was justified as unbending tradition rooted in received natural law. See, e.g., Scott v. State, 39 Ga. 321 (1869) (justifying laws against interracial relations because "[t]he God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it."); State v. Gibson, 36 Ind. 389 (1871) (laws requiring separation of the races derive not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts'"), (quoting Philadelphia & W. Chester R.R. Co. v. Miles, 2 Am. L. Rev. 358 (Pa. Sup. Ct. 1867)); State v. Hairston, 63 N.C. 451 (1869) (upholding state's anti-miscegenation law because "the policy of prohibiting the intermarriage of the two races is so well established, and the wishes of both races so well known.").

Long into the twentieth century, it was a well-worn axiom that laws excluding interracial partners from marriage were beyond constitutional reproach. The sheer weight of cases accepting the constitutionality of bans on interracial marriage was deemed justification in itself to perpetuate these discriminatory laws. See, e.g., Blake v. Sessions, 94 Okla. 59 (1923); Jones v. Lorenzen, 441

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confirm that the right to marry is of fundamental importance for all individuals." Id., 434 U.S. at 384, 98 S. Ct. at 679-80, 54 L. Ed. 2d at 629.

Particularly under New Jersey's equal protection balancing test, where the nature and importance of the right are the first factor to be considered, and tiers of scrutiny have been rejected, the Court should recognize the teachings of Loving and Zablocki. The right to marry does not vary in weight or importance based on who seeks to exercise it.

P.2d 986, 989 (Okla. 1965); Jackson v. City & County of Denver, 124 P.2d 240, 241 (Colo. 1942); Naim v. Naim, 87 S.E.2d 749, 753 (Va. 1955) ("With only one exception," -- the Perez decision, discussed below – the nation's anti-miscegenation statutes "have been upheld in an unbroken line of decisions in every State in which it has been charged that they violate" constitutional guarantees). See also Perez, supra, 198 P.2d at 39-41 (Shenk, J., dissenting) (citing 19 decisions around the nation up to that point upholding anti-miscegenation laws). This is the State's reasoning here.

ii. Perez v. Lippold

Not until 1948 did any court reject the reigning doctrine that laws limiting marriage to partners of the same race reflected a divinely-ordained definition impervious to constitutional challenge. That year, the California Supreme Court held in Perez, supra, 198 P.2d 17, that the state's anti-miscegenation law violated the federal rights to due process and equal protection.[12] The Perez decision was controversial and courageous. Today it is recognized as clearly correct.

The Perez majority acknowledged that laws denying different-race partners the freedom to marry were based on the age-old "assumed" view that such marriages were "unnatural." Id. at 22. But rather than accept this label unthinkingly, the court in Perez set about to fulfill its constitutional

[12] This Court also raised in argument whether the anti-miscegenation cases should be distinguished from New Jersey's exclusion of same-sex couples from the right to civil marriage because they involved criminal statutes. (Tr. 51) In fact, however, the landmark Perez decision invalidated a *civil*, not a criminal, statute, and closely parallels this case. The interracial couple in Perez were denied by a county clerk a license to marry on the basis of California Civil Code § 60, prohibiting issuance of marriage licenses to interracial couples, and California Civil Code § 69, providing that interracial marriages "are illegal and void." See Perez, supra 198 P.2d at 17-18. This provision, originally appearing in the California Civil Code in 1872, in fact replaced an earlier statute imposing criminal penalties for such marriages. Id. at 18. Like the present case, Perez challenged a civil statutory marriage scheme that excluded certain couples from legal marriage.

responsibility to ensure that, no matter how strongly tradition or public sentiment might support such laws, legislation infringing the right to marry "must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection . . . ." Id. at 19. The majority rejected the notion that the legislature's authority to regulate the institution of marriage conferred unchecked power to define who may marry and who may not. See, e.g., id. at 33, 37, 42 (Schenk, J., dissenting).

The court also understood that, under the Constitution, such deference to legislative judgments – a cornerstone of the State's argument here – is neither appropriate nor permissible when constitutional rights, including the right to be free from discrimination, are at stake. Id. at 21. The Perez majority was undeterred by the dissent's contention that, given their long pedigree and the unbroken string of cases upholding them, anti-miscegenation laws could not "now [be] unconstitutional under the same constitution . . . ." Id. at 35. The majority understood that the long duration of a wrong cannot justify its perpetuation. Id. at 26. Nor, the majority understood, had the Constitution changed; rather, its mandates had become more clearly understood. Id. at 32 (Carter, J., concurring) ("the statutes now before us never were constitutional").

Even after the Perez court's groundbreaking decision in 1948, state courts elsewhere in the nation continued to cling to traditional assumptions that marriage between the races would defy a natural order that should not be disturbed by judges through enforcement of the constitutional rights of individuals to choose their marital partners. See Naim v. Naim, 87 S.E.2d 749 (Va. 1955) (upholding anti-miscegenation law); Jones v. Lorenzen, 441 P.2d 986 (Okla. 1965) (same); Loving v. Virginia, 147 S.E.2d 78 (Va. 1966), rev'd, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (same).

iii. Loving v. Virginia

Two decades after Perez, the United States Supreme Court in Loving, supra, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), declared Virginia's anti-miscegenation statute in violation of the fundamental right to marry and the guarantee of equal protection. Like the Perez majority, the Supreme Court was not deterred by the lengthy historical roots of such laws, id., 388 U.S. at 7, 10, 87 S. Ct. at 1821, 1823, 18 L. Ed. 2d at 1014-15, 1016-17; their continued prevalence, id., 388 U.S. at 6 n.5, 87 S. Ct. at 1821 n.5, 18 L. Ed. 2d at 1015 n.5; or continued popular opposition to interracial marriage. The Court also was unswayed by justifications for the laws based on an asserted natural order defining who is fit to marry whom. Id., 388 U.S. at 3, 11, 87 S. Ct. at 1819, 1823, 18 L. Ed. 2d at 1013, 1017-18. Instead, the Court concluded that constitutional guarantees require that the "freedom of choice to marry not be restricted by invidious racial discrimination . . . and cannot be infringed by the State." Id., 388 U.S. at 12, 87 S. Ct. at 1824,18 L. Ed. 2d at 1018.

iv. Loving And Perez Rejected The Contention That The Anti-miscegenation Laws, Like The Marriage Restriction At Issue Here, Have "Equal Application"And Are Facially Neutral

The State argues that the marriage statute is "facially neutral" in that it has equal application to all men and women in New Jersey, and makes the same benefit – "mixed-gender marriage" – available to all on the same basis. (State's 2/24 Br. 35-36; see also Tr. 48) According to the State, "[a]ll men and all women, including plaintiffs, are able to marry . . . . It is the individual plaintiffs' desire to marry someone of the same sex, not plaintiffs' genders, that stands as a barrier to issuance of marriage licenses." (State's 2/24 Br. 34-35) But the virtually identical argument was thoroughly discredited in the cases declaring unconstitutional bans on interracial marriage.

In Loving, the Court was presented with the contention "that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications[,] do not constitute an invidious discrimination based on race." Loving, supra, 388 U.S. at 8, 87 S. Ct. at 1821, 18 L. Ed. 2d at 1016. Yet the Court "reject[ed] the notion that the mere 'equal application' of a statute containing [discriminatory] classifications is enough to remove the classifications from the [constitutional] proscription of all invidious . . . discriminations." Id., 388 U.S. at 8, 87 S. Ct. at 1822, 18 L. Ed. 2d at 1016. Likewise, in Perez, the court rejected the argument that the anti-miscegenation law did not discriminate since whites remained free to marry whites and people of other races remained free to marry each other: "A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable." Perez, supra, 198 P.2d at 25. As the court recognized, the State's theory impermissibly treats marital partners as though they are "interchangeable as trains." Id. Instead, "the essence of the right to marry is freedom to join in marriage with the person of one's choice . . ." Id. at 21.

No different from the plaintiffs in Loving and Perez, plaintiffs here have an enormous interest in access to marriage with their "irreplaceable" partner, regardless of the gender of that person. That these lesbian and gay individuals, already in long-term committed relationships, have the theoretical ability to enter into a heterosexual marriage in no way diminishes their vital interest in marriage with their chosen life partner. The State cannot define marriage in such a way as "to coerce people into marriage" with only those who receive "official . . . sanction." See Saunders, supra, 75 N.J. at 219.

The lesson of this history is a simple one. There is no getting around the fact that New Jersey bars plaintiffs from marrying the persons whom they love. The Court cannot be blinded by

"tradition" from seeing this stark fact. What the State must offer here is an explanation as to why those marriages should be prohibited and others allowed. This the State cannot do.

v. The Courts Also Have Rejected Outmoded Definitions Of The Role Of Gender In The Institution Of Marriage

As with legal restrictions on marriage based on race, throughout "volumes of history," United States v. Virginia, 518 U.S. 515, 531, 116 S. Ct. 2264, 2274, 135 L. Ed. 2d 735, 750 (1996), legislative and common law schemes have maintained rigid definitions of gender-appropriate roles, nowhere more than in shaping the institution of marriage. Assumptions about a fixed natural order dictating gender roles, reminiscent of those now relied on by the State, justified a legal structure that confined married women to the home under the legal dominion of their husbands. The now-infamous concurrence in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1872) (Bradley, J., concurring), voiced long-prevailing assumptions about the "nature of things" that must inexorably dictate the legal structure of marriage and the roles of parties to it:

> the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state. . . .
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> [83 U.S. (16 Wall) at 141, 21 L. Ed. 2d at 446.]

This "maxim of . . . jurisprudence" was deemed supreme above even the constitutional guarantee of equal protection in Bradwell, which upheld Illinois's exclusion of women from the practice of law.[13]

Yet in recent decades courts have come to see that age-old assumptions about gender roles cannot justify the perpetuation of legal inequalities in marriage. The courts have dismantled, on equal protection grounds, a web of laws premised on outmoded assumptions about gender-differentiated roles and capacities of spouses. See, e.g., Tomarchio v. Township of Greenwich, 75 N.J. 62, 75 (1977)("'archaic and overbroad'" generalizations about the financial dependence of wives "ignore the present economic reality that most spouses are mutually dependent economically and suffer equally upon the economic dislocation resulting from the disruption of their union."); Jersey Shore Med. Ctr-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 147-48 (1980)(common law rule making husband but not wife liable for necessary expenses incurred by the other is based on "an anachronism that no longer fits contemporary society" and violates State Constitution's guarantee of equal protection); Lepis v. Lepis, 83 N.J.139, 155 (1980)(gender-neutral alimony and support statutes must be applied free of "sexist stereotypes").

No longer may marriage in its legal and political dimension be premised on fixed "old notions" about the role of gender. "While the law may look to the past for the lessons it teaches, it

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[13] Illinois was not alone in deeming women unfit by definition and tradition to practice law. In the Application of Mary Philbrook to an Examination as an Attorney at Law, 17 NJLJ 202 (1894), the New Jersey court denied a woman's application for a law license. The court expressly adopted the reasoning of a Massachusetts case, which had held that by custom and tradition it would be inappropriate to include women in the definition of "citizen" entitled to apply for admission to the bar. See Robinson's Case,131 Mass. 376 (1881).

must be geared to the present and towards the future if it is to serve the people in just and proper fashion." Paterson Tavern & Grill Owners Ass'n. v. Borough of Hawthorne, 57 N.J. 180, 189 (1970) (striking ban prohibiting taverns from employing women as bartenders).

vi. Canada's Recent Judicial Decision Recognizing The Constitutional Right Of Same-Sex Couples To Marry Rejected The Same Justification Asserted By The State Here

In Halpern v. Attorney General of Canada, 172 O.A.C. 276 (Ont. Ct. App. June 10, 2003), available at Westlaw: 2003 Carswell Ont. 2159,[14] the high court of Ontario ruled that the Canadian constitutional charter's equality guarantee requires that same-sex couples be granted the right to marry. In reaching its path-setting decision, the Canadian court succinctly rejected the same circular reasoning offered in justification by the government here, that because marriage has been defined, throughout "Christendom," as a heterosexual institution, that definition is justified to remain the law. Halpern, supra, 2003 Carswell Ont. 2159 at ¶ 1. As the court explained, "it is accepted that, with limited exceptions, marriage has been understood to be a monogamous opposite-sex union. . . . Stating that marriage is heterosexual because it always has been heterosexual is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement. . ." Id. at ¶ 17. The Canadian court correctly recognized that the traditional understanding of marriage as a male-female union in and of itself offers no reason for perpetuating that exclusion.

Since June 2003, same-sex couples have been marrying in Canada, including United States couples who have returned to their home states legally married. See American Gays Eyeing Canada

[14] For the Court's convenience, a copy of the Halpern opinion is appended to this brief.

to Get Married, London [Ontario] Free Press, June 14, 2003, available at http://www.canoe.com/NewsStand/ LondonFreePress/News/2003/06/14/110703.html. The current reality is that marriage on this continent and in this nation is no longer by definition or practice reserved to male-female couples. To reflect this reality, the Canadian Oxford Dictionary is changing its definition of marriage in its upcoming addition to "[t]he legal or religious union of two people," a definition equally applicable for same-sex and different-sex spouses alike. Kate Jaimet, Same-sex marriage finds its way into Canadian Oxford Dictionary, Edmonton Journal, Sept. 15, 2003, available at http://www.canada.com/nation/story.html.

Not only in dictionaries must archaic definitions of marriage give way to reflect the society in which we live and the rights and needs of our families. New Jersey's historical exclusion of same-sex couples from the definition of marriage is not a governmental objective, but the problem that needs remedy. This purported government interest carries no weight at all.

b. The Desire To Remain In Uniformity With Other States' Discriminatory Definition Of Marriage Cannot Justify Discrimination Against New Jersey Citizens

The only other "justification" the State advances – a purported "interest in preserving uniformity among the States with respect to the definition of marriage" (State's 2/24 Br. 31) – suffers similar flaws of circularity, and is no more than a makeweight. Again, the desire to preserve a discriminatory definition of marriage is no justification for the definition. And the desire to remain in step with other states' discriminatory treatment of gay and lesbian families is likewise no justification at all for preserving discrimination within the State's borders. It is inconceivable that

New Jersey could have a legitimate, much less weighty, interest in subjugating its Constitution and the rights of its own citizens to the discrimination still practiced in other states.

Conventional choice of law and comity principles are routinely applied in every state to address non-uniformity in many aspects of domestic relations laws, including disparities among states in the requirements for marriages or their dissolution. See, e.g., Wilkins v. Zelichowski, 26 N.J. 370, 377-78 (1958). These familiar legal tools, not the deprivation of the constitutional rights of a minority, offer the answer to any purported concern about uniformity with other states. There is no practical or principled reason for New Jersey wholesale to deny marriage rights to an entire class of its citizens in order to remain in lockstep with other states.[15]

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[15] To its credit, the State does not assert purported justifications for denying marriage to same-sex couples relating to insupportable claims about the procreative and child-rearing capacities of lesbian and gay couples. (See Tr. 67-68) This notably distinguishes this case from earlier challenges to exclusionary marriage laws elsewhere in the country. See, e.g., Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (male-female marriage "uniquely involv[es] the procreation and rearing of children within a family"); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App.), rev. denied, 84 Wash. 2d 1008 (1974)(justifying exclusion of same-sex couples from marriage based on "societal values associated with the propagation of the human race").

New Jersey through its laws and public policies has acknowledged the reality that gay and lesbian couples, including plaintiffs in this case, do procreate, rear children together, and make fit parents, and appropriately makes no claim to the contrary now. See, e.g., In re Adoption by H.N.R., 285 N.J. Super. 1, 6 (App. Div. 1995) (lesbians and gay men may adopt the biological children of their same-sex partners, in this case a child conceived with mutual planning in the relationship); V.C. v. M.J.B., 163 N.J. 200, 224 (2000) (recognizing a lesbian as the "psychological parent" of her former partner's biological child, who was conceived and reared in the same-sex relationship); N.J.A.C. 10:121C-4.1(c) (2003) (prohibiting N.J. Division of Youth and Family Services from discriminating in an adoptive placement on the basis of the sexual orientation of the adoptive parents); Kristen Kreisher, Child Welfare League of America, Children's Voice Article, January 2002 ("New Jersey was the first state to specify that sexual orientation . . . cannot be used to discriminate against couples who are seeking to adopt."), available at http://www.cwla.org/articles/cv0201gayadopt.htm.

The State could not, in any event, argue that the purpose of marriage is to further procreation. As the court held in T. v. M, 100 N.J. Super. 530, 538 (Ch. Div.1968), "[i]f the

In sum, the claimed interest in national uniformity is of no weight at all, and cannot counter-balance the burden on plaintiffs from their exclusion from the enormously significant institution of marriage.

4. On Balance, The Plaintiffs' Interest In The Right To Marry Far Outweighs The State's Interest In Perpetuating A Discriminatory Definition Of Marriage And Denying Any Meaningful Access To This Central Institution

Whether viewed as statutory, fundamental, or of some other dimension, plaintiffs' interest in marriage with the person of their choice is of tremendous weight. The intrusion on this interest is absolute. All the State can muster to defend this discriminatory denial of access to marriage and the vast framework of statutory and societal rights it brings is the circular argument that because same-sex couples traditionally have been excluded from marriage, this discrimination should be permitted to continue. This is no legitimate government interest at all, and certainly cannot justify perpetuating discrimination. Weighed in the balance, the plaintiffs' enormous interest in marriage must be found paramount. Their right to equal protection has been denied as a matter of law. New Jersey's promise of equality for "all persons" under the State Constitution requires that same-sex couples be accorded the right to marry.

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begetting of children were the chief end of marriage it should follow that our public policy would favor annulling marriages in sterility cases where the fact of sterility is unknown to the parties at the time of the marriage. But no statute in this state permits annulment in such cases. . . . Health and happiness appear to be the touchstone." Id. at 538.

Point II

Plaintiffs Are Entitled To Summary Judgment On Their Claim To The Fundamental Right To Marry Protected Under The State Constitution

In addition to violating Article I, paragraph 1's promise of equal protection, exclusion of plaintiff same-sex couples from the right to marry their chosen life partners also violates the constitutionally protected fundamental right to marry. Greenberg, supra, 99 N.J. at 571. This right is an aspect of the broader right to privacy guarded in Article I, paragraph 1's promise, to all citizens of the State, of liberty and the pursuit of happiness. Id. The right to privacy safeguards individual autonomy, free of interference by the State, in matters of intimate personal choice central to human experience. See Planned Parenthood, supra, 165 N.J. at 632-33; Saunders, supra, 75 N.J. at 220; In re Quinlan, 70 N.J. 10, 40 (1976).

A. Article I, Paragraph 1 Guarantees The Right To Liberty And Happiness Of "All Persons," And Does Not Except Gay And Lesbian People

Article I, paragraph 1 extends its protections to "*All* persons," not just to those who are heterosexual or otherwise in the majority. Gay and lesbian residents of the State have the same interest in access to marriage with their chosen partner as their heterosexual neighbors. "[L]iberty . . . is the birthright of every individual . . . ." Saunders, supra, 75 N.J. at 220. The New Jersey Constitution does not carve out an exception excluding gay and lesbian individuals from its guarantees of liberty and the pursuit of happiness.

The seven gay and lesbian plaintiff couples assert the settled right to enter into civil marriages, the same structures that unite their heterosexual neighbors. Rather than creation of a

"new" right (see, e.g., Tr. 33), they seek to participate meaningfully in the right to marry already guaranteed them under the New Jersey Constitution. Under the Constitution, plaintiffs share in this right with all others in New Jersey, and yet they are denied access to marriage with the person they love because the State has limited exercise of the right to male-female couples only. By dictating that marriage may be conferred only on different-sex couples, New Jersey's statutory scheme decisively cuts off gay and lesbian adults from marriage. A constitutionally guaranteed right to marry is a hollow right indeed if by law the only spouse you may wed is one to whom you have no sexual orientation and feel no romantic or affectional attachment. It is a hollow right indeed for plaintiffs like Marcye and Karen or Suyin and Sarah, who are told by the State that they must turn away from the "irreplaceable" person they love and with whom they have built a family, and find instead a male spouse in order to participate in the right to marry. See Perez, supra, 198 P.2d at 25. The right to marry the person one loves belongs to "[a]ll persons" in the State, and cannot be parceled out only to those whose choices in the intimate personal relationships they forge have the approval of the legislature and of long convention.

B. The New Jersey Supreme Court Recognizes The Extent Of The Liberties At Stake And That The Constitution Must Be Read In Light Of A Changing Society In Giving Definition To The Fundamental Rights Of All

In the face of its stark violation of the fundamental right to marry, the State resorts to the argument that the right cannot be extended to plaintiffs' same-sex relationships because history and tradition have confined marriage to different-sex partners. This contention treats our constitutional liberties as locked in narrow past conceptions of what was familiar and conventional. It ignores the

command that we now apply a Constitution "written many years ago to a society changed in ways that could not have been foreseen." N.J. Coalition, supra, 138 N.J. at 366-67.

That the framers of the New Jersey Constitutions of 1844 and 1947, or the drafters of the marriage statutes promulgated in 1912 (see Tr. 16), may have blindly assumed that marriage was an institution for male-female couples, does not answer whether the New Jersey Constitution as it endures today can be read to exclude gay and lesbian individuals from its guarantee to "[a]ll persons"of the privacy to enter into marriage with their chosen partners. Our forebears did not proscribe, as urged here by the State, contours to our basic liberties so restrictive and narrow as to lock us for all time in an earlier conception of what is proper. Nor did they draft the Constitution to grant liberties only to some while leaving others excluded from cherished rights.

Article I, paragraph 1 of the New Jersey Constitution speaks, in terms even broader than the federal Constitution, of the rights shared by "All persons" to be "free and independent," and to "have certain natural and unalienable rights," including "of enjoying and defending life and liberty," and "of pursuing and obtaining safety and happiness." N.J. Const. art. I, par. 1. See Right to Choose, supra, 91 N.J. at 303 (Art. I, para. 1 has "more expansive language than that of the United States Constitution"). The New Jersey Supreme Court has declared that "[w]e have not hesitated, in an appropriate case, to read the broad language of Article I, paragraph 1, to provide greater rights than its federal counterpart." Planned Parenthood, supra, 165 N.J. at 633. See also Saunders, supra, 75 N.J. at 217. Indeed, the New Jersey "Bill of Rights, which includes that provision, has been described as expressing 'the social, political, and economic ideals of the present day in a broader way than ever before in American constitutional history.'" Right to Choose, supra, 91 N.J. at 303 (citation omitted).

The New Jersey Constitution accords protection to an array of "rights deemed most essential to both the quality of individual life and the preservation of personal liberty." State v. Schmid, 84 N.J. 535, 555 (1980). Though specific past traditions may be one touchstone for constitutional decision-making, it is by no means the sine qua non. Rather, the New Jersey Supreme Court has made clear that "constitutional provisions of this magnitude should be interpreted in light of a changed society." New Jersey Coalition, supra, 138 N.J. at 368 (constitutional free speech rights extend to require access to private malls by leafletters, an interpretation of a "century-old [constitutional] provision in light of changing times"). "We look back and we look ahead in an effort to determine what a constitutional provision means." Id. at 370. Thus the right to privacy, a safeguard of the autonomy of individuals to make personal choices in those spheres most central to human experience, has been interpreted time and again by the Supreme Court to shield individual choices that may not find explicit sanction in history, tradition, law, or public conceptions of morality.

So, for example, Planned Parenthood, supra, 165 N.J. at 632-33, and Right to Choose, supra, 91 N.J. at 306, confirmed a woman's right to make "one of the most intimate decisions in human experience, the choice to terminate a pregnancy. . . ." Id. See also Planned Parenthood ("we are keenly aware of the principle of individual autonomy that lies at the heart of a woman's right to make reproductive decisions and of the strength of that principle as embodied in our own Constitution."). In re Lee Ann Grady, 85 N.J. 235 (1981), recognized the right to be sterilized, involving "a choice that bears so vitally upon a matter of deep personal privacy that may also be considered an integral aspect of the 'natural and unalienable' right of all people to enjoy and pursue their individual well-being and happiness." Id. at 249-50. Saunders, supra, 75 N.J. at 220, upheld the right to

engage in non-marital sex without government interference, and confirmed that the right to privacy is not limited to "personal decisions concerning procreative matters." Id. at 213; see also id. at 220 ("the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy."). It also cannot be circumscribed to reflect "official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs . . . ." Id. at 219. See also In re Quinlan, 70 N.J. 10, 40 (1976) (recognizing right to refuse life-sustaining medical treatment).

The privacy rights protected under the New Jersey Constitution, including the right to marry, converge in "the ultimate interest which protection of the Constitution seeks to ensure" — "the freedom of personal development." Saunders, supra, 75 N.J. at 213. As the Supreme Court made clear in Saunders, this guarantee prohibits the State from interfering with personal choices surrounding marriage. The Court cautioned that decisions central to the "very independent choice" of marriage lie beyond the "regulatory power" of the legislature:

> If we were to hold that the State could attempt to coerce people into marriage, we would undermine the very independent choice which lies at the core of the right of privacy. We do not doubt the beneficent qualities of marriage, both for individuals as well as for society as a whole. Yet, we can only reiterate that decisions such as whether to marry are of a highly personal nature; they neither lend themselves to official coercion or sanction, nor fall within the regulatory power of those who are elected to govern.
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> [Saunders, supra, 75 N.J. at 219.]

The State runs afoul of the "very independent choice" at the core of the right to privacy when it sanctions marriage for some couples only but not for others for whom marriage is equally important and appropriate. Though by history and tradition the relationships of gay and lesbian

couples might have been thought worthy of state condemnation, those times are decisively over. See Lawrence, supra, 123 S. Ct. at 2484, 156 L. Ed. 2d at 525 (gay men and lesbians "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny. . . ."). Already interpreted to confer a constitutional right to marry, the broadly expressed principles of Article I, paragraph 1 today include gay and lesbian citizens in their promise of liberty and happiness.

C. As The U. S. Supreme Court Most Recently Instructed In Lawrence, In Keeping With New Jersey's Own Constitutional Principles, Our Constitutional Liberties Are Not Frozen In Past Conceptions And Must Be Interpreted To Give Meaning To The Vital Principles At Stake

The U.S. Supreme Court exposed the fallacy of the State's arguments in this case in its landmark opinion this term in Lawrence, supra, 123 S. Ct. 2472, 156 L. Ed. 2d 508. On June 26, 2003, the Court overruled Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), and held that the Texas prohibition on sodomy between same-sex partners violates the federal constitution's guarantee of liberty under the Due Process Clause, the federal analogue to the New Jersey Constitution's right to liberty guaranteed under Article I, paragraph 1. See Greenberg, supra, 99 N.J. at 571. The Lawrence decision is highly instructive to an understanding of the constitutional deprivation at issue in this case, and echoes principles already found in New Jersey's constitutional jurisprudence.

In 1986, in Bowers, the U.S. Supreme Court was asked by a gay litigant who had been arrested in his home for engaging in consensual sex with a male partner, to hold Georgia's sodomy prohibition to be an unconstitutional violation of the federal right to privacy. The Georgia law applied to conduct between different- and same-sex partners alike. Fixating on the claimant's sexual

orientation rather than the liberty of all, the Bowers Court recast a case presented as one about the fundamental right to engage in private, consensual intimate sexual conduct into a case about a narrowly framed "fundamental right to engage in homosexual sodomy." 478 U.S. at 191, 106 S. Ct. at 2844, 92 L. Ed. 2d at 146. So recast, the Court rejected as "facetious" the claim that "homosexual" conduct is "'deeply rooted in this Nation's history and tradition,'" id., 478 U.S. at 194, 106 S. Ct. at 2846, 92 L. Ed. 2d at 148, or entitled to constitutional protection. The Court at that time was unable to see that fundamental liberties are of broader dimension and do not vary by the sexual orientation of the citizen seeking to exercise them.

The Supreme Court's reasoning in Bowers is precisely the same as the flawed reasoning urged by the State, that the right at stake here must be defined not as the fundamental right to marry but rather as an asserted right of homosexuals to "same-sex marriage, " which, as "a matter of tradition and history" has not been recognized and so cannot be deemed a constitutional right. See, e.g., (Tr. 16, 33). This is the very reasoning rejected by the U.S. Supreme Court in Lawrence when it overturned Bowers. The Lawrence Court observed that Bowers' recasting of the issue as whether the federal Constitution confers a fundamental right to engage in homosexual sodomy "discloses the Court's own failure to appreciate the extent of the liberty at stake." Lawrence, supra, 123 S. Ct. at 2478, 156 L. Ed. 2d at 518-19. Rather, the "liberty protected by the Constitution allows homosexual persons" the right we all share to make choices about our "personal bond[s]" with another. Id.

Nor, moreover, has the New Jersey Supreme Court followed the restrictive interpretive path urged by the State for evaluating constitutional liberties. In prior cases, the Court has not defined the interest at issue in terms so narrow as to evade the broader principles at stake, as the Bowers Court erroneously had. For example, in Saunders, supra, 75 N.J. at 216-17, the Supreme Court

identified a fundamental right to privacy shielding the "sexual activities of adults," and held unconstitutional a statute criminalizing fornication with an unmarried woman. Had the Court followed the approach urged by the State, however, it could have defined the nature of the claim with such a degree of specificity as to obscure the constitutional magnitude of the interest at stake, as for example, a claimed fundamental right to "indiscriminate group fornicating . . . among complete strangers [in an] automobile." Id. at 228 (Clifford, J., dissenting). Likewise, the Court has recognized the right of a woman "to control her body and destiny," Planned Parenthood, supra, 165 N.J at 612; Right to Choose, supra, 91 N.J. at 306, and has not curtailed that right by conceiving of the claim as asserting a constitutional interest in an "under-age"or "free government-funded" abortion.

Framed so narrowly, these claimed interests could be said to have been deemed uncloaked by constitutional protection by the framers of the New Jersey Constitution of 1947, just as "a fundamental right to engage in homosexual sodomy" was rejected as "facetious" by the 1986 U.S. Supreme Court.[16] Yet the fundamental privacy rights of the parties to these New Jersey cases certainly have been well-recognized in this State. The New Jersey Constitution of 1947, safeguarding the "ideals of the present day . . . in a broader way than ever before in American

[16] Similarly, had the U.S. Supreme Court begun its analysis of Loving's fundamental rights claim by considering whether there was a fundamental, historic right to "miscegenic" or mixed-race marriages, its conclusions would have been very different. Nor did that Court belittle and prejudge the claim in Zablocki as one for the right to be a dead-beat dad, or in Turner as for the right to a jailhouse marriage. So too the claim of same-sex couples to the fundamental right to marry should not be misapprehended as a claim for the creation of some novel or frivolous constitutional right.

constitutional history," Right to Choose, supra, 91 N.J. at 303, encompasses plaintiff same-sex couples in the same right to marry guaranteed to "all persons" in the State.

As the U. S. Supreme Court held, "our laws and traditions" afford "constitutional protection" central to the liberty guaranteed under the federal, as well as New Jersey, Constitution "to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Id., 123 S. Ct. at 2481, 156 L. Ed. 2d at 522-23. There is no constitutional exception to these protections for gay men and lesbians; "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Id., 123 S. Ct. at 2482, 156 L. Ed. 2d at 523. The Supreme Court declared that gay men and lesbians "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny . . ." Id.,123 S. Ct. at 2484, 156 L. Ed. 2d at 525. In ringing words, the Supreme Court rejected the contention of the State here that our constitutional rights and liberties must be defined solely by reference to history and tradition, and instead directed lower courts back to broader principles:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.
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> [Id.,123 S. Ct. at 2484, 156 L. Ed. 2d at 526.][17]

[17] The teachings of Lawrence cannot be cabined to criminal cases only. In overruling Bowers and identifying a constitutional right to liberty in forging personal relationships whether heterosexual or gay, the Supreme Court spoke in terms that apply with equal force to civil as well as criminal disabilities on our fundamental rights. The Court noted that sodomy prohibitions are rarely enforced for consensual adult conduct, yet are "an invitation to subject homosexual

That past generations have disrespected or simply disregarded the relationships of gay men and lesbians, and privileged with marriage the relationships of heterosexual couples only, does not answer why this oppression may continue. The seven gay and lesbian plaintiff couples in this case have the same vital right to control their destinies and exercise their right to marry as do their heterosexual neighbors.

D. Canada's Recent Decision Recognized That Exclusionary Definitions Of Marriage Do Not Pose A Limitation On Constitutional Rights To Liberty

Halpern, granting the right to marry to Canadian same-sex couples, recognized that one group cannot be deprived of a basic constitutional right on the basis of a history of exclusion. The high court of Ontario rejected the notion that constitutional considerations about marriage must be frozen in the mind-set of earlier generations. See also Point I.C.3.a.vi. supra. Halpern's reasoning also echoes New Jersey's own constitutional principles and is instructive here.

The Canadian court considered whether that nation's courts had constitutional jurisdiction to reject an historic definition of the term marriage, which appears in the Canadian charter itself, as restricted to male-female unions. The court acknowledged that "[t]he definition of marriage in Canada, for all of the nation's 136 years, has been based on the classic formulation . . . 'that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman . . . .'" Halpern, supra, 2003 Carswell Ont. 2159 at ¶ 1. Yet it held that "to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this

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persons to discrimination both in the public and in the private spheres." Lawrence, supra, 123 S. Ct. at 2482, 156 L. Ed. 2d at 523. For this reason, Bowers' "continuance as precedent demeans the lives of homosexual persons." Id. Likewise, excluding gay and lesbian couples from New Jersey's constitutionally-protected right to marry profoundly "demeans the[ir] lives" and "serve[s] only to oppress." Id., 123 S. Ct. at 2484, 156 L. Ed. 2d at 526.

country's jurisprudence of progressive constitutional interpretation." Id. at ¶ 42. Rather, in words reminiscent of the New Jersey and the U.S. Supreme Courts, the Ontario court held that "'[a] constitution . . . is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and . . . for the unremitting protection of individual rights and liberties. . . . It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.'" Id. (citation omitted). The court found that the term "marriage" "has the constitutional flexibility necessary to meet changing realities of Canadian society. . . ." Id. at ¶ 46.

The court rejected the defendant's argument that marriage "is a descriptor of a unique opposite-sex bond that is common across different times, cultures and religions as a virtually universal norm." Id. at ¶ 66.[18] Instead, the court correctly recognized that "the argument that marriage is heterosexual because it 'just is' amounts to circular reasoning. . . . It sidesteps the entire . . . . analysis. It is the opposite-sex component of marriage that is under scrutiny." Id. at ¶ 71.

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[18] Indeed, not only Canada, but the Netherlands and Belgium also have rejected the view that marriage is a "descriptor" of only an "opposite-sex bond." All three nations have extended the right to enter into civil marriage to same-sex couples. See Parliament of the Netherlands "Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage)," Staatsblad 2001, No. 9, available at http://athena.leenumix.n1/rechten/meijers/ind ex.php3?m=10&c=69 (unofficial English translation); Chambre des Représentants de Belgique, "Ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil," 5e Session de la 50e Législature, Doc 50 2165/001, available at http://www1.deKamer.be/FLWB/pdf/ 50/2165/50K21650001.pdf (foreign language text of Belgium code provision granting right to marry to same-sex couples); Agence France-Presse, "Belgium Passes Gay Marriage Law," January 30, 2003, available at http://www1.dekamer.be/FLWB/pdf/50/2165/50k21650001.pdf.

Significantly, in Lawrence, the U.S. Supreme Court explicitly looked to developments in other nations' acceptance of the rights of gay and lesbian individuals that are an "integral part of human freedom," 123 S. Ct. at 2483, 156 L. Ed. 2d at 524, in determining that these individuals should be accorded the same respect under our own constitutional values.

Looking beyond the blinders of tradition and prejudice, the court saw that the "requirement that persons who marry be of the opposite sex denies persons in same-sex relationships a fundamental choice – whether or not to marry their partner." Id. at ¶ 87.

This same choice is denied the gay and lesbian plaintiffs in this case, depriving them of the cherished constitutional right to privacy in making choices so central to our personal liberty and happiness as with whom we will marry and spend our lives.

E. The State's Asserted Interests Cannot As A Matter Of Law Justify The Infringement On Plaintiffs' Constitutional Right To Marry

Plaintiffs' privacy rights, so central to the concept of liberty, are jealously guarded under the New Jersey Constitution, and can be directly infringed only to further a government interest of the highest order. See Saunders, supra, 75 N.J. at 217. Thus, while the government may engage in "reasonable state regulation" of marriage, Greenberg, supra, 99 N.J. at 572, it may not deny a fundamental privacy right unless it can demonstrate a "compelling state interest." Saunders, supra, 75 N.J. at 217; State v. Baker, 81 N.J. 99, 114 n.10 (1979) ("Although this right is not absolute, it may be restricted only when necessary to promote a compelling government interest."). "The right to privacy found in Article I, paragraph 1 is a fundamental right. As such, governmental interference with the right can be justified only by a compelling state interest." Grayson Barber, Privacy and the New Jersey State Constitution 213 N.J. Law 15, 16-17 (Feb. 2002). "Although the Legislature, in exercising its powers, may incidentally affect the natural and unalienable rights of individuals to liberty and the pursuit of happiness which have been recognized in Article I, the validity of any statute directly limiting those rights should be carefully scrutinized in light of its legislative purposes." Saunders, supra, 75 N.J. at 226 (Schreiber, J., concurring). See also Grady, supra, 85 N.J. at 249.

Where, as here, the State's infringement on a fundamental right goes far beyond an "indirect" and "slight imposition," Greenberg, supra, 99 N.J. at 578-79, and instead is a wholesale denial of the fundamental right to enter into marriage, the very heavy burden on the right can be outweighed only by a compelling government interest. For the reasons set forth in Point I above, the State's asserted interests in excluding plaintiffs from the institution of marriage are far from compelling, and certainly cannot justify the wholesale deprivation of their constitutional right to marry.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant the plaintiffs' motion for summary judgment and deny the State's cross-motion for summary judgment in its entirety. The plaintiff couples ask that their right to enter into civil marriage be enforced.

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Respectfully submitted,

By: _____

Lawrence S. Lustberg, Esq.
Jennifer Ching, Esq.
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102-5496
(973) 596-4500

David S. Buckel, Esq.
Susan L. Sommer, Esq..
Adam Aronson, Esq
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street – Suite 1500
New York, New York 10005
(212) 809-8585