Mark LEWIS, *et al.*, Plaintiffs-Appellants, v. Gwendolyn L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services, *et al.*, Defendants-Respondents.	SUPREME COURT OF NEW JERSEY Docket No. 58,389 CIVIL ACTION Appeal From the Superior Court of New Jersey, Appellate Division (Docket No. A-002244-03T5) Sat Below: Hon. Skillman, P.J.A.D., Collester, J.A.D., and Parrillo, J.A.D.

BRIEF OF ASIAN EQUALITY, EQUALITY FEDERATION, PEOPLE FOR THE AMERICAN WAY FOUNDATION AND VERMONT FREEDOM TO MARRY TASK FORCE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

OF COUNSEL:

Joseph F. Tringali
Robert J. Pfister
Paul A. Saso
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017-3954
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

ATTORNEY OF RECORD:

Kevin H. Marino
John A. Boyle
MARINO & ASSOCIATES, P.C.
One Newark Center
9th Floor
Newark, New Jersey 07102-5211
Telephone: (973) 824-9300
Facsimile: (973) 824-8425

TABLE OF CONTENTS

Page

STATEMENTS OF INTEREST OF AMICI CURIAE 1

PRELIMINARY STATEMENT 3

ARGUMENT 5

I. THE CONSTITUTIONAL VIOLATION IS THE DENIAL OF THE RIGHT TO MARRY – NOT ONLY THE DENIAL OF THE INCIDENTS OF MARRIAGE 5

A. Denial of Marriage Licenses Violates Appellants' Right to Marry 5

B. A Separate, Quasi-Marital Status for Same-Sex Couples Is No Solution 7

1. Discrimination of Any Stripe Is Degrading and Pernicious 7

2. Shunting Same-Sex Couples into a Separate Institution Would Itself Be Discriminatory 12

3. Other Courts That Have Considered This Question Have Concluded That "Almost Equal" Is Not Good Enough 13

II. AS A MATTER OF REMEDIES, GRANTING CIVIL MARRIAGES TO SAME-SEX COUPLES IS THE ONLY MEASURE THAT CAN REDRESS THE VIOLATION OF APPELLANTS' RIGHTS 16

A. Appellants Are Entitled To Make-Whole Relief for the Violation of Their Constitutional Rights 16

B. The Remedy For Past Inequality Is Equality Going Forward 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Wright,
468 U.S. 737 (1984) 9

Asbury Park Press, Inc. v. Woolley,
33 N.J. 1 (1960) 17

Bankers Trust Co. of N.Y. v. Crane,
70 N.J. Super. 447 (N.J. Ch. 1962) 6

Borough of Wrightstown v. Medved,
193 N.J. Super. 398 (App. Div. 1984) 24

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 8

Brown v. Bd. of Educ.,
98 F. Supp. 797 (D. Kan. 1951) 7

Carr v. Carr,
120 N.J. 336 (1990) 18

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985) 24

Cooper v. Nutley Sun Printing Co.,
36 N.J. 189 (1961) 18

Cruzan v. Dir., Mo. Dep't of Health,
497 U.S. 261 (1990) 16

EGALE Can., Inc. v. Can. (Attorney Gen.),
[2003] 13 B.C.L.R.4th 1 14

Fischer v. Fischer,
375 N.J. Super. 278 (App. Div. 2005) 18

Franzen v. Equitable Life Assur. Soc'y of U.S.,
130 N.J.L. 457 (1943) 5

Frontiero v. Richardson,
411 U.S. 677 (1973) 9

Page(s)

Goodridge v. Dep't of Pub. Health,
798 N.E.2d 941 (Mass. 2003) ..... passim

Halpern v. Toronto (City),
[2003] 65 O.R.3d 161 ..... 14, 15

Heckler v. Mathews,
465 U.S. 728 (1984) 11

Hennefeld v. Township of Montclair,
22 N.J. Tax 166 (Tax Ct. 2005) 21

Iowa-Des Moines Nat'l Bank v. Bennett,
284 U.S. 239 (1931) 23

Knight v. Super. Ct.,
26 Cal. Rptr. 3d 687 (Ct. App. 2005) 22

Lawrence v. Texas,
539 U.S. 558 (2003) 11, 24

Lewis v. Harris,
378 N.J. Super. 168 (App. Div. 2005) 10, 20

Loving v. Commonwealth,
147 S.E.2d 78 (Va. 1966) 3

Miss. Univ. for Women v. Hogan,
458 U.S. 718 (1982) 9

N.J. Democratic Party, Inc. v. Samson,
175 N.J. 172 (2002) 18

N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n,
82 N.J. 57 (1980) 22

Olmstead v. United States,
277 U.S. 438 (1928) 11

Opinions of the Justices to the Senate,
802 N.E.2d 565 (Mass. 2004) 7, 12, 14

Palmore v. Sidoti,
466 U.S. 429 (1984) 24

Petrozzino v. Monroe Calculating Mach. Co.,
47 N.J. 577 (1966) 23

Page(s)

Pisciotta v. Buccino,
22 N.J. Super. 114 (App. Div. 1952) 6, 7

Plessy v. Ferguson,
163 U.S. 537 (1896) 8, 12

Right to Choose v. Byrne,
91 N.J. 287 (1982) 17, 22, 23

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 9

Robinson v. Cahill,
69 N.J. 133 (1975) 18

Ry. Express Agency v. New York,
336 U.S. 106 (1949) 15

S. Burlington County N.A.A.C.P. v. Mount Laurel Township,
92 N.J. 158 (1983) 4

S. Jersey Cath. Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elem. Sch.,
290 N.J. Super. 359 (App. Div. 2002) 18

State v. Rogers,
56 N.J.L. 480 (1894) 17

Strauder v. West Virginia,
100 U.S. 303 (1879) 11

Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971) 18

Sweinhart v. Bamberger,
166 Misc. 256, 2 N.Y.S.2d 130 (Sup. Ct. Bronx Co. 1937) 21

Town Tobacconist v. Kimmelman,
94 N.J. 85 (1983) 22

United States v. Virginia,
518 U.S. 515 (1996) 9, 10, 19

W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 18

Page(s)

Walker v. Hyland,
70 N.J.L. 69 (1903) 23

Washington Mut. Ins. Co. v. Bd. of Review of N.J. Unemployment Comp. Comm'n,
1 N.J. 545 (1949) 15, 16

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 19

Statutes

Assemb. Appropriations Comm., Assemb. No. 3743 -L. 2003, c. 246 21

N.J. Const. art. I, par. 1 ..... 4, 16

N.J.S.A. 26:8A-1 ..... 19, 20

N.J.S.A. 37:1-2 23

STATEMENTS OF INTEREST OF AMICI CURIAE

Asian Equality (formerly "APACE") is a national ad hoc coalition of Asian Pacific Islander ("API") leaders and organizations determined to fight marriage discrimination against our communities. It represents a broad alliance of API lesbian, gay, bisexual, and transgender affinity groups, as well as major API and LGBT civil rights organizations throughout the country. Asian Equality recognizes the historical legacy of marriage discrimination in the United States and its profound impact on API families. Through community education and coalition building, we seek to empower our API communities to challenge this legacy and to confront present-day marriage discrimination against same-sex couples. In doing so, we want to affirm the lesbian, gay, bisexual, and transgender members of our communities and acknowledge the enriching presence of their love and lives.

The Equality Federation is a network of state/territory organizations committed to working with each other and with national and local groups, including groups throughout New Jersey, to strengthen statewide lesbian, gay, bisexual, and transgender advocacy organizing and to secure full civil rights in every U.S. state and territory.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens organization established to promote and

protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, PFAWF now has more than 750,000 members and activists across the country, including New Jersey. PFAWF has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of gay men and lesbians. PFAWF regularly participates in civil rights litigation, and has supported litigation to secure the right of same-sex couples to marry. PFAWF joins this brief because any remedy for the denial of equal marriage rights to same-sex couples that does not include the right to marry would condemn gay men and lesbians in New Jersey to the status of second-class citizens in violation of the New Jersey Constitution.

The Vermont Freedom to Marry Task Force ("VFMTF") represents a coalition of individuals and organizations in Vermont who support the freedom for same-sex couples to legally marry. VFMTF has consistently advocated full inclusion in marriage for same-sex couples, and supported the passage of Vermont's civil union law as a first step toward that goal. VFMTF continues to educate Vermonters about the need for full inclusion in marriage for same-sex couples. VFMTF is well-positioned to offer insight into the ways in which Vermont's

civil union law, while a step forward for same-sex couples in Vermont, falls short of the constitutional requirement of full equality and inclusion.

PRELIMINARY STATEMENT

The issue before this Court – the right of two loving and committed individuals to marry notwithstanding discriminatory laws – is not novel. Considering a similar question, another state's highest court declared that recognition of such a right "would be judicial legislation in the rawest sense of that term." Undoubtedly viewing the matter as one requiring restraint and deference to the people's elected representatives, that court did as the defendants in this case urge: it deflected all inquiry to "the legislature [rather than] this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate." That was the response Virginia's highest court gave to Richard Loving (a white man) and Mildred Jeter (a black woman) in 1966. Loving v. Commonwealth, 147 S.E.2d 78, 82 (Va. 1966), rev'd, 388 U.S. 1 (1967).

New Jersey's courts have never taken so jaundiced a view of the role entrusted to them by the people of this state. Rather, when the status quo falls short of the exacting standards of due process and equality mandated by New Jersey's Constitution, this Court has squarely held that "enforcement of

constitutional rights cannot await a supporting political consensus" and that it has a solemn obligation "to do our best to uphold the constitutional obligation" in question. S. Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 212-13 (1983).

If, as it should, this Court agrees with appellants that same-sex couples are currently denied their "natural and unalienable rights" to enjoy life and liberty and pursue and obtain safety and happiness, N.J. Const. art. I, par. 1, a critical corollary question emerges: Must these citizens be afforded what they have thus far been unconstitutionally refused – the right to marry – or will a lesser, politically expedient "remedy" (such as domestic partnerships or civil unions) suffice?

Full marriage rights are the only answer. The denial of the right to marry and to equal protection is not merely a denial of the collective rights and duties that married New Jersey citizens enjoy (though those rights and duties are surely important). To deny some citizens the right to marry – even if some or all of the legal and economic benefits that inhere in marriage are provided through an alternative arrangement, such as domestic partnerships or civil unions – is itself a denial of due process and the equal protection of this state's laws. See Point I, infra. Alternatively, the question may be cast as one

of remedies. Marriage is still the answer in that event, as it presents the only possibility for making appellants whole. See Point II, infra.

For these reasons, an order from this Court reversing the lower courts should be accompanied by instructions to enter a judgment directing appellees to issue marriage licenses without regard to the gender of the applicants.

ARGUMENT

I. THE CONSTITUTIONAL VIOLATION IS THE DENIAL OF THE RIGHT TO MARRY — NOT ONLY THE DENIAL OF THE INCIDENTS OF MARRIAGE

A. Denial of Marriage Licenses Violates Appellants' Right to Marry

Civil marriage rightly enjoys the respect and support of the state because marriage is an individual's strongest possible public statement of one's love, fidelity and life-long commitment. It "anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the [state] identifies individuals . . . ." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003); accord Franzen v. Equitable Life Assur. Soc'y of U.S., 130 N.J.L. 457, 467 (1943) ("Marriage is the genesis of the family, and the family is the unit of our society.").

While marriage is, in some respects, a deeply private matter between two loving individuals who commit to living their lives together, the civil institution of marriage also bears the

unique imprimatur of the state. Pisciotta v. Buccino, 22 N.J. Super. 114, 116 (App. Div. 1952) ("The marriage contract is regarded as a triaded one, with the State as the third party, because the status achieved thereby is the foundation of our society."). The private aspect of marriage is coupled with a very public – and publicly enforced – declaration of that commitment. Goodridge, 798 N.E.2d at 952 ("for all the joy and solemnity that normally attend a marriage," a state's marital statutes are effectively licensing laws).

> Marriage is something more than a contract. True it is that the consent of the parties is essential, but when the contract to marry is executed by the marriage, a relation or status between the parties is created which they cannot alter. While other contracts may be modified, restricted, enlarged or entirely abrogated by consent of the parties, once the marriage relation is formed the law steps in and holds the parties to sundry obligations from which there is no escape unless and until the state modifies or dissolves the status by proceedings sanctioned by law.

Bankers Trust Co. of N.Y. v. Crane, 70 N.J. Super. 447, 453-54 (N.J. Ch. 1962), rev'd on other grounds, 78 N.J. Super. 447 (App. Div. 1963) (quotations omitted).

Given the honored place accorded the institution of marriage by the laws and customs of this state, it should come as no surprise that the violation being challenged in this case is not merely the denial of the rights that are incident to

marriage, such as the opportunity to avail oneself of spousal health insurance or eligibility for a lower joint income tax rate.[1] Rather, plaintiffs have taken issue with their exclusion from a "status [that is] the foundation of our society." Pisciotta, 22 N.J. Super. at 116.

B. A Separate, Quasi-Marital Status for Same-Sex Couples Is No Solution

1. Discrimination of Any Stripe Is Degrading and Pernicious

Even when discrimination takes what its proponents call an "innocuous" form,[2] its deleterious effects inevitably surface eventually. Attempts to provide "equal" educational

---

[1] These rights are certainly important and should not be denied, but exclusion from the institution of marriage is exclusion from so much more than economic or legal benefits. Thus, for the reasons discussed below, while New Jersey's recognition of domestic partnerships for certain limited purposes is certainly a step in the right direction and undoubtedly of much value to a host of New Jersey families, it remains the case that only full marriage equality will measure up to the exacting standards of equality contained in New Jersey's constitution.

[2] See, e.g., Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (Sosman, J. dissenting) (no constitutional violation in maintenance of separate "civil union" scheme "where same-sex couples who are civilly 'united' will have literally every single right, privilege, benefit, and obligation of every sort that our State law confers on opposite-sex couples who are civilly 'married'"; the difference is merely "a squabble over the name to be used"); Brown v. Bd. of Educ., 98 F. Supp. 797, 798 (D. Kan. 1951), rev'd, 349 U.S. 294 (1955) (no constitutional violation in maintenance of separate schools for black children where "the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable").

opportunities to black children, for example, were destined to fail so long as "equal" meant "separate":

> Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. * * * To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Brown v. Bd. of Educ., 347 U.S. 483, 493-94 (1954).

It was this same concern about the stigmatizing effects of discrimination that led Justice Harlan to dissent passionately from the Court's endorsement of "separate but equal" in the context of public accommodations in Plessy v. Ferguson, 163 U.S. 537 (1896). Legislating "separate but equal" railroad coaches for blacks and whites, Justice Harlan recognized, "proceed[ed] on the ground that [African Americans] are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." Id. at 560 (Harlan, J., dissenting).

As the Court later acknowledged in Brown and subsequent cases, the guarantee of equal protection does not permit a state to justify discrimination against a particular group simply by claiming to provide "'equal' accommodations."

No amount of facial "equality," however well intentioned, can overcome "stigmatizing injury often caused by . . . discrimination," which "is one of the most serious consequences of discriminatory . . . action." Allen v. Wright, 468 U.S. 737, 755 (1984).[3]

The Supreme Court's VMI decision is instructive. There, in an attempt to remedy a men-only admissions policy at the prestigious and state-supported Virginia Military Institute ("VMI"), Virginia offered women enrollment in a parallel, but distinctive, program. United States v. Virginia, 518 U.S. 515, 526 (1996) ("VMI"). The state's desire for a "separate" facility that would nonetheless be "equal" was made plain: the state argued "that admission of women would downgrade VMI's stature . . . and with it, even the school. . . ." Id. at 542-43. Aspiring female cadets, accused of potentially destroying the very institution they sought admission to, found

[3] While the principle that the Constitution demands equality for its own sake in order to prevent the psychological and social consequences of invidious discrimination was first articulated in response to racial segregation, the U.S. Supreme Court also has rejected other forms of governmental discrimination that send the same message that some members of our community are not as worthy as others. For example, the Court now recognizes that rules and policies that relegate women to a separate sphere are discriminatory and serve to reinforce stereotypes that women are "innately inferior." Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973); Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (gender discrimination "deprives persons of their individual dignity").

their exclusion to be a government-endorsed statement of their inferiority as a class. If they were actually "equal," why would their inclusion in the same program "downgrade" the school? Ultimately, the Supreme Court found that arguments like these – that have been used to exclude women and discriminate against them for generations – were meritless. Id. (holding that Virginia's proposed separate program for women violated the Equal Protection Clause).

Same-sex couples seeking to marry today are similarly accused of "downgrading" the stature of marriage. Opponents of same-sex marriage insist that the exclusion of same-sex couples "preserves" marriage, suggesting that their admission, much like the proposed admission of women into VMI, would "destroy" the institution of marriage. Lewis v. Harris, 378 N.J. Super. 168, 199 (App. Div. 2005) (Parrillo, J., concurring) (noting that granting same-sex couples full civil marriage rights would "seriously compromise[], if not entirely destablize[]" the institution of marriage).

It is from this belief – that opening the possibility of marriage to loving, committed same-sex couples would destroy the institution – that the drive for a remedy of less than full marriage rights arises. To sanction second-class citizenship by reserving the civil status of marriage for opposite-sex couples only is to "confer[] an official stamp of approval on the

destructive stereotype that same-sex relationships are . . . inferior to opposite-sex relationships and are not worthy of respect." Goodridge, 798 N.E.2d at 962. As Justice Brandeis observed, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

> [T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) (emphasis added).[4]

[4] Accord Lawrence v. Texas, 539 U.S. 558, 575 (2003) (sodomy laws are unconstitutional because their continued existence is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (excluding black men from juries "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to . . . race prejudice").

2. Shunting Same-Sex Couples into a Separate Institution Would Itself Be Discriminatory

The very act of creating a separate institution – whether denominated a "civil union," or a "domestic partnership," or anything other than full-fledged marriage – constitutes "a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." Opinions of the Justices, 802 N.E.2d at 570. "The thin disguise of 'equal' accommodations," Justice Harlan presciently wrote in a different but equally compelling context, "will not mislead any one." Plessy, 163 U.S. at 562 (Harlan, J., dissenting) (noting that racial segregation "puts the brand of servitude and degradation upon a large class of our fellow citizens—our equals before the law").

A judicial decree that grants anything less than full marriage rights to same-sex couples would simply misapprehend the nature of the violation proven. That is, by leaving same-sex partners "outliers to the marriage laws," Goodridge, 798 N.E.2d at 963, any perpetuation of the exclusion of same-sex couples from the institution of marriage (whether by the Legislature or this Court) would continue to deny these couples the rights and privileges that lawfully married couples enjoy – rights and privileges that extend far beyond any economic and

legal benefits that are often quantified to demonstrate the harmful effects of excluding certain couples from marriage.

Promising same-sex couples similar legal and financial benefits, while important, without allowing them to marry perpetuates the stigma visited on an entire class of individuals who continue to be excluded from the only institution that is synonymous with lifelong commitment, love and fidelity. To be excluded from this institution by the government merely because the term "marriage" is reserved for opposite-sex couples is to be inherently inferior in the eyes of the law.

3. Other Courts That Have Considered This Question Have Concluded That "Almost Equal" Is Not Good Enough

After the Massachusetts Supreme Judicial Court, applying its own state constitution, ruled that same-sex couples could not be denied the right to marry,[5] the legislature proposed to relegate same-sex couples to a "civil union" status. In rejecting that proposal, the Supreme Judicial Court held that such a purported solution to the constitutional violation found in Goodridge would actually maintain and foster the very stigma of expressly reserving for opposite-sex couples a "status that is specially recognized in society and has significant social

[5] See Goodridge, 798 N.E.2d at 969 ("barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution").

and other advantages." Opinions of the Justices, 802 N.E.2d at 570. Put simply, the court recognized that allowing opposite-sex couples to marry, while forcing same-sex couples to merely "union" or "partner," would create "a separate class of citizens by status discrimination." Id.

Also recognizing this same point, the British Columbia Court of Appeal, in mandating equal marriage for same-sex couples, held that "[a]ny other form of recognition for same-sex relationships, including the parallel institution of [registered domestic partnerships] falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal,' or to leave it to governments to choose amongst less-than-equal solutions." EGALE Can., Inc. v. Can. (Attorney Gen.), [2003] 13 B.C.L.R.4th 1 ¶ 156.

The Ontario Court of Appeal likewise agreed that an alternative system for recognizing same-sex relationships was insufficient, explaining that the right to equality ensures not only equal access to economic benefits, but also equal access to "fundamental societal institutions." Halpern v. Toronto (City), [2003] 65 O.R.3d 161, paras. 102-07. Excluding same-sex couples from marriage, the court held, "perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships." Id.

To decide whether existing domestic partnerships or even the creation of civil unions could ever be equal to marriage, this Court need only consider whether married heterosexuals in New Jersey would accept for themselves the status of "domestic partners" and give up the right to be married. As Justice Jackson recognized:

> The framers of the [United States] Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Ry. Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). "The equal protection clause means that the right of all persons must rest upon the same rule under similar circumstances." Washington Mut. Ins. Co. v. Bd. of Review of N.J. Unemployment Comp. Comm'n, 1 N.J. 545, 553 (1949).

The guarantee of equality "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." Cruzan v. Dir., Mo. Dep't of Health, 497

U.S. 261, 300 (1990) (Scalia, J., concurring). Domestic partnerships are insufficient because married heterosexuals would never accept that status for themselves.

II. AS A MATTER OF REMEDIES, GRANTING CIVIL MARRIAGES TO SAME-SEX COUPLES IS THE ONLY MEASURE THAT CAN REDRESS THE VIOLATION OF APPELLANTS' RIGHTS

A. Appellants Are Entitled To Make-Whole Relief for the Violation of Their Constitutional Rights

Denial of the right to enter into one of the fundamental societal institutions based solely on a characteristic such as sexual orientation is a denial of the rights secured by New Jersey's Constitution. N.J. Const. art. I, par. 1 ("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."). "These constitutional limitations safeguard the fundamental rights of persons and of property against arbitrary and oppressive state action." Washington Mut. Ins. Co., 1 N.J. at 552-53.

New Jersey's Constitution was meant to express "the ideals of the present day in a broader way than ever before in American constitutional history." Right to Choose v. Byrne, 91 N.J. 287, 303 (1982) (citation omitted). Appellants are

entitled to have this constitutional violation fully remedied, because:

> [W]hen legislative action exceeds the boundaries of the authority delegated by the Constitution, and transgresses a sacred 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, [New Jersey's courts] are not at liberty to surrender, or to ignore or to waive it.

Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 12 (1960).

It is the courts' duty to redress constitutional violations that are properly brought before them. The authority and duty of New Jersey courts to act when constitutional rights have been violated is "so entirely established as not to be debatable." State v. Rogers, 56 N.J.L. 480 (1894). Moreover, courts are routinely charged with upholding the fundamental constitutional rights of minority groups:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Constitutional rights can be enforced by courts even in the absence of legislative action. Cooper v. Nutley Sun Printing

Co., 36 N.J. 189, 197 (1961) ("To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper."). Once a constitutional violation has been found, "it follows that the court must 'afford an appropriate remedy to address a violation of those rights.'" Robinson v. Cahill, 69 N.J. 133, 147 (1975) (citation omitted).

The relief appellants seek is necessarily equitable in nature. E.g., Carr v. Carr, 120 N.J. 336, 351 (1990) ("The Legislature has recognized that courts' equitable powers are particularly appropriate in the context of domestic relations."); Fischer v. Fischer, 375 N.J. Super. 278 (App. Div. 2005). The equitable powers of the court are broad. N.J. Democratic Party, Inc. v. Samson, 175 N.J. 172, 176 (2002); S. Jersey Cath. Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elem. Sch., 290 N.J. Super. 359, 397-98 (App. Div. 2002) ("Mere lack of precedent does not stand as a bar to equitable relief necessary to achieve a just result."); cf. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a . . . court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

> A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied

> an opportunity or advantage in the position they would have occupied in the absence of discrimination. * * * A proper remedy for an unconstitutional exclusion, we have explained, aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future.

VMI, 518 U.S. at 547.

B. The Remedy For Past Inequality Is Equality Going Forward

"[T]he equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). And gay and lesbian citizens of this state will not be protected by "equal laws" if they are confined to an entirely separate "domestic partnership" scheme under New Jersey's Domestic Partnership Act[6] that reserves marriage for other, presumably more worthy, citizens.

First, alternative arrangements to marriage, such as "domestic partnerships," are qualitatively different, and provide far fewer legal, economic and social benefits, than does marriage. New Jersey's Domestic Partnership Act does not, and was never meant to, approximate the breadth of the legal and economic rights and benefits that flow from marriage. The Domestic Partnership Act fails to provide, inter alia, comprehensive survivorship and intestacy rights; standing to file a wrongful death suit when a spouse is killed; entitlement

to elective share of a spouse's estate; spousal compensation for crime victims; worker's compensation and disability benefits; owed wages to a surviving spouse; tuition credit and scholarships for spouses of those in public service; tax deduction of a spouse's medical expenses; and spousal election of joint tax filing. Moreover, the New Jersey Legislature itself acknowledged two important legal distinctions between domestic partnerships and marriage when it drafted the Domestic Partnership Act:

> (1) property acquired by one partner during a domestic partnership is treated as the property of that individual, unlike in a marriage where joint ownership may arise by law; and
>
> (2) the status of domestic partnership neither creates nor diminishes individual partners' rights and responsibilities toward children, unlike in a marriage where both spouses possess legal rights and obligations with respect to any children born during the marriage.

N.J.S.A. 26:8A-1. "The [Domestic Partnership] Act confers some but not all state legal rights afforded married persons to those who qualify and register as domestic partners." Lewis v. Harris, 378 N.J. Super. 168, 210 (App. Div. 2005) (Collester, J., dissenting) (emphasis added). "[W]hile individuals in domestic partnerships share some of the same emotional and financial bonds and other indicia of interdependence as married

---

[6] N.J.S.A. 26:8A-1.

couples, domestic partnership is a status distinct from marriage." Assemb. Appropriations Comm., Assemb. No. 3743 -L. 2003, c. 246, following N.J.S.A. 26:8A-1 (emphasis added).

Second, in addition to the governmental benefits that are incidents to marriage still denied to members of domestic partnerships, "domestic partnership" is a status that does not, and will never, fully equal that of civil marriage. While the New Jersey Legislature's attempt at recognizing the "important personal, emotional and committed relationship[s]," id., of its gay and lesbian citizens is laudable, its creation of domestic partnerships for same-sex couples fails to meet constitutional standards both because of the admitted inequality of this status and because the historical and societal weight of a marital relationship could not possibly be replicated by anything short of marriage. New Jersey courts have recognized that domestic partnerships are not co-equal to marital relationships in this state. Hennefeld v. Township of Montclair, 22 N.J. Tax 166 (Tax Ct. 2005); see also Sweinhart v. Bamberger, 166 Misc. 256, 260, 2 N.Y.S.2d 130, 134 (Sup. Ct. Bronx Co. 1937) ("Marriage is more than . . . a mere economic device to regulate the proprietary rights of the persons concerned."); Knight v. Super. Ct., 26 Cal. Rptr. 3d 687, 699 (Ct. App. 2005) (Marriage and domestic partnerships are not co-equal because "marriage is

considered a more substantial relationship and is accorded a greater stature than a domestic partnership").

New Jersey courts have been steadfastly committed to redressing legislative enactments that do not comport with the constitutional requirements of equal protection. Interpreting New Jersey's marriage laws as gender-neutral is well within this Court's power and is in accord with this state's practice of modifying legislative enactments to comport with constitutional requirements rather than striking them down in their entirety. The practice of "judicial surgery" is routinely used by the courts to extend a statute's legal coverage to include a previously excluded group. Right to Choose, 91 N.J. at 311 ("a Court may engage in 'judicial surgery' to excise a constitutional defect or to engraft a needed meaning"). Here in New Jersey, as elsewhere, "when a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery' and through appropriate construction restore the statute to health." Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983); see also N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57 (1980).

Justice Brandeis wrote that "when the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of

benefits to the excluded class." Iowa-Des Moines Nat'l Bank v. Bennett, 284 US 239, 247 (1931). Courts should "ascertain whether the Legislature would want the statute to survive with appropriate modifications rather than succumb to constitutional infirmities." Right to Choose, 91 N.J. at 311. Certainly no party has suggested that this Court strike down New Jersey's statutory scheme for marriage in its entirety, and such a "remedy" would clearly not be what the Legislature intended.

The prudent and straightforward way to remedy the violation here is to interpret New Jersey's marriage laws as gender-neutral. The application of this remedy comes without adding or removing a single letter to the marriage laws of this state. The Court needs only to read the statute for exactly what it says. "Before a marriage can be lawfully performed in [New Jersey], the persons intending to be married shall obtain a marriage license . . ." N.J.S.A. 37:1-2. Rereading under-inclusive or vague statutes as gender-neutral is a solution routinely chosen by courts in this state. Petrozzino v. Monroe Calculating Mach. Co., 47 N.J. 577, 222 (1966) (extending workmen's compensation to dependants of women, as well as men); Walker v. Hyland, 70 N.J.L. 69, 80 (1903) ("the masculine gender, when 'used in any statute,' shall include 'females as well as males'"); Borough of Wrightstown v. Medved, 193 N.J. Super. 398 (App. Div. 1984) (awarding tax exemption to husband

of permanently disabled female veteran by reading "widow" to also mean "widower").

That some people may disapprove of same-sex couples marrying is no justification for arbitrary discrimination by the government. The United States Supreme Court has long recognized that government discrimination is particularly destructive when it is designed to accommodate societal prejudice. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (constitutional guarantees may not be sidestepped "by deferring to the wishes or objections of some fraction of the body politic"). In short, "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433 (1984).[7]

* * *

Civil marriage is unique in its social significance; it is the quintessential expression of two individuals' enduring commitment to one another; it is a life-defining moment for

[7] See also Watson v. Memphis, 373 U.S. 526, 535 (1963) ("constitutional rights may not be denied simply because of hostility to their assertion or exercise"); Lawrence, 539 U.S. at 585 (O'Connor, J., concurring) ("A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.").

countless New Jersey men and women. Regardless of same-sex couples' access to the rights and obligations attendant to marriage, barring them from marriage itself does not comport with the exacting guarantees of New Jersey's Constitution, or with the judiciary's responsibility to vindicate the rights of those unlawfully denied equality.

CONCLUSION

An order from this Court granting relief to appellants will be wholly incomplete unless accompanied by instructions to enter a judgment according full marriage rights to same-sex couples in New Jersey. Anything less would result in the continued denial of due process and the equal protection of the laws of this state.

Respectfully submitted,

MARINO & ASSOCIATES, P.C.

By: 

Kevin H. Marino
John A. Boyle
One Newark Center
9th Floor
Newark, New Jersey 07102-5211
Telephone: (973) 824-9300
Facsimile: (973) 824-8425

Of Counsel:
Joseph F. Tringali
Robert J. Pfister
Paul A. Saso
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

Attorneys for Asian Equality, Equality Federation, People For the American Way Foundation and the Vermont Freedom To Marry Task Force, As Amici Curiae

Dated: Newark, New Jersey
October 21, 2005