SUPREME COURT OF NEW JERSEY
DOCKET NO. 58,389

MARK LEWIS and DENNIS WINSLOW; SAUNDRA HEATH and CLARITA ALICIA TOBY; CRAIG HUTCHISON and CHRIS LODEWYKS; MAUREEN KILIAN and CINDY MENEGHIN; SARAH and SUYIN LAEL; MARILYN MANEELY and DIANE MARINI; and KAREN and MARCYE NICHOLSON-MCFADDEN,

Plaintiffs-Appellants,

v.

GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; CLIFTON R. LACY, in his official capacity as the Commissioner of the New Jersey Department of Health and Senior Services; and JOSEPH KOMOSINSKI, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services,

Defendants-Respondents.

Civil Action

On Petition for Certification to the Superior Court of New Jersey, Appellate Division

SAT BELOW:

Hon. Stephen Skillman, P.J.A.D.
Hon. Donald G. Collester, Jr., J.A.D.
Hon. Anthony J. Parrillo, J.A.D.

BRIEF AMICUS CURIAE AND APPENDIX ON BEHALF OF THE NATIONAL BLACK JUSTICE COALITION

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INTEREST OF AMICUS CURIAE

The National Black Justice Coalition ("NBJC") is a non-profit, civil rights organization of black lesbian, gay, bisexual and transgender people and allies dedicated to fostering equality. NBJC has more than 3,000 members nationwide and advocates for social justice by educating and mobilizing opinion leaders, including elected officials, clergy and media, with a focus on black communities. Black communities have historically suffered from discrimination and have turned to the courts for redress. With this appeal, we turn to the courts again. The issue presented by this appeal has significant implications for the civil rights of black lesbians and gay men in this State – whether they will receive equal treatment under the law and the legal recognition and protections of marriage for their relationships and families. NBJC envisions a world where all people are fully empowered to participate safely, openly and honestly in family, faith and community, regardless of race, gender-identity or sexual orientation.

PRELIMINARY STATEMENT

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

longstanding history and supposed equal application to men and women.

For centuries, these same rationalizations were used to justify the prohibition of interracial marriage – a prohibition that no one today would defend as even arguably constitutional. Thus, in any analysis of today's restrictions on the right to marry for same-sex couples, we must be mindful of this Nation's history of discriminating against couples of different races. At the core of both prohibitions lies the violation of an individual's right to marry.[1] Only the dissenting Judge of the Appellate Division Panel found the parallel between the now-repudiated prohibition on interracial marriage and the prohibition on same-sex marriage constitutionally significant:

> The [majority's] analysis is reminiscent of arguments in support of anti-miscegenation laws before Loving. Those laws defined marriage as the union of a man and woman of the same race, and proponents presented a long history in support of the definition. Indeed, in Loving the State of Virginia argued that there was no fundamental right to interracial marriage because "the historic tradition of marriage" did not contemplate such marriages. In rejecting the argument, the Supreme Court framed the issue not as a claim of right to interracial marriage but rather as an assertion of a fundamental right to marriage. The Court declared that the right to marry was one of the "basic civil rights of man" and could not be restricted or prohibited by racial classification. Therefore, while Loving rejected a prohibition of marriage based on race, the analysis is relevant to the instant case because Loving also rejected a definition of marriage foreclosing an individual's right to marry a

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

> person of one's choosing and addressed the issue of the constitutional viability of the restriction in terms of the fundamental right to marriage itself rather than to a separate right or different form of marriage.

Lewis v. Harris, 378 N.J. Super. 168, 205 (App. Div. 2005) (Collester, J.A.D., dissenting) (citations and footnote omitted).

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

FACTUAL BACKGROUND

NBJC respectfully relies on and incorporates herein the "Factual Background" section contained in Plaintiffs-Appellants' Appellate Division brief.

PROCEDURAL HISTORY

NBJC respectfully relies on and incorporates herein the "Procedural History" section contained in Plaintiffs-Appellants' Appellate Division brief.

ARGUMENT

I. HISTORICAL BACKGROUND

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

The interracial marriage prohibition was deeply rooted in our Nation's history and tradition. Statutes prohibiting interracial marriage were enforced in American colonies and states for more than three centuries. See Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage & Law—An American History 253-54 (2002), reprinted at Aa8-9. The first anti-miscegenation law was enacted in Maryland in 1661. Rachel F. Moran, Interracial Intimacy: The Regulation of Race & Romance 19 (2001), reprinted at Aa13. Virginia followed suit soon after. See id.

Interracial marriage was so far outside of the realm of traditional marriage in colonial America that Virginia amended its anti-miscegenation law in 1691 to banish from the community any white person who married a "negro," "mulatto" or Indian. Wallenstein, supra, at Aa4-5. Couched in "the language of hysteria rather than legalese," the avowed purpose of Virginia's 1691 law was to prevent "that abominable mixture and spurious issue" of whites with blacks or Indians. Id. at A5.

Although the first American anti-miscegenation laws were enacted in the Chesapeake Bay colonies, they quickly spread throughout the country. Massachusetts enacted an anti-miscegenation

law in 1705. Carter G. Woodson, The Beginnings of Miscegenation of the Whites and Blacks, in Interracialism: Black-White Intermarriage in American History, Literature & Law 42, 45, 49 (Werner Sollors ed. 2000), reprinted at Aa27, 28, 30. Pennsylvania passed its anti-miscegenation law in 1725, and Delaware enacted a similar law in 1726. Charles Frank Robinson II, Dangerous Liaisons: Sex & Love in the Segregated South 4 (2003), reprinted at Aa36.

By the time of the Civil War, laws prohibiting interracial marriage covered most of the South and much of the Midwest, and they were beginning to appear in Western states. See David H. Fowler, Northern Attitudes Toward Interracial Marriage: Legislation & Public Opinion in the Middle Atlantic & the States of the Old Northwest, 1780-1930 214-19 (1987), reprinted at Aa40-42. The proponents of these laws argued that they were necessary to uphold the law of nature:

> Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. The same law which forbids consanguineous amalgamation; forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest."

Henry Hughes, Treatise on Sociology, Theoretical & Practical 239-40 (1854), reprinted at Aa47-48.

The term "miscegenation" was first used in an anonymous propaganda pamphlet printed in New York City in 1863. The term was coined from two Latin words meaning "to mix" and "race." The pamphlet — falsely attributed to the Republican Party and to

abolitionists – advocated the "interbreeding" of the white and black races so that they would become indistinguishably mixed. The pamphlet was later exposed as a "dirty trick" instigated by Democrats to discredit Republicans. See, e.g., Wikipedia: The Free Encyclopedia, Miscegenation;[2] The Miscegenation Hoax.[3]

During Reconstruction, southern Democrats adopted the New York-minted term "miscegenation" and insisted on the necessity of preserving the sanctity of marriage by banning interracial marriage. See Moran, supra, at Aa17. A few southern states repealed their anti-miscegenation laws during Reconstruction, but societal pressure to spurn interracial relationships remained steadfast. Id. When white southern males regained control of their state legislatures after Reconstruction, they promptly reinstated anti-miscegenation laws. See id.

Nor did ratification of the Fourteenth Amendment and its guarantee of equal protection bring any change in the courts' view of the constitutionality of these laws. Over the next century, scores of courts confronted challenges to these racial restrictions and (with only two exceptions) consistently upheld the laws on the basis of longstanding tradition, "equal" application to the races and the "logic" of prohibiting interracial marriage. For example,

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[2]Available at <http://en.wikipedia.org/wiki/Miscegenation> (visited Sept. 30, 2005).

[3]Available at <http://www.museumofhoaxes.com/miscegenation.html> (visited Sept. 30, 2005).

in 1878, the Supreme Court of Appeals of Virginia stated:

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

Kinney v. Virginia, 71 Va. 858, 869 (1878). See, e.g. Dodson v Arkansas, 31 S.W. 977, 977-78 (1895) (anti-miscegenation law held not unconstitutional or even "affected" by amendments to Federal Constitution); Missouri v. Jackson, 80 Mo. 175, 177 (1883) (traditional anti-miscegenation law held not to be discriminatory and violative of the Fourteenth Amendment to the Federal Constitution as it applies equally to the races); Green v. Alabama, 58 Ala. 190, 195-97 (1877) (same); Lonas v. Tennessee, 50 Tenn. 287, 312 (1871) (holding anti-miscegenation law unaffected by the Fourteenth Amendment to the Federal Constitution); Indiana v. Gibson, 36 Ind. 389, 393-94 (1871) (same); Scott v. Georgia, 39 Ga. 321, 323, 327 (1869) (upholding constitutionality of anti-miscegenation law and stating that "the offspring of these unnatural connections are generally sickly and effeminate").

Despite the proliferation of anti-miscegenation laws, opponents of interracial marriage feared that state laws were insufficient to protect the sanctity of marriage. In December 1912,

therefore, Representative Seaborn Roddenberry of Georgia proposed an amendment to the United States Constitution to declare "Intermarriage between Negroes or persons of color and Caucasians . . . is forever prohibited." 49 Cong. Rec. 502 (Dec. 11, 1912). Leaders from around the country denounced interracial marriage. For example, Governor William Mann of Virginia called miscegenation "'a desecration of one of our sacred rites.'" New York's Governor, John Dix, called it "'a blot on our civilization'" and "'a desecration of the marriage tie [that] should never be allowed.'" See Robinson, supra, at Aa37. See also Denise C. Morgan, Jack Johnson: Reluctant Hero of the Black Community, 32 Akron L. Rev. 529, 548 (1999).

B. Marriage Prohibitions Extended To Numerous Racial Groups

Although the first anti-miscegenation laws targeted whites and blacks, many states expanded their application to other racial groups. See Peggy Pascoe, Miscegenation Law, Court Cases & Ideologies of "Race" in Twentieth Century America, in Interracialism: Black-White Intermarriage in American History, Literature & Law 178, 183 (Werner Sollors ed., 2000), reprinted at Aa51, 52. Twelve states prohibited marriage between whites and Native Americans. Id. After the mid-eighteenth century, when people from the Far East began to immigrate to the United States, states with substantial populations of Chinese and Japanese responded by enacting anti-miscegenation laws prohibiting marriage between

whites and "Mongolians." Moran, supra, at Aa18-20.

As new "nonwhite" immigrant communities formed, states amended their anti-miscegenation laws to prevent marriages between whites and these immigrants. Id. at Aa19-20. In 1862, Oregon passed its first anti-miscegenation law. See 1862 Or. Laws § 63-102. In 1866, Oregon amended the statute to prohibit marriage between "any white person, male or female" and "any negro, Chinese, or any person having one fourth or more negro, Chinese, or Kanaka [Native Hawaiian] blood, or any person having more than one-half Indian blood." See 1866 Or. Laws § 23-1010.

In 1850, California enacted a law prohibiting marriages between "white persons" and "negroes or mulattoes." Leti Volpp, American Mestizo: Filipinos & Anti-Miscegenation Laws in California, in Mixed Race America & the Law: A Reader 86 (Kevin R. Johnson ed., 2003), reprinted at Aa55. Then, in 1878, California amended its constitution to restrict the intermarriage of whites and Chinese. See Moran, supra, at Aa19. Shortly thereafter, the California Legislature amended the Civil Code to ban the union of "'a white person with a negro, mulatto, or Mongolian.'" Id. (citation omitted). Later, it amended the law to include "'members of the Malay race'" as well. See id. at Aa23 (citation omitted).

The specific targets of anti-miscegenation laws varied from state to state, as different racial or national groups were singled out by specific statutes reflecting legislative bigotry directed at

particular racial groups. Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity & Adoption 220 (2003), reprinted at Aa58. Other states enforced their anti-miscegenation policies on the basis of judicial decisions that turned on white/non-white distinctions. For example, Virginia voided a marriage between a white person and a person of Chinese descent on the basis of that state's statute making it "unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian." See Naim v. Naim, 87 S.E.2d 749, 750 (Va.) (citation omitted), vacated and remanded 350 U.S. 891 (1955), reinstated and aff'd, 90 S.E.2d 849 (1956). All told, thirty-eight states had anti-miscegenation laws in effect at one time or another.[4] See Wallenstein, supra, at Aa8-9. By the end of World War II, thirty states still had such statutes. See id. at fig. 8.[5]

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[4]New Jersey, to its credit, was among the minority of states that did not enact an anti-miscegenation law. Kevin Mumford, After Hugh: Statutory Race Segregation in Colonial America, 1630-1725, 43 Am. J. Legal Hist. 280, 300 (1999).

[5]Of course, affluent people could avoid certain consequences of the anti-miscegenation laws. For example, John Mercer Langston, the first African American to be elected to public office and the founder in 1868 of the Howard University School of Law, was able to succeed to the wealth of his white father (and the opportunities that such wealth would enable) as a result of his father's capacity to contract around certain consequences of Virginia's anti-miscegenation laws to ensure that his children would inherit his wealth. Upon their parents' deaths, those children, including John Mercer Langston, were taken in by a family friend in a free state – Ohio. See John Mercer Langston Bar Ass'n web site (visited Aug. 3, 2005) <www.jmlba.org/JMLBio.htm>.; Kansas St. Hist. Soc'y web site (visited Aug. 3, 2005) <www.kshs.org/publicat/history/1999winter_sheridan.htm>. Similarly, same-sex couples of means who are

State anti-miscegenation laws were considered constitutional until 1967, when the U.S. Supreme Court struck down such discrimination as an unconstitutional interference with an individual's fundamental right to marry. Loving v. Virginia, 388 U.S. 1, 12 (1967). See also Naim, 87 S.E.2d at 750; Kinney, 71 Va. at 869; Dodson, 31 S.W. at 977-78 (anti-miscegenation law held not unconstitutional or even "affected" by amendments to Federal Constitution); Jackson, 80 Mo. at 177; Green, 58 Ala. at 195-97; Lonas, 50 Tenn. at 312; Gibson, 36 Ind. at 393-94; Scott, 39 Ga. at 323, 327.

C. Anti-Miscegenation Laws Enjoyed Vast Popular Support

Bans on interracial marriage reflected contemporary public sentiment. In 1958, a Gallup Poll indicated that 96 percent of all Americans opposed interracial marriage. See Nicholas D. Kristof, Marriage: Mix and Match, NY Times, Mar. 3, 2004, at A23. In 1972 — five years after the Supreme Court declared bans on interracial marriage unconstitutional — a Gallup Poll reported that 75 percent of all white Americans still opposed interracial marriage. See Charlotte Astor, Gallup Poll: Progress in Black/White Relations, But Race is Still an Issue (visited Aug. 3, 2005) <usinfo.state.

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denied the right to marry can, with respect to at least a certain few of the benefits attendant to marriage (i.e., rights of succession), contract for the same, albeit privately and at great expense. This juxtaposition highlights yet another dimension to the inequity that flows from the deprivation of equal marriage rights — a built-in preference for those affected persons of means.

gov/journals/itsv/0897/ijse/gallup.htm>. In 2000, Alabama became the last state to repeal its anti-miscegenation law, with 40 percent of its electorate voting to *keep* the prohibition on the books. TheFreeDictionary.com, Miscegenation (visited Aug. 3, 2005) <www.encyclopedia.thefreedictionary.com/miscegenation>.

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

The Appellate Division's judgment should be reversed. The NBJC urges this Court to keep in mind the history described in Point I, supra, in determining whether construing New Jersey statutes to prohibit same-sex marriages violates the New Jersey Constitution. The State argues that the government has the power to deny same-sex couples the right to enter into civil marriages by defining the right too narrowly and by suggesting that the recognition of that right must somehow become more "popular" before it is accepted. Taking its cue from the "reasoning" employed by the opponents of interracial marriage before Loving, the State also suggested in its arguments below that denying same-sex couples the right to enter into civil marriage is not discriminatory because it applies "equally" to both males and females. This Court should reject those narrow and misleading arguments.

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

All parties to this case agree that the right to marry is a constitutionally protected fundamental right. The reason that individuals have a fundamental right to be free from unwarranted governmental intrusion in decisions involving marriage is that the decision to marry is fundamentally personal and private in nature. See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights"). Marriage

is among those matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

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

The Appellate Division majority and the State advance three overlapping arguments in this area to restrict Appellants' rights in this case. First, they claim that courts should always define fundamental rights as narrowly as possible. Second, they claim that a right is fundamental only if (and to the extent that) it has been exercised and protected throughout our nation's history. Third, they essentially claim that a right is fundamental only if its

exercise is generally accepted in our society. NBJC responds to each argument in turn.

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

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

The New Jersey Constitution does not require a court to "narrow" the liberty of New Jersey citizens. Article I, paragraph 1, of the New Jersey Constitution of 1947 provides, in pertinent part, that

> 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, para. 1. The right to liberty necessarily includes the right to be free from unjustified government interference in one's privacy. Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318 (2003). Thus, the analysis of Appellants' due process claim begins with the question whether the right to marriage is a fundamental right entitled to constitutional protection, both as a general liberty right and as a specific privacy right. NBJC submits that it is both. This analytical

framework cannot be avoided by incorporating the challenged form of bigotry itself into the definition of the "right." Opponents of interracial marriage employed this technique of "creative definition" until its fallacy was exposed nearly forty years ago.

Furthermore, the State's argument should wither here, given that the Constitution of 1947 expresses 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). Other states have relied on similar constitutional provisions to strike down laws that intrude on rights that were once assumed not to exist, but are now deemed fundamental as a matter of both state and federal constitutional law:

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

Kentucky v. Wasson, 842 S.W.2d 487, 504 (Ky. 1992) (Combs, J., concurring) (striking down Kentucky's anti-sodomy laws).

This Court has expressed its willingness to invoke and enforce the New Jersey Constitution when individual liberties and fundamental rights are at issue. See Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) ("[A]rticle 1, paragraph 1 . . . seeks to protect against injustice and against the unequal treatment of those who should be treated alike."); see also Robinson v. Cahill,

69 N.J. 133, 147 (1975) ("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.") (internal quotation marks and citations omitted).

A review of cases in which the U.S. Supreme Court has found government intrusion on fundamental rights in violation of the Fourteenth Amendment's Due Process Clause reveals that, in determining the existence of a fundamental right, the Court considers the nature of the right at issue rather than some very specific governmental restriction being challenged. For example, in Meyer v. Nebraska, 262 U.S. 390, 401-03 (1923), and in Pierce v. Society of Sisters of Holy Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925), the Court considered whether parents had a right to be free from unwarranted governmental intrusion in decisions about how to educate their children. The Court did not frame the issue as whether there was a fundamental right for children to learn the German language or whether there was a fundamental right to attend a private school.

Similarly, in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942), the U.S. Supreme Court considered whether there was a fundamental right to be free from unwarranted governmental intrusion in decisions about whether to have offspring, not whether

a convicted criminal had the fundamental right to bear children. Further, in Zablocki v. Redhail, 434 U.S. 374, 384-85, 388 (1978), and Turner v. Safley, 482 U.S. 78, 95-96 (1987), the Court considered whether there was a fundamental right to be free from unwarranted governmental intrusion in decisions to marry, not whether deadbeat dads or prison inmates in particular had a specific right to marry.

Finally, and most recently, in Lawrence v. Texas, 539 U.S. 558, 578 (2003), the U.S. Supreme Court considered whether there is a fundamental right to be free from unwarranted governmental intrusion into matters of private, consensual sexual conduct, not whether there is a specific right to engage in homosexual sodomy. The very notion of "fundamental" rights reserved to all people naturally flows from the nature of a written Constitution that defines the limited power of the State. That notion reflects the view that people are beings possessed of personal dignity and human worth. States exist to preserve that dignity, worth and autonomy. Only totalitarian regimes view themselves as "dispensing" rights to people at the whim of a transitory majority or the favor of a particular faction.

The U.S. Supreme Court's rejection of anti-miscegenation statutes exposes the fallacy of the Appellate Division majority's reasoning in this case. In Loving, 388 U.S. at 12, the Supreme Court did not ask whether there was a specific right to enter into

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

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

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

Perez v. Lippold, 198 P.2d 17, 19 (Cal. 1948) (Traynor, J.).

There is substantial precedent from this Court speaking to the breadth of the fundamental right to marry under New Jersey law.

According to this Court, "[t]he decision to marry another is "a vital part of life in a free society" and "one of life's most intimate choices." Greenberg v. Kimmelman, 99 N.J. 552, 570-72 (1985). As a result, "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." State v. Saunders, 75 N.J. 200, 219 (1977).[6]

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

The Appellate Division majority asserted that the right to marry must be narrowly viewed to include only opposite-sex marriages because fundamental rights are deeply grounded in our nation's history. This argument runs contrary to settled constitutional jurisprudence and to decisions striking down anti-miscegenation statutes because "deeply grounded" bigotry can never justify contemporary discrimination.

To be sure, courts look to history and the concept of ordered liberty in determining whether a fundamental right exists. But no

[6]The Appellate Division majority concluded that the landmark cases striking down anti-miscegenation laws are explainable solely because of the prohibition on racial discrimination. But, as the California Supreme Court explained when it struck down California's anti-miscegenation law, "[t]he equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals." Perez, 198 P.2d at 20. Furthermore, as set forth in Points I.A. & I.B., supra, after its ratification and until Loving, many courts rejected claims that the Fourteenth Amendment prohibited interracial marriage.

party to this litigation disputes the existence of a fundamental right to marry. Much more significant is the State's inability to cite a single New Jersey case tying the definition of a fundamental right to the state's "traditional" definition thereof. Indeed, it is hard to imagine that any form of discrimination can be styled as permissible merely because it has been "traditionally pervasive." The U.S. Supreme Court has never held that it will rely solely on history when evaluating whether a state-imposed burden on a fundamental right is unconstitutional:

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

Casey, 505 U.S. at 847-48.

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

Superior Court of Alaska properly refused to allow history to hold its fundamental-rights analysis hostage:

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

Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, *4 (Alaska Super. Ct. Feb. 27, 1998), reprinted at Aa59, aff'd, 21 P.3d 357 (Alaska 2001).

The history of interracial marriages exposes the fallacy of the Appellate Division's reasoning: It was once argued that there is no fundamental right to marry someone of a different race because such marriages had a long history of being prohibited. See, e.g., Lonas, 50 Tenn. at 293-95; Britell v. Jorgensen, 129 P.2d 217, 219 (1942); Perez, 198 P.2d at 38 (Shenk, J., dissenting) (arguing that the prohibition of interracial marriage had a long history and twenty-nine states continued to have such laws). In 1948, when the California Supreme Court struck down California's anti-miscegenation statute, Justice Carter acknowledged that "[t]he freedom to marry the person of one's choice has not always existed," but nonetheless concluded that the right was fundamental and that anti-miscegenation statutes impermissibly violated that

right. Perez, 198 P.2d at 31 (Carter, J., concurring).[7]

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

Additionally, as set forth above, until 1967, this Nation had a long and deep-seated history of prohibiting and disapproving of interracial marriages. States and courts routinely defended these prohibitions as having "been in effect in this country since before our national independence." Id. at 35 (Shenk, J. dissenting). Indeed, anti-miscegenation laws were the most deeply embedded form of legally sanctioned racial discrimination in our nation's history — lasting over three centuries. Peggy Pascoe, Why the Ugly Rhetoric Against Gay Marriage is Familiar to This Historian of Miscegenation (visited Aug. 3, 2005) <http://hnn.us/articles/4708.html>.

[7]As a New York court recently explained in ruling the prohibition of marriage for same-sex couples to be unconstitutional, "The challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners." Hernandez v. Robles, 794 N.Y.S.2d 579, 582 (N.Y. Sup. Ct. 2005).

3. The Prevalence of Existing Laws Is Irrelevant

This Court should also reject the suggestion that there is no right to marry someone of the same sex because prohibitions on such marriages are still nearly universal in the United States. According to this theory, anti-miscegenation statutes should have remained constitutional as long as they remained prevalent. Such an argument is both historically and legally wrong.

As an initial matter, the sheer prevalence of a law does not determine its constitutionality. For example, the U.S. Supreme Court in Lawrence quoted from Justice Stevens' dissent in Bowers v. Hardwick, 478 U.S. 186, 216 (1986), explaining that "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." Lawrence, 539 U.S. at 577-78 (citation and internal quotation marks omitted).

Moreover, disapproval of interracial marriage was also once commonplace. When anti-miscegenation statutes were challenged, states relied upon their prevalence and acceptance to defend them. See, e.g., Henkle v. Paquet, 200 P. 911, 913 (Or. 1921) (miscegenation statutes "'have been universally upheld as a proper exercise of the power of each state to control its own citizens'") (citation omitted); Kirby v. Kirby, 206 P. 405, 406 (Ariz. 1922); Lee v. Giraudo, 120 P.2d 167, 173 (Cal. Ct. App. 1941), appeal dismissed, 317 U.S. 590 (1942). Prohibitions on interracial

marriage remained commonplace at the time those prohibitions were invalidated. As set forth above, when the California Supreme Court struck down an anti-miscegenation statute in 1948, thirty states had similar statutes. And when the U.S. Supreme Court struck down anti-miscegenation statutes in Loving, sixteen states still had similar statutes, and 75 percent of white Americans still opposed interracial marriage. See Astor, supra.

More importantly, prohibitions on interracial marriage did not become unconstitutional because they were found in fewer states; rather, those prohibitions always contravened constitutional principles. Perez, 198 P.2d at 32 (Carter, J., concurring) ("the statutes now before us never were constitutional"). The fact that only sixteen states had such laws in 1967 may have made the Supreme Court's decision in Loving less controversial, but the Court's long-overdue decision was not based on the number of states having anti-miscegenation laws at the time.

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

B. The Fact That Prohibitions On Marriage Between Individuals Of The Same Sex Are "Applied Equally" Cannot And Does Not Support The Appellate Division's Judgment

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

Defenders of anti-miscegenation statutes repeatedly argued that the statutes did not discriminate because they applied equally regardless of skin color:

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

Lonas, 50 Tenn. at 298-99. In 1877, the Alabama Supreme Court relied upon a similar rationale:

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

Green, 58 Ala. at 195. The Missouri Supreme Court similarly held in

1883 that "[t]he act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons. . . ." Jackson, 80 Mo. at 177.

Likewise, in 1921, the Supreme Court of Oregon upheld a ban on marriages between Native Americans and whites, stating simply that "the statute does not discriminate. It applies alike to all persons. . . ." Paquet, 200 P. at 913. Then, in 1942, the Supreme Court of Colorado stated: "There is here no question of race discrimination. The statute applies to both white and black." Jackson v. City & Cty of Denver, 124 P.2d 240, 241 (Colo. 1942).

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

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

Perez, 198 P.2d at 20 (emphasis added) (citation omitted). Thus, the proper analysis of the issue focuses on the individual. Because a black individual was not permitted to marry an individual whom a white individual could marry, the anti-miscegenation statute was

found to discriminate on the basis of race. Similarly, the statute discriminated on the basis of race because a white individual could not marry an individual whom a black individual could marry.

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

CONCLUSION

For the foregoing reasons, NBJC, as amicus curiae, respectfully submits that this Court should reverse the judgment of the Appellate Division rejecting Plaintiffs-Appellants' claim that New Jersey's prohibition on marriage between same-sex partners violates the New Jersey Constitution.

Respectfully submitted,

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Dated: October 20, 2005