SUPREME COURT OF NEW JERSEY
Docket No. 58,398

MARK LEWIS, et al.,

Plaintiffs-Appellants,

v.

GWENDOLYN L. HARRIS, et al.,

Defendents-Appellees.

Appellate Division
Docket No. A-2244-03T5

Sat Below:

Hon. Skillman, P.J.A.D.,
Collester, J.A.D., and
Parrillo, J.A.D.

BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs challenge the State of New Jersey's denial of their liberty interest in being able to direct the course of their intimate lives by choosing to marry the irreplaceable person each loves, as others freely may do. Plaintiffs are lesbian and gay individuals in long-term committed relationships; many are parents raising their children together. Article I, paragraph 1 of the New Jersey Constitution guarantees liberty and equality to these lesbian and gay citizens as it does to "[a]ll persons."

This Court has recognized that the choice to marry another individual is among the most intimate of personal decisions and a vital part of freedom preserved from government interference. For most people, the State does not intrude on the distinctly personal choice of a marriage partner beyond matters such as age, consanguinity, and marital status. Each person is free to choose wisely or poorly, without regard to whether the marriage is popular with government officials, but under current New Jersey law, one may do so only *so long as one chooses a different-sex partner* to marry.

It can be difficult for anyone with unfettered access to this pervasive social institution to step back and appreciate what it means for one's dignity, security and social standing

to be entirely excluded from it. Plaintiffs have submitted substantial evidence providing a picture of life under this exclusion. Nor is New Jersey's domestic partner benefits law a meaningful replacement for marriage. Indeed, this separate legal structure only makes starker the government's determination to maintain two classes of citizens.

In assessing liberty and equality claims under Article I, the Court employs a balancing test. The Court already has determined that the right sought here, the right to marry, is fundamental and thus is assigned maximum weight on the constitutional scales. The effort of the Appellate Division majority to strip it of its fundamental nature by calling it the right of "*same-sex* marriage" - as if fundamental liberties depend on whether one conforms to the majority group - must fail or Article I means little. To deny the fundamentality of the right to marry here is to marginalize one class of citizens and debase their intimate lives and their rights to personal autonomy.

Even without labeling the right at stake as fundamental, however, the interests plaintiffs have in entering into marriage are extremely weighty. Those interests - in companionship, security, intimacy, family, and commitment - are common denominators of human life. Plaintiffs cannot enjoy dignity, security and first-class status as citizens

when the government denies them access to one of society's most esteemed institutions, marriage, with the person each loves. And arguments that plaintiffs must wait for the legislature to rectify entrenched injustice in the marriage laws misunderstand New Jersey's constitutional system and the courts' role in safeguarding individual liberties.

The two purported needs Defendants (the "State") offer for the exclusion carry no weight. The first - to avoid a change in the traditional limitation of marriage to a man and a woman so as not to jar society's expectations - makes majority sentiments in New Jersey the test. The second - to ensure that New Jersey's marriage laws remain uniform with the exclusionary laws in most other states - tethers this State's constitutional rights to discrimination practiced elsewhere. Nor is the asserted "public need" to encourage heterosexual procreation within marriage, adopted by the concurring judge below, at all advanced by excluding lesbian and gay families from the institution of marriage.

In the end, this is really a very simple case in constitutional terms. Plaintiffs ask to be given what their friends, relatives, co-workers and neighbors already enjoy - participation with the one person each loves in the central rite of passage in American family life.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on June 26, 2002, seeking 1) a declaration that the State's denial of marriage licenses to plaintiffs is unconstitutional, and 2) an injunction ordering the State to issue marriage licenses to plaintiff couples. Ja11a.[1] The State moved to dismiss; in doing so, it confirmed that it would not advance other alleged public needs put forward by *amici* to justify the discriminatory laws at issue. T67-1-68-8. On this basis, the parties agreed to convert the State's pending motion to dismiss into a motion for summary judgment pursuant to R. 4:46-2(c). Ja135a. Plaintiffs then cross-moved for summary judgment. Ja25a. All facts were undisputed.

The trial court issued its opinion on November 5, 2003, Ja130a, and granted summary judgment to the State in an order entered November 20, 2003, Ja203a. Plaintiffs timely appealed to the Appellate Division. Judge Skillman, with Judge Parillo concurring and Judge Collester dissenting, issued an opinion affirming the trial court's judgment on June 14, 2005. Lewis

[1] "Ja" refers to the Joint Appendix filed in the Appellate Division, and previously provided to the Court. In addition, for the convenience of the Court, the decision of the Appellate Division is attached hereto as Appellant's Appendix in this matter.

v. Harris, 378 N.J.Super. 168 (App. Div. 2005). On July 22, 2005, plaintiffs timely filed their notice of appeal.

STATEMENT OF FACTS

The plaintiffs in this action are all New Jersey residents.[2] Plaintiff couples have been in committed relationships with each other from 13 to 34 years. Dennis Winslow and Mark Lewis have shared their lives for 13 years. Ja83a. Sarah and Suyin Lael have been committed to one another for 15 years. Ja67a. Alicia Toby and Saundra Heath have been partners for 16 years, as have Karen and Marcye Nicholson-McFadden. Ja33a; Ja112a. Cindy Meneghin and Maureen Kilian met in their teens at church, became high school sweethearts, and have been a committed couple for over 31 years. Ja48a. And Chris Lodewyks and Craig Hutchinson, who met in college and are now in their early fifties, have been in a committed relationship for 34 years. Ja40a. The level of commitment and love these couples feel toward one another is no different than that of their married friends. Ja34a; Ja93a, 95a. Yet each was denied a marriage license by

[2] Tragically, plaintiff Marilyn Maneely died on September 7, 2005, and thus plaintiffs no longer seek judgment on her behalf. Her surviving partner, plaintiff Diane Marini, now seeks only declaratory and not injunctive relief. They had been together 14 years at the time of Ms. Maneely's death. Ja92a.

the State solely because they sought to marry a same-sex partner.

Plaintiffs live in Butler, Pompton Lakes, Union City, Newark, Franklin Park, Aberdeen and Haddonfield. Ja50a; Ja40a; Ja83a; Ja33a; Ja68a; Ja113a; Ja92a. They include a Federal Express dispatcher, an ordained minister and two pastors, an investment asset manager, a university web services director, a church administrator, a speech therapist who works with special needs children, a non-profit organization administrator, a small business owner, and co-owners of an executive search firm who have alternated being stay-at-home parents. Ja33a; Ja36a; Ja44a; Ja48a; Ja55a; Ja67a; Ja71a; Ja83a; Ja88a; Ja93a; Ja112a; Ja114a.

Most of the plaintiffs are very active in their communities. Individual plaintiffs serve on local zoning and planning boards, sit on the boards of trustees of a community hospital and a YMCA camp, minister to police and fire departments, participate in local business and professional associations and a variety of church activities, and volunteer as school class parents, youth soccer coaches, PTA members, and soup kitchen workers. Ja37a; Ja44a; Ja51a; Ja83a; Ja93a; Ja113a.

Many of the plaintiff couples are raising children together. Cindy Meneghin and Maureen Kilian have two

children: Josh (now age 12) and Sarah (age 11). Ja50a. Sarah and Suyin Lael are the parents of three girls: Zenali (age 8), Tanaj (age 6) and Danica (age 5). Ja67a-68a. Karen and Marcye Nicholson-McFadden have son named Kasey (age 6) and a daughter, Maya (age 2). Ja112a. Alicia Toby and Saundra Heath are grandparents. Ja36a-37a. Many of the plaintiffs also have shared in the care and support of each other's elderly parents and are deeply involved with one another's extended families. Ja41a; Ja50a-51a; Ja68a; Ja84a; Ja89a; Ja121a.

In June of 2002, each of the individual plaintiffs, together with their respective partners, appeared before the officer authorized to issue marriage licenses in the municipality or county in which the couple resided and requested a marriage license. Ja17a-18a; Ja34a; Ja45a-46a; Ja58a-59a; Ja74a-75a; Ja90a; Ja101a; Ja123a-124a. The government officials in each instance refused to grant the couples a license, turning them away solely because they were a same-sex couple. Id. Each couple fulfilled all other New Jersey statutory requirements for the issuance of a marriage license. Id.

Exclusion from marriage has caused plaintiffs substantial harm. For example, Cindy and Maureen as well as Karen and Marcye have had to pay for expensive cross-adoptions of their

children that would not have been necessary had they been married. Ja50a. Karen and Marcye likewise paid four lawyers, a financial planner, and a tax accountant to advise them on how best to protect their family without the safeguards that come with marriage. Ja112a-115a. Alicia and Saundra have not been able to afford a lawyer to draw up documents providing the few protections unmarried couples can secure in that way. Ja37a-38a. Without marriage, they have had higher health insurance and other costs and less disposable income.

Karen and Marcye, as well as Sarah and Suyin, likewise have had to maintain two separate health plans and pay double deductibles that would not have been necessary had they been allowed to wed. Ja114a; Ja73a. The higher expenses Maureen and Cindy have experienced because they could not marry have meant that they could not afford to have one of them stay at home while their children were little, as they believed was best. Ja55a-56a. For Suyin and Sarah, these costs have affected their educational and career choices. Ja73a. And Sarah was not entitled to family leave or family sick days when Suyin needed surgery and support during her recovery. Ja73a-74a.

The plaintiff couples also have suffered non-economic and dignitary harms from being denied the freedom to marry. They experience being relegated by the government to a second-class

status. Ja94a-95a. They repeatedly are forced to describe and explain their relationships and rights, a demeaning ritual. Ja37a; Ja41a-42a; Ja52a; Ja86a-87a; Ja99a.

Without access to marriage, each plaintiff has had to check "single" on forms at doctor's offices and at their children's schools, or attempt to rewrite forms that acknowledge only married or single people. Ja52a-53a; Ja69a-70a; Ja116a-117a. Because plaintiffs cannot communicate their commitment through marriage, their relationships are seen as less worthy, or even of no significance, by many. Ja53a-54a; Ja74a; Ja100a-101a; Ja117a; Ja122a-123a.

Even for those who have arranged some documentary protection, plaintiffs are left to live in constant insecurity about what might happen to them in times of crisis, tragedy, or even celebration. When Diane struggled with treatment for breast cancer, and when Cindy was taken to the emergency room with meningitis, each had to worry about whether the most important person in her life would be treated with the respect given a spouse. Ja49a-50a; Ja58a; Ja94a; Ja98a-99a. When Marcye gave birth to Kasey after a long labor, Karen's role needed to be established over and over again, even in the newborn nursery, when being able to say "we're married" would have averted this. Ja118a.

On a daily basis, plaintiffs experience the insults and consequences of being individuals whose government openly treats them unequally. Ja34a; Ja42a; Ja57a; Ja72a, Ja74a; Ja86a-87a; Ja95a; Ja116a; Ja118a. Dennis and Mark, pastors who have officiated at hundreds of legal marriage ceremonies as agents of the State, suffer the humiliation of signing marriage licenses for other couples while the State will not allow them to get one for themselves. Ja85a. Likewise, when attending others' weddings, plaintiffs invariably feel the sadness and heartache of their own exclusion from marriage. Ja34a; Ja45a; Ja53a-54a.

Plaintiffs who are parents are left to explain and worry about the messages their children are receiving because the government does not allow them to marry. Ja51a-54a; Ja56a; Ja68a-69a; Ja118a; Ja122a. In turn, parents of the plaintiffs attest to the harms their children and grandchildren suffer because the State denies their lesbian and gay children access to legal marriage. Ja62a; Ja77a-78a; Ja81a-82a; Ja106a-107a; Ja126a-127a; Ja129a.

Plaintiffs also feel deeply the loss that other family members have experienced because they cannot marry. Ja117a-118a. One of the most painful sadnesses in Marcye's life is that her parents did not live long enough to see her married, and Maureen wishes her mother could have had the joy and peace

that being part of a wedding ceremony for Maureen and Cindy would have brought her. Ja122a-123a; Ja56a.

Plaintiffs along with most Americans understand marriage as the institution expressing best the commitment and the core values of integrity, community, honor, respect and love that the plaintiff couples share. Ja34a; Ja41a; Ja45a; Ja86a; Ja90a; Ja101. For many the harm also has a spiritual dimension, even though their request is for civil marriage only. Ja49a; Ja57a; Ja64a; Ja86a. The State's refusal to grant them marriage licenses has thwarted plans for their future that they along with most Americans have held since their youth. Ja41a-42a; Ja71a.

ARGUMENT

The trial court entered summary judgment for the State based on undisputed facts; the standard of review is thus de novo. Manalapan Realty, L.P. v. Township of Manalapan, 140 N.J. 366, 378 (1995).

I. PLAINTIFFS' CLAIMS UNDER THE LIBERTY AND EQUALITY GUARANTEES OF THE NEW JERSEY CONSTITUTION MUST BE EVALUATED UNDER THE COURT'S BALANCING TEST IN LIGHT OF THE STATE'S STRONG COMMITMENTS TO INDIVIDUAL FREEDOM AND EQUAL TREATMENT.

The State's refusal to permit plaintiffs to marry their chosen partners violates the liberty and equality guaranteed to all under Article I, paragraph 1 of the New Jersey

Constitution of 1947 ("Article I"):

> 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.]

See Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 332 (2003) ("the expansive language of [Article I] is the source for both . . . fundamental constitutional guarantees"). This opening paragraph of New Jersey's Constitution 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).

In adjudicating both claims for liberty and claims for equality under Article I, this Court has long applied a balancing test. E.g., Sojourner A., supra, 177 N.J. at 333; McCann v. Clerk of Jersey City, 167 N.J. 311, 326 (2001); Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 630 (2000).[3] That test considers (1) the nature of the affected

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[3] While still giving federal precedents their due, this Court rejected the federal "tiered" tests thirty years ago 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." Robinson v. Cahill, 62 N.J. 473, 491-92 (1973). The "inflexibility of the tiered framework prevents a full understanding of the clash between individual and governmental interests." Planned Parenthood, supra, 165 N.J. at 630.

interest, (2) the extent to which the governmental restriction intrudes upon it, and (3) the public need for the restriction. Caviglia v. Royal Tours of America, 178 N.J. 460, 473 (2004); Sojourner A., supra, 177 N.J. at 332-33. "[T]he greater the burden on the underlying right, the more difficult it is to sustain the State's classification." Planned Parenthood, supra, 165 N.J. at 633. See also State v. Saunders, 75 N.J. 200, 226 (1977) (Schreiber, J., concurring) (a "statute directly limiting . . . rights should be carefully scrutinized in light of its legislative purposes.").

II. PLAINTIFFS HAVE EXTREMELY WEIGHTY INTERESTS IN EXERCISING THE FUNDAMENTAL RIGHT TO MARRY THEIR IRREPLACEABLE LOVED ONE, WHICH IS A CENTRAL ASPECT OF PROTECTED LIBERTY GUARANTEED TO ALL PERSONS, AND IN EXERCISING THE FREEDOM TO MARRY ON EQUAL TERMS WITH OTHERS.

A. The Right to Marry is Fundamental for Plaintiffs as It Is for "All Persons"; Plaintiffs Have an Extremely Weighty Interest in Exercising This Protected Liberty Free of Government Interference.

It is beyond dispute that the exercise of personal choice in marriage is a fundamental right central among those shielded by the guarantees of liberty and happiness. "As one of life's most intimate choices, the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution." Greenberg v. Kimmelman, 99 N.J. 552, 572 (1985). See also J.B. v. M.B., 170 N.J. 9, 23-24 (2001); In

re Baby M., 109 N.J. 396, 447 (1988). This Court underscored in Saunders that Article I's guarantee of privacy prohibits the State from interfering in the individual's right to make personal choices about marriage, cautioning that decisions about marriage are central to the "very independent choice . . . at the core of the right to privacy." Saunders, supra, 75 N.J. at 219. "[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." Id.

Safeguarding the intimate choice of one's marital partner against government intrusion is an essential aspect of the ordered liberty our constitutional traditions protect. The decision to marry is "a vital part of life in a free society." Greenberg, 99 N.J. at 570-572. Indeed, the protections of personal liberty and the pursuit of happiness under New Jersey's Constitution are at their zenith in matters "of intimate personal and family concern."[4] Saunders, supra, 75

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[4] See Planned Parenthood, supra, 165 N.J. at 632 ("[W]e 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."); Right to Choose, supra, 91 N.J. at 306 (the "right encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child"); In the Matter of Lee Ann Grady, 85 N.J. 235, 249-50 (1981) ("Grady") (the decision to be sterilized involves "a choice that bears so vitally upon a matter of deep personal

N.J. at 217. The State may not, without overriding need, regiment and limit deeply personal and important parts of its citizens' lives like marital choice. Certainly being forced into an *unmarried* life would represent an intolerable and fundamental deprivation for the great majority of individuals. Yet that is what the State imposes on plaintiffs and other lesbian and gay citizens of New Jersey.

"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." Loving v. Virginia, 388 U.S. 1, 12 (1967). Marriage is likewise sheltered from government interference under federal law because of its deeply personal nature:

> [Marriage] is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

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privacy . . . [and is] considered an integral aspect of the 'natural and unalienable' right of all people to enjoy and pursue their individual well-being and happiness."); Saunders, supra, 75 N.J. at 220 ("liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy"; affirming right to engage in non-marital sexual intimacy without government interference); Matter of Quinlan, 70 N.J. 10, 39-40 (1976) (recognizing right of "personal decision" to refuse life-sustaining medical treatment).

[Griswold v. Connecticut, 381 U.S. 479, 486 (1965).]

Marriage is changed from what it once was, as with the elimination of unequal gender roles for men and women that were strictly enforced, see infra, Section IV(A), but its essence as a shelter for the couple and family remains. As this Court has recognized, "modern marriage is a partnership," Jersey Shore Med. Center-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 147 (1980) ("Baum"), in which two spouses "are entitled to seek their personal happiness according to their own lights," Merenoff v. Merenoff, 76 N.J. 535, 552 (1978). It is a commitment between two individuals who forego "other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical and social, as best they are able." Estate of Roccamonte, 174 N.J. 381, 392-93 (2002).

Appreciating that the right to make personal decisions central to marriage would be hollow if the government dictated one's marriage partner, courts have placed special emphasis on protecting one's free choice of a spouse. E.g., Loving, 388 U.S. at 12 (declaring ban on interracial marriage unconstitutional); Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 958 (Mass. 2003) ("The right to marry means little if it does not include the right to marry the person of one's

choice"); Perez v. Lippold, 198 P.2d 17, 25 (Cal. 1948) (affirming right to choose marriage with one person who is "irreplaceable" and issuing landmark first ruling striking down anti-miscegenation law).

Plaintiffs' interests in marital autonomy are no different than are other people's interests. Indeed, plaintiffs' relationships share the hallmarks of relationships sanctioned with marriage. See Affidavits of Plaintiffs and Family at Ja33a-129a. New Jersey decisional law and public policy acknowledge the profound bonds that connect countless same-sex couples. As Justice Long wrote in V.C. v. M.J.B.:

> Those qualities of family on which society places a premium - its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which justify isolation from outside intrusion) - are merely characteristics of family life * * * unrelated to the particular form a family takes.
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> [V.C. v. M.J.B., 163 N.J. 200, 232 (2000)(Long, J., concurring).][5]

[5] See also Adoption of Two Children by H.N.R., 285 N.J. Super. 1, 11 (App. Div. 1995) (committed lesbian couple of fourteen years and their children "function together as a family"; approving second-parent adoption by non-biological mother); Application for Name Change by Bacharach, 344 N.J. Super. 126, 135 (App. Div. 2001) (approving lesbian's surname change to that of her partner and rejecting claim of fraud). Most recently, in passing the 2004 Domestic Partnership Act, the Legislature acknowledged the "familial relationships" of

These characteristics of family life on which "society places a premium," are shielded from government intrusion by Article I. They are fully shared by and evident in the family lives the plaintiff couples have built together. So long as "liberty . . . is the birthright of every individual," Saunders, supra, 75 N.J. at 220, plaintiffs too are entitled to exercise the fundamental right to marry.

B. The Fundamental Right to Marry That Plaintiffs Seek to Vindicate Cannot Be Refused By Defining It To Exclude Those Historically Denied The Right to Exercise It, or Out of Unfounded "Slippery Slope" Concerns.

1. Plaintiffs are not Seeking a New Right to "Same-Sex Marriage" but the Freedom to Exercise the Existing Right to Marry the Person of Their Choice.

The Appellate Division majority reasoned that the right plaintiffs seek to vindicate is not the fundamental right to marry but a new right to marry a partner of the same sex, which it deemed lacking in historical roots and not fundamental. Lewis, supra, 378 N.J.Super. at 188. This approach loses sight of the liberty interests held in common by those who wish to marry the person of their choice, whether of the same or a different sex. The proper focus is on those

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same-sex couples, whose members support one another's "financial, physical, and emotional health" and make "important material and non-economic contributions . . . to each other." N.J.S.A. 26:8A-1.

liberty interests at issue and not on the group to which the individual advancing those interests belongs.[6]

In Saunders this Court invalidated a centuries-old "fornication" law that criminalized unmarried people for their sexual conduct, holding that it invaded the protected autonomy of individuals to engage in private sexual intimacies without interference of government. Saunders, supra, 75 N.J. at 207, 210 n.4. The Court recognized that the right of sexual privacy, initially protected in cases involving married persons, was equally shared by unmarried individuals.

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[6] The majority below compounded its error by allowing common religious beliefs to influence its view of the scope of the liberty to enter into civil marriage with a chosen partner. The court claimed that the fundamental right to marry could be denied to same-sex couples because "[o]ur leading religions view marriage as a union of men and women recognized by God." Lewis, supra, 378 N.J. Super. at 185. This reasoning would set a dangerous precedent. Anti-miscegenation statutes too were claimed to be ordained by "'Almighty God.'" Loving, supra, 388 U.S. at 3 (quoting Virginia trial court). In contrast, this Court has held that the right of personal autonomy in sexual matters cannot be circumscribed even though particular exercises of that autonomy "may be abhorrent to the morals and deeply held beliefs of many persons." Saunders, supra, 75 N.J. at 220. See also Lawrence v. Texas, 539 U.S. 558, 571 (2003) (referencing longstanding religious and moral condemnation of gay sexual unions, but recognizing "our obligation . . . is to define the liberty of all, not to mandate our own moral code") (citation omitted). Civil marriage should not be confused with religious marriage. Religious groups can refuse any couple's request to be married, just as the Catholic Church teaches should be done for second marriages of divorced persons.

Saunders, supra, 75 N.J. at 215.[7] The Court did not, as it is asked by the State to do here, protect only the liberties of those who historically had been able to exercise them or define the protected exercise of the right by what was acceptable to the majority. Instead the Court viewed important personal decisions regarding sexual privacy in terms common to all individuals, looking at whether the commonly held interests themselves were deeply rooted in history, irrespective of the identities of the people possessing those interests. See also Stanley v. Illinois, 405 U.S. 645 (1972) (State could not rely on a statutory definition of "parent" that excluded unwed fathers, though rooted in common law and legal tradition, to deny fundamental rights guaranteed other parents).

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[7] In a passage cited at length by this Court, the United States Supreme Court explained that the right protected in Griswold could not be narrowly restricted to a subset of individuals rather than all individuals:

> [T]he marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate individual and emotional makeup. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.
>
> [Saunders, supra, 75 N.J. at 215 (quoting Eisenstadt v. Baird, 405 U.S. 438 (1972)).

In contrast, the dissent in Saunders sought to frame the dispositive question as whether there is a constitutional right to "indiscriminate group fornicating by . . . [unmarried] strangers" in a "parked automobile." Id. at 228 (Clifford, J., dissenting). That description of the issue, however, ignored the vital importance of autonomy in matters of private sexual intimacy and improperly shifted the focus to *who* sought to vindicate the liberty interest - namely unmarried individuals - instead of the underlying liberty shared by all.

The majority below wrongly followed the approach of the Saunders dissent. It limited the right to marry to the different-sex couples who have historically been able to exercise it, redefined the right asserted by plaintiffs to one of "same-sex marriage" and ignored that the vital autonomy interests that gave birth to the *true* right at stake, the right to marry, are shared by all.

The approach below makes the Article I promise of individual autonomy to "all persons" ring hollow. Basic to the guarantee of liberty is that minority rights are not subject to majority approval. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Nor is liberty served by coercing conformity or suppressing human difference. "[C]hoices to enter into and maintain certain intimate human

relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984). Lesbian and gay people are sexually attracted to people of the same sex, and denying their right to marry because of that difference serves no worthy purpose. Indeed, this Court has expressed in the strongest terms its "abhorrence" for "ideolog[ies]" that assign "vastly differing value to the lives of human beings because of their innate group characteristics . . . ." Grady, supra, 85 N.J. at 245.

In Grady, this Court recognized that, under the State Constitution, the "right to be sterilized . . . bears so vitally upon a matter of deep personal concern" that it is an integral aspect of an individual's liberty. Id. at 249-50. The Court held that mentally impaired persons have the same right to choose or forego sterilization because "[t]he right to choose among procreation, sterilization and other methods of contraception is an important privacy right of *all* individuals." Id. at 252 (emphasis added). The Court vindicated this fundamental right even though compulsory sterilization laws for mentally impaired persons once were common. Id. at 245 ("Sterilization has a sordid past in this country especially from the viewpoint of the mentally

retarded."). The Court looked not to discriminatory traditions but to the common underlying liberty interests at stake.

Framing a fundamental right so as to continue to exclude people historically denied exercise of their protected liberty would repeat the error made in Bowers v. Hardwick, 478 U.S. 186 (1986), and set right in Lawrence, supra, 539 U.S. 558. The Bowers Court had recast the right at stake in a challenge by a gay man to Georgia's sodomy statute as a claimed "fundamental right" of "homosexual sodomy," 478 U.S. at 191, and then rejected as "facetious" the idea that such a right is "deeply rooted in this Nation's history and tradition." Id. at 194. In setting aside this ruling in Lawrence, the Supreme Court held that its prior constricted framing of the issue in Bowers "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." Lawrence, supra, 539 U.S. at 567. The Court underscored that:

> To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse.
>
> [Id.]

Likewise, the fundamental right at stake here is not "same-sex marriage" any more than the right in Loving, 388 U.S. 1 was the right to "interracial marriage," the right in

Zablocki v. Redhail, 434 U.S. 374 (1978) was the "right of those who fail to support their children to remarry," or the right in Turner v. Safley, 482 U.S. 78 (1987) was the "right to marry as an imprisoned criminal."

In Loving, the United States Supreme Court declared Virginia's statutory ban on marriage between people of different races a violation of the fundamental right to marry and of the guarantee of equal protection. At that time there was no shared understanding of marriage in America that encompassed interracial couples. Anti-miscegenation laws, in place since colonial days, were supported by overwhelming public opinion and case law. See Loving, supra, 388 U.S. at 6; Jones v. Lorenzen, 441 P.2d 986, 989 (Okla. 1965) (upholding anti-miscegenation law since "great weight of authority holds such statutes constitutional"). Yet the Court did not pose the question of "whether or not a fundamental right to interracial marriage" was rooted in history. The Court reasoned that "[t]o deny this fundamental freedom on so unsupportable a basis as the . . . classifications embodied in these statutes . . . is surely to deprive *all* the State's citizens of liberty without due process of law." Loving, supra, 388 U.S. at 12 (emphasis added).[8]

[8] Assertions that Loving is solely an equal protection precedent or that its holdings are limited to racial

In finding plaintiffs not to have a fundamental right, the Appellate Division relied on several decisions from jurisdictions outside New Jersey. Lewis, supra, 378 N.J.Super. at 186 (collecting cases and characterizing other jurisdictions' precedent as concluding that "marriage between members of the same sex has no historical foundation or contemporary societal acceptance and therefore is not constitutionally mandated . . . ."). The decisions upon which the Appellate Division relied mirror its own errors in mis-framing the issue. Neither flawed authority nor a long history of exclusion direct the result here. E.g., Grady, supra, 85 N.J. at 260 ("We are aware that the weight of authority is against us."). Moreover, of course, there are

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restrictions are insupportable. Lewis, supra, 378 N.J.Super. at 191. Loving expressly declared that its holding was independently based on due process because the law's racial restriction limited the exercise of the fundamental right to marry, a right shared by "*all* the State's citizens." Loving, supra, 388 U.S. at 12 (emphasis added). Later, in Zablocki, supra, 434 U.S. 374, the Court called Loving its "leading decision" on "the right to marry," and expressly reiterated that "[a]lthough Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all* individuals." Id. at 383-84 (emphasis added). See also Lawrence, supra, 539 U.S. at 577-78 (drawing on legacy of anti-miscegenation laws and their rejection despite historical roots in affirming liberty interest of lesbian and gay adults to engage in private sexual intimacy); Dale v. Boy Scouts of America, 160 N.J. 562, 650 (1999) (Handler, J., concurring) (noting strong parallel between anti-miscegenation laws and laws prohibiting intimate relationships of gay people).

many courts outside New Jersey that have struck down barriers to committed same-sex couples choosing to marry.[9]

In any event, however, the liberties at stake in the right of every adult to choose whom to marry without intervention of government are closely guarded in New Jersey. The private and personal aspects of marital freedom are deeply rooted in history and tradition, even though the legal institution of marriage and attendant laws have evolved considerably over time. As the dissent below understood, the obligation here is to protect for a minority a right and liberty long denied and perhaps not earlier envisioned. Lewis, supra, 378 N.J.Super. at 207. Indeed, "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

[9] See Goodridge, supra, 798 N.E.2d 941; In re Coordination Proceeding, No. 4365, 2005 WL 583129 (Cal.Super. Mar. 14, 2005), appeal docketed, Judicial Council Coordination Proceeding No. 4365 (Cal. Ct. App. June 15, 2005); Hernandez v. Robles, 794 N.Y.S.2d 579 (Sup. Ct. N.Y. Cty. 2005), appeal docketed, No. 103434/2004 (N.Y. App. Div. Feb. 8, 2005); Castle v. Washington, No. 04-2-00614-4, 2004 WL 1985215 (Wash.Super. Sep. 7, 2004), appeal docketed, No. 75956-1 (Wash. Sup. Ct. Sept. 10, 2004), Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash.Super. August 4, 2004), appeal docketed, No. 75934-1 (Wash. Sup. Ct. August 31, 2004). See also Catholic Civil Rights League v. Hendricks, 2004 CarswellQue 1927 (2004); Halpern v. Toronto (City), 2003 CarswellOnt 2159 (2003); EGALE Canada Inc. v. Canada (Attorney Gen.), 2003 CarswellBC 1006 (2003).

the War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 366-67 (1994).[10]

The core purpose of marriage - to provide shelter and stability for two committed people and the family they form - has remained constant over time, and is as vital to plaintiffs as to other citizens. Plaintiffs cannot be excluded from the exercise of this right with their chosen life partners simply because of historical resistance to the idea that marriage should embrace committed relationships forged between people of the same sex. As Justice Kennedy put it in Lawrence:

> 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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> [Lawrence, supra, 539 U.S. at 578-79.] [11]

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[10] The dissent below correctly observed that "[h]istory should be considered a guide, not a harness, to recognition of constitutional rights, and patterns of the past cannot justify contemporary violations of constitutional guarantees." Lewis, supra, 378 N.J.Super. at 206. "'History and tradition are the starting point but not in all cases the ending point'" of a fundamental rights analysis. Lawrence, supra, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833 (1998)).

[11] To be sure, Lawrence did not present or determine whether excluding same-sex couples from marriage violates the federal Constitution or can be justified. Yet the import of Lawrence in *defining the relevant liberty interest* under federal due process analysis is unmistakable: fundamental liberties are

2. The Majority Below Erroneously Sought to Justify Denying Same-sex Couples the Right to Marry Based on Timeworn Alarms About Polygamy.

The majority and concurrence below relied on the "slippery slope" argument that, if same-sex couples are allowed to exercise their right to marry, the door will be open for polygamy as well. Lewis, supra, 378 N.J. Super. at 187-88, 199. Arguments like this have been raised time and again to distract courts from claims by minorities to fundamental rights now recognized as firmly protected by constitutional guarantees.[12] Resolution of this case does not require the Court to reach any questions relating to the State's ban on polygamy,[13] nor would a ruling for plaintiffs effectively lift that ban.

Were a claim for polygamy ever actually presented, it would face likely obstacles at every juncture of the New

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guaranteed to all and may not be "defined" in group-based terms to exclude a class of people from their shelter.

[12] E.g., Perez, supra, 198 P.2d at 46 (Shenk, J., dissenting) (comparing ban on interracial marriage to bans on incest, bigamy and polygamy); Peter Irons & Stephanie Guitton, eds., May It Please the Court 282-83 (1993) (quoting transcript of Virginia Attorney General's oral argument in Loving that the "prohibition of interracial marriage . . . stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage").

[13] This Court has explained that "[e]ach case must be considered and evaluated on its own merits," In re Kallen, 92 N.J. 14, 27 (1983), and that constitutional questions not "necessary to the disposition of the litigation" should not be reached, O'Keefe v. Passaic Valley Water Comm'n, 132 N.J. 234, 240 (1993).

Jersey balancing test that are wholly absent here. In this case the plaintiffs challenge the government's interference with their profoundly important decision to commit to the one person of their choice by entering into the legal system's unique and constitutionally protected relationship of "bilateral loyalty," Griswold, 391 U.S. at 486, one with "reciprocal rights" shared between two people, Maynard v. Hill, 125 U.S. 190, 211-212 (1888). Whatever interests an individual may have in entering into a polygamous relationship, they are not grounded in the bilateral, reciprocal relationship of marriage that plaintiffs seek. A person's interests in polygamous marriage likely differ in key respects from those of someone who simply wishes to marry the one person of his or her choice. Nor would a polygamist's interests in sharing a life with multiple spouses necessarily trigger the same concerns about privacy and individual autonomy present here or be entitled to the same degree of protection from government intrusion.

In addition, would-be polygamists can still marry someone they love. The *extent* of the intrusion caused by restricting the *number* of individuals a person may marry to one person, is far less than the intrusion here, which restricts that number to *zero*. See infra, Section II(C)(2).

The public needs likely to be advanced for precluding polygamy also would be vastly different from those asserted in this case. Polygamy raises a host of issues concerning the rights and interests of the multiple spouses, and of children born into such families, triggering the consistent strand of due process law that accounts for significant competing interests or involvement of third parties. E.g., Moriarty v. Bradt, 177 N.J. 84, 115 (2003) (affirming that fundamental right to parental autonomy could be intruded upon to serve countervailing best interests of the child). For example, which of multiple spouses would have decision-making authority if one spouse became incapacitated? How would custody, visitation and child support issues be handled? And which of multiple spouses would inherit if one dies intestate? Allowing more than two people to be married to one another would require a complete restructuring of the rules of civil marriage, raising potentially compelling government concerns.[14]

In contrast, permitting same-sex couples to marry requires nothing more than construing the marriage eligibility

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[14] E.g., Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985) (government justified in prohibiting polygamy in part because state "has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage.").

requirements to be gender neutral, akin to what was ordered in other cases eliminating discriminatory treatment on the basis of the sex of marital partners. E.g., Tomarchio v. Township of Greenwich, 75 N.J. 62, 73 (1977). In short, alarms about polygamy should not distract from the important questions raised by this case, nor will vindication of plaintiffs' rights resolve the hypothetical claims that may or may not someday be raised by polygamists.

C. Whether or Not Labeled Fundamental, Plaintiffs' Interests in Being Able to Marry an Irreplaceable Partner on Equal Terms With Others are Extremely Weighty and Constitutionally Guaranteed.

1. The Equality Guarantee in Article I Protects Plaintiffs Regardless of Whether the Right at Stake is Labeled Fundamental.

Whether the nature of plaintiffs' profound interest in choosing to marry the person each loves is labeled "fundamental" or not, Article I still strongly protects plaintiffs' interests, including their claim to equal treatment under law. The State here fences plaintiffs out of one of society's most vital institutions. Plaintiffs' interest in marrying their chosen partners is explained by the very same array of reasons that heterosexuals wish to marry, and is one of the most weighty interests imaginable in our society. It is unthinkable that the government could tell the heterosexual majority they cannot marry the ones they love.

That New Jersey tells lesbian and gay people they cannot marry their loved ones likewise should be deplored. As said by Justice Scalia, 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. Director, Missouri Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). New Jersey denies plaintiffs equal protection of the laws by denying them the first-class citizenship and tangible and intangible benefits bestowed on those who marry.

Article 1 guarantees the right to equal treatment from government. Sojourner A., supra, 177 N.J. at 332. The constitutional guarantee of equality shelters individuals from a "different evil" than that addressed by the guarantee of liberty, which prohibits undue government intrusion into protected areas of personal liberty. Greenberg, supra, 99 N.J. at 562. The guarantee of equality guards "against injustice and against the unequal treatment of those who should be treated alike." Id. at 568. The equality guarantee prohibits the State from picking and choosing who benefits from laws without a justification that outweighs the harms to those who are excluded - the "legislature must write evenhandedly." Id. at 562; see also Caviglia, 178 N.J. at 472.

Article I's equality promise safeguards New Jersey citizens from arbitrary or invidious government discrimination, and does so whether or not fundamental rights are not at stake. E.g., Baum, supra, 84 N.J. at 147-48 (gender-based spousal support rule unconstitutionally discriminates against husbands); Washington Nat'l Ins. Co. v. Bd. of Review, 1 N.J. 545, 552 (1949)(statute entitling some but not all insurance agents to unemployment compensation was unconstitutional "arbitrary discrimination"); Forstrom v. Byrne, 341 N.J. Super. 45, 48-49 (App. Div. 2001) (right to equal protection was violated by statute granting services to private but not home-schooled children).

The majority below wrongly made plaintiffs' distinct and vital constitutional right to equality a victim of its conclusion that plaintiffs have no fundamental right to marry. Lewis, supra, 378 N.J.Super. at 189-90. Under this deeply flawed reasoning, the State is free to make invidious and arbitrary distinctions among the people of New Jersey so long as it stops short of impinging on a fundamental right. This, however, is simply not the law. E.g., 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 does, it "must proceed in a neutral manner."); WHS Realty Co. v. Town of Morristown, 323 N.J.

Super. 553, 562-63 (App. Div. 1999) ("A municipality is not mandated to provide for municipal garbage removal . . . . However, once the service is provided," it must be without unjustified discrimination). Indeed, if affirmed, the lower court's holding not only effectively would write the *separate* guarantee of equality out of the New Jersey Constitution, but also would render the State's equality guarantee far less protective than the federal, notwithstanding this Court's frequent explanations that Article I instead provides protection independent of and "comparable" or "superior" to that guaranteed by the federal right. Baum, supra, 84 N.J. at 148; see also Planned Parenthood, supra, 165 N.J. at 633; Saunders, supra, 75 N.J. at 217.[15]

Even the most deferential federal rational basis review still requires that mundane economic legislation classify in a manner that is rationally related to a legitimate state interest. Heller v. Doe, 509 U.S. 312, 319-20 (1993). Federal rational basis review has been sufficient to strike laws singling out citizens based on antipathy toward who they

[15] In recent years a number of courts applying their own state's equality guarantees have concluded that restricting civil marriage to different-sex couples fails even rational review. See, e.g., Goodridge, supra, 798 N.E.2d at 961; Hernandez, supra, 794 N.Y.S.2d at 597-600, 604-05; In re Coordination Proceeding, supra, 2005 WL 583129 *11; Andersen, supra, 2004 WL 1738447 *11. See also Baker v. Vermont, 744 A.2d 864, 886 (1999).

are.[16] Moreover, "a more searching form of rational basis review" has been applied by the federal courts to laws "inhibiting personal relationships." Lawrence, supra, 539 U.S. at 580 (O'Connor, J., concurring). It would thus be a dramatic departure for this Court to hold that New Jersey's guarantee of equality, and the balancing test that applies it, are less protective than federal law and apply only when fundamental rights are denied. This Court should not accept the invitation to do so.

2. Plaintiffs, Like "All Persons", Have Extremely Weighty Interests in Choosing Whether and Whom to Marry Upon Which the State Intrudes.

Plaintiffs' affirmative interests in sharing the freedom to decide for themselves whether and whom to marry, and in placing themselves and their families under the institution's broad shelter, are extremely weighty for them as they are for others who already exercise the right. The social, financial and legal significance of the institution of marriage is difficult to overstate. "For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty

[16] Romer v. Evans, 517 U.S. 620 (1996) (invalidating state constitutional amendment that targeted lesbian and gay citizens for exclusion from protective laws); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (equal protection violated by food stamp law's discrimination against unrelated individuals residing together).

legal, financial, and social obligations." Goodridge, supra, 798 N.E.2d at 948. "Their marriage takes them beyond independence to interdependence, to a mutual sharing of aspirations, earnings and assets." Greenberg, supra, 99 N.J. at 575.

Moreover, the burden on the personal and social dignity of plaintiffs and their families that is imposed by exclusion from marriage has profound, deleterious consequences. Our legal tradition attaches significant weight to the practical and social impact of differential treatment. "The sad truth is that excluded groups and individuals have been prevented from full participation in the social, economic, and political life of our country. The human price of this bigotry has been enormous." Dale, supra, 160 N.J. at 619; see also Sweatt v. Painter, 339 U.S. 629, 634 (1950) (a separate institution opened for black law students could not compare to the prestige and practical benefits of attending the existing law school for white students); United States v. Virginia ("VMI"), 518 U.S. 515 (1996) (same as to separate military school for women). Similarly, the marital exclusion here deeply intrudes upon plaintiffs' liberty and autonomy as supposedly equal members of a free society. It relegates them to the scarring daily experience of second-class citizenship. The State does not begin to justify these infringements, nor could it.

a. Plaintiffs and their children have substantial tangible interests in having access to the comprehensive legal structure that shelters married families; the State's domestic partner law does not offer comparable protections.

Marriage is the exclusive gateway to a comprehensive legal structure that helps build and support families, and privileges married couples as a financial and legal unit. By excluding plaintiffs from each of these laws (of which there are hundreds) by virtue of its definition of who may marry, the State deepens the harmful impact of its discriminatory treatment of plaintiffs while reinforcing the singular status of marriage in New Jersey. The broad matrix of interlocking rights and responsibilities accessed only through civil marriage covers virtually every dimension of a couple's life and provides an unparalleled level of support for the couple and their children. Indeed, the institution of civil marriage "touch[es] nearly every aspect of life and death." Goodridge, supra, 798 N.E.2d at 955.

New Jersey's Domestic Partnership Act ("DPA"), effective in July 2004, provides important but relatively few benefits and obligations for committed same-sex couples as compared to marriage. N.J.S.A. 26:8A-1. Its provisions include protection against some forms of discrimination, including in medical contexts; rights of hospital visitation; joint tax

filing status; and health and pension benefits for state employees. Id.

Among the many other remaining disparities vis-à-vis marital benefits and obligations not provided, the DPA fails to afford:

1) Laws sheltering the spouse in case of accident or death: comprehensive survivorship and intestacy rights, N.J.S.A. 3B:5-3, 5-4; standing to file a wrongful death suit when one's spouse is killed, N.J.S.A. 2A:31-4; entitlement to an elective share of a spouse's estate, N.J.S.A. 3B:8-1; worker's compensation and disability benefits, and owed wages to surviving spouses, N.J.S.A. 34:11-4.5, 34:15-13f, 43:21-42(b); compensation for spouses of homicide victims, N.J.S.A. 52:4B-2, 10;
2) Other laws providing economic supports for married couples and their children: alimony, maintenance, custody, and division of assets in divorce, N.J.S.A. 2A:34-2, 23, 23.1; tuition credits and scholarships for spouses of those in public service, N.J.S.A. 18A:62-25, 71-78.1, 71B-23; tax deductions for spousal medical expenses, N.J.S.A. 54A:1-2, 54A:3-3; N.J.S.A. 54:34-1, N.J.A.C. 18:26-5.11;
3) Laws defining access to spousal protections: The marriage law limits access to public and private sector

safety nets which turn on married status (e.g., coverage under family health insurance plans; family medical leave to care for a spouse).

Thus, the lack of access to rights and obligations tied to marriage has had serious practical consequences for plaintiffs in areas such as childrearing, parentage and many others. Ja33a-129a. To take but one example – access to family health insurance through spousal status – plaintiffs' families face far higher costs to meet their insurance needs. Ja37a ("In addition to paying two deductibles, we pay for what my health plan would cover, if Alicia could be on it."). Lack of spousal health insurance frequently means both partners have to work to obtain health insurance for the whole family and thus have to relinquish goals such as having a stay-at-home parent until children are in school. Ja55a-56a. These exclusions greatly limit family security and financial and employment options. Ja73a. Neither costly legal documents like powers of attorney nor wills "stacked up high," nor domestic partner status, compare with what being able to say "we're married" accomplishes in just a single utterance. Ja94a.

In blocking plaintiffs' access to civil marriage, the State "forbid[s]" its lesbian and gay citizens "the safeguards that others enjoy or may seek without constraint. These are

protections taken for granted by most people either because they already have them or do not need them." Romer v. Evans, 517 U.S. 620, 631 (1996). The far-reaching practical impact of the State's discrimination carries heavy weight in the balancing test.

b. Plaintiffs and their families have substantial interests in the dignitary and intangible benefits of marriage.

Equality encompasses significant intangible as well as tangible elements. The State bars plaintiffs from American society's accepted touchstone of a relationship's dignity, stability and worth, leaving their relationships devalued or invisible.

Marriage is widely understood in our culture as the most compelling and definitive expression of love and commitment between two adults. Ja34a. It is a means to express "personal dedication" and affirm one's commitment to support the other and the relationship, in the classic vow, "in sickness and in health, 'til death do us part.'" Turner, supra, 482 U.S. at 95-96. Marriage signifies to the couple and outsiders that each spouse will give the maximum effort and sacrifice to support the other and to succeed in the relationship. E.g., Ja78a ("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.").

Marriage also uniquely communicates to the world a message about individual identity and values. Goodridge, supra, 798 N.E.2d at 955 ("the decision whether and whom to marry is among life's momentous acts of self-definition."). E.g., Ja64a; Ja45a. Marriages 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." Ja77a.

For many, marriage is a central part of the American dream, key to "settling down" into responsible adulthood in our society. E.g., Ja49a ("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."); Ja113a. That core dream is routinely instilled in children by their parents; in return, a piece of the classic dream is to give parents the joy and peace of mind of seeing their children married and cared for by another. E.g., Ja81-82a. Children who grow up to identify as gay or lesbian find the dream of marriage shattered. And parents realize with sadness that it will not be an option for their lesbian and gay children, and see the "message of unworthiness to the

young people of this state that is terribly destructive." Ja57a-58a.

The expression of one's values through marriage can be particularly important for lesbian and gay parents who want to be role models for their children and impart their belief in the importance of marriage and the dignity of their relationship. E.g., Ja72a ("I feel terrible every time I . . . have to say that I am single in front of my children."); Ja52a-54a ("We are getting this constant message that our family doesn't count, or isn't legitimate, and that is insulting and very demeaning to us."); Ja123a ("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."); Ja118a ("Living with dignity and respect are all the more important now that we have children. We have the responsibility to instill self-respect in our son and daughter.").

Most fundamentally, plaintiffs, their children and families, suffer from being deemed inferior, unworthy, and second-class under the State's exclusionary, two-track approach. By denying them access to marriage, the State of New Jersey places individuals in same-sex relationships in a separate and inferior legal class. The DPA reinforces this

inferior status.[17] N.J.S.A. 26:8A-1. Indeed, the consequences of thus labeling a group as inferior are far more destructive to families and children when, as here, it has the sanction of law. Brown v. Bd. of Educ., 347 U.S. 483, 493-94 (1954) (racial segregation of children in schools "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."). The State has sent a message to the rest of society through its marital discrimination that invites private persons to deny plaintiffs' full dignity and equality. Lawrence, supra, 539 U.S. at 575 (state laws banning lesbian and gay sexual intimacy were "an invitation to subject homosexual persons to discrimination both in the public and the private spheres."). As the Massachusetts Supreme Judicial Court explained in response to the State Senate's attempt to offer same-sex couples civil unions instead of marriage:

> [T]he use of the word "marriage" by "spouses" who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and

[17] Further, to obtain the inferior status of a domestic partner, applicants must meet a higher burden than required for the privileged status of a marriage. Any two people of different sexes - be they long-term partners or only recently acquainted - can quickly and readily obtain a marriage license. Same-sex domestic partners, in contrast, must produce evidence of a commitment, such as joint deeds or bank accounts, or beneficiary status under a will. N.J.S.A. 26:8A-4(b)(1). The requirement to prove one's commitment to the government's satisfaction is yet another intrusion, adding to the message of inferiority.

> "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex . . . couples to second-class status. . . . The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.
>
> [In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (2004).]

Plaintiffs have strong interests in being freed of the stigma of being defined by the State as "unmarriageable" because they are lesbian and gay and are not drawn to different-sex partners. Constitutional doctrine "neither knows nor tolerates classes among citizens.'" Romer, supra, 517 U.S. at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting)). The State's intrusion on plaintiffs' substantial dignitary, social, tangible and intangible interests "works a deep and scarring hardship on a very real segment of the community," Goodridge, supra, 798 N.E.2d at 968, and should be accorded maximum weight in the balancing test.

III. THE STATE'S DENIAL OF ACCESS TO THE RIGHT TO MARRY IS COMPLETE, NOT MERELY INCIDENTAL, INCREASING THE STATE'S BURDEN TO JUSTIFY ITS BAR.

A central component of the second balancing test factor, "the extent to which the governmental restriction intrudes upon [the affected right]," Planned Parenthood, supra, 165 N.J. at 630, turns on whether the individual's exercise of the right is incidentally or more directly infringed. "The

greater the burden on the underlying right, the more difficult it is to sustain the State's classification." Id. at 633. The State has not merely placed a reasonable condition on the freedom to marry but has prevented its exercise altogether for plaintiffs and others drawn to same-sex partners. Cf. Greenberg, supra, 99 N.J. at 566 (noting favorably the distinction in federal doctrine between laws that place no direct obstacle in the path of persons desiring to get married and laws that make the choice of marriage impossible). Accordingly, the State has an elevated burden to demonstrate a sufficient public need for this deprivation.

It cannot be said that having an "equal right to marry a *different*-sex partner" means there is no deprivation of plaintiffs' right to marry. The Court has seen through such arguments in the past and recognized that the proper inquiry is whether the State imposes a functional bar on meaningful exercise of a right by some citizens. Planned Parenthood, supra, 165 N.J. at 635-36 (parental notification requirement operates as "a functional bar" on minor's right to make her own reproductive decisions, which judicial waiver provisions do not overcome); Greenberg, 99 N.J. at 566 (law tying right to marry to paying child support had effect of "prevent[ing] absolutely some persons from marrying," and making marriages

"'practically impossible'") (quoting Zablocki, supra, 434 U.S. 374).

The Appellate Division mistakenly reasoned that plaintiffs have "significant" legal rights, such as engaging in sexual relations, adopting children, and registering as domestic partners - and the option to bring constitutional challenges as to other rights currently tied to marriage - that immunize the marriage exclusion from judicial rather than legislative reversal. Lewis, supra, 378 N.J.Super. at 194. The United States Supreme Court persuasively rejected such arguments in Stanley, supra, 405 U.S. at 646. The State argued there that its refusal to regard an unwed biological father as a parent was mitigated by the availability of certain key rights available without regard to parenthood. The Court gave a stinging rebuke:

> [W]e reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian . . . [T]his suggestion overlooks the fact that legal custody is not parenthood or adoption. . . . [E]ven if Stanley were a mere step away from 'custody and control,' to give an unwed father only 'custody and control' would still be to leave him seriously prejudiced by reason of his status.
>
> [Id.]

Likewise, the rights and alternative legal status offered to unmarried same-sex couples in New Jersey are but a "'pale shadow'" of what the State offers through marriage. VMI, 518

U.S. at 553 (citation omitted). Their provision does not change the fact that the State has erected an insurmountable barrier to plaintiffs' exercise of their freedom to marry that demands an elevated justification.

IV. THE PURPORTED PUBLIC NEEDS FOR THE STATE'S INTRUSION DO NOT OVERCOME THE INTERESTS OF PLAINTIFFS IN SHEDDING THE DEPRIVATIONS OF EXCLUSION FROM MARRIAGE AND IN HAVING FULL AND EQUAL DIGNITY AND AUTONOMY.

The last stage in the balancing test demands consideration of the asserted public needs for the State's discrimination in marriage. Sojourner A., supra, 177 N.J. at 333. The State advanced two interests below: 1) preserving a traditional "definition" of marriage as between a man and a woman, and 2) maintaining uniformity with similar restrictions on marriage adhered to by other States. These rationales express nothing more than a continuing majoritarian desire to discriminate as an end in itself, and carry no weight in the balance. The majority below sidestepped these dubious explanations and supplied its own hypothesis - one disavowed by the State itself - that barring same-sex couples and their families from the protections of marriage somehow advances an interest in encouraging heterosexual procreation to occur within marriage. But this "asserted need" must be "capable of realization" through the classification employed in the marriage laws. Planned Parenthood, supra, 165 N.J. at 639;

WHS Realty Co., supra, 323 N.J. Super. at 570-71 (classification that excludes apartment dwellers from garbage collection service fails to serve legitimate legislative objective). The asserted government interest in channeling heterosexual procreation simply is not advanced by denying gay people the right to marry.

The government bears a daunting burden to justify its total intrusion on plaintiffs' right to marry. As set forth above, plaintiffs' interests in exercising that right are extremely weighty. Only the most compelling government interest, not found here, could justify such an intrusion on plaintiffs' liberty and autonomy. E.g., Saunders, supra, 75 N.J. at 217. None of the purported government interests is entitled to weight; much less do they outweigh the injury to plaintiffs from being deprived of the right to marry.

A. The State's Argument That the Marital Exclusion Should Remain the Law Because it is Familiar and Comfortable to the Majority Conflicts With Settled Constitutional Precepts.

The State argued below that it has a substantial interest in preserving marriage as a union of a male and a female so as not to "disrupt long-settled expectations and deeply-held beliefs of the vast majority of New Jersey's citizens." Brief and Appendix of Defendants-Respondents dated September 2 ("Def. App. Div. Br."), 2004, at 42. A call for adherence to

a traditional definition of marriage because people are used to it or may feel strongly about it does not address the definition's constitutionality, only its popularity among those who fit within its reach. The State thus offers a tautology, not a public need. But this Court has made clear that 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." Saunders, supra, 75 N.J. at 219.[18] Such considerations sustained neither prohibitions on interracial marriage, Loving, supra, 388 U.S. 1, nor bans on gay sexual intimacy, Lawrence, supra, 539 U.S. 558, and have no greater merit here.

Tradition and public sentiment have been similarly insufficient to justify earlier discriminatory laws requiring adherence to strict gender roles within and outside of

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[18] A State interest in tradition grounded in lingering private disapproval of homosexuality would provide an illegitimate basis for lawmaking. Palmore v. Sidoti, 466 U.S. 429, 433 (1984)("private bias may be outside the reach of the law but the law cannot directly or indirectly give it effect"); Romer, supra, 517 U.S. 620. Indeed, as Justice Scalia has made clear, an asserted public need to "'preserv[e] the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." Lawrence, supra, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original). See also Dale, supra, 160 N.J. at 620 (reviewing a statutory claim and rejecting "discrimination based on 'archaic' and 'stereotypical notions' about homosexuals") (internal quotation omitted).

marriage. Throughout "volumes of history," VMI, supra, 518 U.S. at 531, the legal regime of "coverture"[19] that confined married women to the home under the legal dominion of their husbands was justified by assumptions about a fixed natural order dictating gender roles. See also Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (prevailing assumptions, based on "the law of the Creator" and "nature herself," about the "wide difference in the respective spheres and destinies of man and woman used to justify exclusion of women from law practice"). Today the State seeks to defend the gender-role assumption that women should only marry men and men should only marry women by invoking similar majoritarian arguments based on traditionally accepted stereotypes, but this must be rejected.

Imposing gender role expectations once thought to be the "essence" of marriage has come to be understood as contrary to constitutional guarantees of liberty and equality. Among many other examples, the Court has declared unconstitutional gender-based rules premised on generalizations that women

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[19] See William Blackstone, Commentaries on the Laws of England (1765), 442 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything . . . ."); Mary Story v. A.D. Baird, 14 N.J.L. 262 (1834).

should depend financially on men, Tomarchio, supra, 75 N.J. at 75 (worker's compensation); Baum, supra, 84 N.J. at 147 (liability for necessary expenses of wife), and has stricken "marital rape" laws founded on the assumption that a wife must submit to her husband's sexual demands. See State v. Smith, 85 N.J. 193 (1981).

The same sort of impermissible stereotypes are at play when it is held that a man must "take" only a woman in marriage, and a woman only a man, so that each will play their expected gender roles in their separate marital spheres. With the glaring exception of legislated discrimination against same-sex couples in marriage, New Jersey's statutory and common law scheme for civil marriage is now free of vestiges of gender discrimination. Gubernat v. Deremer, 140 N.J. 120, 137 (1995) ("The principle of gender neutrality is evident in the laws as administered by the courts of New Jersey and throughout the legal system.") (quoting K.K. v. G., 219 N.J.Super. 334 (Ch.Div.1987)). By claiming that sex roles must instead be reified in marriage, the State urges the Court to take a giant step backwards.

The Court's caution against limitations on personal freedoms based on what is familiar and accepted by the majority, including the supposed "'constitution of the family organization . . . founded in the divine ordinance, as well as

in the nature of things,'" Dale, supra, 160 N.J. at 618 (quoting Bradwell, supra, 83 U.S. at 141), has never been more pertinent. The suggestion that the freedom to marry is protected only if each individual seeking to exercise it adheres to gender-based expectations of partner choice held by the majority necessarily excludes lesbian and gay people and ignores more than 150 years of legal and social history eliminating sex-based roles in marriage.

B. The New Jersey Constitution Places No Value on Remaining Consistent With Discriminatory Laws in Other Jurisdictions; There is No Such Public Need.

The State also maintains that the marriage exclusion advances a purported public need to maintain "uniformity" with other States' limitation of marriage to different-sex couples. Def. App. Div. Br. at 43. This argument should be dismissed out of hand. There is no authority that justifies subverting rights guaranteed under the New Jersey Constitution in deference to the discriminatory laws of other states. Indeed, it would be the antithesis of federalism for a state to thus bind itself instead of asserting its independence. As the Massachusetts high court recently held:

> [W]e would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual

> rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere.
>
> [In re Opinions of the Justices to the Senate, 802 N.E. 2d 565, 571 (Mass. 2004).]

There is an entire body of law – the "choice of laws" doctrine – that assumes under principles of federalism that states will *not* be uniform in their laws. Conventional choice of law and comity principles are applied routinely in every state to address non-uniformity in many aspects of domestic relations, including marriage validity. These familiar tools, not the deprivation of the constitutional rights of a minority, offer the answer to any purported concern about uniformity with other states.

C. Excluding Same-Sex Couples From Marriage Does Not Advance Any Public Need to Promote Heterosexual Procreation Within Marriage, As the State Has Agreed.

The concurrence below contended that marriage began and still exists to serve a public need "to control or ameliorate" the "consequences" of heterosexual procreation, and that therefore gay people may be excluded from it. Lewis, supra, 378 N.J.Super. at 197. But the methodology of the concurring opinion (as well as of the majority) is not consistent with

this Court's balancing test.[20] First, of course, the concurrence does not come to grips with the weight of *plaintiffs'* interests in marital freedom. But it also does not explain how depriving same-sex couples and their children of the right to marry, and of the security and status that flow from marriage, possibly could advance an interest in encouraging heterosexuals to procreate within marriage.

For good reason the State "disclaims reliance upon promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex." Lewis, supra, 378 N.J.Super. at 185 n.2. It is well-settled in New Jersey that marriage is not conditioned on the capacity or intention to procreate. There are many childless marriages. "Health and happiness," not "the begetting of children," is the "touchstone" of marriage. T. v. M., 100 N.J. Super. 530, 538 (N.J. Super. 1968) (otherwise "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."). See also M.T. v. J.T., 140 N.J. Super. 77 (App. Div. 1976) (marriage was valid even though

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[20] The dissent below correctly explained that the purported government interests do not even pass muster under an analysis akin to the federal rational basis test. Lewis, supra, 378 N.J.Super. at 219.

wife had no uterus and thus was incapable of procreation); Lewis, supra, 378 N.J. Super. at 212 (Collester, J., dissenting). As the Lawrence dissenters observed, "encouragement of procreation" could not "possibly" be a justification for denying same-sex couples marriage, "since the sterile and the elderly are allowed to marry." 539 U.S. at 605 (Scalia, J., dissenting).

Moreover, it is inconceivable that heterosexuals' procreative decisions will be influenced by whether gay friends and neighbors have the right to marry. Further, the interest in having children reared in marital families is not exclusive to heterosexuals. "[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws." Goodridge, supra, 798 N.E.2d at 963. Thousands of children being raised in New Jersey by same-sex couples, plaintiffs included, share this interest in being part of a married family.[21] Barring same-sex couples from marriage undermines the State's interest in serving *those*

[21] Of the more than 16,000 New Jersey couples who identified as same-sex households in the 2000 Census, Tavia Simmons and Martin O'Connell, U.S. Census Bureau, Married-Couple and Unmarried Partner Households: 2000, at 4 (Feb. 2003), nearly 5,000 reported raising children in the home. Id. at 4,9. Even this number of same-sex households likely was undercounted. Ronald Alsop, As Same-Sex Households Grow More Mainstream, Business Takes Notice, Wall St. J., Aug. 8, 2001, at B4.

New Jersey children without in any way advancing the purported goal of directing heterosexuals into marriage, and thus this asserted need cannot be given serious weight. Planned Parenthood, supra, 165 N.J. at 639 (the asserted purpose must be "capable of realization."). The New Jersey Constitution requires much more than this to counterbalance plaintiffs' interests in marriage.

* * *

The profound interests underlying the decision to marry the person of one's choice are extremely weighty. The State's intrusion on these interests is complete. Plaintiffs and their families are denied the significant tangible and intangible supports of marriage freely given to others, blocked from participation in the most profound civic ritual honoring commitment and family values, and labeled with an inferior status. Measures like the DPA cannot come close to offering what civil marriage confers legally and socially in our country.

The asserted public needs on the opposite side of the scale carry scant weight and cannot justify the wholesale intrusion on plaintiffs' rights at issue here. There is absolutely no harm to the public from honoring the freedom to marry for committed same-sex couples. The balancing test thus

requires a ruling for plaintiffs under the guarantees of equality and liberty in the New Jersey Constitution.

V. THE APPROPRIATE REMEDY IS FOR THE COURT TO CONSTRUE NEW JERSEY LAW TO ALLOW SAME-SEX COUPLES EQUAL ACCESS TO MARRIAGE.

New Jersey's courts are vested with the remedial power to save an unconstitutional law "if it is reasonably susceptible to a constitutional interpretation." Right to Choose, supra, 91 N.J. at 311. Such an attempt is appropriate if "the Legislature would want the statute to survive with appropriate modifications rather than succumb to constitutional infirmities." Id. Here, no one seeks an end to marriage. This is unthinkable to plaintiffs, who sorely appreciate how "vital" marriage is to "life in free society." Greenberg, supra, 99 N.J. at 570-72. Undoubtedly the Legislature would deem it unthinkable as well.

It is an easy matter to correct the constitutional infirmity in the relevant marriage statutes by ordering them to be read in gender-neutral terms and eliminating restrictions based on the sexes of the partners. The Court followed a similar approach in Tomarchio, supra, 75 N.J. at 73, construing the statutory scheme for workers' compensation to apply without regard to the claimant's sex. Applying this simple remedy here provides plaintiffs with equal marriage rights, the only remedy consistent with the Court's duty to

enforce the rights guaranteed to all persons under the New Jersey Constitution. The very purpose of constitutional guarantees is 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.
>
> [Barnette, supra, 319 U.S. at 638.]

This Court, as the "the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility." Robinson v. Cahill, 69 N.J. 133, 154 (1975).

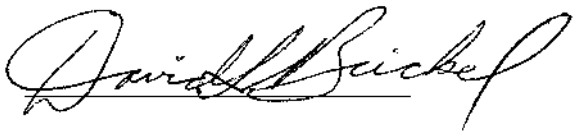
Accordingly, the Court should reverse and remand for entry of summary judgment granting plaintiffs' claim for relief. New Jersey's laws concerning marital rights should be read as neutral with regard to the sex of the marital partners, and plaintiffs and other same-sex couples should be granted full access to civil marriage and the rights and responsibilities that flow from it.

CONCLUSION

Plaintiffs respectfully request that this Court overturn New Jersey's statutory barrier to exercising their freedom to marry. The decision of the lower court to grant the State summary judgment should therefore be reversed, and the matter should be remanded for entry of a declaratory judgment and an injunction requiring that the State grant marriage licenses to plaintiffs.

Dated: October 21, 2005

Respectfully submitted,

By: 

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